Superior Court of New Jersey

CHAMBERS OF
JUDGE VINCENT J. GRASSO
ASSIGNMENT JUDGE
(732)-929-2176

OCEAN COUNTY COURT HOUSE
P.O. BOX 2191
TOMS RIVER, NJ 08754-2191

August 26, 2014

Anthony H. Ogozalek, Jr., Esq.
Beckman, Ogozalek & Perez
Paintworks Corporate Center
7 Foster Avenue, Suite 201
Gibbsboro, New Jersey 08026

Adam S. Weiss, Esq.
Methfessel & Werbel, P.C.
2025 Lincoln Highway-Suite 200
P.O. Box 3012
Edison, New Jersey 08818

Re: New Jersey Foundation for Open Government, Inc., et al
v. Island Heights Board of Education, et al
Docket No. OCN-L-703-14

Dear Counsel:

Summary

The matter before the court is a R. 4:46-2(c) motion for summary judgment 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 the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21 (OPMA).

The court issued an opinion in this case on April 25, 2014. That opinion articulated the court's findings that: (1) R. 4:69-6(a)'s 45-day limitations period barred part of count one of plaintiffs' complaint; (2) the remaining part of count one failed to state a claim; (3) as to counts

two and three, defendants violated the Open Public Records Act, N.J.S.A. 47:1A-1 to -13 (OPRA) when they denied plaintiffs access to certain closed session meeting minutes by furnishing those meeting minutes in heavily redacted form and justifying each redaction with a statement that the redacted material dealt with "legal, student or personnel issues." The court ordered defendants to furnish unredacted meeting minutes from its closed sessions for the court's *in camera* review and allowed plaintiffs the opportunity to move for summary judgment on the remaining counts of the complaint. Defendants have furnished those minutes.

Plaintiffs now move for summary judgment under R. 4:46-2(c) on counts five and six which seek declaratory relief and defendants' future compliance with OPMA. Plaintiffs indicate that they no longer wish to pursue count four in light of the court's April 25, 2014 decision. At issue, therefore, in this opinion is whether the Board complied with OPMA when it adopted resolutions to go into closed session to discuss matters "including but not limited to confidential student information, personnel matters, contracts and litigation." Also at issue is whether any of the Board's closed sessions violated OPMA when the Board discussed topics that it should have discussed in public session.

Background

The court gave a detailed factual background in its April 25, 2014 opinion. Accordingly, the court does not do so at length in this opinion. Instead the court will recite only those facts found in the record and in the parties' R. 4:46-2(c) statements of undisputed material facts that germane to the issues raised in count five and count six of plaintiffs' complaint.

Initially, the record contains the meeting minutes of the January 9, 2013, February 13, 2013, March 6, 2013, April 10, 2013, May 15, 2013, June 12, 2013, July 10, 2013, August 14, 2013, September 11, 2013, October 9, 2013, November 13, 2013, and December 11, 2013 public

meetings. These meeting minutes reflect that, at each of these meetings, the Board adopted a resolution to go into closed session. The minutes from these meetings also recite the language of each resolution:

> On [date] at [time] the Island Heights Board of Education will move into Executive Session for the purpose of discussing matters excluded from public discussion/deliberation, including but not limited to confidential student information, personnel matters, contracts and litigation.
>
> WHERAS[sic], Section 8 of the Open Public Meetings Act, NJSA 10:4-12 permits the exclusion of the public from a meeting in certain circumstances; and
>
> WHERAS, this public body is of the opinion that such circumstances exist;
>
> NOW THERFORE [sic], BE IT RESOLVED, by the Board of Education of the Borough of Island Heights, in the County of Ocean, State of NJ, as follows:
>
> The subject matters will be made public, if and when, confidentiality is no longer necessary, Action may be taken.

The Board went into closed session after reciting some version of this resolution.

The record also reflects that the Board released heavily redacted minutes from its closed sessions. The court has compared the redacted meeting minutes with the unredacted meeting minutes. By way of example, the Board redacted five entire lines, reflecting two separate items, from the January 9, 2013 closed session meeting minutes. Similarly, the Board redacted nine entire lines, reflecting three separate items, from the February 13, 2013 closed session meeting minutes. The record discloses that the remaining closed session meeting minutes, with the exception of the July 10, 2013 closed session meeting minutes, are all similarly redacted.

The court has also reviewed the parties' R. 4:46-2(c) statements of undisputed material facts and finds that the following facts are not in dispute. At the Board's February 8, 2012 closed session meeting, it discussed "the solar panel project," the current board goal regarding shared superintendence," the "possibility of having K,1,2, self-contained classroom for the

upcoming 2012-12 school year," and Mrs. Fuhring's "progress on her goals for the 2011-12 year."

At the Board's January 9, 2013 closed session, it discussed the possibility of having "a volunteer to assist in picking teacher of the year," and an announcement that Ocean County Superintendent Joe Pasiment will be "overseeing Monmouth, Ocean and Middlesex."

At the February 13, 2013 closed session, it discussed "tuition for the 2013-14 school year" and the Board's intentions to do "trainings the last week of school." Similarly, in the March 6, 2013 closed session, it discussed tuition rates and "Choice school application."

Next, at the April 10, 2013 closed session, the Board discussed the naming of its multi-purpose room, a conflict concerning meeting dates, calendar changes to half days and NJSBA Board training on April 17, 2013. In the same vein, the Board discussed dates of the school band concert, "dedication for Mr. CZ," the "QSAC" on May 28, 2013, and the "Choice school application" in closed session on May 15, 2013. On June 12, 2013, the Board informed its members in closed session that the district did "extremely well" on the "QSAC" and that the district's teachers have "all the necessary training for teacher evaluations and are in compliance."

Defendants further admit that at the Board's July 10, 2013 closed session, the Board discussed the science curriculum, textbooks, tuition discounts, and e-mails regarding the "Choice District." Likewise, defendants admit that at the August 14, 2013 closed session, the Board discussed Mrs. Fuhring's "progress on the teacher evaluation system" and Mrs. Brendel's success in obtaining insurance funds for a new gym floor. Additionally, the September 11, 2013 closed session contained discussions regarding "School Choice," building repairs and lighting, and "a new sign with PTO" while the October 9, 2013 closed session contained a discussion regarding Mr. Tsucala's offer to be the chair for building and grounds.

Finally, defendants admit that the Board discussed, in its November 13, 2013 closed session, the fact that the Spanish teacher began her employment, that the Board is "really working hard and diligently to put art back in the Island Heights Grade School," and the need to focus on Language Arts. Also, the Board undisputedly discussed that "dissolution" was "finally over."

Findings

Count five of plaintiffs' complaint challenges the Board's practice of adopting resolutions to go into closed session to discuss matters "including but not limited to confidential student information, personnel matters, contracts and litigation." It asks for a declaratory judgment that the Board violated N.J.S.A. 10:4-13 by failing to state the general nature of the closed session Board meetings. It further seeks an injunction under N.J.S.A. 10:4-16 to ensure the Board's future compliance with N.J.S.A. 10:4-13.

Count six alleges that the Board improperly entered closed session to discuss matters reserved for public discussion. Plaintiffs argue that this practice violates N.J.S.A. 10:4-12(b). This count seeks a declaratory judgment that the Board violated OPMA and an injunction preventing the Board from discussing public matters in closed session. The court will address these counts in order after articulating the standard for summary judgment.

Summary Judgment

Summary judgment obviates futile trials by allowing courts to pierce the pleadings to see whether a genuine dispute exists. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75–76 (1954) (citations omitted). However, it must not deprive deserving litigants of their right to a trial. Id. at 77. Accordingly, the Court may grant summary judgment only if: (1) no genuine issue of material fact exists; and (2) the movant is entitled to judgment as a matter of law.

R. 4:46-2(c). When determining whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the non-movant. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523–24 (1995). If, using the same evidentiary standard that would apply at trial, the court finds the evidence one-sided, it may grant summary judgment if that party is entitled to judgment as a matter of law. Id. at 536.

As a threshold issue, the court finds that the record contains no genuine issue of material fact that precludes it from granting summary judgment on counts five and six. The court notes that defendants deny that "each" of its resolutions authorizing closed session contains the language referenced above. Defendants clarify in their papers that only the February 10, 2013 resolution contains the "confidential student information, personnel matters, contracts and litigation" language.

As a general rule, a denial of the movant's facts, without record support, cannot prevent summary judgment. Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002). The court's review of the resolutions authorizing closed sessions allows the court to find that plaintiffs are correct in its assertion as to the wording of the resolutions. Otherwise, defendants admit those material facts on which plaintiffs rely to argue that the court should grant summary judgment on count six. Accordingly, the court finds the absence of any genuine issue of material fact that precludes summary judgment. In the absence of any genuine issue of material fact, the court determines only whether plaintiffs are entitled to judgment as a matter of law.

OPMA

OPMA—often known as the "Sunshine Law"—comports with this state's "strong tradition" of "favoring public involvement in almost every aspect of government." Polillo v. Deane, 74 N.J. 562, 569 (1977). The statute recites the Legislature's finding that, the "right of

the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process." N.J.S.A. 10:4-7. Broadly speaking, OPMA requires public officials to grant the public access to its meetings, except for in certain well-delineated exceptions in which a public body may exclude the public and go into closed session. To ensure compliance with OPMA's provisions, it provides that

> Any person, including a member of the public, may apply to the Superior Court for injunctive orders or other remedies to insure compliance with the provisions of this act, and the court shall issue such orders and provide such remedies as shall be necessary to insure compliance with the provisions of this act.
>
> [N.J.S.A. 10:4-16.]

Count Five

The court finds that the Board's resolutions authorizing closed session violate N.J.S.A. 10:4-13 because they lack sufficient specificity to inform the public of the "general nature" of the closed session discussion. OPMA provides that prior to entering closed session, a public body must first adopt a resolution: (1) "[s]tating the general nature of the subject to be discussed"; and (2) "[s]tating 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." N.J.S.A. 10:4-13. A resolution authorizing closed session may not give a generalized list of possibilities of what the public body may discuss. See Council of N.J. State College Locals, NJSFT, AFT/AFL-CIO, Local 2364 v. Trenton State College Bd. of Trustees, 284 N.J. Super. 108, 113 (Law Div. 1995) (finding that closed-session resolution outlining "consider personnel matters, labor relations, any pending litigation, and any other matters specifically exempted by the

Open Meetings Act" failed under N.J.S.A. 10:4-13 because it did not articulate specific exception).

Here, the Board's resolutions state that the Board would discuss "confidential student information, personnel matters, contracts and litigation." The court finds that these resolutions leave the public to guess at which of these issues the Board would discuss because they give three different possibilities. Moreover, the court finds that the resolutions fail to state with any clarity "the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public." The court finds that the Board violated N.J.S.A. 10:4-13 because it entered closed session without first apprising the public of the "general nature" of the closed session discussion and the time when and the circumstances under which the confidential discussion could "be disclosed to the public."

Count Six

The court finds that the Board, in closed session, improperly discussed matters that it should have discussed in public session. N.J.S.A. 10:4-12(b) provides an exhaustive list of circumstances under which a public body may go into closed session:

> A public body may exclude the public only from that portion of a meeting at which the public body discusses any:
>
> **(1)** matter which, by express provision of federal law, State statute, or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section;
>
> **(2)** matter in which the release of information would impair a right to receive funds from the Government of the United States;
>
> **(3)** 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 an 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 an incapacitated individual, the individual's guardian) shall request in writing that the material be disclosed publicly;

(4) collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body;

(5) matter involving the purchase, lease, or acquisition of real property with public funds, the setting of banking rates, or investment of public funds, if it could adversely affect the public interest if discussion of the matters were disclosed;

(6) tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair that protection, or investigations of violations or possible violations of the law;

(7) pending or anticipated litigation or contract negotiation other than in subsection b.(4) herein in which the public body is, or may become, a party, or 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;

(8) matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, 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 the individual employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting; or

(9) deliberations 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 or omission for which the responding party bears responsibility.

[N.J.S.A. 10:4-12.]

Courts must construe these statutory exceptions strictly and in favor of the public's right to attend meetings. Hartz Mountain Indus., Inc. v. N.J. Sports & Exposition Auth., 369

N.J. Super. 175, 186 (App. Div. 2004), certif. denied, 182 N.J. 147 (citing Payton v. N. J. Turnpike Auth., 148 N.J. 524, 555–56 (1997)).

Here, the court finds that the Board discussed matters that should have properly been addressed at the public session. Defendants do not dispute that, the Board's discussion's regarding: (1) the solar panel project; (2) the Board's goal regarding shared superintendence; (3) the "possibility of having K,1,2, self-contained classroom for the upcoming 2012-12 school year"; (4) Mrs. Fuhring's "progress on her goals for the 2011-12 year"; (5) the possibility of having "a volunteer to assist in picking teacher of the year"; (6) the announcement that Joe Pasiment would now oversee Ocean, Monmouth, and Middlex counties; (7) the Board's intentions to do "trainings the last week of school"; (8) tuition rates; (9) the Choice School application; (10) the naming of the Board's multi-purpose room; (11) a conflict concerning meeting dates; (12) calendar changes to half days; (13) NJSBA Board training; (14) the dates of the school band concert; (15) the "dedication for Mr. CZ"; (16) the Quality Single Accounting Continuum or "QSAC"; (17) the science curriculum; (18) textbooks; (19) Mrs. Fuhring's "progress on the teacher evaluation system"; Mrs. Brendel's success in obtaining insurance funds for a new gym floor; (20) building repairs and lighting; (21) "a new sign with PTO"; (22) the fact that the Spanish teacher began teaching; (23) the Board's efforts to bring art to the grade school; and (24) the need to focus on Language Arts do not fall within the exceptions enumerated in N.J.S.A. 10:4-12(b). The court agrees and finds that the Board violated OPMA by excluding the public from these discussions.

There is no assertion here of bad faith by plaintiffs on counts five and six. Because the Board's violations are technical ones due to oversight, rather than willful

ones that undermine the fundamental purposes of the Act, the court orders that the Board conform in the future to N.J.S.A. 10:4-13 by adopting a resolution with sufficient specificity at a public meeting before entering a closed session and to N.J.S.A. 10:4-12 by using closed sessions to discuss only the matters listed in N.J.S.A. 10:4-12(b). Liebeskind v. Mayor and Mun. Council of Bayonne, 265 N.J. Super. 389, 394–95 (App. Div. 1993). The Act provides that any action taken by a public body at a ruling which does not conform to the statutory provisions shall be voidable. However, under the circumstances for this court, the Island Heights Board of Education is to take corrective and remedial action by proceeding *de novo* at a public meeting held in conformity with the statutes. Polillo v. Deane, 74 N.J. 562, 579 (1977). It may utilize so much of the testimony and evidence which it acquired in its original effort as it deems necessary and appropriate. Ibid. Nevertheless, any decision in these regards must be arrived at in a manner in strict conformity with OPMA consistent with this Order. Ibid.

Summary judgment is entered in favor of plaintiffs on counts five and six with count four withdrawn by plaintiffs. Mr. Ogozalek is to prepare and submit the Order. Counsel need to confer and advise the court on the issue of counsel fees and costs.

Respectfully submitted,

Vincent J. Grasso

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