

John Paff
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Tel. 732-873-1251
Email: paff@pobox.com
Plaintiff

JOHN PAFF,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	LAW DIVISION, CIVIL PART
	:	MIDDLESEX COUNTY
vs.	:	DOCKET NO.
	:	
MONROE TOWNSHIP BOARD	:	Civil Action
OF EDUCATION	:	
Defendant	:	COMPLAINT

Plaintiff John Paff, by way of complaint against the Defendant Monroe Township Board of Education states as follows:

Preliminary Statement

1. This is an action under the Open Public Meetings Act (“OPMA”), N.J.S.A. 10:4-6 et seq., challenging the sufficiency and form of the resolutions typically passed by the Defendant before it excludes the public from its meetings.

Parties

2. Plaintiff John Paff is an individual who resides in Franklin Township, Somerset County, New Jersey and receives mail at P.O. Box 5424, Somerset, NJ 08875.

3. Defendant Monroe Township Board of Education is a public body as that term is defined by N.J.S.A. 10:4-8(a).

First Count

4. Plaintiff repeats the allegations stated above as if set forth at length herein.

5. On or about December 28, 2004, Plaintiff, in his capacity as the Chairman of the Open Government Task Force of the Libertarian Party of Central New Jersey submitted

a report to the Defendant, requesting Defendant, among other things, to change the manner in which it resolves to exclude the public from its meetings. A copy of the December 28, 2004 four-page report is attached as Exhibits A1 – A4.

6. Defendant responded to Plaintiff's December 28, 2004 letter by its five-page letter of February 11, 2005, a copy of which is attached as Exhibits B1 – B5.

7. On June 28, 2006, July 19, 2006 and August 30, 2006, Defendant passed three resolutions that purport to authorize the Defendant to enter into nonpublic (closed or executive) meetings in accordance with N.J.S.A. 10:4-13. These three resolutions, each consisting of one page, are attached as Exhibits C1 – C3.

8. Each of the resolutions set forth as Exhibits C1, C2 and C3 describe the subjects to be discussed during the closed sessions in the following manner: "Personnel, Negotiations, Legal and Student Matters."

9. Each of the resolutions set forth as Exhibits C1, C2 and C3 purport to authorize the Defendant "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."

WHEREFORE, Plaintiff demands judgment:

A. Declaring that the form of resolution typically passed by Defendant before going into a nonpublic (i.e. closed or executive) meeting does not describe the subjects to be discussed outside of public view precisely enough to satisfy N.J.S.A. 10:4-13.

B. Declaring and setting forth 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.

C. Declaring that the form of resolution typically passed by Defendant before going into a nonpublic session violates the Open Public Meetings Act (N.J.S.A. 10:4-6 et seq.) to the extent that it purports to authorize “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.”

D. Enjoining Defendant from passing future resolutions that do not meet the requirements and declarations determined by this Court.

E. Awarding Plaintiff his costs.

F. Such other relief as the Court deems equitable and just.

Certification Of No Other Actions

Pursuant to R.4:5-1, it is hereby stated that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding to the best of my knowledge and belief. Also, to the best of my belief, no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this pleading, I know of no other parties that should be joined in the above action. In addition, I recognize the continuing obligation of each party to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

Dated: September 26, 2006

John Paff
Plaintiff

**LIBERTARIAN PARTY OF CENTRAL NEW JERSEY
OPEN GOVERNMENT TASK FORCE**

**PO Box 11853
New Brunswick, NJ 08906
Email: ipsmc@pobox.com**

MONROE TOWNSHIP BOARD OF EDUCATION, MIDDLESEX COUNTY
December 28, 2004

*John Paff, Task Force Chairman
Phone 732-873-1251*

INTRODUCTION

The Libertarian Party of Central New Jersey has created an Open Government Task Force of which I¹ am the chairman. The Task Force's goal is to bring all local government agencies, such as municipal councils, school boards, fire districts, etc. 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 Task Force recently conducted an initial compliance audit of your Board and has produced this report. I ask that you review it and advise us in writing of which, if any, of the requested action items you will adopt.

I would like to receive your response by February 15, 2004. Be assured that while I prefer settling the issues raised voluntarily, I will resort to litigation² if the need arises.

OBSERVATIONS AND ANALYSIS

Observation No 1 *The Board's resolutions authorizing closed sessions do not comply with the Open Public Meetings Act (N.J.S.A. 10:4-13).*

At its meeting of October 27, 2004, the Board passed the following resolution, which appears to be typical³ of those passed by the Board when it goes into closed or executive session.

Be It Resolved, that the Board of Education of the Township of Monroe hereby moves to go into closed session, in accordance with Sunshine Law, Chapter 231 of the Public Laws of 1975 to discuss the following subjects:

Personnel, Negotiations, Legal and Student Matters

The discussion conducted in closed session can be disclosed to the public at such time as the matters have been resolved. This resolution authorizes

¹ I raise the issues in this report both as an individual and as the Task Force chairman.

² See, for example, [Paff v. Perth Amboy City Council](#), Docket No. MID-L-3470-04, [Paff v. Franklin Township Redevelopment Agency](#), Docket No. SOM- L-1448-04, [Paff v. Union Township Committee](#), Docket No. UNN- L-3392-04.

³ I reviewed the public meeting minutes from seven other meetings (February 27, 2002, March 13, 2002, March 25, 2002, April 10, 2002, April 24, 2002, May 8, 2002 and May 22, 2002) and found that nearly identical resolutions were passed at each.

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. Motion Carried Unanimously.

I assert that this form of resolution is deficient in two ways:

1. It does not inform the public, with any degree of specificity, of which matters will be discussed during closed session.
2. It seems to authorize additional public meetings "as the need may arise" and apparently without need for a separate resolution under N.J.S.A. 10:4-13.

As to the first point, the Court found in Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO, Local 2364 v. Trenton State College Bd. of Trustees, 284 N.J. Super. 108 (L.1995) that the defendant Board's practice of passing a very general resolution whenever it desired to go into closed session did not comply with Open Public Meetings Act because it did not "afford the public any real knowledge of the Board's executive-session proceedings." The Court further 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.

It would appear, therefore, that your Board's standard form of resolution, which simply states that "Personnel, Negotiations, Legal and Student Matters" will be discussed, is similarly defective.

As to the second point, the Board's standard closed session resolutions seeks to authorize additional closed sessions "as the need may arise . . . at any time prior to the next public meeting." I assert that a separate resolution is required for each and every closed session held during the same meeting, and that separate notice is required for closed sessions occurring after the meeting adjourns. On the latter point, see Dunn v. Mayor and Council, 163 N.J. Super. 32, 34 (App. Div.1978). On the former point, see Caldwell v. Lambrou, 161 N.J. Super. 284, 289 (L.1978).

Action Requested: *I ask that the Board amend its procedure so that its future closed session resolutions meet the requirements of the Open Public Meetings Act, specifically N.J.S.A. 10:4-13.*

Observation No 2 *Some matters have been improperly redacted from closed session minutes.*

I have reviewed the minutes of the closed sessions of February 27, 2002, March 13, 2002, March 25, 2002, April 10, 2002, April 24, 2002, May 8, 2002 and May 22, 2002. I question whether some of the redactions are permissible under the Open Public Meetings Act.

In several instances, matter related to personnel issues was redacted.

- In the minutes of the February 27, 2002 closed session, for example, the names of the following employees were suppressed: a) the employee who had taken a medical leave of absence, b) the teacher who was dismissed, c) the employee who required mentoring, and d) the employee who made a salary request.
- In the minutes of the March 13, 2002 closed session, the identity of the employee who decided to rescind his resignation was redacted.
- In the minutes of the March 21, 2002 closed session, the identities of those interviewed for the position of Mill Lake School principal were suppressed.
- In the minutes of the March 25, 2002 closed session, the identity of the bus driver who received a traffic citation was suppressed.
- In the minutes of the April 24, 2002 closed session, the identity of the staff member whose conduct was discussed was suppressed. Also, other details regarding this staff member (i.e. what he or she should "undergo," what should be discussed and with whom it should be discussed) are redacted.
- In the minutes of the May 8, 2002 closed session, a) the identity of an employee and the nature of an "upcoming" event related to that employee were redacted, and b) the identity of an employee and the nature of the physician's recommendation were redacted.
- In the minutes of the May 22, 2002 closed session, the identity of the employee who employment status was discussed was redacted.

While N.J.S.A. 10:4-12(b)(8) clearly allows discussion of personnel matters to take place in closed session, it does not follow that suppressing the identities of those employees is justified, especially since more than two and half years have elapsed since the closed sessions took place.

In South Jersey Pub. Co. v. New Jersey Expressway Authority, 124 N.J. 478, 493-94 (1991), the Supreme Court stated:

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.

In Payton v. New Jersey Turnpike Auth. 148 N.J. 524. 556-57 (1997) the Court ruled that

If a public body legitimately conducts a meeting in closed session under any of the exceptions enumerated in N.J.S.A. 10:4-12b, it nevertheless must make the minutes of that meeting "promptly available to the public" unless full disclosure would subvert the purpose of the particular exception. If disclosure would subvert the purpose of an exception, then the subversion must be balanced against the applicant's interest in disclosure. We believe that only the unusual case will justify total suppression of the minutes of a closed session; such a case would require great harm to the public interest underlying the exception from even minimal disclosure as well as a negligible interest in disclosure.

In the vast majority of cases in which full disclosure would have an adverse impact on the purpose of the particular exception, other methods of maintaining confidentiality can be achieved, such as redacting the specific information that would undermine the exception. We stress, however, that, given the Legislature's strongly stated intent to effectuate broad public participation in the affairs of governmental bodies, few cases will require even partial nondisclosure.

I don't see how release of the suppressed information identified above would subvert or undermine any of the exceptions to full disclosure. Accordingly, I believe that this information ought to be publicly disclosed.

Action Requested: *I ask that the Board publicly disclose all the information redacted from the minutes of the closed sessions held on February 27, 2002, March 13, 2002, March 25, 2002, April 10, 2002, April 24, 2002, May 8, 2002 and May 22, 2002.*

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

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February 11, 2005

John T. Paff, Secretary
Libertarian Party of Central New Jersey
P.O. Box 11853
New Brunswick, NJ 08906-1853

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

Re: Monroe Township Board of Education - Request for Records Under OPRA

Dear Mr. Paff:

You may recall that we represent the Monroe Township Board of Education in connection with the request for records under OPRA and your report which you submitted to Wayne Holliday, Secretary to the Monroe Township Board of Education, on December 28, 2004. The following is our response.

**YOUR CONTENTION THAT THE BOARD'S RESOLUTIONS
AUTHORIZING CLOSED SESSIONS DO NOT COMPLY
WITH THE OPEN PUBLIC MEETINGS ACT (N.J.S.A. 10:4-13)**

You cite the Board Resolution authorizing closed session to discuss personnel, negotiations, legal and student matters and assert that the form of resolution is deficient in two ways:

1. It does not inform the public, with any degree of specificity, of which matters will be discussed during closed session.

2. It seems to authorize additional public meetings "as the need may arise" and apparently without need for a separate resolution.

You rely upon N.J.S.A. 10:4-13 and Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO, Local 2364 v. Trenton State College Bd of Trustees, 284 N.J. Super. 108 (Law Div. 1995). At the outset, please note that the case upon which you rely was decided by the trial court in a county other than Middlesex County, where Monroe Township Board of Education is venued. As such, the holding may be persuasive, but it is not binding upon a Law Division judge sitting in Middlesex County. In addition, the holding in that case, as opposed to the language which you cited was that invalidation of the Board's action was neither appropriate nor warranted where notice of the closed session was provided and where an appropriately noticed open public meeting aired the issues. Similarly, the Monroe Township Board of Education, to the extent that it takes action on matters discussed in closed session, takes such action at appropriately noticed open public meetings where the public is free to observe and comment.

N.J.S.A. 10:4-13 does not require specific designation of the items to be discussed in closed session. The statute reads in relevant part as follows:

"No public body shall exclude the public from any meeting to discuss any matter described [in N.J.S.A. 10:4-12] 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 . . . ;"

Courts have ruled that the reasons to terminate certain employees following a closed session of a board of education did not have to be revealed or stated under the Open Public Meetings Act. To do so would circumvent the very purpose for permitting personnel matters to be discussed in closed session. Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), Cert. Den., 76 N.J. 238. The Rice Court noted that the board of education fully complied with the Open Public Meetings Act in adopting a resolution calling for an executive session to discuss personnel matters and in proceeding to hold the closed session, where the stated purpose of the closed session was clearly within the statutory exceptions pertaining to personnel matters. The public was fully aware of the nature of the personnel matters to be discussed in the executive session. It was announced to the public at the time the resolution was adopted, that any decision reached during executive session would be made known to the public when action was formally taken on it. This is precisely the procedure followed by the Monroe Township Board of Education.

The Open Public Meetings Act does not require a public body to provide "adequate

notice" of a closed session provided that the public body, at a prior public meeting, has passed a resolution stating the items to be discussed in closed session. Attorney General Formal Order 1976, No. 29

As for your second assertion challenging the right of the Board to convene into closed session "as the need may arise," the Board has never had a closed session between meetings without first complying with all of the requirements of the Open Public Meetings Act to conduct either a special meeting or an emergency meeting. In Houman v. Mayor and Council of Borough of Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977), the Court stated that the notice requirement for an executive session of the borough council was complied with where the resolution for an executive session was passed at a prior regularly scheduled public meeting of the council, for which adequate notice had been given pursuant to statute.

If the resolution authorizing closed session were passed at the beginning of each regular action meeting, either the action meeting would have to start earlier than 8:00 p.m., in order to discuss the closed session items before action was taken or the Board would have to meet in executive session after the action meeting was concluded, and possibly reconvene in open session. On some occasions, the Board's executive sessions start as early as 5:00 p.m. It would be an imposition on the public to call the action meeting as early as 5:00 p.m. solely to adopt a resolution going into closed session and keeping the public waiting for as long as three (3) hours. It would also be an imposition on the public to meet in closed session after the open session and then reconvene at an unknown time in open session, leaving the public in limbo. In effect, the Board currently adopts a resolution at an action meeting ratifying, reaffirming and restating the items discussed in closed session at a previous meeting. See Board of Education of City of Orange Township v. Brown, 233 N.J. Super. 242 (App. Div. 1989).

As far as your suggestion that the Board should give specific identification of the items to be disclosed in closed session, we have a problem. If the Board meets only once a month, it will not be able to identify, for example, at the meeting of January 26, 2005, the specific closed session items which will be discussed at its next meeting on February 23, 2005.

Your observation number 2 alleges that some matters have been improperly redacted from closed session minutes. You have argued that N.J. S.A. 10:4-12(b)(8) would not allow the identity of employees discussed in closed session to be suppressed. You also cite South Jersey Publishing Co. v. N.J. Expressway Authority, 124 N.J. 478, 493-494 (1991) and Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 556-57 (1997). While the cases you cite are certainly binding on the Monroe Township Board of Education, having been decided by the Supreme Court of New Jersey, we believe that the case law would require a court to

review documents in chambers in order to decide the extent to which they should be disclosed. Payton was cited in Christy v. Salem, 366 N.J. Super. 535 (App. Div. 2004) for that proposition.

In Payton, the Plaintiff brought suit under the Law Against Discrimination against her employer and two supervisors, alleging sexual harassment. She sought to discover her employer's confidential internal investigation for the purpose of establishing the employer's liability for its failure to respond to her complaints. The Payton Court cited Dixon v. Rutgers, The State University of New Jersey, 110 N.J. 432 (1988), another case involving the Law Against Discrimination which was concerned with the disclosure of the defendant's confidential tenure investigation. The Payton Court noted that it was dealing with the tension between two competing public interests, one favoring a disclosure and the other favoring confidentiality. Identifying the existence of a public interest to protect the confidentiality of those involved in the investigation if a loss of confidentiality would otherwise undermine the efficacy of investigations, the Payton Court fashioned a "conditional privilege" rather than a "blanket privilege." The Court stated that its application permits the trial court to supervise discovery and protect confidentiality by procedures, short of suppression, which "may include redaction, issuance of confidentiality or gag orders and sealing of portions of the record," when a competing public interest favors disclosure. 148 N.J. 524 at page 542.

I again refer you to the case which you cited, Council of NJ State College Locals, etc., which contains the following language:

"While the purpose of the act is to secure public access to the meetings of public bodies, N.J.S.A. 10:4-15 provides a means to balance the rights of an informed citizenry against the needs of government to function effectively." 284 N.J. Super. 108 at Page 115.

I also direct you to the Payton Court's comments with regard to closed sessions to discuss litigation. The Court stated:

"We view N.J.S.A. 10:4-12(b)(7), relating to pending litigation and material covered by the attorney-client privilege, as duplicative of the protection otherwise afforded by the attorney-client privilege and work-product doctrine. If a communication is covered by the privilege, then the public body legitimately may meet with its attorney in closed session." 148 N.J. 524 at page 559.

The executive session to consider pending litigation in which a public entity was a party was upheld in Fallone Properties LLC v. Bethlehem Township Planning Board, 369 N.J. Super. 552 (App. Div. 2004) at page 567.

While you state that you don't see how release of the "suppressed information" would subvert or undermine any of the exceptions to full disclosure, we feel otherwise. The closed session discussions took place in the presence of counsel and as such are protected under the lawyer-client privilege and work-product privilege. In addition, the individual employees and others have a legitimate right to expect that the discussions will remain private. Under the circumstances, the Board will not disclose the information redacted from the Minutes referred to in your report of December 28, 2004.

By way of conclusion, since the Board would never simply meet between meetings without otherwise complying with the Open Public Meetings Act and since the Board complies with State statute which requires only the "general nature of the subject to be discussed" in executive session, the Board must respectfully reject your request to take action.

Very truly yours,


BERTRAM E.. BUSCH
Monroe Township Board of Education Attorney

BEB/db

cc: Dr. Ralph Ferrie, Superintendent of Schools
Dr. Christopher Tienken, Assistant Superintendent of Schools
Wayne Holliday, Board Secretary/Business Administrator

BOARD ATTORNEY

Mr. Bertram E. Busch, Esq.

MEMBERS OF THE PUBLIC — 103

After the Pledge of Allegiance and roll call, the President read the following statement:

In accordance with the provisions of the New Jersey Open Public Meetings Law, the Monroe Township Board of Education has caused notice of this meeting to be published by having the date, time and place thereof posted June 23, 2006:

1. At all schools,
2. Home News Tribune,
3. Cranbury Press,
4. Filed with the Clerk of the Municipality.

CLOSED SESSION RESOLUTION

Ms. Speizer moved, seconded by Ms. Haring the adoption of the following resolution:

Be It Resolved, that the Board of Education of the Township of Monroe hereby moves to go into closed session, in accordance with Sunshine Law, Chapter 231 of the Public Laws of 1975 to discuss the following subjects:

Personnel, Negotiations, Legal and Student Matters.

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. Motion Carried Unanimously.

ATTENDANCE -_continued

ATTORNEY

Mr. Bertram E. Busch, Esq.

MEMBERS OF THE PUBLIC —12

After the Pledge of Allegiance and roll call, the Board Vice President read the following statement:

In accordance with the provisions of the New Jersey Open Public Meetings Law, the Monroe Township Board of Education has caused notice of this meeting to be published by having the date, time and place thereof posted July 14, 2006:

1. At all Schools,
2. Home News Tribune,
3. Cranbury Press,
4. Filed with the Clerk of the Municipality.

CLOSED SESSION RESOLUTION

Ms. Leonard moved, seconded by Ms. Speizer the adoption of the following resolution:

Be It Resolved, that the Board of Education of the Township of Monroe hereby moves to go into closed session, in accordance with Sunshine Law, Chapter 231 of the Public Laws of 1975 to discuss the following subjects:

Personnel, Negotiations, Legal and Student Matters.

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. Motion Carried Unanimously.

ATTORNEY

Mr. Bertram E. Busch, Esq.

MEMBERS OF THE PUBLIC - 23

After the Pledge of Allegiance and roll call, the Board President read the following statement:

In accordance with the provisions of the New Jersey Open Public Meetings Law, the Monroe Township Board of Education has caused notice of this meeting to be published by having the date, time and place thereof posted August 25, 2006:

1. At all Schools,
2. Home News Tribune,
3. Cranbury Press,
4. Filed with the Clerk of the Municipality.

CLOSED SESSION RESOLUTION

Mr. Leary moved, seconded by Mr. Kaufman the adoption of the following resolution:

Be It Resolved, that the Board of Education of the Township of Monroe hereby moves to go into closed session, in accordance with Sunshine Law, Chapter 231 of the Public Laws of 1975 to discuss the following subjects:

Personnel, Negotiations, Legal and Student Matters

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. Motion Carried Unanimously.

PRESENTATION – NO CHILD LEFT BEHIND

Dr. Ferrie gave a presentation regarding No Child Left Behind and test scores for grades 3, 4, 8 and 11. The public was given the opportunity to ask questions.

PUBLIC FORUM

LETTER OPINION – NOT FOR PUBLICATION

January 22, 2007

John Paff
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James F. Schwerin, Esquire
Parker McCay P.A.
Suite 102A
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1009 Lenox Drive
Lawrenceville, NJ 08648

Re: Paff v. Monroe Township Board of Education
Docket No. L-7770-06

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.

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 13, 2007, 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

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.

(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.

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 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.

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

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 N.J. 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

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,

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).

Judge Carchman's decision 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 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). 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,

Alexander P. Waugh, Jr.
Judge of the Superior Court