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DAVID W. OPDERBECK *Plaintiff* v. MIDLAND PARK BOARD OF EDUCATION *Defendant.*	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET No. BER-L-8571-13 CIVIL ACTION OPINION

Argued: December 23, 2013
Decided: December 24, 2013

Honorable Peter E. Doyne, A.J.S.C.

David W. Opderbeck, pro se.

Steven R. Fogarty, Esq. and Brian Pete, Esq. appearing on behalf of Midland Park Board of Education (Fogarty & Hara).

Introduction

On November 6, 2013, David W. Opderbeck ("plaintiff" or "Opderbeck") filed a verified complaint and an order to show cause against the Midland Park Board of Education ("MPBOE" or the "Board"). Opderbeck sought a judgment requiring the MPBOE to include attachment reports and other referenced documents with the agendas provided to the public in electronic form contemporaneous with their distribution to MPBOE members, money damages and penalties, attorney's fees, and other relief the court deems just.

Facts/ Procedural History

A. May 28, 2013 Meeting

Opderbeck, a professor at Seton Hall School of Law and a resident of Midland Park, has had at least one of his children attend Midland Park public schools within the last twelve years. Opderbeck and his wife, Susan Opderbeck ("Susan" when referenced individually, "Opderbecks" when referenced collectively), attended the MPBOE meeting on May 28, 2013 as the Board was scheduled to discuss issues relating to school activities in which their children were involved. Prior to attending the meeting, Susan obtained the meeting agenda on the MPBOE website, http://midlandparkschools.k12.nj.us/Page/58. The agenda referenced numerous attachments but none were available on the website. Susan contacted the MPBOE to request copies of the attachments to the agenda be made available on the website. Susan was advised "attachments to the agenda were not made available to the public until after the meeting is concluded and only pursuant to a written request under the Open Public Records Act ("OPRA"). (Comp. at ¶ 4). Susan requested the Board respond to her various concerns by email. On May 29, 2013, Dr. Marie Cirasella ("Cirasella"), Superintendent of Schools, authored an email to the Opderbecks addressing Susan's questions about band trip proposals. In the email, Cirasella states, "[t]he board cannot and should not rely on information provided by board meeting attendees during open session—it is the school administration's responsibility and charge to do so." (Comp. Ex. B).[1] On May 30, 2013, Opderbeck authored an email to Cirasella and the MPBOE members addressing his concerns about her previous email, citing the requirements under Open Public Meetings Act ("OPMA")[2], and requesting confirmation "the full agenda,

[1] Defendant alleges this statement was taken out of context and refers to the scheduling of the band trip, not to the issues before the court.

[2] Although Opderbeck refers to the Open Public Records Act, the statute sections cited, N.J.S.A. 10:4-9, refers to the Open Public Meetings Act ("OPMA"). As Opderbeck also referenced the act as the "Sunshine Law", it is evident he was referring to OPMA.

including attachments provided to the Board, hereafter will be supplied to the public in advance of Board meetings." (Comp. Ex. C).

On June 3, 2013, Stephen Fogarty, Esq. ("Fogarty"), general counsel for the MPBOE, emailed Opderbeck explaining OPMA only requires written notice of the "time, date, location, and to the extent known, the agenda of any meeting to be published forty-eight (48) hours in advance." (Comp. Ex. D). Fogarty cited to a formal advisory opinion by the New Jersey Attorney General to support his proposition supplementary materials given to Board members to inform their decision-making need not be included in the agenda. Furthermore, Fogarty alleged under the Open Public Record Act ("OPRA"), "pre-decisional advisory, consultative, or deliberative materials" are exempt from disclosure. (Id.) (citing N.J.S.A. 47:1A-1.1).

On June 3, 2013, Opderbeck sent an email response to Fogarty. Opderbeck alleged it was the duty of the courts to interpret statutes as "an Attorney General Opinion interpreting a statute does not create binding law." (Comp. Ex. E). Opderbeck stated the MPBOE's own bylaws include define "agenda" as including attachments: "The agenda shall be delivered to each board member no later than Friday before the meeting and shall include such reports and supplementary materials as are appropriate and available." (Comp. at ¶ 8). As such, Opderbeck argued it was within the intent of OPMA to supply agenda information prior to public Board meetings and wished the Board would reconsider so that further action would not be required.

B. June 4, 2013 Meeting

On June 4, 2013, Opderbeck attended the MPBOE meeting and requested the Board change its policy by including attachments and appendices with the agendas. On June 5, 2013, the Villadom Times newspaper published an article entitled, "Parents urge speedier approval of music trips", reporting on concerns the Opderbecks and other parents raised at the May 28, 2013

Board meeting. Board president, William Sullivan was quoted in the article stating the Board must abide by a code of ethics which requires them to "make decisions in terms of the educational welfare of children" and Board members must "refuse to surrender [their] independent judgment to special interest groups[;] . . . if a Board member has questions, or needs more information on an item that the administration moves for a vote on the agenda, they have the responsibility to seek those answers." (Comp. Ex. F).

On June 5, 2013, Fogarty emailed Opderbeck a response letter ("Fogarty's first June 5th letter"). Fogarty agreed that the judiciary has the role of interpreting statutes but he was "unaware of any judicial opinion constructing the adequate notice requirement of the Open Public Meetings Act to require the posting of meeting agendas and the attachments provided with those agendas to Board members." (Comp. Ex. G). Fogarty explained case law supports the MPBOE's position supplements and attachments given to Board members do not have to be publicly disclosed and OPMA's language has been interpreted to exempt public bodies from having to publish agenda for any meeting which has been annually noticed. Fogarty clarified MPBOE bylaw 0164 pertained solely to internal functions of the Board as it is devoid of any language regarding the Board's public notice obligations.

On that same day, Opderbeck responded to Fogarty's first June 5th letter ("Opderbeck's first June 5th letter"). He dismissed Fogarty's arguments regarding annual notice as the MPBOE does not provide an annual notice that meets the statutory requirements. In his letter, Opderbeck discussed the public policy interests in government transparency and accountability and quoted references to the New Jersey Supreme Court case, Polillo v. Deane, 74 N.J. 562 (1977). Opderbeck stated he did not wish to litigate the matter but viewed it as an important issue of

concern and as such, requested confirmation by June 10, 2013 if the MPBOE would change its policy.

In response to Opderbeck's first June 5th letter, Fogarty authored a second letter the same day as his final correspondence regarding the matter ("Fogarty's second June 5th letter"). Fogarty clarified, "[i]f supplementary attachments to an agenda were required for adequate notice as [Opderbeck] contend[ed], then it logically follows that an annual meeting schedule, without any agenda, could not satisfy the notice requirement." (Comp. Ex. I). Fogarty argued Opderbeck had not produced any precedent or non-judicial guidance to support his position; histrionic references do not bear any meaning to the Board's obligations pursuant to OPMA. Therefore, Fogarty alleged the notice and agendas provided by the MPBOE were in compliance with New Jersey law and if Opderbeck desired documents pertaining to Board approved action, they could be requested pursuant to OPRA.

Opderbeck responded to Fogarty's second June 5th letter via email the same day ("Opderbeck's second June 5th letter"). Opderbeck wished to note his "histrionic references" were quotations from Justice Pashman's opinion in Polillo v. Deane. Opderbeck concluded, "[i]t would be regrettable indeed if the Board were to disagree with Justice Pashman's thoughtful conclusion that these precepts have everything to do with the 'very fabric of government in this State' at every level, including Boards of Education." (Comp. Ex. J).

C. June 5, 2013 Meeting

On June 5, 2013, Opderbeck attended the regularly scheduled MPBOE meeting and requested the policy be changed to include attachments with meeting agendas. The MPBOE addressed Opderbeck's curricular concerns but did not respond to his request regarding attachments.

Following the June 5, 2013 MPBOE meeting, Opderbeck unsuccessfully attempted to contact Forgary several times by telephone to resolve the dispute. On June 7, 2013, Opderbeck sent Fogarty an email with a drafted verified complaint as "a final effort to resolve this matter amicably." (Comp. Ex. K). Opderbeck offered to have the matter resolved if the MPBOE would supply attachments along with agendas on their website. On June 9, 2013, Fogarty responded that he would submit the "proposed settlement" to the Board at the next meeting on June 18, 2013 even though he personally continued to disagree with the public's right of access to the agenda attachments. Fogarty also noted he had no authority to change the Board's policy. Opderbeck responded by email he would not take any further action pending the Board meeting on June 18, 2013.

On June 20, 2013, Fogarty and Opderbeck spoke by telephone. Opderbeck alleges Fogarty "represented that the MPBOE would draft and adopt a new policy by which it will make agenda attachment items available to the public with the meeting agendas" to be adopted in September. (Comp. at ¶ 18). On June 21, 2013, Opderbeck sent a confirming email to Fogarty putting the terms of the telephone conversation in writing and suggesting the proposed policy specifically reference N.J.S.A. 10:4-12. The same day, Forgarty sent a letter confirming the telephone conversation as well and also stating documents deemed privileged or exempt under OPRA will be excluded from the new policy. Opderbeck believed the dispute was satisfactorily resolved based on this agreement. (Comp. at ¶ 18).

D. September 17, 2013 Meeting

On September 17, 2013, Opderbeck attended the MPBOE meeting in which the new policy was to be introduced. The Board's Policy Committee introduced a policy in compliance with the June 20, 2013 agreement. However, Opderbeck contends Board members proposed

amendments which excluded many non-privileged documents citing concerns about "overloading" the public with information and copying costs. Opderbeck responded to the concerns, adding there would no additional costs as the documents are already provided by email to Board members. On this date, Opderbeck authored a letter to Fogarty explaining at the MPBOE meeting an amendment to the policy was introduced which appendices but not attachments would be supplied with the agenda. Opderbeck identified the Board members' concerns about the burden of production as "specious" as the documents have already been scanned for the members. Opderbeck was equally concerned with the argument the policy would overload the public with information. Therefore, Opderbeck asked Fogarty to inform him by the end of the week if the Board was going to adopt the policy discussed in June to include all documents or he would file his verified complaint.

On September 20, 2013, Fogarty responded via email to Opderbeck, informing him the Board's discussion of the policy was a "first reading" and the Board "would adopt a final policy on a 'second reading'". (Comp. Ex. N). On September 24, 2013, Opderbeck responded to Fogarty reiterating his concern he "as a member of the public, continue[s] to suffer irreparable harm as a result of the Board's refusal to supply agenda attachments".[3] (Comp. Ex. N).

Fogarty advised Opderbeck by email dated October 1, 2013, the Board "is still considering specific revisions to its policies regarding attachments to the published agenda." (Comp. Ex. P).

E. October 15, 2013 Meeting

On October 15, 2013, Opderbeck attended the MPBOE meeting in which the Board decided not to adopt a new policy, i.e. the Board would not include attachments and appendices

[3] Opderbeck's response references a report in the Villadom Times dated September 25, 2013 which included comments made by various Board members regarding the provision of agenda attachments. (Comp. Ex. O).

with the agendas. Opderbeck communicated his frustration with the Board's decision to Fogarty in an email that same day. (Comp. Ex. Q).

F. Opderbeck's OPRA Request

On October 16, 2013, Opderbeck sent an OPRA request to the Clerk of Midland Park seeking: "All meeting agendas prepared by and for the Midland Park Board of Education, including all attachments, appendices, and related records." (Comp. Ex. R). Opderbeck also requested the "records be mailed to [him] when they are distributed to the Board of Education members prior to each Board of Education meeting." (Id.). The OPRA request was sent to Fogarty as well. Later that day, Opderbeck communicated with Fogarty seeking clarification whether sending the OPRA request to Fogarty sufficed as service upon the Board or whether additional service need be made on a Board representative. (Id.). Fogarty sent an email in response on October 18, 2013. (Id.). Fogarty sent another email that same day in response to Opderbeck's October 15, 2013 email which informed Opderbeck the Board was still considering whether additional disclosures should be made prior to meetings. (Comp. Ex. T). Moreover, Fogarty explained Opderbeck's position the public is entitled to attachments is governed by OPRA, not OMPA. Appurtenant to this, Fogarty asserted "certain agenda attachments may fall under the category of [intra-agency advisory, consultative or deliberative] material" and other issues may affect disclosure. (Comp. Ex. T).

The MPBOE denied the OPRA request on October 21, 2013 stating Opderbeck requested materials "not yet in existence" and the request "would exist in perpetuity". (Comp. Ex. S).

G. Pleadings

Subsequently, on November 1, 2013, plaintiff filed a verified complaint with an order to show cause and a letter brief in support of the relief requested. The complaint alleged violations

of OPMA, the New Jersey common law right to access public records, and the New Jersey Civil Rights Act. Plaintiff requested: 1) preliminary and permanent injunctive relief pursuant to R. 4:52, N.J.S.A. 10:4-16, N.J.S.A. 47:1A-6, and N.J.S.A. 10:6-2, requiring defendant to electronically provide the public with the attachments and other documents referenced in agendas contemporaneously with their distribution to Board members; 2) money damages and penalties; 3) attorney's fees and costs; and 4) such other relief as the court may deem just and equitable.

On November 27, 2013, counsel on behalf of defendant, MPBOE, filed an answer. Plaintiff filed a reply on December 5, 2013. On December 7, 2013, defendant's counsel sent Opderbeck a notice of frivolous litigation pursuant to R. 1:4-8. As both parties agreed there little legal precedent on the issue presented, it is unclear how such litigation could be deemed frivolous. On December 12, 2013, defendant's counsel filed a motion to dismiss in lieu of an answer.[4]

Oral argument was entertained on December 23, 2013.

Legal Standards

A. OPRA

The Act, N.J.S.A. 47:1A-1 to -13, "plainly identifies its purpose at the outset: to ensure that government records, unless exempted, are readily accessible to citizens of New Jersey for the protection of the public interest. To accomplish that aim, OPRA sets forth a comprehensive framework for access to public records." Mason v. City of Hoboken, 196 N.J. 51, 57 (2008) (internal citation omitted).

OPRA provides "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

[4] As this is a final decision, it renders the defendant's motion to dismiss moot.

public interest, and any limitations on the right of access [under the Act] shall be construed in favor of the public's right of access." N.J.S.A. 47:1A-1. 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.
>
> [Id. § 1.1.]

Records are typically available during the public agency's regular business hours with an exception for smaller towns, agencies, and school districts. Id. § 5. The records may be redacted to protect personal information, and the records custodian may charge a fee for copying and related services. Ibid. Typically, any request for a record must be made using the agency's official request form. Ibid. The custodian must respond to all requests within seven business days, unless the applicant fails to provide necessary contact information. Ibid.

If access to a government record is denied, the person denied access, and only that person, may challenge the decision by filing a complaint in Superior Court or with the Government Records Counsel. Id. § 6. The application must be brought within forty-five days of the denial. Mason, supra, 196 N.J. at 68 ("[A] 45-day statute of limitations should apply to OPRA actions, consistent with the limitations period in actions in lieu of prerogative writs.").

The proceeding will go forward in a summary or expedited manner. N.J.S.A. 47:1A-6; see Courier News v. Hunterdon Cnty. Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div.

2003). As such, "the action is commenced by order to show cause supported by a verified complaint." Ibid. In Courier News, the Appellate Division held the trial court had failed to follow proper procedure when it denied a newspaper its right to summary adjudication on an OPRA action. The trial judge had erroneously applied the standard for preliminary relief to the summary action and dismissed plaintiff's action without prejudice. Id. at 377. As a result, the Appellate Division, recognizing the Act's policy of expediency, invoked original jurisdiction over the matter. Id. at 379.

In OPRA actions, the public agency has the burden of proving the denial is authorized by law. N.J.S.A. 47:1A-6. As such, the agency "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." Courier News, supra, 358 N.J. Super. at 383. In establishing legal support, "[a] decision of the [Government Records Council] shall not have value as a precedent for any case initiated in Superior Court," N.J.S.A. 47:1A-7, though such decisions are normally accorded deference unless "arbitrary, capricious or unreasonable" or violative of "legislative policies expressed or implied in the act governing the agency." Serrano v. S. Brunswick Twp., 358 N.J. Super. 352, 363 (App. Div. 2003) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). Lastly, "a court must be guided by the overarching public policy in favor of a citizen's right of access." Courier News, supra, 358 N.J. Super. at 383. If it is determined access was improperly denied, such access shall be granted, and a successful requestor shall be entitled to reasonable attorney's fees. N.J.S.A. 47:1A-6.

B. New Jersey Common Law

In addition to OPRA, disclosure of public records can be sought under the common law. Thus, even if the information requested falls within one of the exceptions to access under the

statutory construct of OPRA, plaintiff may still prevail by resorting to the common law right to access government records, a thorough background of which is provided by Mason, supra, 196 N.J. at 67-68:

> The common law definition of a public record is broader than the definition contained in OPRA.
>
> . . .
>
> To access this broader class of documents, requestors must make a greater showing than required under OPRA: (1) the person seeking access must establish an interest in the subject matter of the material; and (2) the citizen's right to access must be balanced against the State's interest in preventing disclosure.
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> [Ibid. (internal citations and quotations omitted).]

Thus, to prevail under the common law, plaintiffs must show the record sought constitutes a "public record" and establish a right in the record sought, which outweighs the State's interest in preventing disclosure.

Once it is shown the record is a "public record" and is therefore subject to disclosure, and the plaintiff's interest in the record is established, the court must weigh the plaintiff's interest against the government's interest in non-disclosure. The Supreme Court has set forth the following factors for use in conducting this balance:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen

> that may circumscribe the individual's asserted need for the materials.
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> [Loigman v. Kimmelman, 102 N.J. 98, 113 (1986).]

The Supreme Court in South Jersey Publishing, in discussing the second requirement for common law disclosure, found:

> In its balancing, a court may find it necessary to compel production of the sought-after records and conduct an in camera review thereof. It may, indeed, decide that to release the records in a redacted form, editing out any privileged or confidential subject matter, is appropriate. A mere summary of the record is inadequate, however, where a more complete record reflecting the underlying facts is available and the plaintiff's need therefore outweighs any threat disclosure may pose to the public or private interest.
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> [S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 488-89 (1991).]

C. Open Public Meetings Act

The OPMA statute provides the public has a right to be present at all meetings of public bodies, unless one or more of the nine exceptions excluding the public from the meeting applies. N.J.S.A. 10:4-7; see also, N.J.S.A.10:4-12(b) (providing a list of exceptions to the holding of public meetings). Even so, "the Legislature contemplated that the minutes of all meetings, including executive-session meetings, would be disclosed eventually unless their release otherwise would conflict with the legislative purpose in authorizing the executive-session meeting." S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 491 (1991) (citing N.J.S.A. 10:4-14). The Board of Education is required to make all its minutes "promptly" available to the public even when a public body has met in closed session so long as full disclosure of the minutes would not subvert the purpose of having the closed session to begin with. Payton v. N.J. Tpk. Auth., 148 N.J., 524, 557 (1997) (finding if a public body meets in

closed session it must still make those minutes "'promptly available to the public' unless full disclosure would subvert the purpose of the particular exception" (quoting N.J.S.A. 10:4-14)). "Prompt" availability for open session minutes has been held to mean a time period of two days to two weeks from the meeting's conclusion depending in part on when the next meeting is scheduled. See Liebeskind, supra, 265 N.J. Super at 394-95.

Further, the released minutes "must contain sufficient facts and information to permit the public to understand and appraise the reasonableness of the public body's determination[s] made in a non-public session." S. Jersey Pub. Co. v. N.J. Expressway Authority, 124 N.J. 478, 493. (1991).

N.J.S.A. 10:4-9 requires a public body to provide adequate notice prior to any public meeting other than those exempted by the statute. N.J.S.A. 10:4-8(d) defines adequate notice as notice of "at least 48 hours providing the time, date, location and, to the extent known, the agenda of any regular, special, or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken."

Case law interpreting N.J.S.A. 10:4-9 demonstrates closed sessions do not necessitate "adequate notice" as defined by the statute, merely a resolution to enter into closed session. See McGovern v. Rutgers, 418 N.J. Super. 458, 469 (App. Div. 2011) (finding for a closed session to comply with OPMA, the public body must first pass a resolution at a public meeting providing the general nature of the closed session discussion, but need not provide adequate notice as defined by N.J.S.A. 10:4-8(d)).

Analysis

The crux of the matter is the contention by the plaintiff that the defendant must provide all attachments with the agenda prior to each meeting. Adequate notice pursuant to N.J.S.A.

10:4-8 requires "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda of any regular, special or rescheduled meeting, which notice shall accurately state whether formal action may or may not be taken."[5] The OPMA statute does not provide a definition for the word "agenda" nor does any case law illuminate this matter. However, a prior Attorney General Formal Opinion does delve into this issue finding: "the word agenda refers solely to the list of items to be discussed or acted upon at the meeting. The notice required by N.J.S.A. 10:4-8(d), therefore, need only contain a listing of the items which will be before the Board at the meeting and need not include the supportive or explanatory materials and reports relative to such items." Attorney General Formal Opinion, 1976-19. Plaintiff correctly asserts an Attorney General Opinion does not create binding precedent.

The failure of the MPBOE to provide attachments and supplemental documents renders the agendas virtually meaningless. Once the defendant posts the agenda, it is the Board's responsibility to ensure it is meaningful. The defendant cannot provide adequate notice without including the attachments to the agenda. The attachments in this case are not simply supplemental; they are an integral element necessary to understand the agenda.

"New Jersey has a history of commitment to public participation in government and to the corresponding need for an informed citizenry." S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 486-87 (1991). It is the intent of OPRA, OPMA, and the common law right of access to create transparency in the government and avoid secrecy. Providing agendas which are incomprehensible without the supplemental attachments falls short of the goals of the legislation. By failing to provide these attachments prior to the Board meeting, the public is unable to act as an informed citizenry. Furthermore, supplying these documents through an OPRA request after

[5] Defendant alleges the meetings are annually noticed, therefore, do not require an agenda pursuant to OPMA. However, defendant admits due to a clerical error, the annual meeting notice for 2013 was only published in one (1) newspaper instead of two (2) as required by OPMA.

the meeting fails to insure an informed citizenry. Although not dispositive, it is worth noting the surrounding school districts, Ridgewood, Waldwick, and Wyckoff, all provide attachments to their Board meeting agendas on their respective websites. Providing the agendas without attachments does not allow the public to meaningfully participate in the Board meetings and is contrary to spirit and intent of OPMA and OPRA.

The defendant's rationale in not producing the documents remains unclear. The Board will not be required to produce all attachments to the agenda. It is evident some attachments may include documents protected pursuant to the deliberate process privilege, the attorney client privilege, or may contain confidential personnel information regarding students or employees. Therefore, the Board does not have to provide any attachments or supplemental documents which qualify for an enumerated exemption, privilege, or the like. If the Board has a good faith belief certain attachments or documents are privileged or exempt pursuant to OPRA, OPMA, or the common law right of access, they do not need to be provided and the plaintiff or any other party may then submit the appropriate OPRA request. But the attachments and supplementary documents which are not privileged or exempt must be produced electronically with the agendas pursuant to OPMA. At most, this process will require one additional step of review to ensure documents which are exempt or privileged are not posted. As the documents are already produced electronically to the Board members, posting the attachments with the agendas will not create an undue burden or cost.

Plaintiff seeks an award of counsel fees and costs pursuant to OPMA, N.J.S.A. 10:4-16 and the New Jersey Civil Rights Act, N.J.S.A. 10:6-2c and e. Unlike the Open Public Records Act which allows for fee shifting, OPMA does not contain a provision for attorney's fees.

Moreover, attorneys appearing in a pro se capacity cannot recover legal fees. "The fees a lawyer might charge himself are not, strictly speaking, attorneys' fees and where a lawyer represents himself, legal fees are not truly a cost of litigation--no independent lawyer has been hired (or must be paid) to pursue a complaint." Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 544-45 (App. Div. 2009); see Segal v. Lynch, 211 N.J. 230, 262-65 (2012). Therefore, plaintiff is not entitled to fees. As there are no damages competently set forth, plaintiff is also not entitled to damages.

Conclusion

OPMA "creates a strong presumption of access to the meetings of public bodies, allowing the public to view all meetings 'at which any business affecting the public is discussed or acted upon in any way.'" Burnett v. Gloucester County Bd. of Chosen Freeholders, 409 N.J. Super. 219, 232 (App. Div. 2009) (citations omitted). "Our Supreme Court 'has made it absolutely plain that the prescribed provisions of the OPMA require strict and literal compliance and may not be satisfied by substantial compliance.'" Fallone Properties, L.L.C. v. Bethlehem Twp. Planning Bd., 369 N.J. Super. 552, 566 (App. Div. 2004). The "'Open Public Meetings Act" is in keeping with a strong tradition both in this State and in the nation favoring public involvement in almost every aspect of government." Polillo v. Deane, 74 N.J. 562, 569 (1977) (citations omitted).

Against this strong policy in favor of access, defendant has been unable to articulate any persuasive reasoning why the attachments should not be posted with the agendas prior to a Board meetings. The only justification offered is the lack of relevant case law and a prior opinion of the Attorney General. These attachments are already produced in electronic form for the Board members and are necessary to for the public to understand the agenda. The public cannot be "overloaded" with information concerning the workings of their governmental and municipal

entities. While cognizant exemptions or privileges may apply to certain attachments, absent the same, the public has a right to know and receive the full agenda prior to any meeting. There exists a significant public interest in ensuring the open, transparent, and public review of matters discussed by the Board consistent with the legislative intent pursuant to OPRA, OPMA, and the common law right of access. To the extent the Board does not claim an exemption, privilege, or some particularized reasons why it cannot produce the documents, all attachments shall be uploaded with the agenda pursuant to the requirements of OPMA. Defendant's pending motion to dismiss is now moot pursuant to this decision, and the application to deem the complaint frivolous must also be denied.

Plaintiff shall submit an order in conformity with this decision.