



New Jersey Libertarian Party

Open Government Advocacy Project

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MAY 17, 2012

Hon. Thomas W. Fromm, Mayor and members of the
Swedesboro Borough Council

1500 Kings Highway

Swedesboro, NJ 08085 (via e-mail only to tgoodwin@swedesboro.comcastbiz.net)

Dear Mayor Fromm and Council members:

I write both individually and on behalf the New Jersey Libertarian Party's Open Government Advocacy Project to comment on the manner in which the Borough Council goes into nonpublic (i.e. executive or closed) session.

As you are aware, the Senator Byron M. Baer Open Public Meetings Act requires public bodies, such as the Swedesboro Borough Council, to publicly pass a resolution before excluding the public from a meeting. The statute that requires the resolution states:

N.J.S.A. 10:4-13— *Closed meetings; resolution to conduct.*

No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. (10:4-12) until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

a. Stating the general nature of the subject to be discussed; and

b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

By way of a recent records request, I received resolutions which purport to authorize executive sessions held by the Borough Council on January 19, 2010, June 21, 2010, January 3, 2011, March 21, 2011 and May 16, 2011. According to Clerk Goodwin, these are the resolutions for the five most recently held executive sessions. Copies of them are attached to this letter for your ready reference.

Those resolutions, which are virtually identical to each other, state the “general nature” of the executive session as discussion of “matters involving pending litigation, collective bargaining agreements, matters involving lease or acquisition of real property or investment of public funds, protecting public safety, and/or personnel.” Notably, the most recent resolution— from May 16, 2011— identifies the general nature as being “related to acquisition of property.”

I don't think that this form of resolution—at least the ones other than May 16, 2011— satisfies N.J.S.A. 10:4-13 because it gives the public no real sense of what is being privately discussed¹. To paraphrase the highest court of another state, a body which only announces “legal matters” or “personnel negotiations” 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. Hinds County Council of Supervisors v. Common Cause of Mississippi, 551 So.2d 107, 114 (MS 1989).

Of course, there can be no dispute that the Borough Council often has legitimate reasons to meet in nonpublic session. Among these reasons is the need to prevent the adverse parties in litigation or contract negotiations from gaining an unfair advantage and to allow members of the governing body to debate and deliberate personnel matters without public scrutiny or participation. But, the need to discuss matters privately should not prevent the public from being informed, as precisely as possible, of the topics that are being privately discussed.

For example, suppose that Swedesboro is being sued by a Mr. Jones who was injured after he slipped and fell on what he claims to be negligently maintained municipal property. Since the lawsuit is already a public record, there is no public purpose served by vaguely describing a private discussion of it as “pending litigation.” Rather, the resolution should at the very least describe the private discussion as “Discussion of slip and fall negligence suit, Jones v. Swedesboro, Docket No. GLO-L-012345-11.” This way, the public has a very good sense of what the Council’s private discussion is about while the ability of the Council to develop its lawsuit strategy is not undermined.

Using the same example, suppose that Jones’ attorney sent the Council’s attorney an offer to fully settle the lawsuit upon the Council’s payment of \$20,000. While the Council would obviously need to discuss how to respond to the offer in private, lest Jones or his attorney would be in the audience witnessing the discussion, there is no reason why the public cannot be

¹ In McGovern v. Rutgers, 418 N.J. Super. 458, 469-70 (App. Div. 2011)¹, the Appellate Division considered the question of how much specificity N.J.S.A. 10:4-13(a) requires. The court held that when informing the public of the general nature of nonpublic meeting discussion topics, a body “must tread a fine line—informing the public about its executive-session activities while not compromising the privacy interests of those whose business is being discussed.” (quoting Council of New Jersey State College Locals v. Trenton State College Board, 284 N.J. Super. 108, 113, (Law Div.1994)). The court approved of the New Jersey State College court’s statement that a resolution “should contain as much information as is consistent with full public knowledge without doing any harm to the public interest.” 284 N.J. Super at 114 (quoting 34 New Jersey Practice, Local Government Law § 141, at 174 (Michael A. Pane) (2d ed. 1993)).

informed in the N.J.S.A. 10:4-13 resolution that the Council will meet in private to discuss “a settlement offer received from the Plaintiff in the slip and fall negligence suit known as Jones v. Swedesboro, Docket No. GLO-L-012345-11, in which the Plaintiff offers to settle the suit in exchange for the Council paying him \$20,000.” While it may initially seem that this would provide “too much” information to the public, this concern disappears once it is realized that the sole purpose of the exception² that allows litigation matters to be discussed in private is to keep the adverse party to the litigation in the dark regarding the Council’s position.³ Since, in this example, the adverse party (i.e. Jones) already knows that he offered to settle the lawsuit for \$20,000, there is no legitimate reason why the public should not also know of the tendered settlement offer.

As another example, suppose that a personnel matter, such as whether or not a Mrs. Smith, a public works employee, should be disciplined because of repeatedly arriving late to work, is to be discussed in closed session. In such a case, the amount of detail set forth in the N.J.S.A. 10:4-13 resolution should correspond to the amount of detail that the Council and its attorney predict will be publicly disclosed in the closed meeting’s minutes, when those minutes are made public.

The standard that the Council is to use when determining how much information about a personnel matter is to be disclosed in the closed session’s minutes is set forth in South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478 (1991). That standard is that a) the public needs information if it is properly fulfill its role of evaluating the wisdom of governmental action or a decision not to act, b) that New Jersey’s strong public policy requires that a public body’s actions and decisions to not act be disclosed in the body’s closed meeting minutes along with sufficient facts and information to permit the public to understand and appraise the reasonableness of the body’s determination, and c) to the extent a cognizable privacy interest may be compromised by the required disclosure, the extent of disclosure may be modified through redactions of the minutes, provided the public interest in disclosure is not subverted

Thus, regardless of whether the Council disciplines Ms. Smith or chooses to not impose discipline due to her lateness, the outcome should be recorded in the closed meeting minutes. The question of whether that entry in the minutes should be redacted before the minutes are made public requires a balancing of Ms. Smith’s interest in keeping the disciplinary matter private against the public’s interest in effectively monitoring the Council. If the Council, with counsel’s advice, determines after balancing these interests that the outcome will be published unredacted in the closed session’s minutes (i.e. if the minutes will disclose to the public, e.g. that “Ms. Smith was suspended for three days on account of her habitual lateness”), then the exact

² N.J.S.A.10:4-12(b)(7) is to prevent adverse parties to litigation and contracts from learning the details of the public body’s negotiation tactics and litigation strategy.

³ See the discussion in Paff v. Washington Township, Docket No. MER-L-2205-07 and Nevin v. Asbury Park City Council, 2005 WL 2847974 (App. Div. November 1, 2005) which are on-line at <http://www.lpcnj.org/OGTF/Washington.pdf> (Nevin begins at page 44 of the PDF file at the link).

nature of the matter (i.e. that “the Council will discuss disciplining Ms. Smith for excessive lateness”) should be set forth in the closed meeting’s N.J.S.A. 10:4-13 resolution. Inversely, if the Council determines that Ms. Smith’s privacy interest exceeds the public’s right to know, then less information (e.g. “the Council will discuss disciplining an employee for excessive lateness”) should be set forth in the closed meeting’s N.J.S.A. 10:4-13 resolution.

In other words, if the officer or employee being discussed doesn't have a privacy interest sufficient to withstand a citizen's request for the executive session minutes, why should not the public know the topic of the executive session prior to it occurring?

In conclusion, I’ve attached a "model resolution" that I would like the Council to use in the future.

Thank you very much for your attention to this matter. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Paff', with a large, stylized flourish above the name.

John Paff

R-31-2010

RESOLUTION OF THE BOROUGH COUNCIL OF THE BOROUGH OF
SWEDESBORO, COUNTY OF GLOUCESTER AND STATE OF NEW
JERSEY ON THE MATTER OF CLOSED OR EXECUTIVE SESSION

WHEREAS, under the provisions of the Open Public Meetings Law, N.J.S.A. 10:4-12(b) the public may be excluded from that portion of the meeting at which certain enumerated topics are discussed; and,

WHEREAS, this public body is of the opinion that such circumstances presently exist;

NOW, THEREFORE, BE IT RESOLVED that the Borough Council will go into closed or executive session from which the public shall be excluded. The Borough Council may discuss matters involving pending litigation, collective bargaining agreements, matters involving lease or acquisition of real property or investment of public funds, protecting public safety, and/or personnel as permitted under Section 7 of the Open Public Meetings Act, and

BE IT FURTHER RESOLVED that the discussion conducted at said closed or executive session shall be disclosed to the public as soon as such disclosure shall not be prejudicial to the parties concerned.

ADOPTED at a regular meeting of the Mayor and Borough Council of the Borough of Swedesboro held on January 19, 2010.

BOROUGH OF SWEDESBORO

ATTEST:

GEORGE WEEKS, COUNCIL PRES.

DOLORES M. CONNORS, CLERK

R-79-2010

RESOLUTION OF THE BOROUGH COUNCIL OF THE BOROUGH OF
SWEDESBORO, COUNTY OF GLOUCESTER AND STATE OF NEW
JERSEY ON THE MATTER OF CLOSED OR EXECUTIVE SESSION

WHEREAS, under the provisions of the Open Public Meetings Law, N.J.S.A. 10:4-12(b) the public may be excluded from that portion of the meeting at which certain enumerated topics are discussed; and,

WHEREAS, this public body is of the opinion that such circumstances presently exist;

NOW, THEREFORE, BE IT RESOLVED that the Borough Council will go into closed or executive session from which the public shall be excluded. The Borough Council may discuss matters involving pending litigation, collective bargaining agreements, matters involving lease or acquisition of real property or investment of public funds, protecting public safety, and/or personnel as permitted under Section 7 of the Open Public Meetings Act, and

BE IT FURTHER RESOLVED that the discussion conducted at said closed or executive session shall be disclosed to the public as soon as such disclosure shall not be prejudicial to the parties concerned.

ADOPTED at a regular meeting of the Mayor and Borough Council of the Borough of Swedesboro held on June 21, 2010.

BOROUGH OF SWEDESBORO

ATTEST:


THOMAS W. FROMM, MAYOR


TANYA L. GOODWIN, CLERK

R-22-2011

RESOLUTION OF THE BOROUGH COUNCIL OF THE BOROUGH OF
SWEDESBORO, COUNTY OF GLOUCESTER AND STATE OF NEW
JERSEY ON THE MATTER OF CLOSED OR EXECUTIVE SESSION

WHEREAS, under the provisions of the Open Public Meetings Law, N.J.S.A. 10:4-12(b) the public may be excluded from that portion of the meeting at which certain enumerated topics are discussed; and,

WHEREAS, this public body is of the opinion that such circumstances presently exist;

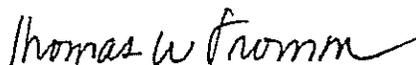
NOW, THEREFORE, BE IT RESOLVED that the Borough Council will go into closed or executive session from which the public shall be excluded. The Borough Council may discuss matters involving pending litigation, collective bargaining agreements, matters involving lease or acquisition of real property or investment of public funds, protecting public safety, and/or personnel as permitted under Section 7 of the Open Public Meetings Act, and

BE IT FURTHER RESOLVED that the discussion conducted at said closed or executive session shall be disclosed to the public as soon as such disclosure shall not be prejudicial to the parties concerned.

ADOPTED at a regular meeting of the Mayor and Borough Council of the Borough of Swedesboro held on January 3, 2011.

BOROUGH OF SWEDESBORO

ATTEST:



Thomas W. FROMM, MAYOR



TANYA GOODWIN, CLERK

R-43-11

RESOLUTION OF THE BOROUGH COUNCIL OF THE BOROUGH OF
SWEDESBORO, COUNTY OF GLOUCESTER AND STATE OF NEW
JERSEY ON THE MATTER OF CLOSED OR EXECUTIVE SESSION

WHEREAS, under the provisions of the Open Public Meetings Law, N.J.S.A. 10:4-12(b) the public may be excluded from that portion of the meeting at which certain enumerated topics are discussed; and,

WHEREAS, this public body is of the opinion that such circumstances presently exist;

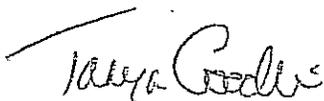
NOW, THEREFORE, BE IT RESOLVED that the Borough Council will go into closed or executive session from which the public shall be excluded. The Borough Council may discuss matters involving pending litigation, collective bargaining agreements, matters involving lease or acquisition of real property or investment of public funds, protecting public safety, and/or personnel as permitted under Section 7 of the Open Public Meetings Act, and

BE IT FURTHER RESOLVED that the discussion conducted at said closed or executive session shall be disclosed to the public as soon as such disclosure shall not be prejudicial to the parties concerned.

ADOPTED at a regular meeting of the Mayor and Borough Council of the Borough of Swedesboro held on March 21, 2011.

BOROUGH OF SWEDESBORO

ATTEST:



TANYA GOODWIN, CLERK



Thomas W. FROMM, MAYOR

R-75-11

RESOLUTION OF THE BOROUGH COUNCIL OF THE BOROUGH OF
SWEDESBORO, COUNTY OF GLOUCESTER AND STATE OF NEW
JERSEY ON THE MATTER OF CLOSED OR EXECUTIVE SESSION

WHEREAS, under the provisions of the Open Public Meetings Law, N.J.S.A. 10:4-12(b) the public may be excluded from that portion of the meeting at which certain enumerated topics are discussed; and,

WHEREAS, this public body is of the opinion that such circumstances presently exist;

NOW, THEREFORE, BE IT RESOLVED that the Borough Council will go into closed or executive session from which the public shall be excluded. The matters being discussed during this session are related to acquisition of real property.

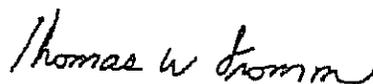
BE IT FURTHER RESOLVED that the discussion conducted at said closed or executive session shall be disclosed to the public as soon as such disclosure shall not be prejudicial to the parties concerned.

ADOPTED at a regular meeting of the Mayor and Borough Council of the Borough of Swedesboro held on May 16, 2011.

BOROUGH OF SWEDESBORO

ATTEST:


TANYA GOODWIN, CLERK


Thomas W. FROMM, MAYOR

BOROUGH OF SWEDESBORO
RESOLUTION NO. _____
AUTHORIZING EXECUTIVE SESSION

WHEREAS, while the Sen. Byron M. Baer Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) requires all meetings of the Swedesboro Borough Council to be held in public, N.J.S.A. 10:4-12(b) sets forth nine (9) types of matters that may lawfully be discussed in "Executive Session," i.e. without the public being permitted to attend, and

WHEREAS, the Swedesboro Borough Council has determined that _____ (insert number) issues are permitted by N.J.S.A. 10:4-12(b) to be discussed without the public in attendance shall be discussed during an Executive Session to be held on _____, 20____ at _____ P.M, and

WHEREAS, the nine (9) exceptions to public meetings set forth in N.J.S.A. 10:4-12(b) are listed below, and next to each exception is a box within which **the number** of issues to be privately discussed that fall within that exception shall be written, and after each exception is a space where additional information that will disclose as much information about the discussion as possible without undermining the purpose of the exception shall be written.

“(1) Any matter which, by express provision of Federal law, State statute or rule of court shall be rendered confidential or excluded from public discussion.” The legal citation to the provision(s) at issue is:_____ and the nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____
_____;

“(2) Any matter in which the release of information would impair a right to receive funds from the federal government.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____
_____;

“(3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____
_____;

“(4) Any collective bargaining agreement, or the terms and conditions of which are proposed for inclusion in any collective bargaining agreement, including the negotiation of terms and conditions with employees or representatives of employees of the public body” The collective bargaining contract(s) discussed are between the public body and _____
_____;

“(5) Any matter involving the purchase lease or acquisition of real property with public funds, the setting of bank rates or investment of public funds where it could adversely affect the public interest if discussion of such matters were disclosed.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is

_____;

“(6) Any tactics and techniques utilized in protecting the safety and property of the public provided that their disclosure could impair such protection. Any investigations of violations or possible violations of the law.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____

_____;

“(7) Any pending or anticipated litigation or contract negotiation in which the public body is or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.” The parties to and docket numbers of each item of litigation and/or the parties to each contract discussed are _____

_____ and
nature of the discussion, described as specifically as possible without undermining the need for confidentiality is _____

_____;

“(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.” Subject to the balancing of the public’s interest and the employee’s privacy rights under South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, the employee(s) and nature of the discussion, described as specifically as possible without undermining the need for confidentiality are _____

_____;

“(9) Any deliberation of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act of omission for which the responding party bears responsibility.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is

_____;

WHEREAS, the length of the Executive Session is estimated to be _____ minutes after which the public meeting shall (circle one) reconvene and immediately adjourn or reconvene and proceed with business.

NOW, THEREFORE, BE IT RESOLVED that the Council will go into Executive Session for **only** the above stated reasons;

BE IT FURTHER RESOLVED that the Council hereby declares that its discussion of the aforementioned subject(s) will be made public at a time when the public's interest in disclosure is greater than any privacy or governmental interest being protected from disclosure. For each of the above items, the estimated date by which such disclosure can be made and/or the occurrence that needs to take place before disclosure can be made are listed below (attach separate sheet if necessary)

Subject of Discussion	Estimated Date	Necessary Occurrence

BE IT FURTHER RESOLVED that the Clerk, at the present public meeting, shall read aloud enough of this resolution so that members of the public in attendance can understand, as precisely as possible, the nature of the matters that will privately discussed.

BE IT FURTHER RESOLVED that the Clerk, on the next business day following this meeting, shall furnish a copy of this resolution to any member of the public who requests one at the fees allowed by N.J.S.A. 47:1A-1 et seq.

Council President

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE RESOLUTION APPROVED BY THE SWEDESBORO BOROUGH COUNCIL OF EDUCATION AT ITS PUBLIC MEETING HELD ON _____20____.

Borough Clerk