John Paff
P.O. Box 5424
Somerset, NJ 08875-5424
Tel. 732-873-1251
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Plaintiff

JOHN PAFF, Plaintiff, vs. MONROE TOWNSHIP BOARD OF EDUCATION Defendant	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MIDDLESEX COUNTY DOCKET NO. L-7770-06 Civil Action NOTICE OF MOTION FOR SUMMARY JUDGMENT

To: Bertram E. Busch, Esq., Council for
Defendant Monroe Township Board of Education

PLEASE TAKE NOTICE that on **Friday, January 5, 2007** at 9 o'clock a.m. or as soon thereafter that I may be heard, I will apply to the above named court, located at 1 J.F.K. Square, New Brunswick, New Jersey for the following relief:

1. Summary judgment against Defendant Monroe Township Board of Education on all issues.

2. An award of Plaintiff's costs in this action against Defendant Monroe Township Board of Education.

I will rely on the enclosed Certification of John Paff, Statement of Material Facts and Letter Brief. Oral argument is requested. Pursuant to R.1:6-2(c), there is no pre-trial conference, calendar call or trial date fixed at this time.

Dated: December 8, 2006

_____
John Paff, Plaintiff

CERTIFICATION OF SERVICE

On December 8, 2006, I served a copy of this Notice of Motion, Certification, Statement of Material Facts, Letter Brief and form of Order upon Defendant Monroe Township Board of Education by hand-delivery to the office of Bertram E. Busch, 215 North Center Drive, North Brunswick, New Jersey.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: December 8, 2006

_____

John Paff, Plaintiff

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P.O. Box 5424
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Plaintiff

JOHN PAFF, Plaintiff, vs. MONROE TOWNSHIP BOARD OF EDUCATION Defendant	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MIDDLESEX COUNTY DOCKET NO. L-7770-06 Civil Action STATEMENT OF MATERIAL FACTS (R.4:46-2(a))

1. From February 27, 2002 through to November 15, 2006, Defendant's motions and resolutions authorizing the Board's nonpublic sessions, in accordance with N.J.S.A. 10:4-13, informed the public that the Board would "discuss personnel, negotiations, legal and student matters." *Paff Certification, ¶ 4 and 8 and Exhibits P13, P14, P15, P19, P20, P21, P22, P23, P24, P25, P26, P28 and P29.*

2. From February 27, 2002 through to at least August 30, 2006, Defendant's resolutions authorizing the Board's nonpublic sessions included a provision allowing the "Board to convene into closed session as the need may arise at any time during the public session, immediately after adjournment or at any time prior to the next public meeting." *Paff Certification, ¶ 4 and Exhibits P13, P14, P15, P19, P20, P21, P22, P23, P24, P25 and P26.*

Dated: December 8, 2006

_____
John Paff

John Paff
P.O. Box 5424
Somerset, NJ 08875-5424
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Plaintiff

JOHN PAFF, Plaintiff, vs. MONROE TOWNSHIP BOARD OF EDUCATION Defendant	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MIDDLESEX COUNTY DOCKET NO. L-7770-06 Civil Action CERTIFICATION IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

John Paff certifies as follows:

1. I am the Plaintiff in this action and am fully and personally familiar with the facts of this case.

2. A true copy of the Complaint filed in this case is attached as Exhibits P1 through P15.

3. A true copy of Defendant's responsive pleading is attached as Exhibits P16 through P18.

4. In or about December 2004, in response to Plaintiff's request for government records, the Defendant Board provided Plaintiff with copies of its resolutions that purport to authorized it to exclude the public from its meetings on the following dates in 2002: February 27, March 13, March 25, April 10, April 24, May 8, May 22 as well as October 27, 2004. True copies of those resolutions, in date order, are attached as Exhibits P19 through P26. Each of these resolutions contain identical language justifying the exclusion of the public: That the Defendant Board was to discuss "Personnel, Negotiations, Legal and Student Matters."

5. On or about December 28, 2004, Plaintiff, both as an individual and as Chairman of the Libertarian Party of Central Jersey Open Government Task Force, transmitted a report (Exhibits P4 through P7) to the Defendant Board that, among other things, challenged the whether the resolutions identified in ¶ 4 above were specific enough to satisfy N.J.S.A. 10:4-13.

6. By letter dated February 11, 2005 (Exhibits P8 through P12), Defendant's counsel responded to Plaintiff's December 28, 2004 letter.

7. Defendant was served with the summons and complaint in this matter on October 11, 2006. The Certification is attached as Exhibit P27.

8. At its October 18, 2006 and November 15, 2006, Defendant (who had at that time already been served with the complaint) passed closed session motions announcing that it would meet in nonpublic session "to discuss personnel, negotiations, legal and student matters." Page relevant pages from the minutes of those meetings are attached as Exhibits P28 and P29.

9. On July15, 2004, the Hon. Robert A. Longhi, A.J.S.C., issued an Order (attached as Exhibits P30 and P31) in the case of Paff v. Perth Amboy City Council, Docket No. L-3470-04. The form of resolution used by the defendant in that case is typified by the resolution attached as Exhibit 32.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: December 8, 2006

_____
John Paff

John Paff

P.O. Box 5424
Somerset, New Jersey 08875-5424
Telephone – 732-873-1251 E-mail – CJSC@pobox.com Fax – 908-325-0129
December 8, 2006

Hon. Alexander P. Waugh, J.S.C.
Superior Court, Middlesex County
Law Division - Courthouse
New Brunswick, New Jersey *(via Hand Delivery)*

RE: Paff v. Monroe Township Board of Education
Docket No. L-7770-06
Returnable: January 5, 2007

Dear Judge Waugh:

Please accept this letter in lieu of a more formal brief in support of Plaintiff's Motion for Summary Judgment and taxed costs against Defendant Monroe Township Board of Education.

BRIEF PROCEDURAL HISTORY

On or about September 26, 2006, Plaintiff filed his Complaint (Exhibits P1 – P15). On or about November 9, 2006, Defendant filed its Answer (Exhibit P16 – P18). Plaintiff now moves for summary judgment.

LEGAL ARGUMENT

Standard Of Review On A Motion For Summary Judgment

Plaintiff is entitled to summary judgment if, on the full motion record, the Defendant, who is entitled to have the facts and inferences viewed most favorably to it, has not demonstrated the existence of a dispute whose resolution in its favor will ultimately entitle him to judgment. R.4:46-2(c). Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 539-40 (1995).

At issue in this case is whether the resolutions passed by Defendant prior to

excluding the public from its meetings (i.e. to go into closed or executive session) comply with N.J.S.A. 10:4-13. Since the resolutions are written public records, there can be no genuine factual dispute as to what language those resolutions contain. Accordingly, this matter is ripe for summary judgment because all the Court needs to do is to apply the law to the language contained within those resolutions.

Point I. Whether the Defendant Board's form of closed session resolution describes the subject(s) to be discussed during nonpublic session(s) with enough specificity to satisfy N.J.S.A. 10:4-13(a).

From February 2002 through to after the filing of the present complaint , Defendant Board's nonpublic meeting resolutions informed the public that the Board would "discuss personnel, negotiations, legal and student matters." Statement of Material Facts, ¶ 1.

N.J.S.A. 10:4-13 states:

> **Closed meetings; resolution to conduct.** No public body shall exclude the public from any meeting to discuss any matter described in subsection [N.J.S.A. 10:4-12(b)] until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:
>
> a. Stating the general nature of the subject to be discussed; and
>
> b. Stating 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.

A. Merely reciting the litany of closed meeting topics does not comply with N.J.S.A. 10:4-13.

In Council of N.J. State College Locals v. Trenton State College Bd. of Trustees, 284 N.J. Super. 108 (Law. 1995) the Court considered whether a resolution in the form of "The Board of Trustees will hold closed session on [specific date] and at any

other time as necessary to consider personnel matters, labor relations, any pending litigation, and any other matters specifically exempted by the Open Meetings Act" complied with N.J.S.A. 10:4-13. The Court, concluding that the notice was insufficient, stated:

> The Board's notice is framed so broadly that it does no more than tell the public that there will be a meeting in executive session. The notice merely recites the litany of exceptions which would allow it to proceed in closed session. No attempt is made to indicate which one or ones of these exceptions are relevant to a particular closed-session proceeding. This complete failure to delineate which subject or subjects will be discussed in closed session does not comply with the statutory mandate that the public know the general nature of the agenda.

Id. at 113.

A similar conclusion was reached by the Mississippi Supreme Court when it held that

> A meaningful reason is of sufficient specificity that the audience will at some later date be able to check it out. Did the Board in fact discuss that particular matter, or confine its executive session to that particular matter?
>
> A board which only announces "litigation" or "personnel matters" for going into executive session has said nothing. It might as well have stated to the audience, "Ladies and gentlemen, we are going into executive session," and stopped there. The Act requires that a board cannot use its statutory authority to go into executive session upon certain matters as a device to circumvent the very purposes for which it is under the Open Meetings Act. The purpose of the Act is that the business conducted at all meetings of public boards be wide open.
>
> Here the minutes reveal the Board failed woefully to comply with the Act. Had the Board, as required by the Act, first closed its meeting to discuss a need to go into executive session at all on these various matters, the Board president could quite easily have given the audience a reason with some particularity, some specificity and some meaning.

Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107, 114 (MS 1989).

The Defendant's boilerplate form of closed session resolution is similar to those rejected in the cases cited above.

B. Defendant's vague announcement its nonpublic meeting topics is inconsistent with the Open Public Meetings Act's objectives.

The Open Public Meetings Act was passed with the following legislative objective:

> The Legislature finds and declares 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, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

N.J.S.A. 10:4-6

The legislature also commanded the courts to construe the Open Public Meeting Act "in order to accomplish [the above stated] purposes." N.J.S.A. 10:4-21. Accordingly, to the extent that the wording of the statute is susceptible to more than one meaning, that meaning will be adopted which comports with the general public policy of the State as manifested by its legislation rather than that which runs counter to such policy. Civil Service Dep't. v. Clark, 15 N.J. 334, 341 (1954).

The term "general nature," as used in N.J.S.A. 10:4-13 is susceptible to more

than one meaning. For example, suppose that a public body needed to privately discuss how it should respond to a settlement offer received from the plaintiff in a slip and fall negligence case (hypothetically Brown v. Board, Docket No. MID-L-0000-06) against the public body. Each of the following resolutions, which get progressively more specific, arguably set forth the "general nature" of the discussion: "The Board shall go into closed session to discuss . . .

a. Personnel, Negotiations, Legal and Student matters."[1]
b. Legal matters."
c. Pending Litigation."
d. Brown v. Board, Docket No. MID-L-0000-06."
e. to consider a settlement offer received from the plaintiff in Brown v. Board, Docket No. MID-L-0000-06."

Yet, none of the above hypothetical resolutions undermine the reason and purpose of going into closed session—to allow the Board to privately discuss the received settlement offer and determine how to respond to it. Even if Plaintiff Brown was sitting in the meeting room when the body announced that it was going to go into nonpublic session to discuss his settlement offer, this would not give him any advantage in the litigation because he would not be able to witness the actual discussions.

Accordingly, out of the above five hypothetical forms of resolution, the legislative purposes set forth in N.J.S.A. 10:4-6 would be best served by (e). Accordingly, the Court should, consistent with its obligation to construe the statute in favor of open and transparent government, declare[2] that resolutions describing closed session topics

[1] This is the form of resolution the Defendant typically uses.
[2] ¶ B of the complaint requests a declaration of the "minimum amount of detail and specificity that N.J.S.A. 10:4-13 requires Defendant to include within its resolutions that authorize nonpublic meetings." The award of such relief is authorized by the Uniform Declaratory Judgments Law (N.J.S.A. 2A:16-51 et seq." and by N.J.S.A. 10:4-16 which authorizes the Court to "issue such orders and provide such remedies as shall be necessary to insure compliance with the provisions of this act."

need to be as specific as possible provided that the reason for going into closed session is not compromised.

This is essentially the reasoning used by the Kentucky courts. That state's statute regarding informing the public of nonpublic session topics is similar to New Jersey's. It states:

> Notice shall be given in regular open meeting of the **general nature** of the business to be discussed in closed session, the reason for the closed session, and the specific provision of KRS 61.810 authorizing the closed session;

KRS 61.815(a) (emphasis supplied)

Despite the statute's use of the term "general nature" the Kentucky Supreme Court construed that to mean that "[t]here must be specific and complete notification in the open meeting of any and all topics which are to be discussed during the closed meeting." Floyd County Bd. of Ed. v. Ratliff, 955 S.W.2d 921, 924 (1997). In coming to this conclusion, the Court analyzed and relied upon the legislative purpose behind that state's Open Meeting Law.

C. "Legal" matters are not exempt under N.J.S.A. 10:4-12(b).

While N.J.S.A. 10:4-12(b)(7) permits "pending or anticipated litigation or contract negotiation" to be privately discussed, it does not exempt the broader category of "legal" matters from being discussed in public. Accordingly, the Defendant should, in any event, be enjoined from announcing "Personnel, Negotiations, **Legal** and Student matters" as its reason for going into closed session.

D. Prior case law in Middlesex County supports the Plaintiff's position.

On July 15, 2004, Assignment Judge Robert A. Longhi issued an Order disposing of a similar case Plaintiff brought against another municipal governing body

within Middlesex County. In that Order (Exhibits P30 – P31) the Court ordered the defendant to "comply with . . . the "guidelines set forth in Council of N.J. State College Locals v. Trenton State College Bd. of Trustees, 284 N.J. Super. 108 (Law. 1995)" and to reimburse Plaintiff for his costs in that action. The form of resolution used by that municipality, typified by Exhibit 32 (See Paff Certification, ¶ 9), states that the nonpublic session was being held to discuss "Personnel matters, as defined by the statute, contractual negotiations, pending litigation."

Although Judge Longhi's decision was oral and unreported, it was made in a case that is virtually identical to the present one and should be considered persuasive.

D. New Jersey Practice supports Plaintiff's position.

The Council of N.J. State College Locals court quotes the late Michael Pane:

> Although there is no case law on the subject good practice would dictate that resolutions be as specific as possible, e.g., the 'general nature of the subject to be discussed' should not be set forth as 'litigation' but, rather, as 'litigation--A vs. B.' Resolutions should contain as much information as is consistent with full public knowledge without doing any harm to the public interest. 34 New Jersey Practice, Local Government Law § 141, at 174 (Michael A. Pane) (2d ed. 1993).

Ibid.

Mr. Pane was considered an authority on local government law. While certainly not binding upon this Court, his statement that closed session resolutions should "contain as much information as is consistent with full public knowledge without doing any harm to the public interest" should be considered persuasive.

Point II. The Defendant should be enjoined from passing resolutions that authorize multiple nonpublic sessions at undetermined times.

The Defendant's standard form of closed session resolution authorizes the "Board to convene into closed session as the need may arise at any time during the

public session, immediately after adjournment or at any time prior to the next public meeting." Statement of Material Facts, ¶ 2. This provision purportedly authorizes the Board, without further public notice, to hold one or more private meetings at undisclosed dates, hours and locations.

Even the Defendant's counsel seems to concede that these "as the need may arise" closed session could not be held without separate public notices. See, first full paragraph on Exhibit P10. Accordingly, the Defendant should be enjoined from passing resolutions that purport to "authorize" meetings that could not be legally held without proper notice.

Point III. The Defendant should pay Plaintiff's Costs.

R.4:42-8(a) states:

> Unless otherwise provided by law, these rules or court order, costs shall be allowed as of course to the prevailing party.

The definition of a "prevailing party" was discussed by the Appellate Division in African Council v. Hadge, 255 N.J. Super. 4, 11 (App. Div. 1992). Although the case dealt with a federal civil rights counsel fee claim, the logic set forth by the African Council court should also apply here:

> Singer v. State adopted a two-pronged test for determining when one is a prevailing party for purposes of Section 1988 counsel fee awards. Singer requires a party to "demonstrate that his [her] lawsuit was causally related to securing the relief obtained; a fee award is justified if plaintiffs' efforts are a 'necessary and important' factor in obtaining the relief" and "plaintiff must establish that the relief granted had some basis in law." (internal citations omitted)

If the present litigation results in the Defendant altering its closed session resolution procedure, Plaintiff should be declared the "prevailing party" because his

lawsuit was both “causally related” and a “necessary and important factor” in obtaining the desired relief and because the relief granted has a basis in law. Id.

Once it has been established that Plaintiff is the "prevailing party," costs ought to be "allowed as of course." R.4:42-8(a). In Gallo v. Salesian Soc., Inc., 290 N.J. Super. 616, 660 (App. Div. 1996) the Appellate Division stated:

> R 4:42-8(a) provides: "Unless otherwise provided by law, these rules or court order, costs shall be allowed as of course to the prevailing party." The judge here expressly found that plaintiff was a prevailing party. He should have awarded her costs "as of course" under the rule.

Finally, denial of costs in this instance would profoundly chill my willingness, and that of other interested citizens, to bring suits, such as this one, that seek to benefit the public interest. The salutary public policy behind statutes such as the Open Public Meetings Act would be frustrated if citizens were dissuaded enforcing it.

Respectfully,

John Paff

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Attorneys for Monroe Twp. Board of Education

JOHN PAFF, Plaintiff, vs. MONROE TOWNSHIP BOARD OF EDUCATION Defendant	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MIDDLESEX COUNTY DOCKET NO. L-7770-06 Civil Action NOTICE OF CROSS-MOTION FOR SUMMARY JUDGMENT

To: John Paff
PO Box 5424
Somerset, NJ 08875-5424
Plaintiff

PLEASE TAKE NOTICE that on the 19th day of January 2007 the undersigned attorney for defendant, the Monroe Township Board of Education ("Board"), will cross-move before this court for an order granting summary judgment dismissing the Complaint. The Board will rely on the Brief and the Certification of Wayne Holliday submitted herewith, along with a proposed form of Order.

Parker McCay
Attorneys for Monroe Twp. Board of Education

/s/ James F. Schwerin

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Attorneys for Monroe Twp. Board of Education

JOHN PAFF, Plaintiff, vs. MONROE TOWNSHIP BOARD OF EDUCATION Defendant	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART MIDDLESEX COUNTY DOCKET NO. L-7770-06 Civil Action CERTIFICATION OF WANYE HOLLIDAY

WAYNE HOLLIDAY, of full age, certifies as follows:

1. I am the Board Secretary/Business Administrator for the Monroe Township Board of Education ("Board"). I submit this Certification in support of the Board's cross-motion for summary judgment, and in opposition to the motion for summary judgment filed by plaintiff.

2. The Complaint challenges the form of three resolutions passed by the Board at an open public meeting allowing the Board to go into executive session pursuant to the Open Public Meetings Act ("OPMA"), N.J.S.A. 10:4-6, et. seq. It is asserted that the resolutions were deficient in that they stated that the Board was going into executive session to discuss "Personnel, Negotiations, Legal and Student Matters." There is no allegation that there was any discussion of matters not contained within the above description.

3. There is no dispute that the resolutions were in the form stated above. It is the position of the Board that said form complies with the OPMA, and should be allowed

by this court. If the resolution was to be more specific, it would not allow for discussion of matters which a member may wish to raise which fall within the statutory allowance, but may not have been previously made known to my office in order to have a list of items prepared for the resolution.

4. The workings of a public body such as the Board are not so precisely regulated that there may not be things which become known to one or more Board members as possible problems falling within the parameters of things which may legally be discussed in executive session. To force the resolution for executive session to be more specific would hamstring the Board's ability to react to situations as they occur.

5. The need to retain flexibility is demonstrated by the Board's practice of holding its executive session prior to the public session, in order to avoid forcing members of the public attending the meeting to wait around during the executive session. Executive session meetings are held as early as 5:00 p.m. and public sessions are at 8:00 p.m. Reliance is placed on the executive session resolution passed at the prior meeting.

6. The actions of this Board are designed to keep the public as informed as possible without impinging on the legitimate privacy concerns recognized in the OPMA.

I certify that the foregoing statements made by me are true. I am aware that if my of the foregoing statements are willfully false, I am subject to punishment.

January 3, 2007 /s/ Wayne Holliday

BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

By James F. Schwerin, Esq. on behalf of the Monroe Township Board of Education

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PRELIMINARY STATEMENT

This is an action pursuant to the Open Public Meetings Act ("OPMA"), N.J.S.A 10:4-6, et. seq. Plaintiff is a member of the public who is challenging the form of resolution utilized by the defendant, the Monroe Township Board of Education ("Board") in order to move from public session into the executive session authorized by the OPMA. Plaintiff having moved for. summary judgment, the Board now cross-moves for summary judgment.

STATEMENT OF FACTS

Plaintiff is an individual who is part of a political party[1] which has created what it calls a task force for open government, seeking to advance its own agenda for what public bodies should be doing. To that end, plaintiff, on behalf of his party, has made it a practice to file law suits attacking the practices of various public entities in Central New Jersey in regard to compliance with the OPMA.[2] He is not a resident of Monroe Township; the Complaint lists him as a resident of Somerset.

The resolutions challenged by plaintiff all stated that the Board was going into executive session to discuss matters relating to "personnel, negotiations, legal and student matters." It is not disputed that these are the categories of matters for which a public entity may go into executive session under the OPMA. Additionally, the

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[1] The Libertarian Party.

[2] These include at least the following: Paff v. N.J. Dept. of Labor, Bd. of Review; Libertarian Party of Central New Jersey v. Murphy; Paff v. Perth Amboy City Council; Paff v. Byrnes.

resolutions stated that the Board might convene in closed session as necessary not only during the current public meeting, but also prior to the next public session. Plaintiff is not asserting that any matters which may not be legally discussed in executive session were discussed or that there was any violation of the OPMA once the Board was not in public session. All that is at issue is the language of the resolutions.

Despite the concern expressed by plaintiff, this Board has never met without having passed a resolution, either concurrently or at the most recent public session, authorizing the non-public discussion.

The Board's usual scheduling practices are highly relevant to the form of resolution used. In order to minimize inconvenience to the public, the Board more often than not holds its executive sessions before the public session, sometimes as early as 5:00 p.m., before an 8:00 p.m. public meeting. This is done to avoid inconveniencing the members of the public attending by making them wait around during the private meeting. As a result, what happens is that during the public session, a resolution will be passed authorizing the Board to go into private session which may not be utilized until the next meeting; hence the language in the form of resolution regarding convening prior to the next public session. The need for flexibility in listing the items to be considered in executive session becomes readily apparent, as new matters may arise prior to the next scheduled meeting date.

POINT ONE

THE INTENT OF THE OPMA IS SERVED BY ALLOWING A PUBLIC ENTITY TO LIST ITEMS TO BE CONSIDERED IN PRIVATE SESSION BY REFERENCE TO THE CATEGORIES LISTED IN THE STATUTE. INFORMATION IN GREATER DETAIL WILL BE FORTHCOMING IN THE MANDATED RELEASE OF MINUTES.

In bringing this suit, plaintiff has placed great reliance on the decision in Council of New Jersey State College Locals v. Trenton State College, 284 N.J. Super.

108 (Law Div. 1995). Aside from the fact that the Council of New Jersey State College Locals decision has never been reviewed at a higher level, and is not binding on this court, its reasoning, however well intentioned in the interest of open government, does not sufficiently take into account either past precedent or the provisions of the OPMA itself.

The right to go into executive session is set forth in N.J.S.A. 10:4-12(b), which reads:

> b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> (1) Any matter which, by express provision of Federal law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section.
>
> (2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States.
>
> (3) Any 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 such 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 incompetent, his guardian) shall request in writing that the same be disclosed publicly.
>
> (4) Any 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) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

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

(7) Any 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.
Any 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) Any 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 such matter or matters be discussed at a public meeting.

(9) Any 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.

In turn, the requirement as to notice to be given before going into private session is set forth in N.J.S.A. 10:4-13, reading:

No public body shall exclude the public from any meeting discuss any matter described in subsection 7.b. until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

a. Stating the general nature of the subject to be discussed; and

> b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session [by] the public body can be disclosed to the public. (footnote omitted)

It is clear that the legislature was differentiating between the specificity needed in the pre-executive session notice as to what was to be discussed ("general nature") and that for when later disclosure to the public will be forthcoming ("as precisely as possible") This differing language is not addressed in the Council of New Jersey State College Locals decision. Yet, by using the language it did, the legislature was leaving discretion to the public entity as to how descriptive it needed to be, with the emphasis on assuring the release to the public of as much detail as possible once the matters had been discussed.

This is in keeping with N.J.S.A. 10:4-14, which calls for minutes of closed sessions to be available to the public. It is these minutes, not the general description of matters to be discussed, which will truly keep the public informed as to what went on behind closed doors.

Not only did the Council of New Jersey State College Locals decision not address the different language used in the statute, it also never mentions Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), certif. den. 76 N.J. 238 (1978). In Rice, the court had no problem with a resolution stating only that the Board would go into executive session to discuss "privileged personnel items." That certainly does not reach the level of specificity apparently contemplated in Council of New Jersey State College Locals.

Plaintiffs attempt to use out of state case law in support of his position fails to take into account the substantial distinguishing facts that make the cases he cites

inapposite. In Mississippi,[3] the statute read differently from New Jersey's OPMA. There was a cumbersome procedure mandated which is just what the Monroe Board is trying to avoid.[4] In Kentucky[5], the issue raised was not the wording of the executive session resolution, but whether or not the discussion that took place really fit within the personnel exception to the statute.[6]

Here, there is not even an allegation that the Monroe Board discussed any matters not properly considered in executive session. All that plaintiff asserts is that the language of the resolutions was not informative enough. It is urged that the decision in Council of New Jersey State College Locals, which is not binding on this court,[7] does not sufficiently take into account the realities of how a board of education or other such public entity operates, especially given that the minutes of what was discussed must be made promptly available, so that no secrecy may be maintained. Unless this court wishes to impose the cumbersome and burdensome procedure set out in the Mississippi, but not the New Jersey, statute, the Board should be allowed to continue its current practice as long as there is no basis for stating that the executive session was used to discuss matters not allowed under the OPMA.

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[3] Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107 (Miss. 1989).

[4] The public entity had to first vote to go into private session to discuss if there was a valid reason to go into executive session to discuss a particular matter. Then there would be a return to public session to vote on going back into executive session to discuss the particular matter raised. In that context, the need for specificity is to ensure that the executive session is limited to the particular matter which was considered at the private session

[5] Floyd County Board of Education v. Ratliff, 955 S.W.2d 921 (Ky. 1997)

[6] The resolution referred to personnel matters, but actually involved a reorganization plan, even thought Kentucky case law limited the personnel exception to matters relating to the appointment discipline or dismissal of an individual employee, member or student.

[7] Judge Longhi's ruling in Paff v. Perth Amboy City Council, without a decision setting forth the facts, has no precedential value.

CONCLUSION

For the aforestated reasons, the resolutions passed by the Board before going into executive session fully comply with the OPMA. Therefore, the Board's cross-motion for summary judgment should be granted, and plaintiff's motion for summary judgment should be denied.

Respectfully submitted,

Parker McCay
Attorneys for Monroe Twp. Board of Education

/s/ James F. Schwerin

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January 12, 2007

Hon. Alexander P. Waugh, J.S.C.
Superior Court, Middlesex County
Law Division - Courthouse
New Brunswick, New Jersey *(via Hand Delivery)*

RE: Paff v. Monroe Township Board of Education
Docket No. L-7770-06
Returnable: January 19, 2007

Dear Judge Waugh:

Please accept this letter in lieu of a more formal reply brief in further support of Plaintiff's Motion for Summary Judgment and taxed costs and in opposition to the Cross-Motion filed by Defendant Monroe Township Board of Education.

Defendant states that its policy is to pass its closed session resolutions at the public meeting prior to when the nonpublic session is to be held. For example, the resolution that authorized the Board's December 13, 2006 nonpublic session was apparently passed during the public meeting of November 15, 2006.

This policy, according to Defendant, permits the Board to "retain flexibility" and to hold its nonpublic sessions "as early as 5:00 p.m." so that members of the public are not forced to "wait around during the executive session." Holliday Cert., ¶¶ 3 – 5. Since the topics that will need to be privately discussed on December 13, 2006, for example, are not known on November 15, 2006, the Board's policy—the argument goes—requires it to announce the topics in only the most general terms. "To force the resolution for executive session to be more specific would hamstring the Board's ability to react to situations as they occur." Id., ¶ 4.

The Defendant's position is almost identical to that in Council of N.J. State College Locals v. Trenton State College Bd. of Trustees, 284 N.J. Super. 108 (Law. 1995). In that case, the Defendant Board argued "that the scheduling of the closed meeting precedes the public meeting and precludes the publication of notice more specific than the language presently utilized." Id. at 114. The Court, however, found the Board's argument "illusory" and adopted the Plaintiff's suggested "practical solution—rather than have the closed meeting precede the public meeting, reverse the order and issue appropriate notice." Id. At 115.

Plaintiff makes a similar suggestion here. Why cannot the Monroe Township Board of Education pass its closed session resolutions on the same day and prior to its closed sessions?

On page 5 of its Brief, Defendant cites Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), certif. den. 76 N.J. 238 (1978), and argues that the analysis in Council of N.J. State College Locals is somehow weakened because the Rice court "had no problem" with the resolution at issue in that case. In Rice, the defendant Board passed a resolution to privately discuss "personnel matters." But this resolution is much more specific than the boilerplate "personnel, negotiations, legal and student matters" resolutions passed by the Defendant in the present case. Also, the Rice court found that despite the terseness of the resolution, "the public there assembled were fully aware of the nature of the personnel matters to be discussed in the executive session." Rice at 71. Thus, the issues in Rice are easily distinguishable from that in Council of N.J. State College Locals.

On page 7 of its Brief, the Defendant argues that the facts present in this case

are substantially different from those before the court in Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So.2d 107, 114 (MS 1989). While Mississippi's statutory mechanism is somewhat more complicated than New Jersey's, in that it requires two votes before going into closed session instead of one, the statutes similarly require the body to inform the public of the topics it intends to privately discuss. (Miss. Code Ann. § 25-41-7 (3) (5) requires a public body to publicly announce "the reason for going into executive session" and N.J.S.A. 10:4-13 requires a body to state the "general nature of the subject to be discussed.")

Thus, the differing mechanisms for excluding the public from a meeting is of no moment. What is relevant is the Mississippi Supreme Court's holding that allowing bodies to give the public only "generalized fluff" instead of a "genuine and meaningful" reason for the public's exclusion "would frustrate the very purpose of the Act." Id. At 111.

While Hinds is an out-of-state case and is not binding on this Court, it can and should "inform [this Court's] interpretation" of the Open Public Meetings Act. In re Adoption of N.J.A.C. 13:38-1.3(f), 341 N.J. Super. 536, 546 (App. Div. 2001).

In conclusion, Plaintiff suggests that the issues before this court are straightforward:

1. Does N.J.S.A. 10:4-13, which must be liberally construed to enhance the "public's effectiveness in fulfilling its role in a democratic society," (N.J.S.A. 10:4-7, 21) demand more from Defendant than its boilerplate, consistent pronouncements that it excluding the public from its meetings to "discuss personnel, negotiations, legal and student matters" ?
2. If so, what level of specificity is required to satisfy N.J.S.A. 10:4-13?

3. Should an injunction or other remedy be imposed to ensure the Board's future compliance with N.J.S.A. 10:4-13?

4. Is the Plaintiff the "prevailing party" in this matter so that he can recover his costs?

For all of the above reasons, and those stated in the initial Letter Brief, Plaintiff urges this Honorable Court to find in his favor.

Respectfully,

John Paff

cc. James F. Schwerin, Esq. *(via regular mail and Fax to 609-896-9023)*

SUPERIOR COURT OF NEW JERSEY
CHAMBERS OF ALEXANDER P. WAUGH, JR., JUDGE
MIDDLESEX COUNTY COURT HOUSE
NEW BRUNSWICK, NEW JERSEY

LETTER OPINION – NOT FOR PUBLICATION

January 22, 2007

John Paff
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Re: Paff v. Monroe Township Board of Education
Docket No. L-11146-99

Dear Counsel:

This matter is before the Court on cross-motions for summary judgment. Oral argument took place on January 19, 2007, following which I reserved decision.

Plaintiff John Paff (Paff) is a resident of Franklin Township, Somerset County, New Jersey. According to his complaint, he is the Chairman of the Open Government Task Force of the Libertarian Party of Central New Jersey. Defendant Monroe Township Board of Education (Board) is a municipal corporation of the State of New Jersey. [*Page 2]

Paff filed his Complaint on September 26, 2006, seeking a declaration that the Board fails to comply with the terms of the Open Public Meetings Act (N.J.S.A. 10:4-6 to 21) (Act) with respect to closed session resolutions. Specifically, Paff contends that the Board's regular practice of adopting a closed session resolution that allows it to "discuss personnel, negotiations, legal and student matters" and "to convene into closed session as the need may arise at any time during the public session, immediately after adjournment or at any time prior to the next public meeting" fails to comply with the requirements of N.J.S.A. 10:4-13. The Board filed its Answer on November ?, 2007, [sic] taking the position that its

actions comply with the statute. There being no material facts at issue, the parties have filed motions for summary judgment.

The general legislative purpose of the Open Public Meetings Act is set forth in N.J.S.A, 10:4-7, in pertinent part, as follows:

> The Legislature finds and declares 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, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.
>
> The Legislature further declares it to be the public policy of this State to insure that the aforesaid rights are implemented pursuant to [*Page 3] the provisions of this act so that no confusion, misconstructions or misinterpretations may thwart the purposes hereof.

(Emphasis added). Pursuant to N.J.S.A. 10:4-21, the Act is to "be liberally construed in order to accomplish its purpose and the public policy of this State as set forth in [N.J.S.A. 10:4-7]."

Consistent with its stated public purpose, N.J.S.A. 10:4-12a requires meetings of public bodies to be open to the public at all times, unless the subject matter of the meeting falls into one of the statutory exceptions. Those exceptions are articulated as follows:

> A public body may exclude the public only from that portion of a meeting at which the public body discusses:
>
> (1) Any matter which, by express provision of Federal law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section.
>
> (2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States.
>
> (3) Any 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 such 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 incompetent, his guardian) shall request in writing that the same be disclosed publicly. [*Page 4]

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

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

(7) Any 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.

Any 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) Any 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 such matter or matters be discussed at a public meeting.

(9) Any 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 [*Page 5] belonging to the responding party as a result of an act or omission for which the responding party bears responsibility.

N.J.S.A. 10:4-12b.

If an entity subject to the Act intends to hold a closed session, it must comply with the provisions of N.J.S.A. 10:4-13, which provides:

> No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:
>
> a. Stating the general nature of the subject discussed; and
>
> b. Stating 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.

The underlined provision is the one at issue in this case.

It is my understanding that the Board typically meets at 8 p.m. for a public session. One of the first items of business is a resolution to go into closed session to discuss "personnel, negotiations, legal and student matters". The motion also provides as follows:

> The discussion conducted in closed session can be disclosed to the public at such time as the matters have been resolved. This resolution authorizes the Board to convene into closed session as the need may arise at any time during the public session, immediately after adjournment or at any time prior to the next public meeting.

Typically, however, the Board does not then go into closed session, but instead continues the public session. Again typically, the Board holds a regular closed session meeting as early as 5 p.m. on the day of its next public meeting on the basis [*Page 6] of the resolution passed at the preceding public meeting. (Holliday Certification, Paragraph 5).

Paff argues that the Board is not complying with N.J.S.A. 10:4-13 because (1) it is merely listing topics that are permissible for closed session discussion without disclosing what will actually be discussed and (2) it appears to be noticing, at least potentially, multiple closed session meetings that could take place on different days. The Board contends that it is complying with the statute because it is giving the "general" subjects that may be discussed. The Board also argues that it does not always know at the time the resolution is offered what topics might need to be discussed in the future. However, counsel for the

Board acknowledged at oral argument that the Board could not meet in closed session between noticed public meetings without giving separate notice of such a meeting.

There does not appear to be an Appellate Division decision that addresses the issue squarely, Then Mercer County Assignment Judge Carchman addressed the issue at some length in a reported case - Council of New Jersey State College Locals v. Trenton State College, 284 NJ. Super. 108 (Law Div. 1995). That case is mentioned in Loigman v. Committee of Middletown, 308 N.J. Super. 500, 502 (App. Div. 1998), as having been relied upon by the court below. The issue in Loigman, however, was the manner of enforcement of the order below, and apparently not the merits of the decision. Nevertheless, there is nothing in the Loigman opinion that suggests the Appellate Division questions the correctness of the approach taken by Judge Carchman in the Trenton State case.

In Trenton State, the Board of Trustees utilized the type of broad closed session resolution at issue in this case, one that listed a variety of permitted closed session topics. Judge Carchman concluded that the resolution did not comply with [*Page 7] the statutory requirement.

> * * * The Act mandates that the public be informed of "the general nature of the subject to be discussed." The Board, like many other public bodies, must tread a fine line—informing the public about its executive-session activities while not compromising the privacy interests of those whose business is being discussed. Nevertheless, the Board has struck a balance which does not afford the public any real knowledge of the Board's executive-session proceedings. The Board's notice is framed so broadly that it does no more than tell the public that there will be a meeting in executive session. The notice merely recites the litany of exceptions which would allow it to proceed in closed session. No attempt is made to indicate which one or ones of these exceptions are relevant to a particular closed-session proceeding. This complete failure to delineate which subject or subjects will be discussed in closed session does not comply with the statutory mandate that the public know the general nature of the agenda.
>
> The statutory requirement is not an onerous one--only the general nature of subject need be disclosed; specificity is not required. For example, a resolution authorizing a closed session meeting to "Review the performance of individual personnel" comports with N.J.S.A. 10:4-13. Cole v. Woodcliff Lake Bd. of Educ., 155 N.J. Super. 398, 407 (Law Div. 1978); see also Houman v. Mayor of Pompton Lakes, 155 N.J. Super. 129, 149-50 (Law Div. 1977) ("[T]he statement that personnel matters would be considered, without specific disclosure that the personnel question involved the retention of legal counsel, is arguably sufficient. However, the resolution

made no mention of the fact that the closed meeting would also involve the discussion of whether, in the first instance, to pursue the appeals. Therefore, this resolution is not in conformity with the mandatory requirements of N.J.S.A. 10:4-13.").

> [A]lthough there is no case law on the subject good practice would dictate that resolutions be as specific as possible, e.g., the 'general nature of the subject to be discussed' should not be set forth as 'litigation' but, rather, [*Page 8] as 'litigation-A vs. B.' Resolutions should contain as much information as is consistent with full public knowledge without doing any harm to the public interest.

[34 *New Jersey Practice, Local Government Law* § 141, at 174 (Michael A. Pane) (2d ed. 1993).]

The Board has made no effort to provide the public with as much knowledge as possible. It has merely recited the provisions of the statute, not made an attempt to comply with it. N.J.S.A. 10:4-13, which requires a public body to state the general nature of the subject or subjects to be discussed in closed session, would be devoid of all substantive meaning if mere reiteration of all potential reasons for moving into closed session were sufficient for compliance. The Legislature, in enacting N.J.S.A. 10:4-13, certainly did not intend that result. The Board's resolution, which simply parrots the statutory language and encompasses all possible justifications for proceeding in closed session, is improper.

The Board argues that the scheduling of the closed meeting precedes the public meeting and precludes the publication of notice more specific than the language presently utilized. Plaintiff suggests a practical solution--rather than have the closed meeting precede the public meeting, reverse the order and issue appropriate notice. Not only is there no statutory impediment to this proposal, the statute appears to contemplate this procedure. The Board's argument is illusory; the problem is easily remedied.

This court holds that the statutory reference to general notice mandates more than a restatement of the statutory language and requires that the public be informed of the matters to be discussed, albeit in general terms rather than with the specificity required by the notice requirements for a public meeting.

284 N.J. Super. 114-16 (emphasis in original). See also Houman v. Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977). [*Page 9]

Judge Carchman's position clearly articulates the public policy behind the Act, i.e., that closed session resolutions should contain as much information as is consistent with full public knowledge without doing any harm to the public interest. This requires some balancing by the public entity and its

counsel. Obviously, the Board discusses issues, such as student discipline, that are very confidential and it would be inappropriate even to identify the student involved. Other issues, such as labor negotiations, generally need to be discussed in closed session, but not necessarily without giving the public notice that the topic is being discussed.

Litigation against public entities is frequently settled, subject to approval by the entity. In most cases, there is no reason why the Board cannot announce that the specific litigation is being discussed in closed session, during which the arguments in favor and against a proposed settlement can be fully and freely discussed with counsel. If, in a specific case, the mere fact of an entity's discussion of specific litigation could adversely affect its litigation strategy or disclose confidential information, it might well be appropriate not to identify the litigation being discussed.

The Board's argument that it cannot know at the time of one meeting what will be discussed at the closed session held before its next public meeting is, in my view, as "illusory" as Trenton State's similar argument before Judge Carchman. There is no reason why the Board cannot notice its public meeting to start whenever it intends to hold the closed meeting, go into public session and then immediately into closed session after passing the appropriate resolution. At that time, the Board should be in a position to know what matters need to be discussed [*Page 10] in closed session. It can certainly advise members of the public that, although the public meeting will be convened at, for example 5 p.m., the Board will immediately go into closed session and not discuss public business until, for example, 8 p.m.

The paramount public policy here is not the convenience of the public entity, but rather the right of New Jersey "citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion." N.J.S.A. 10:4-7 (emphasis added). In order to vindicate that right, the Board must make a good faith effort to

provide the public with as much knowledge as possible without endangering the "public interest" or the rights of others.

For the reasons expressed above, I will grant Mr. Paff's motion for summary judgment and deny the Board's cross-motion. As the prevailing party, Mr. Paff will be entitled to taxed costs pursuant to R. 4:42-8.

Sincerely yours,

/s/ Alexander P. Waugh
Judge of the Superior Court