



New Jersey Libertarian Party

Open Government Advocacy Project

John Paff, Chairman

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August 21, 2007

Robert D. Bernardi, Esq., Prosecutor
Burlington County Prosecutor's Office
P.O. Box 6000
Mount Holly, NJ 08060

Dear Prosecutor Bernardi:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project, to follow up on an August 17, 2007 Burlington County Times article, a copy of which is attached as Exhibits 1 – 2.

I recognize that county prosecutors around New Jersey have differing views as to how attentive they should be to allegations of violations of the Senator Byron M. Baer Open Public Meeting Act (OPMA) by local governments within their jurisdictions. One end of the spectrum is represented by the Middlesex County Prosecutor, who in a November 29, 2006 letter (Exhibits 3 – 4), opines that scarcity of resources prohibits his office's involvement in OPMA matters. The other end of the spectrum is represented by the Union County Prosecutor who, as evidenced by his December 13, 2006 letter (Exhibits 5 – 7), conducts extensive and detailed investigations into alleged OPMA violations.

I am interested in learning how receptive you are to proactively investigating and enforcing OPMA infractions at a local level. I believe that N.J.S.A. 10:4-17, liberally construed in accordance with N.J.S.A. 10:4-21, allows you to audit local bodies for OPMA compliance even if no specific complaint has been made.

I also wish to remind you that unlike the Open Public Records Act (OPRA), the OPMA contains no provision allowing a citizen who successfully sues a local government for injunctive or other relief, pursuant to N.J.S.A. 10:4-16, to recover his attorney fees from the errant municipality. (Compare to the attorney fee shifting provision contained within OPRA at N.J.S.A. 47:1A-6.) The net result is that unless county prosecutors enforce the OPMA, local government officials who violate the OPMA are likely to continue violating it because the costs of litigation will usually dissuade citizen enforcement.

As stated in the Times article, I ask that you please send a mail-merge letter to all the municipalities, school districts and other local public bodies in Burlington County informing them that your office will be conducting future, random OPMA compliance

checks and will consider levying civil penalties, as provided for by N.J.S.A. 10:4-17, against officials who serve on public bodies which are found to be in violation of the law. I believe that such a letter, while easy and inexpensive generate, will have a dramatic impact on local bodies' level of compliance.

Are you willing to undertake this project? If so, please know that I am willing to assist in any way, including providing you with a mail-merge database that contains the contact information for all the public bodies.

I greatly appreciate your time considering this suggestion and look forward to receiving your response.

Sincerely,

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

John Paff

Advocate questions the minutes from board

By TODD MCHALE
Burlington County Times
August 17, 2007

Somerset County resident John Paff is a firm believer in the need for transparency on the part of governmental agencies, but he says all he's found in Burlington County is a serious lack of compliance with the state's Open Public Meetings Act.

On the heels of settling a lawsuit with Medford Township over the descriptions of topics to be discussed in its closed-door meetings, Paff recently set his sights on the Evesham Township Board of Education. He says he found much of the same.

"This is Medford revisited," Paff said of the lack of information made available to him after he requested copies of the resolutions authorizing the school board to go into closed sessions and the minutes of those meetings.

Paff, an open-government advocate for the Libertarian Party in New Jersey, said he couldn't believe what the Evesham school board considered minutes.

"This is a table of contents. These aren't minutes," Paff said. "Minutes are required by law to be 'reasonably comprehensible,' so a person can get an understanding of what happened. It doesn't have to be a transcript, but it should be enough to show whether it's a brand new lawsuit or continuing litigation and the attorney is just giving the board members an update."

In an e-mail sent to Paff on Tuesday, John Scavelli Jr., assistant superintendent for business/ board secretary for Evesham, wrote that this form was how the board traditionally has kept its minutes.

"It is not the intention of myself or this board of education to suppress minutes of any meetings," Scavelli wrote. "They have been provided to you in the manner which they were kept."

Paff said he doesn't blame Scavelli, who took the job in Evesham in July, but wonders why previous school administrators didn't think this was a problem.

"These are people who make \$100,000 to \$150,000 a year and they have these lawyers from these prestigious law firms and nobody can figure out these minutes aren't right?" Paff said.

Yesterday, Scavelli said he couldn't comment on past practices, but he said the school district has already begun the process of changing its procedures, especially the recording of meeting minutes.

"We're going to be doing the minutes in a different style," Scavelli said. "It's something we were working on before."

He admitted that Paff's inquiry "helped move it along a little bit."

Paff said he doesn't plan to pursue litigation at this time, but will keep a close eye on the board to ensure it lives up to its word.

However, Paff said his experience with public bodies in the area makes him think it may be time to ask for help from the Burlington County Prosecutor's Office.

“I could spend the rest of my life filing lawsuits in Burlington County, but I don't really feel I should have to work that hard,” Paff said. “I'd like to think that someone in the business of law enforcement would be enforcing the law.”

He said he believes that if the county prosecutor sent out letters to all public bodies to inform them that it planned to conduct spot checks for compliance in the future, with possible fines being levied against violators, most of the public bodies would straighten up their act.

“If they want me to compile the list of all the towns, boards and sewage authorities, I'll do it,” Paff said.

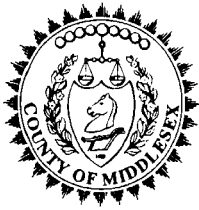
Jack Smith, spokesman for the county Prosecutor's Office, said the office already investigates all complaints regarding violations to the state's public meeting regulations.

“If there are official letters of complaint requesting an investigation, it's reviewed by our office and appropriate action is taken,” Smith said.

Regardless, Paff said he believes it's time to hold public officials accountable for their actions.

“Even if you don't believe in Libertarianism, we all believe there ought to be open government,” he said. “I just think the level of openness in government should match the amount of lip service.”

E-Mail: TODD MCHALE



William F. Lamb, 1st Assistant Prosecutor
Julia L. McClure, Deputy 1st Assistant Prosecutor
Ronald A. Abramowitz, Executive Assistant Prosecutor

**COUNTY OF MIDDLESEX
PROSECUTOR'S OFFICE
PROSECUTOR BRUCE J. KAPLAN**

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Dennis W. Watson, Chief
Joseph W. Krisza, Deputy Chief

November 29, 2006

Freeholder Christopher Rafano
Middlesex County Administration Bldg.
New Brunswick, NJ 08901

Re: Enforcement of Open Public Meetings Act – Monroe Township
Libertarian Party of Central Jersey Complaint (John Paff)

Dear Freeholder Rafano:

I am in receipt of Mr. Paff's letter to you of November 24, 2006. With regard to same, it remains the position of the Middlesex County Prosecutor's Office to exercise its broad discretion and, accordingly, decline to take the action requested by Mr. Paff. The reasons for this declination are contained in First Assistant Prosecutor William F. Lamb's letter to Mr. Paff dated November 21, 2006.

As you are aware, the obligations and responsibilities of this office are vast and the resources are limited in comparison to those responsibilities. While I appreciate the importance of complying with the Open Public Meetings Act, our limited resources cannot be directed to commencing an investigation and possibly a civil lawsuit in this case. The resources are better directed to those instances where the underlying act is not only criminal, but more importantly, where the complainant/victim has no remedy other than through the Middlesex County Prosecutor's Office. In this particular case, and as noted in Mr. Paff's November 17, 2006 letter and again in his letter to you dated November 24, 2006, private citizens are specifically granted the authority to enforce the act claimed to be violated by Mr. Paff. The legislature anticipated that a County Prosecutor's Office may not be in a position to pursue potential violations of the Act and accordingly provided private citizens with enforcement rights.

First Assistant Prosecutor Lamb did not conclude there was a violation of the Act, but to the contrary, concluded...“this office does not know how accurately the agenda memo reflects the substance of the board's discussions or the extent...”. Rather, he opined that on its face, while the rate of pay for substitute nurses may not properly be the subject of private discussion, an opinion could not be rendered without an investigation.

While I appreciate and commend any person or party that dedicates time to ensuring “good government” and compliance with the laws governing same, this office reiterates our decision not to take any action on this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Bruce J. Kaplan', written over the typed name below.

BRUCE J. KAPLAN
Middlesex County Prosecutor

/jf

UNION COUNTY PROSECUTOR'S OFFICE

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THEODORE J. ROMANKOW
Prosecutor of Union County

ALBERT CERNADAS, JR.
First Assistant Prosecutor

December 13, 2006

John Paff, Task Force Chairman
Open Government Task Force
P.O. Box 5424
Somerset, New Jersey 08875-5424

**Re: Garwood Board of Education/Open Public Meetings Act
Executive Session Minutes of October 18, 2005, April 6, 2006 and June 20, 2006**

Dear Mr. Paff:

Please be advised that I am in receipt of your letter of November 29, 2006 regarding the Garwood Board of Education and I have reviewed the issues you raised with John Geppert, Jr., the Board's attorney. This letter will address those concerns and Mr. Geppert's response.

1. Meeting of October 18, 2005— it is your position that the closed session minutes did not provide sufficient information regarding Monty Brown and his relationship to the Board of Education for the public to determine the reasonableness of the Board's decision to take no action regarding the matter involving him.

According to Mr. Geppert, Monty Brown was then a member of the Board of Education. Newspaper articles had been published regarding his arrest for possession of marijuana and related paraphernalia on October 9, 2005. He later received a conditional discharge in Municipal Court. (see the attached articles from the Westfield Leader). From the attendant publicity, it was clear that the person referred to in the Board of Education minutes was the same Monty Brown. As noted in the closed session minutes, the Board took no action with respect to Mr. Brown at that time. Under the circumstances, the minutes provided sufficient information to the public regarding this matter.

2. Meeting of April 6, 2006---it is your position that the closed session minutes did not sufficiently detail what occurred during a session that lasted for more than four hours.

According to Mr. Geppert, the Board's position is that the minutes discussing staffing and four separate employees were reasonably comprehensible and therefore sufficient under *N.J.S.A. 10:4-14*. The minutes do not reflect whether the Board made any decisions concerning these matters or merely discussed them. In *South Jersey Publishing v. New Jersey Expressway*, 124 *N.J.* 478, at 493 (1991), the New Jersey Supreme Court stated:

The minutes are intended to recite and disclose any official decision or action taken by a public body, and necessarily must contain sufficient facts and information to permit the public to understand and appraise the reasonableness of the public body's determination. The purpose of the personnel exemption is to facilitate the process by which the public body makes personnel-type decisions, permitting the debate and deliberation to be conducted without public scrutiny or participation. But the exemption is designed to enable the public body to determine the appropriate action to be taken, not to withhold from the public either the public body's determination or the reasons on which its determination was based.

In a subsequent case, *Liebeskind v. Municipal Council of Bayonne*, 265 *N.J. Super.* 389 (App. Div. 1993), the Appellate Division distinguished the holding in *South Jersey Publishing* on its facts. The Appellate Division noted that no minutes of the closed session meeting were provided in *South Jersey Publishing*, and intimated that the Court's holding reflected its concern with the lack of minutes rather than the information contained therein. The Appellate Division held that a public body was not required to reveal the reasons why it took the legislative action it did because "*N.J.S.A. 10:4-14* simply require[d] that what took place at the meeting and what final action was taken should be reflected in the minutes." *Liebeskind*, 265 *N.J. Super.* at 401.

In reconciling these two holdings, it is fair to conclude that any action taken by the Board on the matters discussed at the closed meeting ie. projected staffing, Mr. Sneekloth's employment, Ms. Chilstrom's three-day work week and Mrs. Lipsett working in the main office as a teacher's aide, should have been included in the minutes of the closed session. However, the details of the decision-making process, such as the debate between Board members before any action was taken, and any discussion concerning matters on which no action was taken are not matters that must be included in the minutes.

John Paff
December 13, 2006
Page 3

3. Meeting of June 20, 2006—it is your position that the resolution to go to closed session by the use of the check-the-box for the appropriate exception method is insufficient to give the public adequate notice of what will be discussed. In addition, you contend that discussion of the “glycol problem” at a closed session was not justified under any of the exceptions set forth in *N.J.S.A. 10: 4-12*.

According to Mr. Geppert, the “glycol problem” related to “anticipated litigation” by a contractor and therefore qualified as an exception to the open public meeting requirement under *N.J.S.A. 10: 4-12(b)(7)*. However, the resolution for a closed meeting did not refer to it as such but rather by a check mark next to the phrase “other permitted by law.”

The real issue, as I see it, is not the mistaken designation of the appropriate exception but rather the Board’s reliance on the check-the-box method in every case in which the Board resolves to go to closed session. Each case should be examined on its own facts. For example, in this case, an additional description of the anticipated litigation such as “anticipated litigation regarding a problem in Lincoln School” could have been set forth in the resolution to go to closed session. In personnel cases, an additional description such as “hiring substitute teachers” could be added to the resolution without compromising the integrity of the closed meeting.

By copy of this letter, I am recommending that the Garwood Board of Education review its practices regarding resolutions for closed sessions and minutes of those sessions where official action is taken to provide more details in the appropriate case.

Very truly yours,

THEODORE J. ROMANKOW
Prosecutor of Union County



By: ANN R. RUBIN
Assistant Prosecutor

c: w/ enclosures
John Geppert, Jr., Esq



**OFFICE OF THE PROSECUTOR
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JAMES J. GERROW JR.
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ROBERT D. BERNARDI
BURLINGTON COUNTY PROSECUTOR

September 5, 2007

JOHN ANGERMEIER
CHIEF OF INVESTIGATIONS

John Paff, Chairman
New Jersey Libertarian Party
Open Government Advocacy Project
P.O. Box 5424
Somerset, NJ 08875-5424

Re: Open Public Meetings Act Inquiry

Dear Mr. Paff:

Thank you for your letter of August 21, 2007. In that correspondence you indicate that you are interested in learning how receptive my office is to proactively investigating and enforcing OPMA infractions at the local level. As a follow-up to that inquiry you have requested I make notification to all municipalities, school districts and other local public bodies in Burlington County informing them that my office will be "conducting future, random OPMA compliance checks and will consider levying civil penalties as provided for by N.J.S.A. 10:4-7, against officials who serve on public bodies which are found to be in violation of the law." Your stated rationale for sending out this letter is that you believe that it would have a "...dramatic impact on local bodies' level of compliance."

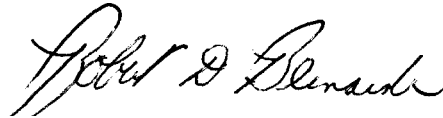
Initially, let me make it clear that this office has, and will in the future, investigate allegations of non-compliance with the Open Public Meetings Act. However, since I have been Prosecutor of Burlington County, my office has received few complaints of violations of OPMA. In those instances, the entities were contacted and we engaged in discussions with the solicitors of those entities to rectify any misunderstandings regarding compliance with the Act. Therefore, given that this office has received few citizen complaints in the past eight years that I have served as Prosecutor, I do not believe that sending a "warning" notice to all of the entities which you suggest would serve any beneficial purpose. I am sure that you will agree that no one wishes to be threatened with prosecution or litigation. Given the scarcity of complaints that have been brought to the attention of this office, I do not feel it is necessary or appropriate to issue the letter which you suggest.

Again, to be perfectly clear, this office will investigate what it deems to be specific allegations of willful non-compliance with the Open Public Meetings Act. Such allegations should be more than conclusory statements. We would require specific information regarding the nature of the alleged violation, the date(s) on which it occurred, and the officials involved. As a general practice, when such a complaint is received, my office would contact the municipal solicitor requesting an explanation of the actions of the entity involved.

In my view, resorting to formal action in the Superior Court against a governmental entity for perceived violations of the Open Public Meetings Act should be reserved for what are determined to be purposeful and intentional violations on the part of that entity or its officials. I believe it is entirely proper to consider the nature, quality and effect of the non-compliance of a particular offending governmental body in fashioning what corrective measures must be taken.

As you are aware, the fines for knowingly violating the Act are \$100.00 for a first offense and not more than \$500.00 for any subsequent offense (N.J.S.A. 10:4-17). I think we can agree that these penalties do not necessarily serve to deter individuals who are otherwise intent on violating the Act. I believe that they represent recognition by the legislature that government should operate with transparency and that resort to the statutory remedies should serve only as a last resort in the event an entity fails to take corrective action once it is brought to their attention. I trust that this correspondence will serve to respond to your inquiry.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Robert D. Bernardi".

Robert D. Bernardi
Burlington County Prosecutor

RDB:ph