



# SUPERIOR COURT OF NEW JERSEY

COUNTIES OF  
ATLANTIC AND CAPE MAY

**JAMES P. SAVIO**  
J.S.C.

March 23, 2015

1201 Bacharach Boulevard  
Atlantic City, NJ 08401-4510  
609/345-6700  
TTD: 348-5551

Christopher A. Barrett, Esquire  
Cooper Levinson  
1125 Atlantic Avenue  
Atlantic City, NJ 08401

Walter M. Luers, Esquire  
23 W. Main Street  
Suite C203  
Clinton, NJ 08809

**RE: Schmidt v. Cape May County Technical School District**  
**Docket No: CPM-L-356-14**

Gentlemen:

In accordance with N.J.S.A.47:1A-1 et seq, the Open Public Records Act, (OPRA), on June 9, 2014, the plaintiff, John Schmidt, served a request for the production of certain documents on the Cape May Technical School District (Board), a public entity of the State of New Jersey. Schmidt requested copy of the following records: (1) the resolution of the Board of Education terminating Charlotte Giles from employment; (2) the agenda of the meeting where the termination of Charlotte Giles was voted on (the agenda of the meeting in which the resolution of the Board of Education to terminate Charlotte Giles was passed); and (3) all closed/executive session meeting minutes of the Board of Education held between the following dates and the corresponding resolution that authorized the closed session: September 1, 2010 to December 31, 2010, January 1, 2011 to December 31, 2011, January 1, 2012 to April 18, 2012. On June 18, 2014, the board, through the custodian of



*"The Judiciary of New Jersey is an Equal Opportunity/Affirmative Action Employer"*

[www.njcourtsonline.com](http://www.njcourtsonline.com)



records, responded to the OPRA request but certain portions of the minutes of the Board's executive secessions were redacted citing N.J.S.A. 47:1A-1.1, attorney client privilege and personnel exception (grievance), as well as N.J.S.A. 47:1A-3, ongoing investigation by a State agency, as the reasons for the redaction.

On August 4, 2014, Schmidt filed a verified complaint against the Board in accordance with N.J.S.A. 47:1A-6 challenging the custodian of records for the Board's decision to redact portions of the minutes of executive secessions of the Board between January 18, 2011 and April 17, 2012. An order to show cause was filed on September 16, 2014, and after appropriate briefs were filed by the parties, the matter came before the court for oral argument on October 17, 2014. At the time of the hearing, counsel for the Board indicated that the sections of the minutes of the meetings were redacted based upon either the attorney client privilege and/or the personnel privilege. The court was unable to determine, based solely upon a review of the redacted minutes, whether the attorney client privilege or the personnel privilege authorized many of the redactions. As a result, the court ordered the defendant to supply an unredacted copy of the minutes along with a Vaughn Index<sup>1</sup>. On December 5, 2014, the defendant supplied the court with an unredacted copy of the minutes along with the Vaughn Index.

#### **Open Public Records Act (OPRA)**

The purpose of OPRA is "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64 (2008) (quoting Asbury Park Press v. Ocean Cnty. Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). OPRA

---

<sup>1</sup> Vaughn v Rosen, 484 F.2d 820, 826-828 (D.C. Appeal 1973)

advances that public policy goal by making government records "readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest." N.J.S.A. 47:1A-1.

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. N.J.S.A. 47:1A-6. The application must be brought within forty-five (45) 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 must proceed in a summary or expedited manner. N.J.S.A. 47:1A-6; 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 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. "(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.

In addition to OPRA, disclosure of public records may be sought under the common law right of access. 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. [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 decision making 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. 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. South Jersey Pub. Co. v. New Jersey Expressway Authority, 124 N.J. 478, 488-89 (1991).

### **Personnel Records Exemption**

The Legislature has declared "... personnel records are, by definition, not classified as government records at all; any document that qualifies as a personnel record is therefore not subject to being disclosed notwithstanding the other provisions of the statute." Kovalcik v. Somerset County Prosecutor's Office, 206 N.J. 581, 592, (2011). All information included in personnel records other than a public employee's name, title, position, salary, payroll record, length of service, date of termination of public employment and the reason for separation, and the amount and type of pension received, is not considered a government record. N.J.S.A. 47:1A-10. OPRA does not define precisely what information is covered by the phrase "personnel record" in the exemption but courts tend to favor employee confidentiality. McGee v. Twp. of E. Amwell, 416 N.J. Super. 602, 615, (App. Div. 2010).

### **Attorney Client Exemption**

Our Supreme Court also noted "records within the attorney-client privilege or any executive or legislative privilege, as well as items exempted from disclosure by any statute, legislative resolution, executive order, or court rule" are excluded from records available

to the public. Mason, supra, 196 N.J. at 65; O'Boyle v. Borough of Longport, 218 N.J. 168, 176 (2014).

As such, a records custodian may rightfully deny a request if the record belongs to one of enumerated categories of exemptions, which "significantly reduces the universe of publicly-accessible information. As the Legislature acknowledged in N.J.S.A. 47:1A-1 and N.J.S.A. 47:1A-8, the only countervailing relief mechanism for those seeking access to a statutorily excluded document is the common law right of access." Bergen Cnty. Imp. Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 516-17, (App. Div. 2004), certif. denied, 182 N.J. 143, (2004). One category "OPRA expressly exempts from the definition of a government record [is] 'any record within the attorney-client privilege.' N.J.S.A. 47:1A-1.1. "Thus, if [the documents] are a 'record within the attorney-client privilege,' they are confidential documents and beyond OPRA's reach." Paff v. Division of Law, 412 N.J. Super. 140, 150 (App. Div. 2010) (citing N.J.S.A. 47:1A-1.1). The exemption does not provide absolute protection, as it specifically grants public access to "attorney or consultant bills or invoices except that such bills or invoices may be redacted to remove any information protected by the attorney-client privilege." N.J.S.A. 47:1A-1.1.

Courts have repeatedly held that the attorney-client privilege is fully applicable to communications between a public body and its attorney. Paff, supra, 412 N.J. Super. at 152-54. In general, the attorney-client privilege shields:

Confidential communications between a client and his attorney in the course of a professional relationship . . . and protects only those communications expected or intended to be confidential.

The privilege is not restricted to legal advice. The privilege also extends to consultations with third parties whose presence and advice are necessary to the

legal representation. Furthermore, the privilege survives the termination of the attorney-client relationship. The privilege must yield, however, in furtherance of "overriding public policy concerns," or other important societal concerns. O'Boyle, supra, 218 N.J. at 185-86 (internal citations omitted).

New Jersey has codified the deeply rooted attorney-client privilege, in an identical statute and rule. Paff, supra, 412 N.J. Super. at 150 (citing N.J.S.A. 2A:84A-20(1); N.J.R.E. 504). If a confidential communication is protected by the privilege, the relevant portion of the statute provides:

"[A] client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative." Paff, supra, 412 N.J. Super. at 150 (quoting N.J.S.A. 2A:84A-20(1); N.J.R.E. 504).

However, it appears clear that the terms of an agreement between a governmental entity and another that requires the governmental entity to pay taxpayer funds to a claimant to withhold making a claim or to dismiss a claim against that entity is subject to public disclosure. Moreover, our Supreme Court has held that "A governmental entity cannot enter into a voluntary agreement at the end of a public lawsuit to keep a settlement confidential, and then claim a 'reasonable expectation of privacy' in the amount of that settlement." Asbury Park Press v. County of Monmouth, 201 N.J. 5, 7, (2010).

### **Common Law Right of Access**

The common law right of access depends on three requirements: "(1) the records must be common-law public documents; (2) the person seeking access must 'establish an interest in the subject matter of the material'; and (3) the citizen's right to access 'must be balanced against the State's interest in preventing disclosure.'" Keddie v. Rutgers, 148 N.J.

36, 50 (1997) (internal citations omitted). The common law definition of "public record" is broader than the definition contained in OPRA. Mason supra, 196 N.J. at 67. However, requestors under the common law right of access must make a greater showing than required under OPRA. Id.

### **Common Law Public Document**

Applying the common law, first it must be determined if the record is a common law public document. The information requested constitutes a public record under the common law, which "makes a much broader class of documents available, but on a qualified basis." Higg-A-Rella, Inc. v. County of Essex, 141 N.J. 35, 46, (1995). "Common-law records are any records made by public officers in the exercise of public functions. These materials include almost every document recorded, generated, or produced by public officials whether or not required by law to be made, maintained or kept on file." Id. (internal citations and quotations omitted).

### **Interests of Requester**

Second, the requesters both have the requisite interest to inspect the records. Schmidt has the requisite interest to inspect the records as a citizen. The burden then shifts to the defendant to demonstrate the need for nondisclosure outweighs the plaintiffs' need for disclosure. O'Boyle v. Borough of Longport, 426 N.J. Super. 1, 13, (App. Div. 2012).

### **Common Law Balancing Test**

The balancing test weighs the interests in confidentiality against the need for disclosure. Defendant argues Ms. Giles' interest as an employee to retain her individual privacy outweighs the public need for disclosure. It must be considered "whether the claim of confidentiality is 'premised upon a purpose which tends to advance or further some

wholesome public interest or a legitimate private interest." Keddie supra, 148 N.J. at 51 (internal citations omitted). Additionally, the court must consider the six factors set forth in Loigman to assist with the determination:

(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 decision making 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. Loigman supra., 102 N.J. at 113.

The first factor is the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government. This first factor is not particularly informative either way and thus does not weigh towards nondisclosure in the matter before the court.

The second factor is 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. Ms. Giles may have believed the terminal leave agreement would remain confidential. However, the court has no certification from Ms. Giles suggesting she believed the agreement with the Cape May Technical School Board was to be confidential. While not required to join the action, it is notable Ms. Giles has decided not to intervene in order to protect her privacy interests. A lawsuit opens up an individual to public inquiry and negates a reasonable expectation of confidentiality. Payton v. New Jersey Turnpike Auth., 148 N.J. 524, 557-58 (1997). This court does not believe an agreement to settle a lawsuit with a payment to a plaintiff by a public entity to dismiss the litigation coupled with a general release of the plaintiff's rights to make a claim against the entity and an

agreement with an individual who may have a right to file a lawsuit against the public entity that involves the expenditure of public funds in exchange for refraining from filing suit should be treated differently. As the payment to Ms. Giles would be an expenditure of public funds, it could be expected the public would have a right to know how tax money is being spent. Therefore, Ms. Giles should have expected her identity would be exposed and the details of the agreement may have been as well. The second factor weighs in favor of plaintiff Schmidt.

The third factor is the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure. It is apparent the school board does not wish to disclose the terminal leave agreement with Ms. Giles and the payment of funds to Ms. Giles by the governmental entity. However, it is essential there is transparency in government affairs. While personnel records are exempt under OPRA, the Cape May Technical School Board's attempt to shelter settlement documents in this exemption is not sufficient to justify non-disclosure. Accordingly, the third factor weighs in favor of Schmidt.

The fourth factor is the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers. Here, the information sought is mainly factual data. The settlement agreement would expectedly include factual data relating to the retirement of Ms. Giles and her compensation. Therefore, the fourth factor weighs in favor of Schmidt.

The fifth factor is whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency. This

factor does not appear particularly informative either way and thus does not weigh towards non-disclosure.

The final factor is whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials. As with the previous factor, this factor is not particularly applicable based on the record before the court and thus does not weigh towards non-disclosure.

Looking to all the relevant Loigman factors, disclosure of the requested information is not an unreasonable invasion of Ms. Giles' individual privacy. Ms. Giles' has chosen not to intervene in this case. Furthermore, the concerns about confidentiality do not outweigh the public's need for access to this information as this is an expenditure of public funds. Accordingly, in the opinion of this court, disclosure is mandated under the common law right of access.

### **Open Public Meetings Act (OPMA)**

#### **Closed Meeting Minutes**

"New Jersey has a history of commitment to public participation in government and to the corresponding need for an informed citizenry." South Jersey Pub. Co. v. New Jersey Expressway Authority, 124 N.J. 478, 486-87, (1991). It is the intent of OPMA to create transparency in the government and avoid secrecy. There is a strong public policy "favoring adequate disclosure of all actions taken by public bodies, whether at public meetings or executive sessions." Id. at 493. Therefore, OPMA requires "the public maintain 'reasonably comprehensible minutes' of all meetings including executive sessions to be 'promptly available' to the public unless inconsistent with the provisions of the Act authorizing the public body to meet in executive session." Id.; N.J.S.A. 10:4-14. OPMA does not provide

a definition for what constitutes "promptly available". If a public body conducts a closed session meeting, "it nevertheless must make the minutes of that meeting 'promptly available to the public' unless full disclosure would subvert the purpose of the particular exception." Payton, supra, 148 N.J. at 556-57. However, only an unusual case will justify suppression of the minutes from 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." Id. "When the issue concerns the conduct of a public official that potentially affects the expenditure of public funds — [salary and benefits following termination of employment] — the public body cannot withhold permanently the minutes from disclosure." S. Jersey Publ'g Co., supra, 124 N.J. at 494.

#### **Fees and Sanctions**

Schmidt seeks an award of counsel fees and costs pursuant to N.J.S.A. 47:1A-6, which provides a prevailing party shall be entitled to attorney's fees:

A person who is denied access to a government record by the custodian of the record, at the option of the requestor, may . . . institute a proceeding to challenge the custodian's decision by filing an action in Superior Court . . . . If it is determined that access has been improperly denied, the court . . . shall order that access be allowed. A requestor who prevails . . . *shall* be entitled to a reasonable attorney's fee. N.J.S.A. 47:1A-6 (emphasis added).

As the Cape May Technical School Board has not satisfactorily defended its denial and is found to be in violation of OPRA, Schmidt is entitled to reasonable attorney's fees and costs.

#### **Conclusion**

Generally, the OPRA statute is intended to be construed in favor of the public's right of access. It is the burden of the public agency to demonstrate that the law permits a withholding of such access. "[T]he court must maintain a sharp focus on the purpose of

OPRA and resist attempts to limit its scope, absent a clear showing that one of its exemptions or exceptions incorporated in the statute by reference is applicable to the requested disclosure." Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329, (Law Div. 2004). "The salutary goal, simply put, is to maximize public knowledge about public affairs in order to ensure an informed citizenry and minimize the evils inherent in a secluded process." Id. 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 (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 Tp. Planning Bd., 369 N.J. Super. 552, 566, (App. Div. 2004). It is the intent of OPRA, OPMA, and the common law right of access to create transparency in the government and avoid secrecy.

In light of the aforementioned analysis, the Court concludes that Cape May County Technical School District is obliged to supply plaintiff with an unredacted copy of: (1) the resolution of the Board of Education terminating Ms. Giles from employment and (2) the agenda of the meeting where the termination of Ms. Giles was voted on (the agenda of the meeting in which the resolution of the Board of Education to terminate Ms. Giles was passed). As for the request for all closed/executive session meeting minutes of the Board of Education held between September 1, 2010 and April 18, 2012, plaintiff is entitled to an unredacted copy of the entries in which there were discussions about the proposed settlement with Ms. Giles. However, the discussions where Amy L. Houck advised the

Board and made recommendations regarding settlement with Ms. Giles, are confidential and the attorney-client privilege is applicable. In addition, the entries of the minutes from the meetings held between January 18, 2011 and October 18, 2011 discussing the issues with Ms. Giles shall remain redacted pursuant to the attorney-client privilege. Finally, all entries in the minutes pertaining to the evaluation of the Superintendent for the Board of Education, the dispute between an architect and the Board, and all other matters not related to the direct issue in this matter shall remain redacted as they are confidential and irrelevant.

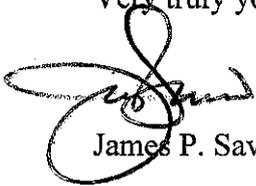
The proposed settlement with Ms. Giles was addressed at various meetings of the Board from the time period of November 22, 2011 to April 17, 2012. The following chart lists the entries of the minutes that should be provided to the plaintiff unredacted, as well as the provisions that should remain redacted to preserve the attorney-client privilege:

<b>Date of Meeting</b>	<b>Entries Unredacted</b>	<b>Entries Redacted</b>
<b>November 22, 2011</b>	Under "Personnel" Headline <ul style="list-style-type: none"> <li>• Line 1 – Line 2: "Mr. Matthies . . . grievance.</li> </ul>	Under "Personnel" Headline <ul style="list-style-type: none"> <li>• Line 2 – Line 20: "Ms. Houck reported . . . overpayment amount."</li> </ul> All other entries not relating to this matter that are confidential and/or subject to the attorney-client privilege.
<b>December 20, 2011</b>		Under "Personnel" Headline <ul style="list-style-type: none"> <li>• Line 1 – Line 10: "Ms. Houck informed . . . negatively of the district."</li> </ul> All other entries not relating to this matter that are confidential and/or subject to the attorney-client privilege.

<p><b>January 17, 2012</b></p>		<p>Under "Potential Litigation – OPRA Request" Headline</p> <ul style="list-style-type: none"> <li>• Line 1 – Line 7: "Ms. Houck indicated . . . Board of Education."</li> </ul> <p>Under "Personnel – Grievance C.G." Headline</p> <ul style="list-style-type: none"> <li>• Line 1 – Line 4: "Ms. Houck reported . . . negotiation process."</li> </ul> <p>All other entries not relating to this matter that are confidential and/or subject to the attorney-client privilege.</p>
<p><b>February 21, 2012</b></p>		<p>Under "Arbitration – C.G." Headline</p> <ul style="list-style-type: none"> <li>• Line 1 – Line 6: "Ms. Houck . . . prior to the meeting."</li> </ul> <p>All other entries not relating to this matter that are confidential and/or subject to the attorney-client privilege.</p>
<p><b>March 20, 2012</b></p>	<p>Under "Legal Matters Update" Headline</p> <ul style="list-style-type: none"> <li>• Line 1</li> </ul>	<p>Under "Legal Matters Update" Headline</p> <ul style="list-style-type: none"> <li>• Line 5 – Line 6: "Personnel . . . February 14, 2012."</li> </ul> <p>All other entries not relating to this matter that are confidential and/or subject to the attorney-client privilege.</p>
<p><b>April 17, 2012</b></p>	<p>Under "Grievance – C.G." Headline</p> <ul style="list-style-type: none"> <li>• Line 2 – Line 7: "The agreement is . . . open session."</li> </ul>	<p>Under "Grievance – C.G." Headline</p> <ul style="list-style-type: none"> <li>• Line 1 – Line 2: "Ms. Houck reported . . . Charlotte Giles."</li> </ul> <p>All other entries not relating to this matter that are confidential and/or subject to the attorney-client privilege.</p>

Counsel shall attempt to agree upon a reasonable quantity of fees to be afforded. Failing to accomplish the same, counsel for Schmidt shall submit certifications within ten (10) days of this date and defendant's counsel shall have seven (7) days thereafter to respond. Counsel for Schmidt shall prepare an omnibus order in conformity with this decision and shall submit the same pursuant to the five (5) day rule.

Very truly yours,

A handwritten signature in black ink, appearing to read 'James P. Savio', with a large, stylized flourish extending to the left.

James P. Savio, J.S.C.