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New Jersey Foundation for Open
Government and John Paff,

Plaintiffs,

v.

Island Heights Board of Education and
Lillian Brendel,

Defendants.

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION

OCEAN COUNTY

DOCKET NO. OCN L-703-14

CIVIL ACTION

OPINION

Argued: April 16, 2014

Decided: April 25, 2014

Vincent J. Grasso, A.J.S.C.

Anthony H. Ogozalek, Jr., Esq. appearing on behalf of the plaintiffs, New Jersey Foundation for Open Government, Inc. and John Paff (Law Offices of Beckman, Ogozalek & Perez)

Adam S. Weiss, Esq. and Jennifer Herrmann, Esq. appearing on behalf of the defendant, Island Heights Board of Education (Law Offices of Methfessel & Werbel, P.C.)

Summary

The matter before the court comes by way of an order to show cause and verified complaint filed by plaintiffs New Jersey Foundation for Open Government, Inc., a non-profit New Jersey corporation, and John Paff, its treasurer, alleging that defendants Island Heights Board of Education (Board) and Board secretary Lillian Brendel have violated New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA) and the common law right of access. The complaint also alleges that the Board has violated the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21 (OPMA). At issue is whether the Board complied with OPRA when it

provided plaintiffs redacted closed session meeting minutes and explaining to plaintiffs that the redacted items were “confidential for the following reasons legal, student or personnel issues.”

Background

On April 22, 2012, Paff submitted a request under OPRA and the common law right of access to Brendel requesting “Minutes of the February 8, 2012 closed session” and the “Resolution, as required by N.J.S.A. 10:4-13, that authorized the February 8, 2012 closed session.” Brendel replied by e-mail dated May 9, 2012:

I have enclosed our session minutes from February 8, 2012. We have also attached the agenda for March 7, 2012 as it states that our executive session begins at 6:15 p.m. There is no official resolution as we notify the public at each meeting of the next meeting date as well as executive session begins at 6:15 p.m.

Brendel’s e-mail included as an attachment the February 8, 2012 meeting minutes and the March 7, 2012 agenda.

On May 11, 2012, Paff e-mailed the Board. In substance, the e-mail urged the Board to comply with OPMA and also threatened the Board with a lawsuit under that statute if the Board failed to do so. Paff attached a draft lawsuit to the e-mail. The Board, through its attorney, left Paff a voicemail acknowledging that the Board had received the draft lawsuit. These matters are not before the court.

On January 6, 2014, Paff submitted another records request to Brendel. The request sought meeting minutes and resolutions pertaining to each nonpublic session the Board held in 2013. Paff additionally requested that if the Board redacted any part of the meeting minutes, it should “provide enough detail about the nature of each redaction to allow me to assess whether or not the redaction is reasonable.” Brendel replied to Paff’s January 6, 2014 records request on January 10, 2014 and indicated that she had forwarded Paff’s records request to its attorney.

The record discloses that no communications took place between Paff and the Board until January 28, 2014. On that date, Paff e-mailed Brendel. He offered an extension to Brendel if she could provide the documents that he requested by January 31, 2014. The Board, however, provided the requested documents on January 28, 2014. Although the Board furnished the closed session meeting minutes from 2013, it redacted several items. Brendel explained broadly that, “[t]he items in black are retracted by our attorney as they are confidential for the following reasons legal, student or personnel issues.” Brendel’s e-mail concluded with, “[p]lease let me know if you need anything further.”

One month later, on the evening of February 28, 2014, Paff sent Brendel another e-mail documents request. This time, Paff asked Brendel to provide meeting resolutions or motions and minutes from all nonpublic meetings from December 12, 2013 until February 28, 2014. Brendel certifies that due to snowstorm-related closures, she did not actually receive the documents request until March 4, 2014. The record shows that on March 13, 2014, Brendel e-mailed Paff the requested nonpublic meeting minutes.

Findings

Plaintiff alleges that the Board has violated both New Jersey’s Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA), the common law right of access, and the Open Public Meetings Act, 10:4-6 to -21 (OPMA). Count one of plaintiff’s complaint seeks declaratory relief and attorney’s fees. Specifically, it seeks to declare that: (1) Brendel’s January 28, 2014 response to Paff’s January 6, 2014 OPRA request; and (2) Brendel’s March 13, 2014 response to Paff’s February 28, 2014 OPRA request were untimely per N.J.S.A. 47:1A-5(i) (requiring custodian to respond to OPRA request “within seven business days after receiving a request”). Count two

seeks a declaratory judgment that the Board violated OPRA by providing redacted meeting minutes from its nonpublic sessions. Count two also seeks an order from this court compelling the Board to submit unredacted minutes for *in camera* review or a privilege log, and attorney's fees. Count three seeks an order from this court compelling the Board to submit unredacted minutes to Paff.

Count four pleads a cause of action under the common law right of access. The parties stipulated at oral argument that the court should not resolve this count in a summary manner. Likewise, the parties both indicated that counts five and six, which seek to remedy violations of OPMA, should not be resolved in a summary manner.

The court will resolve counts four, five, or six at a later date, if necessary. The court addresses only plaintiff's OPRA challenge in a summary manner. N.J.S.A. 47:1A-6. In doing so, the court also incidentally discusses plaintiffs' OPMA challenge because the court finds that it is inextricably linked with plaintiffs' OPRA challenge. The court, however, does not rule on counts five and six of plaintiff's complaint arising under OPMA. Finally, the court also addresses the Board's argument that R. 4:69-6(a)'s 45-day limitations period bars plaintiff's suit.

45-Day Limitations of Actions

As a threshold issue, the court addresses the Board's argument that under R. 4:69-6(a), the 45-day limitations period bars plaintiff's suit. The Board correctly points out that OPRA cases are generally governed a 45-day limitations period, the same as actions in lieu of prerogative writs. Mason v. Hoboken, 196 N.J. 51, 70 (2008). The 45-day limitations period begins to run on the date of the alleged OPRA violation. Caporusso v. New Jersey Dep't of Health & Senior Servs., 434 N.J. Super. 88, 99–100 (App. Div. 2014). The Board argued in its

papers that plaintiff's cause of action accrued either on January 17, 2014, or January 22, 2014, depending on whether the court finds that the Board was required to respond to his January 6, 2014 OPRA request on January 16, 2014 or January 21, 2014. Using either of these dates, the Board argued that plaintiff had to file the instant action before March 3, 2014 or March 8, 2014. Plaintiffs filed on March 12, 2014.

Generally, “[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to review, hearing or relief claimed.” R. 4:69-6(a). A court may enlarge this time period “where it is manifest that the interests of justice so require.” R. 4:69-6(c). Courts may do so in one of three circumstances: (1) cases that raise important and novel constitutional questions; (2) cases involving informal or *ex parte* determinations of legal questions by administrative officials; and (3) cases that raise important public rather than private interests which require adjudication or clarification. Brunetti v. New Milford, 68 N.J. 576, 586 (1975).

Here, the court declines to find that R. 4:69-6(a)'s 45-day limitations period bars plaintiff's suit in its entirety. At oral argument, plaintiff conceded that the part of count one that sought to declare untimely the Board's January 28, 2014 response to Paff's January 6, 2014 response was time-barred. Furthermore, the record discloses that plaintiff gave the Board an extension of time until January 31, 2014 in which to respond to his January 6, 2014 OPRA request. At the very least, this time extension calls into question the viability of this part of count one. Accordingly, the court dismisses that part of count one that seeks to declare the Board's response to plaintiff's January 6, 2014 OPRA request untimely under N.J.S.A. 47:1A-5(i).

The court also dismisses the second part of count one that seeks to declare untimely that the Board's March 13, 2014 response to plaintiff's February 28, 2014 OPRA request violated N.J.S.A. 47:1A-5(i). Initially, the court finds that the 45-day limitations period does not bar this part of count one because plaintiff filed within that limitations period. Nevertheless, the court finds that this count fails to state a cause of action because the court finds that the Board responded within seven business days of plaintiff's February 28, 2014 OPRA request. The court finds that because the Board was closed due to a snowstorm on March 3, 2014, it did not receive the OPRA request until March 4, 2014. Cf. North Jersey Media Group v. Englewood Pub. Sch. Dist., No. BER-L-700-13 (Law Div. Mar. 5, 2013) (slip op. at 35) (explaining that Hurricane Sandy and custodian's surgery provided sufficient cause for the court to relax OPRA's 7 business day responsive period). Counting seven business days thereafter, the Board had until March 13, 2014 to respond to Paff's February 28, 2014 OPRA request. The Board did so on March 13, 2014. The court hereby dismisses count one of the complaint.

The court finds that the causes of action pleaded in counts two and three accrued no earlier than January 28, 2014, the date on which the Board produced the redacted closed-session meeting minutes. Plaintiff filed suit within 45 days of that date on March 12, 2014. The court finds that counts two and three of the complaint are timely under R. 4:69-6(a).

OPRA

Initially, OPRA manifests the State's public policy of transparency in government. See N.J.S.A. 47:1A-1 ("[G]overnment 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 . . . shall be construed in favor of the public's

right of access . . .”). Generally, OPRA requires a public body to disclose any “government record.” N.J.S.A. 47:1A-1. OPRA defines “government record” broadly to mean:

[A]ny 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 . . . or that has been received in the course of his or its official business . . .

[N.J.S.A. 47:1A-1.1.]

However, a public body need not disclose a “government record” if that record falls into one of OPRA’s twenty-one categories of documents that fall outside the statute’s reach.

N.J.S.A. 47:1A-1.1. OPRA places the burden of proving such an exception on the public body who wishes to withhold a government record. N.J.S.A. 47:1A-6. In doing so, the public body’s custodian of record must state the “specific basis” for withholding a government record. Gannett N.J. Partners v. Middlesex, 379 N.J. Super. 205, 215 (App. Div. 2005). Moreover, they “must produce specific reliable evidence sufficient” to prove their asserted “statutorily recognized” exception. Courier News v. Hunterdon County Prosecutor's Office, 358 N.J. Super. 373, 382–83 (App. Div. 2003). Absent such a showing, a citizen's right of access is unfettered. Ibid.

In evaluating a public body’s decision to withhold information, a court must determine: (1) if the information constitutes a government record; and (2) if the record evidence produced by the public body establishes an exception that shields the government record from disclosure.

Initially, OPMA classifies Board meeting minutes as government records. Broadly speaking, OPMA requires public officials to grant the public access to its meetings, except for certain well-delineated exceptions. N.J.S.A. 10:4-6 to 21. OPMA defines a “meeting” as, “any gathering . . . which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the

specific public business of that body.” N.J.S.A. 10:4-8(b). OPMA broadly defines "public business" as “all matters which relate in any way, directly or indirectly, to the performance of the public body's functions or the conduct of its business.” N.J.S.A. 10:4-8(c).

In pertinent part, OPMA requires public bodies to:

keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with N.J.S.A. 10:4-12.

[N.J.S.A. 10:4-14.]

N.J.S.A. 10:4-14’s “reasonably comprehensive” language requires public body’s minutes to reflect what took place at a meeting, and what action the public body took. Liebeskind v. Bayonne, 265 N.J. Super. 389 (App. Div. 1993).

N.J.S.A. 10:4-12 provides that a public body may only exclude the public from a portion of a meeting in which the public body discusses certain enumerated subjects. Among other things, these include: (1) matter rendered confidential by other laws; (2) matters which would constitute an invasion of individual privacy; (3) proposed terms of a collective bargaining agreement; (4) litigation-related subjects; and (5) certain employment matters. N.J.S.A. 10:4-12. “[O]nly the unusual case will justify total suppression of the minutes of a closed session; such a case would require great harm to the public interest underlying the exception from even minimal disclosure as well as a negligible interest in disclosure.” Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 557 (1997) (citing N.J.S.A. 10:4-12(b)).

Under these principles, the court finds that the Board did not satisfy its duty under OPRA to satisfy plaintiff’s January 6, 2014 document request. OPMA required the Board to record

nonpublic meeting minutes in a reasonably comprehensible manner and to make those minutes publicly available. OPMA operates to place the nonpublic meeting minutes within the category of government records. Accordingly, the Board was required to furnish those minutes in response to Paff's OPRA request of January 6, 2014. If any of those minutes reflected discussions regarding items so "unusual" that even "minimal disclosure" would cause "great harm to the public interest," the Board had to give specific reasons for redacting them. Payton, supra, 148 N.J. at 557; See Gannett N.J. Partners, supra, 379 N.J. Super. at 215 (requiring custodian to state specific basis for denial of public records).

Here, the court finds that the Board fell short of meeting its obligations under OPRA by asserting only that the redacted items in the minutes dealt with "legal, student or personnel issues." This blanket statement does not allow members of the public to know or discern with any reasonable clarity what the Board discussed in the nonpublic meetings or what actions the Board took. Nor does it suggest what specific privilege the Board seeks to invoke because it lists three different potential privileges. In sum, the Board's redaction can only be viewed as overly broad as it does not identify a specific privilege the Board seeks to invoke but rather it lists three different potential privileges.

For the foregoing reasons, the court finds that the Board violated OPRA when it provided Paff redacted nonpublic meeting minutes and failed to explain its redactions with specificity. The court finds in favor of plaintiffs as to counts two and three of its verified complaint. The court also will grant plaintiffs' relief requested on count three and direct the Board to provide the court with unredacted minutes for the requested closed sessions for an *in camera* review by the court. Pending the courts *in camera* review, defendant Board shall reissue the closed session

minutes with redactions consistent with this opinion and case law. The court will entertain further argument as to whether plaintiffs are a prevailing party entitled to their reasonable attorney's fees. Additionally, the court leaves the parties to argue their respective positions regarding counts four, five, and six arising under the common law right of access and OPMA. Mr. Ogozalek is to prepare an order that comports with this decision.

Respectfully submitted,

VINCENT J. GRASSO, A.J.S.C.

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