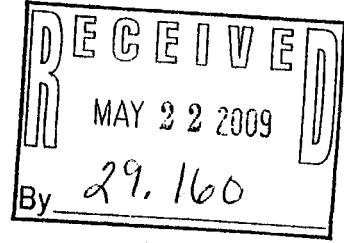


FILED

MAY 27 2009

Steven P. Perskie, J.S.C.



John Paff
P.O. Box 5424
Somerset, NJ 08875-5424
Tel. 732-873-1251
Email: paff@pobox.com
Plaintiff

JOHN PAFF
Plaintiff,

vs.

ABSECON CUSTODIAN et al
Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ATLANTIC COUNTY
DOCKET NO. L-3392-08

Civil Action

CONSENT JUDGMENT
(w/ Galloway Defendants only)

This matter was opened to the Court by Plaintiff John Paff and Michael J. Blee, Esq., attorney for Defendants Galloway Township Custodian (hereafter "the Custodian") and Galloway Township Council (hereafter "the Council"), and upon consent of these parties, it on this 27th day of MAY 2009 ORDERED that:

1. The parties' positions and intentions are set forth in a Memorandum of Understanding, a copy of which is attached and made part of this Consent Judgment.
2. The Council agrees, going forward, that the resolutions it passes, in accordance with N.J.S.A. 10:4-13, before going into a nonpublic (i.e. closed or executive) meeting:
 - a. Shall be in the form of the sample "TOWNSHIP OF GALLOWAY TOWNSHIP RESOLUTION NO. _____ AUTHORIZING EXECUTIVE SESSION" attached to this Consent Judgment as Exhibit A
 - b. Set forth as much information about the topic(s) to be privately discussed that can be disclosed without undermining the N.J.S.A. 10:4-12b exception(s) that authorize the topic(s) to be discussed in private.

c. Set forth, as precisely as possible, the time that is expected to elapse or the event that needs to occur before the minutes of the nonpublic session relating to each topic privately discussed may be publicly disclosed.

3. The Custodian and the Council agree, going forward, that absent extraordinary circumstances, to make a draft version, marked as "draft," of the nonexempt portion of the Council's nonpublic (i.e. closed or executive) meeting minutes available to the public within twelve days after that meeting or two business-days before the Council's next regular meeting, whichever is longer. For example, if the Council went into a nonpublic meeting during its regularly scheduled Thursday, April 10, 2008 meeting, and if its next regularly scheduled meeting was on Thursday, April 24, 2008, then the nonexempt portion of the April 10, 2008 nonpublic meeting must be publicly available by close of business on Tuesday, April 22, 2008. As another example, if the Council held a special meeting on Thursday, April 17, 2008 and went into a nonpublic meeting during that meeting, and if its next regularly scheduled meeting was on Thursday, April 24, 2008, then the nonexempt portion of the April 17, 2008 nonpublic meeting must be publicly available by Tuesday, April 29, 2008, which is twelve days after the nonpublic meeting.

4. The Council agrees to pay Plaintiff, within 10 days of its receipt of a fully executed copy of this Consent Judgment, \$59.78¹ as the Custodian's and Council's share of Plaintiff's costs so far in this matter.

5. This Consent Judgment is entered into with no admission of fault by the Custodian or the Council.

6. This Consent Judgment resolves all the matters within this lawsuit as they relate to Defendants Galloway Township Custodian and Galloway Township Council as well

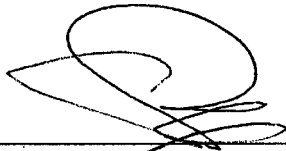
¹ Since eleven of the seventeen municipalities which were sued have not yet settled, this represents 1/11 of Plaintiff's total, unreimbursed costs, which to date, are \$657.57.

as any issues that have been asserted or could be asserted by the defendants against the Plaintiff.

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STEVEN P. PERSKIE, J.S.C

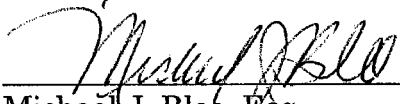
Hon. Steven P. Perskie, J.S.C.

We consent to the terms of this Consent Judgment:



John Paff, Plaintiff

Date: 5/19/09



Michael J. Blee, Esq.
For Defendants Galloway Township Custodian and Galloway Township Council

Date: 5/14/09

Memorandum of Understanding

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. 10:4-7. The Legislative Findings and Recommendations underpinning the Senator Byron M. Baer Open Public Meetings Act.

This Memorandum is entered into between John Paff (hereafter “Plaintiff”) and Defendants Galloway Township Custodian (hereafter “the Custodian”) and Galloway Township Council (hereafter “the Council”). Its purpose is to explain and provide context to the Consent Judgment that has been simultaneously signed by the parties.

Plaintiff chairs the New Jersey Libertarian Party’s Open Government Advocacy Project which seeks to increase governmental transparency and accountability. On October 3, 2008, Plaintiff filed suit against seventeen municipalities in Atlantic County. Among the defendants were the Custodian and the Council. The reasons that the Custodian and Council were named in the suit was because Plaintiff felt that a) the Council’s closed session resolutions are not specific enough to satisfy N.J.S.A. 10:4-13, b) the Custodian and the Council needs to make the nonexempt parts of the Council’s nonpublic meeting minutes publicly available more quickly, and c) that the Council’s nonpublic meeting minutes don’t contain the date, time and location of the meeting.

Plaintiff doesn't allege or believe that any of these issues were intentional or that the Custodian or the Council engaged in any wrongdoing or chicanery. From Plaintiff's experience, many if not most municipalities do not follow the letter of the Open Public Records Act and the Senator Byron M. Baer Open Public Meetings Act. Indeed, sixteen municipalities other than Galloway Township have also been sued in this matter.

Accordingly, the object of Plaintiff's lawsuit is not to embarrass or pillory the Custodian or the Council. Rather, Plaintiff seeks to use this lawsuit to impress upon Atlantic County's municipalities and other public bodies the vital importance of open government and, hopefully, to convince them to adopt a set of "best practices" that will maximize the amount and quality of official information available to the public and the speed in which citizens receive that information. Similarly, the Custodian and the Council recognize this lawsuit as an opportunity to reaffirm their commitment to open and transparent government.

Against this backdrop, the merits of the Fifth Count and Sixth Count of First Amended Complaint are addressed below.

Fifth Count

All parties acknowledge that there are legitimate reasons for a municipal governing body to meet in nonpublic session. Among these reasons is the need to prevent the adverse parties in litigation or contract negotiations from gaining an unfair advantage and to allow members of the governing body to debate and deliberate personnel matters without public scrutiny or participation.² But, the need to discuss matters privately should not prevent the public from being informed, as precisely as possible, of the topics that are being privately discussed.

² See South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478, 494 (1991)

For example, suppose that Galloway Township is being sued by a Mr. Jones who was injured after he slipped and fell on what he asserts to be negligently maintained municipal property. Since the lawsuit is already a public record, there is no public purpose served by publicly describing a private discussion of the lawsuit in a N.J.S.A. 10:4-13 resolution vaguely, such as “personnel and legal matters.” Rather, the resolution should at the very least describe the private discussion as “Discussion of slip and fall negligence suit, Jones v. Galloway Township, Docket No. ATL-L-012345-08.” This way, the public has a very good sense of what the Council’s private discussion is about while the ability of the Council to develop its lawsuit strategy is not undermined.

Using the same example, suppose that Jones’ attorney sent the Township’s attorney an offer to fully settle the lawsuit upon the Township’s payment of \$20,000. While the Council would obviously need to discuss how to respond to the offer in private, lest Jones or his attorney would be in the audience witnessing the discussion, there is no reason why the public could be not be informed in the N.J.S.A. 10:4-13 resolution that the Council will meeting in private to discuss “a settlement offer received from the Plaintiff in the slip and fall negligence suit known as Jones v. Galloway Township, Docket No. ATL-L-012345-08, in which the Plaintiff offers to settle the suit in exchange for the Township paying him \$20,000.” While it may initially seem that this would provide “too much” information to the public, this concern disappears once it is realized that the sole purpose of the N.J.S.A.10:4-12(b)(7) exception is to prevent *adverse parties* to litigation and contracts from learning the details of the public body’s negotiation tactics and litigation strategy.³ Since, in this example, the adverse party (i.e. Jones) already knows that he offered to settle the

³ See the discussion in Nevin v. Asbury Park Township Council, 2005 WL 2847974 (App. Div. November 1, 2005)

lawsuit for \$20,000, there is no legitimate reason why the public should not also know of the tendered settlement offer.

For another example, suppose that a personnel matter, such as whether or not a Mrs. Smith, a public works employee, should be disciplined because of repeatedly arriving late to work, is to be discussed in closed session. In such a case, the amount of detail set forth in the N.J.S.A. 10:4-13 resolution should correspond to the amount of detail that the Council and its attorney predict will be publicly disclosed in the closed meeting's minutes, when those minutes are made publicly available.

The standard that the Council is to use when determining how much information about a personnel matter is to be disclosed in the closed session's minutes is set forth in South Jersey Publishing Company, Inc. v. New Jersey Expressway Authority, 124 N.J. 478 (1991). That standard is that a) the public needs information if it is properly fulfill its role of evaluating the wisdom of governmental action or a decision not to act, b) that New Jersey's strong public policy requires that a public body's actions and decisions to not act be disclosed in the body's closed meeting minutes along with sufficient facts and information to permit the public to understand and appraise the reasonableness of the body's determination, and c) to the extent a cognizable privacy interest may be compromised by the required disclosure, the extent of disclosure may be modified through redactions of the minutes, provided the public interest in disclosure is not subverted

Thus, regardless of whether the Council disciplines Ms. Smith or chooses to not impose discipline due to her lateness, the outcome should be recorded in the closed meeting minutes. The question of whether that entry in the minutes should be redacted before the minutes are made public requires a balancing of Ms. Smith's interest in keeping the disciplinary matter private against the public's interest in effectively monitoring the

Council. If the Council, with counsel's advice, determines after balancing these interests that the outcome will be published unredacted in the closed session's minutes (i.e. if the minutes will disclose to the public, e.g. that "Ms. Smith was suspended for three days on account of her habitual lateness"), then the exact nature of the matter (i.e. that "the Council will discuss disciplining Ms. Smith for excessive lateness") should be set forth in the closed meeting's N.J.S.A. 10:4-13 resolution. Inversely, if the Council determines that Ms. Smith's privacy interest exceeds the public's right to know, then less information (e.g. "the Council will discuss disciplining an employee for excessive lateness") should be set forth in the closed meeting's N.J.S.A. 10:4-13 resolution.

Sixth Count

All parties acknowledge that there are legitimate reasons for a municipal governing body to suppress certain portions of the minutes of its nonpublic meetings. Among these reasons is the need to prevent the adverse parties in litigation or contracts from gaining an unfair advantage. But, the fact that some material may need to be redacted or suppressed from the body's nonpublic meeting minutes⁴ does not force a conclusion that the remaining, non-exempt material need not be made promptly available to the public. Indeed, N.J.S.A. 10:4-14 states that "reasonably comprehensible minutes of all [a body's] meetings . . . shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12b]." (Emphasis supplied.)

Also, there is no need for minutes to be "approved" by a governing body before drafts of those minutes can be publicly released. Since approval cannot take place but at a meeting, requiring approval before public release makes it impossible for meeting minutes to be available to prior to the body's next meeting.

⁴ See, e.g. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 557, 58 (1997).

New Jersey courts have held that draft minutes of public meetings must be publicly disclosed prior to the meeting at which formal approval is to occur. Liebeskind v. Mayor and Municipal Council of Bayonne, 265 N.J. Super. 389, 394, 395 (App. Div. 1993) (minutes to be publicly available within two weeks after each meeting and at least three business days before the next meeting). The same principle should apply to the nonexempt portion of the body's nonpublic meeting minutes.

Finally, there is real value in interested members of the public promptly knowing the nature of the nonexempt portions of nonpublic meetings. An opportunity to read the nonexempt portions of the minutes of the previous nonpublic session the day before the next meeting allows citizens to offer cogent, informed comments during the public portion of the next meeting. Delaying the release of those minutes, on the other hand, deprives citizens from being informed of and commenting on important public issues until after those issues may have become stale.

Conclusion

Again, Plaintiff attributes no malice or wrongful conduct toward the Custodian or the Council. And, the Custodian and the Council may not necessarily agree that the Open Public Records Act and Meetings Act requires, as a matter of law, that which is set forth in this Consent Judgment. Rather, all parties recognize that the public benefits from open and transparent government and it is this goal that motivates the parties to enter into this Consent Judgment.

TOWNSHIP OF GALLOWAY
RESOLUTION NO. _____
AUTHORIZING EXECUTIVE SESSION

WHEREAS, while the Sen. Byron M. Baer Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) requires all meetings of the Galloway Township Council to be held in public, N.J.S.A. 10:4-12(b) sets forth nine (9) types of matters that may lawfully be discussed in "Executive Session," i.e. without the public being permitted to attend, and

WHEREAS, the Galloway Township Council has determined that _____ (insert number) issues are permitted by N.J.S.A. 10:4-12(b) to be discussed without the public in attendance shall be discussed during an Executive Session to be held on _____, 20____ at _____ P.M, and

WHEREAS, the nine (9) exceptions to public meetings set forth in N.J.S.A. 10:4-12(b) are listed below, and next to each exception is a box within which the number of issues to be privately discussed that fall within that exception shall be written, and after each exception is a space where additional information that will disclose as much information about the discussion as possible without undermining the purpose of the exception shall be written.

“(1) Any matter which, by express provision of Federal law, State statute or rule of court shall be rendered confidential or excluded from public discussion.” The legal citation to the provision(s) at issue is: _____ and the nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____;

“(2) Any matter in which the release of information would impair a right to receive funds from the federal government.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____;

“(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.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____;

“(4) Any collective bargaining agreement, or the terms and conditions of which are proposed for inclusion in any collective bargaining agreement, including the negotiation of terms and conditions with employees or representatives of employees of the public body” The collective bargaining contract(s) discussed are between the Township and _____;

“(5) Any matter involving the purchase lease or acquisition of real property with public funds, the setting of bank rates or investment of public funds where it could adversely affect the public interest if discussion of such matters were disclosed.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____;

“(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.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____;

“(7) Any pending or anticipated litigation or contract negotiation 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.” The parties to and docket numbers of each item of litigation and/or the parties to each contract discussed are _____

_____ and nature of the discussion, described as specifically as possible without undermining the need for confidentiality is _____
_____;

“(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance, 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 individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.” Subject to the balancing of the public’s interest and the employee’s privacy rights under South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478, the employee(s) and nature of the discussion, described as specifically as possible without undermining the need for confidentiality are _____

_____;

“(9) Any deliberation 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 of omission for which the responding party bears responsibility.” The nature of the matter, described as specifically as possible without undermining the need for confidentiality is _____

_____;

WHEREAS, the length of the Executive Session is estimated to be _____ minutes after which the public meeting of the Township Council shall reconvene;

NOW, THEREFORE, BE IT RESOLVED that the Township Council of Galloway Township will go into Executive Session for **only** the above stated reasons;

BE IT FURTHER RESOLVED that the Township Council directs the Township Clerk to make ten (10) photocopies of this resolution immediately after it passes and to distribute those photocopies to the public in attendance prior to the Executive Session commencing.

BE IT FURTHER RESOLVED that the blank spaces within this form of resolution are to be filled out in conformity with a Consent Judgment and Memorandum of Understanding dated [DATE] that arose out John Paff v. Absecon Custodian, et al, Docket No. ATL-L-3392-08.

BE IT FURTHER RESOLVED that the Township Council hereby declares that its discussion of the aforementioned subject(s) will be made public at a time when the public’s interest in disclosure is greater than any privacy or governmental interest being protected from disclosure. For each of the above items, the estimated date by which such disclosure can be made and/or the occurrence that needs to take place before disclosure can be made are listed below (attach separate sheet if necessary)

Subject of Discussion	Estimated Date	Necessary Occurrence

ATTEST:

TOWNSHIP OF GALLOWAY TOWNSHIP

Galloway Township Clerk

Mayor

(Exhibit A to Consent Judgment)