

Libertarian Party of Central New Jersey

Open Government Task Force

John Paff, Task Force Chairman

P.O. Box 5424

Somerset, NJ 08875-5424

Phone: 732-873-1251

November 24, 2006

Christopher D. Rafano, Chairman
Law and Public Safety Committee
Middlesex County Board of Chosen Freeholders
15 Charter Drive
South River, NJ 08882

RE: Enforcement of Open Public Meetings Act

Dear Freeholder Rafano:

As the Chairman of the Law and Public Safety Committee, and liaison to the county prosecutor's office, we request that you please speak with Prosecutor Kaplan and urge him to devote some resources—even very limited resources—toward enforcing the Open Public Meetings Act, N.J.S.A. 10:4-6, et seq. (also known as the Sunshine Act).

Attached is a) our November 17, 2006 letter to First Assistant Prosecutor William F. Lamb; b) the minutes of the Monroe Board of Education's October 18, 2006 nonpublic (i.e. closed or executive session) minutes, and c) Mr. Lamb's November 21, 2006 reply. We appreciate Mr. Lamb's prompt response and his suggestion that we are probably correct that the Monroe Board violated the Act by discussing the substitute nurse pay rate issue in closed session. We are, however, troubled by his statement that his office, apparently as a matter of policy, has elected to direct all of its resources toward the "prosecution of violent offenders and the discharge of other pressing obligations," thus leaving no time or resources left for the Act's enforcement.

As you may already be aware, the Act can be enforced in only two ways. First, N.J.S.A. 10:4-16 permits private citizens to enforce the Act through civil actions for injunctive and other forms of civil relief. Second, N.J.S.A. 10:4-17 empowers the county prosecutors and the Attorney General's office to impose monetary penalties of \$100 to \$500 against the Act's knowing violators.

Unfortunately, the vast majority of citizens do not have and cannot realistically be expected to devote the time or resources necessary to bring suit on their own. This is because the Act contains no provision for a citizen, even if he or she successfully proves a serious Sunshine Act violation in civil court, to recover his or her attorney fees and other litigation expenses from the offending official. Clearly, it is the rare citizen who is going to expend substantial sums of his or her

own money, with no chance of recovery, in order to vindicate the public's right to know.

The lack of private enforcement makes it even more important that county prosecutors and Attorney General enforce the Act. Like any other law, the Open Public Meetings Act is apt to be ignored once it becomes known that it will not be enforced.

Further, we doubt that it would take much time or resources to effectively enforce the Act. We believe that if the prosecutor's office were to conduct random compliance checks of the county's municipal governing bodies and school boards and send letters of admonition to the Act's violators, that all public bodies would readily bring themselves into compliance. This result is especially likely if the prosecutor's office were to issue a press release announcing its random compliance checks and its intention to levy fines against future violators.

While we understand that you are not in a position to dictate policy to the county prosecutor, we would greatly appreciate it if you, as the citizens' elected liaison to the prosecutor's office, would urge that office to adopt a random compliance check or other program that would result in better compliance with the Sunshine Act.

Thank you very much for your kind attention. We look forward to hearing from you.

Very truly yours,

A handwritten signature in black ink, appearing to be 'John Paff', with a large, stylized flourish at the end.

John Paff

Libertarian Party of Central New Jersey

Open Government Task Force

John Paff, Task Force Chairman

P.O. Box 5424

Somerset, NJ 08875-5424

Phone: 732-873-1251

November 17, 2006

William F. Lamb, First Assistant
Middlesex County Prosecutor's Office
25 Kirkpatrick St, 3rd Floor
New Brunswick, NJ 08901

(via Fax only to 732-745-2791)

RE: Monroe Township Board of Education
Open Public Meetings Act

Dear First Assistant Prosecutor Lamb:

The Libertarian Party of Central New Jersey has created an Open Government Task Force of which I am the chairman. The Task Force's goal, and my personal goal¹, is to bring all local government agencies in our tri-county area (Somerset, Middlesex and Union Counties) into full compliance with the Open Public Meetings Act, Open Public Records Act and other open-government statutes and regulations.

The Open Public Meetings Act, N.J.S.A. 10:4-17², empowers your office to enforce monetary penalties against officials who knowingly violate the Act. We assert that the Monroe Township Board of Education has violated the Act and ask that you investigate the following matters and take whatever action—perhaps a letter of admonition, if you find that a monetary penalty is too severe—you deem appropriate.

Following this cover letter are the minutes from the Board's October 18, 2006 meeting. I wish to invite your attention to two sections: a) the item at the bottom of page one revealing that the Board "discussed the suspension of pay for" a person whose name has been suppressed; and b) the item near the top of page two revealing that the Board "discussed the rate of pay for substitute nurses."

As to the first item, while we certainly agree that the Board was permitted to **discuss**³ the employee's suspension without the public being present, we assert that it was improper for the Board to suppress the name of the suspended employee from its meeting minutes. As explained by the New Jersey Supreme Court

¹ I bring this matter to your attention both in my personal capacity and as the Task Force chairman.

² In case you choose not to act in this matter, we specifically reserve our right to also enforce the Board's future compliance through the civil remedies provided by N.J.S.A. 10:4-16 or other remedies provided by law.

³ Such a private discussion is specifically permitted by N.J.S.A. 10:4-12(b)(8).

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 our view, it would be anomalous to interpret the Open Public Meetings Act, enacted by the Legislature to enhance the public's access to and understanding of the proceedings of governmental bodies, in a manner that foreclosed the public's right to obtain material and information vital to its ability to evaluate the wisdom of governmental action.

South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, 493-94 (1991).

Clearly, the public cannot “evaluate the wisdom” of this employee’s suspension unless it knows the employee’s identity.

As to the second item, The Board apparently believed that privately discussing substitute nurse pay rates was authorized by N.J.S.A. 10:4-12(b)(8) which allows for certain “personnel matters” to be discussed outside of public view. That exception, however, permits private discussion of “[a]ny 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 . . .” (emphasis supplied).

As you can see, the personnel exception intends to allow the Board to privately discuss matters relating to a specific employee. Thus, while it is entirely appropriate for the Board to privately discuss whether or not Crossing Guard Jones should be fired or promoted, general policy matters—such as general pay rates—that are not specific to an identifiable employee should be discussed publicly.

When the Legislature enacted the Open Public Meetings Act in 1975, it declared 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; that secrecy in public affairs undermines the faith of the public in

government and the public's effectiveness in fulfilling its role in a democratic society . . .

We believe that the Monroe Board of Education, by a) withholding information from the public and b) discussing matters in private that ought to be discussed in public, thwarts rather than advances this legislative policy. Accordingly, we call upon the your office to vindicate the public's interest in this matter.

Thank you very much for your kind attention. We look forward to hearing from you.

Very truly yours,

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

John Paff

cc. Wayne Holliday, Board Secretary (via email PDF attachment)
Bertram E. Busch, Board Attorney (via email PDF attachment)

Closed Session, October 18, 2006

CONFIDENTIAL
Closed Session

The Board of Education convened to closed session at 6:39 p.m.

Board Members Present

Ms. Kathy Kolupanowich, Board President
Mr. Lew Kaufman, Board Vice President
Mr. Marvin I. Braverman
Ms. Carol Haring
Mr. Joseph Homoki
Mr. John Leary
Ms. Rita Ostrager Ms.
Amy Speizer

Board Member Absent

Ms. Kathy Leonard

Jamesburg Board Member Representative Present

Ms. Patrice Faraone

Staff

Dr. Ralph Ferrie, Superintendent of Schools
Mr. Wayne Holliday, Business Administrator/Board Secretary
Dr. Edward Forsthoffer, Assistant Superintendent of Personnel
Dr. Christopher Tienken, Assistant Superintendent of Curriculum & Instruction
Mr. Robert Goodall, High School Principal (arrived 7:15 p.m./departed 7:37 p.m.)
Mr. David Kirk, K-12 Supervisor/Athletics/Health & PE/Co-curricular activity (arrived
7:15 p.m./departed 7:37 p.m.)

Board Attorney

Mr. Bertram E. Busch, Esq., Busch and Busch, LLP

Negotiations

Members of the Board of Education and administrators discussed the "Memorandum of Agreement" between the Monroe Township Board of Education and the Monroe Township Education Association.

Personnel

Dr. Forsthoffer, Dr. Ferrie and Members of the Board of Education discussed the suspension with pay for [REDACTED]

Personnel

Mr. Goodall, Mr. Kirk, Dr. Ferrie, Dr. Forsthoffer and Members of the Board of Education discussed the "Administrative Report" for [REDACTED]

Personnel

Dr. Ferrie and Members of the Board of Education discussed the rate of pay for substitute nurses.

Personnel

Dr. Ferrie and Members of the Board of Education spoke about tuition reimbursement for non-affiliated technology staff.

Legal

Mr. Busch indicated that Township Assistant Attorney, Peg Schaffer submitted [REDACTED] to the Green Acres Division of the Department of Environmental Protection as related to the land exchange regarding the new High School.

Legal

Mr. Busch spoke about the mediation regarding [REDACTED]

Legal

Mr. Busch and Members of the Board of Education discussed the legal ramifications related to [REDACTED]

Adjournment

The closed session adjourned at 7:50 p.m.

Respectfully submitted,

/s/ Wayne Holliday
Board Secretary/Business Administrator



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

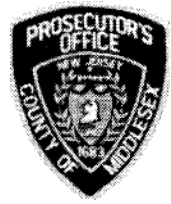
COUNTY OF MIDDLESEX
PROSECUTOR'S OFFICE
PROSECUTOR BRUCE J. KAPLAN

25 Kirkpatrick Street, 3rd Floor
New Brunswick, New Jersey 08901

732-745-3300

Fax: 732-745-2791

November 21, 2006



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

John Paff
P. O. Box 5424
Somerset, New Jersey 08875-5424

Re: Monroe Twp. Board of Ed. Meeting
Closed Session: October 18, 2006

Dear Mr. Paff:

This is to acknowledge receipt of your November 17 fax regarding the closed executive session conducted by the Monroe Township Board of Education on October 18, 2006. As I understand it, you perceive two possible violations of the Open Public Meetings Act in the agenda memo of that session. More particularly, your concerns focus on: (1) board discussion of a suspension with pay for a board employee whose name is obliterated from the agenda memo, and (2) board discussion of the rate of pay for substitute nurses.

Regarding the former, this office does not share the view that obliteration of the employee's name was violative of the Act. In our estimation, the employee's identity falls within the statutory exemption of personnel matters that can be considered by the board in private. Regarding the board discussion of pay for substitute nurses, this office does not know how accurately the agenda memo reflects the substance of the board's discussions or the extent, if any, to which those discussions segued onto matters that are entitled to confidentiality. That said, the topic itself – the rate of pay for substitute nurses – appears to be one more properly the subject of public discussion.

On this point and in the exercise of the broad discretion accorded prosecutorial agencies, the Middlesex County Prosecutor's Office declines to take action regarding the matter. As I am sure that you appreciate, the resources of this office are finite and, in our view, more appropriate reserved for the prosecution of violent offenders and the discharge of other pressing obligations. By copy of this letter, however, we will convey our conclusion about the substitute nurses pay discussion to board officials and anticipate that they will be more mindful of the Act when formulating the agenda for future executive sessions. Lastly, our declination to pursue this matter is without prejudice to remedies available to the Libertarian Party in its own right under the Open Public Meetings Act.

Very truly yours,

/s/ WILLIAM F. LAMB First
Assistant Prosecutor

/jf

c: Wayne Holliday, Board Secretary, Monroe Twp. Bd. of Education
Bertram Busch, Esq.

BUSCH AND BUSCH , LLP

ATTORNEYS AT LAW

215 NORTH CENTER DRIVE
(U.S. HIGHWAY I, SOUTH)
NORTH BRUNSWICK, NEW JERSEY 08902

(732) 821-2300
FAX (732) 821-5588

MAILING ADDRESS
P.O. BOX 7448
NORTH BRUNSWICK, N.J. 08902-7438

LEWIS D. BUSCH (1927-1986)
HENRY BUSCH (1936-2000)
MALCOLM R. BUSCH
RONALD JBUSCH
BERTRAM E. BUSCH
MARK N. BUSCH
LEONARD R. BUSCH
STEVEN F. SATZ*
GREGORY A. BUSCH
ALLISON J. BUSCH
COUNSEL

*CERTIFIED BY THE SUPREME COURT OF
NEW JERSEY AS A CIVIL TRIAL ATTORNEY
OADMITTED IN NJ AND NY

E-mail: beb@buschlaw.com

November 28, 2006

William F. Lamb, Esq.
First Assistant Prosecutor
County of Middlesex
Office of the Prosecutor
25 Kirkpatrick Street, 3rd Floor
New Brunswick, NJ 08901

Re: Monroe Township Board of Education

Dear Mr. Lamb:

This will serve to confirm receipt of a copy of your letter dated November 21, 2006, addressed to John Paff.

This will also confirm that we represent the Monroe Township Board of Education in connection with a letter dated November 17, 2006, from John Paff, both in his personal capacity and as the Open Government Task Force Chairman of the Libertarian Party of Central New Jersey.

We deny Mr. Paff's allegations and we will be discussing the matter administratively in the near future. In the meantime, if I can be of any assistance, please feel free to contact me.

Very truly yours,

/s/ BERTRAM• E. BUSCH
Monroe Township Board of Education Attorney

BEB/db

cc: John Paff