JOHN PAFF, Plaintiff, vs. ENGLEWOOD CLIFFS BOARD OF EDUCATION Defendants	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART BERGEN COUNTY DOCKET NO. L-2148-12 Civil Action

BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

Rules

STATEMENT OF FACTS

On or about February 22, 2012, Plaintiff sent the Englewood Cliffs Board of Education (hereafter "the Board") a records request seeking: a) "[t]he minutes of the three most recently held nonpublic (i.e. closed or executive) school board meetings for which minutes are available for public disclosure in either full or redacted form," b) "[t]he resolutions, as required by N.J.S.A. 10:4-13, that authorized the" nonpublic meetings for which minutes were provided in accordance with a) above and c) the N.J.S.A. 10:4-13 resolutions that authorized the three nonpublic meetings most recently held. *Statement of Material Facts, ¶ 1.*

On February 28, 2012, the Board responded to Plaintiff's request with an eight-page fax consisting of a fax cover page[1]; minutes from the Board's January 9, 2012, November 7, 2011 and October 3, 2011 nonpublic meetings[2] (i.e. the three most recent nonpublic meetings for which minutes were available for public disclosure, either in full or redacted form) and "Resolution S[3]," which was purportedly responsive to ¶ 3 of Plaintiff's February 22, 2012 request. *Statement of Material Facts, ¶ 2.* In its fax cover page the Board explained that "the minutes from our December 5, 2011 and February 6, 2012 [nonpublic] meetings are currently only in draft form [and anticipated] that they should be approved and available next week."

On or about February 29, 2012, Plaintiff submitted another records request to the Board seeking: a) a copy of the minutes of the Board's December 5, 2011 nonpublic meeting; b) the

[1] Motion Exhibit Page 9.
[2] Motion Exhibit Pages 10 – 15.
[3] Motion Exhibit Page 16.

minutes of the remaining nonpublic meetings held during 2011 and c) minutes of any "workshop sessions" held during 2011. *Statement of Material Facts, ¶ 3.* On March 6, 2012, the Board responded with a twenty-five page fax, including a fax cover page and the minutes of thirteen nonpublic sessions held on eleven dates in 2011. *Statement of Material Facts, ¶ 4.*

On May 23, 2011, The Record published the Board's 2011-2012 meeting schedule as required by N.J.S.A. 10:4-18. *Statement of Material Facts, ¶ 5.*

PROCEDURAL HISTORY

Plaintiff initiated this action on March 12, 2012 by filing a Complaint[4]. On April 25, 2012, the Board, through Counsel, filed its Answer and Separate Defenses[5]. Plaintiff now moves for summary judgment.

LEGAL ARGUMENT

Point I. Summary Judgment Standard.

The standard for summary judgment is well known. If the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party, summary judgment should be granted. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). When the evidence is so one sided that one party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment. Id.

[4] Motion Exhibit Pages 1 – 43

[5] Motion Exhibit Pages 44 – 53.

Point II: 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 needs to 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 III. N.J.S.A. 10:4-13(a) requires resolutions that authorize nonpublic sessions to a) be separate resolutions tailored for each nonpublic session; b) be passed in public, at a properly noticed public meeting and c) contain more detail regarding the matters privately discussed than the Board's resolutions currently provide.

a. The Board must pass a separate resolution for each nonpublic session it convenes.

Prior to excluding the public from a meeting, the Board is obliged to pass a resolution in public "[s]tating the general nature of the subject to be discussed." N.J.S.A. 10:4-13(a). From its response to ¶ 3 of Plaintiff's February 22, 2012 request, Defendant takes the position that passing "Resolution S"[6] at its May 9, 2011 reorganization meeting, without more, is sufficient to inform the public of each and every nonpublic meeting the Board later held between May 9,

[6] Motion Exhibit Page 16

2011 and its 2012 reorganization meeting. Indeed, in her February 28, 2012 fax cover page, the person the Board entrusted to respond to Plaintiff's records request identified "Resolution S" as being "the resolution authorizing the executive session meetings."

"Resolution S," in pertinent part, states:

> AND BE IT FURTHER RESOLVED that regular Board of Education meetings will commence at 8:00 P.M., in the Upper School Media Center and that the Board of Education ***may meet*** at 7:00 P.M., in Executive Session for the purpose of discussing personnel, litigation, negotiations, individual privacy, security, investments/property acquisition and legal as well as at 7:45 P.M. for a Workshop Session. (Emphasis supplied.)

This language is mirrored in the meeting notice[7] that the Board later published in the newspaper. It is clearly not sufficient for a public body to pass one resolution at the beginning of the year that intends to authorize multiple nonpublic sessions to be held during that year. Rather, the statute requires that the Board pass a separate, specific resolution in public prior to each nonpublic session.

Assuming, *arguendo*, that a single, blanket resolution is sufficient to authorize multiple nonpublic sessions, Resolution S is not such a resolution because it gives the public no real sense of what the Board is going to privately discuss. Rather it "merely recites the litany of exceptions (i.e. personnel, litigation, negotiations, individual privacy, security, investments/property acquisition and legal) which would allow it to proceed in closed session [without attempting] to indicate which one or ones of those exceptions are relevant to a particular closed-session

[7] Motion Exhibit Page 43.

proceeding." Council of New Jersey State College Locals v. Trenton State College Board of Trustees, 284 N.J. Super. 108, 113 (Law Div. 1995). See, also, Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107, 114 (MS 1989). ("A board which only announces 'litigation' or 'personnel matters' for going into executive session has said nothing. It might as well have stated to the audience, 'Ladies and gentlemen, we are going into executive session,' and stopped there.")

b. The Board falsely asserts that the public voluntarily chose not to attend the parts of the meeting where the N.J.S.A. 10:4-13 motions were made.

¶ 14 of Plaintiff's complaint[8] states:

> The minutes of the nonpublic meetings held during 2011 and on January 9, 2012 each contain a "motion" that purports to authorize the executive session but a) those motions are apparently passed without the public in attendance and b) that even if the public is admitted to the portions of the meetings where those motions are passed, the motions are deficient because they do not provide the specificity required by N.J.S.A. 10:4-13(a) and do not even attempt to comply with N.J.S.A. 10:4-13(b). Alternatively, if the "motions" are indeed passed in public, then the public meetings at which the motions are passed violate the Act because they do not commence with the announcement required by N.J.S.A. 10:4-10.

Defendant's answer[9] to that paragraph states:

> Defendant admits the allegation set forth in Paragraph Fourteen of the Verified Complaint that the minutes of the nonpublic meetings held during 2011 and on January 9, 2012 each contain a motion authorizing the executive session. However, ***although Defendant admits that said motions were passed without any public choosing to attend the meeting, the public was not excluded from the portion***

[8] Motion Exhibit Page 3.

[9] Motion Exhibit Pages 46 – 47.

> ***of the portions of the meetings during which the motions were made***, consistent with N.J.S.A. 10:4-13. Defendant further denies that the motions do not provide the specificity required by N.J.S.A. 10:4-13(a), and denies that the public meetings at which the motions were passed did not commence with the announcement required by N.J.S.A. 10:4-10, but admits that the motions do not state the time when and the circumstances under which the discussions conducted in closed session could be disclosed to the public, pursuant to N.J.S.A. 10:4-13(b). (Emphasis supplied.)

Thus, according to the Board, the public was permitted to attend the nonpublic meetings, all but one[10] of which began between 7:00 and 7:30 p.m., but "chose" not to. But, the public's "choice" was illusory since both Resolution S[11] and the Board's published meeting notice[12] inform the public only that "the Board of Education ***may meet*** at 7:00 P.M. in Executive Session . . ." (Emphasis supplied.) Thus, a member of the public could not know whether he or she should arrive at the meeting location at 7:00 P.M., 7:45 P.M[13]. or 8:00 P.M. The only time that the public could be sure that a meeting ***would*** commence was at 8:00 P.M., as set forth in Resolution S and the published meeting notice.

Even if a member of the public knew that a nonpublic session was going to be held at 7:00 P.M. on given meeting date, it is not surprising that he or she would "choose" not to

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[10] The motions within the minutes of the nonpublic meetings held after the May 9, 2011 reorganization meeting indicate that motions to exclude the public were passed at 7:05 P.M. (August 1, 2011--first session); 7:08 P.M. (September 12, 2011 and November 7, 2011); 7:10 P.M. (January 9, 2012); 7:15 P.M. (October 3, 2011 and December 5, 2011); 7:20 P.M. (July 11, 2011); 7:30 P.M. (June 6, 2011) and 8:30 P.M. (August 1, 2011—second session).

[11] Motion Exhibit Page 16.

[12] Motion Exhibit Page 43.

[13] The Board also stated in Resolution S and its published notice that it "***may meet*** . . . at 7:45 P.M. for a Workshop Meeting." (Emphasis supplied.) Yet, it its March 6, 2012 fax cover page, the Board states that "[t]here were no workshop sessions held during 2011." (Motion Exhibit Page 18.)

attend. Resolution S and the published meeting notice both expressly state that the meeting that ***may*** commence at 7:00 P.M. is an "Executive Session" at which matters involving "personnel," "individual privacy" and similarly confidential matters would be discussed. Reasonably astute members of the public understand "Executive Sessions" to be meetings that are ***not*** open to the public. Thus, a reasonable member of the public would not arrive at a 7:00 P.M. meeting only to be denied entry.

In sum, the Board's admission[14] that the nonpublic meeting "motions were passed without any public choosing to attend the meeting" followed by its assertion that "the public was not excluded from the portion of the portions of the meetings during which the motions were made" is sophistry. In actuality, the Board failed to inform the public, with any degree of certainty, whether or not a nonpublic meeting would commence at 7:00 P.M. and a member of the public had no reason to expect to be admitted to the "Executive Session" if he or she were to arrive at the meeting location at 7:00 P.M.

c. The Board falsely asserts that the Executive Sessions that "may" commence at 7:00 P.M. commenced with the announcement required by N.J.S.A. 10:4-10.

In its response[15] to ¶ 14 of Plaintiff's complaint, Defendant "denies that the public meetings at which the motions were passed did not commence with the announcement required by N.J.S.A. 10:4-10." This is clearly false because the statement required by N.J.S.A. 10:4-10 is

[14] Motion Exhibit Page 46, ¶ 14
[15] Motion Exhibit Pages 46 – 47.

not mentioned anywhere in any of the minutes of the nonpublic meetings that commenced between 7:00 and 7:30 P.M. N.J.S.A. 10:4-10 states, in relevant part, that:

> At the commencement of every meeting of a public body the person presiding shall announce publicly, and shall cause to be entered in the minutes of the meeting, an accurate statement to the effect [] that adequate notice of the meeting has been provided, specifying the time, place, and manner in which such notice was provided . . .

Had the proper "Sunshine" announcement been made when the "Executive Session" commenced, a statement to that effect would have been "entered in the minutes of the meeting." So, the Board violated the Open Public Meetings Act in one of two ways: a) by failing to announce the required statement before the public portion at which the N.J.S.A. 10:4-13 resolution was allegedly made or b) by failing to record in the allegedly public meeting minutes an "an accurate statement to the effect [] that adequate notice of the meeting has been provided, specifying the time, place, and manner in which such notice was provided."

d. The Board erroneously claims that its closed session motions, even if they are passed in public at a properly announced meeting, comply with N.J.S.A. 10:4-13(a).

In its response[16] to ¶ 14 of Plaintiff's complaint, Defendant "denies that the motions do not provide the specificity required by N.J.S.A. 10:4-13(a)" Thus, the Board asserts that terse statements such as "Legal: NC – 2 issues"[17] and "Legal: Fogarty – Bussing[18]" meet the standard established by N.J.S.A. 10:4-13(a).

[16] Motion Exhibit Pages 46 – 47.
[17] See, Minutes of July 11, 2011 Executive Session, Motion Exhibit Page 27.
[18] See, Minutes of September 12, 2011 Executive Session, Motion Exhibit Page 22.

In McGovern v. Rutgers, 418 N.J. Super. 458, 469-70 (App. Div. 2011)[19], 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 , *supra* at 113). 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)).

The "Legal: NC – 2 issues" and "Legal: Fogarty – Bussing" descriptions referenced above, as well as the bulk of the other descriptions contained in the Board's Executive Session minutes, are unintelligible. Who or what is "NC" ? Of what nature are the "2 [legal] issues that pertain to "NC"? Are they contracts, lawsuits or anticipated litigation? Clearly, the Board could have provided the public with more information while still protecting any legitimate confidentiality or personal privacy issues.

In the motion it passed on January 9, 2012[20], the Board stated that it was going into Executive Session to discuss "Legal: Litigation regarding the Englewood Cliffs and Englewood School Districts." At the very least, the Board could have identified the precise matters of

[19] McGovern was decided on February 18, 2011, prior to the Board's May 9, 2011 reorganization meeting.
[20] Motion Exhibit 11.

litigation that were discussed, e.g., "Englewood School District v. Englewood Cliffs School District, Docket No. BER-L-1234-10," or perhaps, "Receipt of an offer from plaintiff's attorney in "Englewood School District v. Englewood Cliffs School District, Docket No. BER-L-1234-10, to settle the case for $120,000."[21]

e. The Board concedes that its closed session motions, even if they were passed in public at a properly announced meeting, do not comply with N.J.S.A. 10:4-13(b).

In its answer[22] to Complaint ¶ 14, Defendant "admits that the motions do not state the time when and the circumstances under which the discussions conducted in closed session could be disclosed to the public, pursuant to N.J.S.A. 10:4-13(b)." Accordingly, it is an uncontested fact that the Board's motions do not comply with that statute.

f. Summary of the relief needed to satisfy the First Count of the Complaint.

The Board's executive session resolutions are non-compliant with the Open Public Meetings Act in three ways. First, they are passed a meeting for which the public has not received adequate notice. Second, they were either passed in private or at a public meeting that was not commenced with the announcement required by N.J.S.A. 10:4-10. Third, they fail to provide the public with the amount of information required by McGovern. Accordingly, this Court should grant the relief requested in the First Count of Plaintiff's complaint by a)

[21] While it may initially seem that disclosure of the $120,000 settlement offer is too much information to give to the public, this concern disappears once it is realized that the sole purpose of the N.J.S.A. 10:4-12(b)(7) exception is to prevent adverse parties to litigation and contracts from learning the details of the public body's negotiation tactics and litigation strategy. (See the discussion in Nevin v. Asbury Park City Council, 2005 WL 2847974 (App. Div. 2005), Motion Exhibit Pages 54 – 58) . Since, in this hypothetical example, the adverse party (i.e. Englewood School District) already knows that it offered to settle the lawsuit for $120,000, there is no legitimate reason why the public should not also know of the tendered settlement offer.

[22] Motion Exhibit Pages 46 – 47.

enjoining the Board from excluding the public from a meeting unless it first passes a separate resolution at a properly noticed and announced public meeting; b) declaring the minimum amount of information that needs to be disclosed in the Board's executive session resolutions and c) enjoining the Board, going forward, from passing executive session resolutions that do not disclose the minimum amount of information required by the Court.

Point IV. The Board is not permitted to inform the public that it "may meet" at a future date and time.

As discussed in Point III(b), *infra*, both Resolution S[23] and the Board's published meeting notice[24] informed the public only that "the Board of Education ***may meet*** at 7:00 P.M. in Executive Session . . . as well as at 7:45 P.M. for a Workshop Session." (Emphasis supplied.) A public body is not allowed to advertise dates and hours when it ***might*** meet. Rather, the Open Public Meetings Act requires public bodies to inform the public of the dates and hours that it ***will*** meet. If this was not the case, public bodies could sidestep the Open Public Meetings Act and frustrate the citizenry by informing the public that it ***may meet*** at 6 p.m. every day, even while knowing full well that it intends to meet on only a few of those days.

Accordingly, this Court should grant the relief requested in the Second Count of Plaintiff's complaint and declare that the "may meet" language contained in its Resolution S and the notice published in The Record on May 23, 2011 is noncompliant with the Meetings Act

[23] Motion Exhibit Page 16.
[24] Motion Exhibit Page 43.

and enjoin the Board, going forward, from posting or publishing meeting notices or schedules unless they set for the actual date and time of each upcoming meeting.

Point V. Improper topics discussed during nonpublic meetings.

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, 21 and 22[25] of the Complaint ("Sunshine Law/Board Retreat," "HIB," "Flexible Spending Account," "Finance – June 30, 2011 Audit – Reviewed with Steven Wielkotz" and "Finance – Budget") are almost[26] certainly 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 VI. Executive minutes are not "reasonably comprehensible."

[25] Motion Exhibit Page 5.

[26] Since the minutes are so terse, as argued in Point VI, *infra*, it is difficult to tell whether or not these subjects were permissibly discussed outside of the public's presence.

N.J.S.A. 10:4-14 requires meeting minutes to be "reasonably comprehensible." The purpose of closed meeting minutes is not merely to inform the public of what occurred during the private session, but also to create a record for the Board members themselves.

Suppose that a newly elected Board member were to read the Board's July 11, 2011[27] and September 12, 2011[28] executive minutes in order to familiarize himself or herself with prior issues confronted by the Board. Or, suppose that a Board member who was present at those two executive sessions wished to refresh his or her recollection of what transpired at those meetings. If these hypothetical school board members were to review these minutes, they would be completely flummoxed because they would not have the foggiest idea of which issues "Legal: NC – 2 issues" and "Legal: Fogarty – Bussing" referred.

The correct practice is to take more verbose minutes and then redact them, as necessary, before publicly disclosing them. For example, instead of stating "Legal: NC – 2 issues," the July 11, 2011 executive minutes regarding "Legal: NC – 2 issues" might hypothetically read:

> *Board attorney Fogarty updated the board on two issues regarding employee Norbert Carter (i.e. NC). The first issue is a whistleblower suit Carter brought against the Board member Luppino in which he falsely accused Luppino of falsifying Carter's time sheets in order to make him appear to be excessively absent when he was not. That case is pending in Bergen County Superior Court and has been assigned docket number L-1234-11. Mr. Fogarty advised that the Board should not settle case and instead litigate it to its conclusion.*
>
> *The second issue involving Carter was his arrest for assault of certificated staff members Jim Jones and Ann Doe. Carter was charged with simple*

[27] Motion Exhibit Page 27.
[28] Motion Exhibit Page 22.

assault by Fair Lawn police after having been in a heated argument with Jones and Doe at the Hard Times Restaurant and Pizzeria at 1523 North High Street. Although Carter appears to have mended his relationship with both Jones and Doe, Mr. Fogarty felt that he should be assigned to a school different from the one that Jones and Doe work so that they don't have to confront one another at work.

If the minutes were taken in this fashion, the Board members themselves would have a clear record of what transpired while any confidentiality interests could be addressed by redacting the minutes before disclosing them to the public.

There isn't a great deal of case law on what constitutes "reasonably comprehensible" minutes. In one case, the Appellate Division rejected the argument that the Council on Affordable Housing's executive minutes needed to disclose "the reasons why the [COAH] members voted as they did." Township of Bernards v. State, Dept. of Community Affairs, 233 N.J. Super. 1, 28 (App. Div. 1989), certification denied 118 N.J. 194.

Another case that deals with the "reasonably comprehensible" question is Liebeskind v. Mayor and Mun. Council of Bayonne, 265 N.J. Super. 389 (App. Div. 1993). Liebeskind held that the statute does not require a "word for word recitation of every event or a verbatim detailing of every public comment or objection." Id. at 400-01. The Liebeskind court, relying on Township of Bernards, *supra*, held that the Meetings Act "does not mean that the public body must reveal the reasons why it took the legislative action that it did." Ibid.

While Township of Bernards and Liebeskind both held that minutes need not reveal the reasons ***why*** the members of a body voted as they did, neither case supports an argument that

meeting minutes need not contain enough context and detail to allow the public to understand ***what*** the public body members discussed and the facts that they based their discussion and ultimate decisions upon.

Indeed, in Liebeskind, the Appellate Division quoted and did nothing to diminish the Supreme Court's mandate that "minutes are intended to recite 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." South Jersey Publishing Co., Inc. v. New Jersey Expressway Auth., 124 N.J. 478, 493 (1991).

Obedience to South Jersey Publishing is what Plaintiff requests in this case. This Court must keep in mind that the Board minutes at issue record private meetings that the public is not allowed to observe. Therefore, the sole source of information available to the public regarding the Board's private discussions is the executive session minutes. Accordingly, it is of vital importance that those minutes record enough context and detail about the private discussions to allow the public and the Board members themselves to understand that which occurred at those private meetings.

The fact that some information discussed may be subject to privilege or privacy concerns is not a bar to recording that information in the minutes. Any privileged material can be redacted from the minutes before they are disclosed to the public. Indeed, if the allegedly private or privileged material is not recorded in the minutes, the courts will not be able to

balance the government's interest in confidentiality against the public's interest in disclosure as required by Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556 – 57 (1997). ("[I]f a public body legitimately conducts a meeting in closed session under any of the exceptions enumerated in N.J.S.A. 10:4-12(b), 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. If disclosure would subvert the purpose of an exception, then the subversion must be balanced against the applicant's interest in disclosure. * * * In the vast majority of cases in which full disclosure would have an adverse impact on the purpose of the particular exception, other methods of maintaining confidentiality can be achieved, such as redacting the specific information that would undermine the exception.")

In the present case, the executive session minutes, whether by accident or design, contain extremely little information and deprive the public from being able "to understand and appraise the reasonableness of the public body's determination." In fact, the minutes don't even inform the public of exactly which matters were discussed, let alone what decisions were made and the reasonableness of those decisions.

This Court should declare that the Board's nonpublic meeting minutes fail to meet the standard required by South Jersey Publishing and enjoin the Board from recording minutes of future executive sessions that fail to meet that standard.

Point VII: Plaintiff should be awarded his 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 improvement in the Board's compliance with the Open Public Meetings Act. If successful, Plaintiffs should be declared the "prevailing party" because his 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.

Once it has been established that Plaintiff is the "prevailing party," costs ought to be "allowed as of course." R. 4:42-8(a). In Gallo v. Salesian Soc., Inc., 290 N.J. Super. 616, 660 (App. Div. 1996) the Appellate Division stated:

> R. 4:42-8(a) provides: "Unless otherwise provided by law, these rules or court order, costs shall be allowed as of course to the prevailing party." The judge here expressly found that plaintiff was a

> prevailing party. He should have awarded her costs "as of course" under the rule.

Finally, denial of costs in this instance would profoundly chill Plaintiff's willingness, and that of other interested citizens, to bring suits, such as this one, that seek to benefit the public interest. The salutary public policy behind statutes such as the Open Public Meetings Act would be frustrated if citizens were dissuaded enforcing it.

Respectfully submitted,

Dated: May 1, 2012

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John Paff