

Petition for Rulemaking

State of New Jersey
Department of Community Affairs
(Submitted in accordance with N.J.A.C. § 5:2-2.2)

1. The full name and address of the petitioners;

New Jersey Foundation for Open Government, Inc.
P.O. Box 271
Jamesburg, NJ 08831

John Paff
172 Silver Lake Rd
Bridgeton, NJ 08302

2. The substance or nature of the rulemaking that is requested;

Amendments to N.J.A.C. § 5:35-1.1 and N.J.A.C. § 5:35-1.2 which are set forth in the attached appendix. The appendix, which contains the full text of the two above-cited Code sections, is marked up with strike-outs and underlines denoting, respectively, deleted and added text.

3. The reasons for the request;

Petitioners seek three categories of rule changes. First, they seek to place some time constraints within which the Local Finance Board ("Board") must complete its preliminary investigations and investigations regarding Local Government Ethics Law (LGEL) complaints. Second, they seek to make the existence of and records pertaining to LGEL complaints publicly available earlier in the process. Third, they seek to restrict the Board's ability to reject complaints that allege unethical conduct when related matters are pending before a court or administrative agency.

A. Imposition of Time Constraints.

Petitioner Paff has filed one LGEL complaint that has been pending three years and five months. That case bears complaint number 12-009 (filed on March 7, 2012). In addition, Petitioner Paff has filed three LGEL complaints that have been pending before the Board for more than two years. Those cases bear complaint numbers 13-034 and 13-035 (both filed on August 16, 2013) and 13-014 (filed on April 21, 2013). The only correspondence Petitioner Paff

has received in each of these four cases is a standard acknowledgment letter that the Board's staff mailed shortly after each complaint was filed.

When it enacted the Local Government Ethics Law, the Legislature found that "[t]he vitality and stability of representative democracy depend upon the public's confidence in the integrity of its elected and appointed representatives." In order to accomplish this, the Legislature developed the LGEL to "to provide a method of assuring that standards of ethical conduct and financial disclosure requirements for local government officers and employees shall be clear, consistent, uniform in their application, and enforceable on a Statewide basis." Petitioners contends that permitting investigations to linger on for years defeats the Legislature's stated goals and diminishes the public's confidence, not only in the integrity of local government officials, but also in the Board's ability or willingness to enforce the LGEL.

Prompt resolution of ethics charges, however, would benefit the public by ensuring that officials who violate the LGEL are promptly disciplined. It would also benefit ethical public officials by more quickly dispensing with unwarranted LGEL complaints.

Petitioners submits that the petition's recommended time goals (i.e. 60 to 120 days to finish the preliminary investigation and 12 to 18 months to complete the investigation) are reasonable. Petitioners notes that under the proposed language, even those time goals could be extended in extraordinary cases.

B. Earlier public disclosure of ethics complaints.

Petitioners can find no statute that mandates confidentiality of LGEL cases. Accordingly, Petitioners posit that the Department, by rule, has the authority to prescribe whether and when LGEL case documents are subject to public disclosure. While Petitioners accepts a limitation on public disclosure during the preliminary investigation stage, they believe all case documents should become public after the Board completes its preliminary investigation.

Petitioners presume that the drafters of N.J.A.C. § 5:35-1.2's confidentiality provisions sought to protect public

officials from the potentially damaging or embarrassing statements contained in LGEL complaints until after those complaints were fully investigated and resolved. While everyone--private individuals and public officials alike--has an interest in maintaining his or her good reputation, the public also has a strong interest in promptly knowing which of its public servants stand accused of impropriety and the facts and circumstances underlying those accusations.

Civil and criminal complaints are immediately available to the public and may be published in newspapers and blogs before any judicial action is taken on them provided that the publication is full, fair and accurate. If a civil lawsuit alleging that a private citizen stole money, committed assault and battery or any other actionable tort is filed at the courthouse on Tuesday, the lawsuit could be put on full display in Wednesday's newspaper and the paper would be immune from the civil defendant's defamation lawsuit provided that its report was full, fair and accurate. As long as the publication is fair and accurate, "both the publication's truth and the publisher's knowledge of its truth or motivation for publishing it are irrelevant."¹ Thus, the hapless citizen-defendant has no remedy against the publisher of a fair and accurate recitation of untrue allegations contained in a lawsuit even if the publisher knows that the allegations are false and publishes them anyway.

If the sordid details of a private person's life--factually true or not--can be set forth in a lawsuit or criminal complaint and then, after the lawsuit's or complaint's filing at the local courthouse, be immediately communicated to the world via regular and social media, why should the Board's rules protect public officials--particularly elected public officials such as mayors or county freeholders--from a public airing of the facts alleged in an LGEL complaint? The current N.J.A.C. § 5:35-1.2 holds public officials to a lower level of public accountability than private citizens when the opposite should be the case. Petitioners' proposal would at least afford accused public officials temporary confidentiality until the conclusion of the preliminary investigation--a

¹Salzano v. North Jersey Media Group Inc. 201 N.J. 500, 530 (2010) citing Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 7.3.2.2.4. (PLI Press, 3d ed. 1999.)

luxury not available to the private citizen named in a lawsuit or criminal complaint.

C. Treatment of complaints that relate to matters pending before a court or administrative agency.

The present N.J.A.C. § 5:35-1.1(c) allows the Board to reject a complaint "on a matter which is pending in a court of law or administrative agency." This potentially allows the Board to reject legitimate complaints alleging substantial ethical impropriety if another proceeding is pending even if that proceeding is only tangentially related to ethics complaint. Petitioners assert that the public interest would be better served if § 5:35-1.1(c) could be invoked only if the same issues laid out in the complaint are also being adjudicated in another tribunal. Petitioner Paff's proposed text is borrowed from New Jersey Court Rule 1:20-3(f) which governs attorney disciplinary matter.

4. The petitioner's interest in the request, including, without limitation, any relevant organizational affiliation or economic interest.

Petitioner Paff is a long time, award winning² local government activist who strongly believes that much of the corruption that plagues New Jersey could be arrested if the State were to take more seriously its obligation to hold local officials accountable for their misdeeds. Petitioner New Jersey Foundation for Open Government, Inc. is a non-profit 501(c)(3) organization that seeks to increase transparency, accountability, honesty and democracy in government at all levels by defending and expanding public access to government records and meetings. Neither petitioner has an economic interest in this request.

5. The statutory authority under which the Department may take the requested action.

Authority for the proposed rule amendments is found in N.J.S.A. 40A:9-22.7(g).

²Petitioner Paff was awarded the "Heroes of the 50 States" award and inducted into the State Open Government Freedom of Information Hall of Fame on October 24, 2014 at the National Freedom of Information Coalition (NFOIC) Summit in St. Petersburg, Florida.

Appendix to Rulemaking Petition

§ 5:35-1.1 Complaints; procedure

(a) Every complaint alleging that a local government officer or employee, who is not regulated by a county or municipal code of ethics, has violated the Local Government Ethics Law, N.J.S.A. 40A:9-22.1 et seq., shall be in writing and signed by the complainant. However, the Local Finance Board may upon its own initiative initiate a complaint against a local government employee or officer, in which case the summary of the complaint shall be contained in the Board's minutes and the complaint shall proceed, where applicable, in accordance with this subchapter or be transmitted to the appropriate county or municipal ethics board.

(b) Complaints shall:

1. State the point of the Local Government Ethics Law alleged to be violated;
2. State the name(s) and title(s) of the parties involved in the action and against whom the complaint is filed;
3. Set forth in detail the pertinent facts surrounding the alleged violative action;
4. Indicate whether the complaint concerns the complainant in any way and what, if any, relationship the complainant has to the subject of the complaint; and
5. Indicate any other action previously taken in an attempt to resolve the issue and indicate whether the issue is the subject of pending litigation elsewhere.

(c) ~~The Board shall not process a complaint on~~ If a complaint alleges facts that are substantially similar to the material allegations of a matter which is pending in a court of law or administrative agency of the State, the Board shall advise the complainant in writing that the complaint is being dismissed without prejudice to it being filed anew after the matter pending in the court or agency has been resolved.

(d) The Board's staff shall acknowledge receipt of the complaint within 30 days of receipt of the complaint and commence a preliminary investigation as to whether the complaint is within the Board's jurisdiction or frivolous or without any reasonable factual basis.

(e) The Board shall endeavor to complete its preliminary investigation within 60 days of receipt of the complaint and, absent extraordinary circumstances, shall complete its preliminary investigation within 120 days of receipt of the complaint.

~~(e)~~ (f) Upon completion of the preliminary investigation, the Board shall make a determination as to whether the complaint is outside its jurisdiction or frivolous or without any reasonable factual basis.

1. If the Board concludes that the complaint is outside its jurisdiction, frivolous or without any reasonable factual basis, the Board's staff shall advise the complainant and the local government employee or official, who is the subject of the complaint, in writing of the Board's conclusion.

2. If the Board concludes that the complaint is within its jurisdiction, not frivolous, and having a reasonable factual basis, the Board shall advise the complainant of the Board's conclusion in writing and direct a further investigation to be conducted by the Board's staff.

~~(f)~~ (g) The Board's staff in conducting the investigation shall notify the local government employee or officer, who is the subject of the complaint, of the nature of the complaint and the facts and circumstances surrounding the complaint.

1. The local government employee or officer shall have the opportunity to present to the Board's staff any statements or other information concerning the complaint he or she wishes. Such statements or information shall be presented to the Board within 30 days of receipt of notification. Upon written application, the Board or its staff may extend the time for filing such statement.

2. The Board's staff shall obtain any further information or statements from any person with relevant information or from any other source, necessary to conduct the investigation.

(h) The Board shall endeavor to complete its investigation within one year of receipt of the complaint and, absent extraordinary circumstances, shall complete its investigation within eighteen months of receipt of the complaint.

~~(g)~~ (i) At the conclusion of the investigation, the Board's staff shall present to the Board the results of its investigation, which

shall include any statements or information received from the local government employee or officer, who is the subject of the complaint, and from any person or source with relevant information. The Board shall consider the matter based on the documents submitted to the Board's staff or obtained by the Board's staff. However, the Board in its discretion may direct the complainant, the local government employee or officer, who is the subject of the complaint, or any other person with relevant information to appear before the Board or to provide to the Board any additional information. The local government employee or officer who is the subject of the complaint may request to appear before the Board. However, such appearance is not required, unless directed by the Board.

~~(h)~~ (j) If the Board determines, based upon the results of the investigation, that no violation of the Local Government Ethics Law has been committed by the local government employee or officer, the Board shall issue a Notice of Dismissal to the individual and provide a copy to the complainant.

~~(i)~~ (k) If the Board determines, based upon the results of the investigation, by a two-thirds vote that a violation of the Local Government Ethics Law has been committed by the local government employee or officer, the Board shall issue a Notice of Violation to the individual containing the nature of the violation, assessing a penalty, and advising the individual of his or her opportunity to request an administrative hearing.

1. The Notice of Violation shall be transmitted to the local government employee or officer by regular and certified mail or by personal service.

2. The local government employee or officer, within 30 days of receipt of the letter, may request an administrative hearing to contest the Notice of Violation. Any request for an administrative hearing must be filed in the Board's office within 30 days of the receipt of the Notice of Violation by the local government employee or officer. The Board in its sole discretion may extend the time for requesting an administrative hearing for any reason it deems appropriate.

3. If an administrative hearing is not requested or if not timely filed by the local government employee or officer, the Order shall be deemed the Final Decision of the Board.

~~(j)~~ (l) Any administrative hearing shall be conducted in conformity with the rules and procedure, insofar as they may be applicable, of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq.

1. The Board shall determine whether it will conduct the administrative hearing or whether to transmit the matter to the Office of Administrative Law as a "contested case" for the rendering of an initial decision.

2. If the Board transmits the matter to the Office of Administrative Law as a "contested case," the Board shall review the initial decision and render a final decision. However, any finding that a violation of the Local Government Ethics Law has been committed by the local government employee or officer, requires a two-thirds vote of the Board.

§ 5:35-1.2 Confidentiality

(a) Any complaints, statements, information, or documents obtained or prepared by the Board staff or the Board are deemed confidential and not subject to public disclosure during the course of the preliminary investigation ~~or investigation to determine whether a violation of the Local Government Ethics Law has occurred,~~ except as necessary for the Board's staff or the Board to conduct the preliminary investigation ~~or investigation.~~ Upon the Board's conclusion that the complaint is within its jurisdiction, not frivolous, and has a reasonable factual basis, the complaint and subsequently filed documents, except for internal notes, memoranda and other deliberative material prepared by the Board and its staff, shall be public records. All complaints dismissed under § 5:35-1.1 (c) and those found to be outside the Board's jurisdiction, frivolous or without any reasonable factual basis, together with the corresponding notices to the complainants, shall be public records.

(b) The Board's discussion regarding a preliminary investigation or investigation shall be in executive session. However, any vote by the Board regarding a preliminary investigation or investigation shall be in public session. In public session, the complaint shall only be identified by a docket number, determined by the Board's staff.

~~(c) The Notice, the complaint and allied statements or information obtained by the Board's staff during the course of the preliminary investigation or investigation are subject to public disclosure 30 days after mailing a Notice of Dismissal, pursuant to N.J.A.C. 5:35-1.1(h), or a Notice of Violation, pursuant to N.J.A.C. 5:35-1.1(i).~~