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Plaintiff

JOHN PAFF,	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, CIVIL PART
Plaintiff	:	CAMDEN COUNTY
vs.	:	DOCKET NO. L-7027-06
	:	
LAWNSIDE BOROUGH COUNCIL	:	Civil Action
	:	
Defendant	:	NOTICE OF MOTION

To: Matthew B. Wieliczko, Esq., Council for
Defendant Lawnside Borough Council

PLEASE TAKE NOTICE that on **Friday, June 8, 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 101 South Fifth Street, Camden, New Jersey for the following relief:

- a) Leave to Amend the Complaint
- b) An Order, pursuant to R.1:10-3, 1) holding that Defendant's Counsel's April 27, 2007 certification does not fully comply with the Court's April 13, 2007 Order, and 2) requiring Defendant or its counsel to file and serve a compliant certification.

I will rely on the enclosed Certification of John Paff and Letter Brief. Oral argument is **not** requested. In accordance with R.4:9-1, I have attached a copy of my proposed Amended Complaint. Pursuant to R.1:6-2(c), there is no pre-trial conference, calendar call or trial date fixed at this time. Also, the Discovery End Date has passed.

Dated: May 10, 2007

John Paff, Plaintiff

CERTIFICATION OF SERVICE

On May 10, 2007, I served a copy of this Notice of Motion, Certification, Letter Brief and form of Order upon Defendant Lawnside Borough Council by priority mail to Matthew B. Wieliczko, Esq., Zeller & Bryant, LLP, 10 Melrose Ave, Suite 400, Cherry Hill, NJ 08003.

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: May 10, 2007

John Paff, Plaintiff

John Paff

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Francis J. Orlando, Jr., A.J.S.C.

Hall of Justice

101 S Fifth St – Suite 670

Camden, New Jersey

RE: Paff v. Lawnside Borough Council

Docket No. L-7027-06

Returnable: June 8, 2007

Dear Judge Orlando:

Please accept this letter in lieu of a more formal brief in support of Plaintiff's Motion.

INTRODUCTORY STATEMENT

This motion seeks two forms of relief: a) leave to amend the Complaint, pursuant to R.4:9-1 and b) an Order, pursuant to R.1:10-3, 1) holding that Defendant's Counsel's April 27, 2007 certification does not fully comply with the Court's April 13, 2007 Order, and 2) requiring Defendant or its counsel to file and serve a compliant certification.

LEGAL ARGUMENT

Point 1: Motion to Amend the Complaint

Although Plaintiff requested the minutes/notes of some of the Defendant's 2006 nonpublic (executive or closed) meetings on September 5, 2006, he did not receive any of those records until March 21, 2007, when heavily redacted versions of those minutes/notes were served upon him as part of Defendant's response to Plaintiff's summary judgment motion. Plaintiff's Cert. ¶ 8.

After having had an opportunity to review those redacted minutes/notes, Plaintiff

now wishes to seek declaratory and injunctive relief on a) whether the minutes/notes of the April 24, 2006 and August 28, 2006 closed meetings, at which personnel matters were discussed, satisfy the “reasonably comprehensible” standard imposed by N.J.S.A. 10:4-14; and b) whether it was legal for Defendant to meet with prospective “redevelopers” on March 7, 2006, March 8, 2006 and March 14, 2006 without the public being allowed to observe those meetings.

R.4:9-1 permits Plaintiff to file an amended complaint only if he first gains his adversary’s consent or the Court’s permission. Since Plaintiff has asked for, but not yet received his adversary’s consent, Plaintiff’s Cert. ¶¶ 6, 7, he now moves for an Order granting him leave to file and serve an amended complaint. (A copy of the proposed Amended Complaint is attached to the Notice of Motion, as required by R.4:9-1.)

A motion for leave to amend should be liberally granted and without consideration of the ultimate merits of the amendment. Notte v. Merchants Mut. Ins. Co., 185 N.J. 490, 500-501 (2006). Deciding a motion to amend “requires a two-step process: whether the non-moving party will be prejudiced, and whether granting the amendment would nonetheless be futile.” Id.

A grant of the present motion will not prejudice the Borough of Lawnside. It was the Defendant Borough, not the Plaintiff, that withheld the minutes/notes for over six months after Plaintiff requested them. Any prejudice was caused by Defendant’s own inaction. Further, the questions raised by the First Amended Complaint are substantial, important questions and are not “futile.”

2: As to Relief under R.1:10-3.

In this case, the Defendant Borough has claimed that much of the material contained

within its nonpublic meeting minutes/notes is privileged or otherwise exempt from public disclosure. Because of the Defendant's Claim, this Court "is obliged . . . to inspect the challenged document *in camera* to determine the viability of the claim." Hartz Mountain Industries, Inc. v. New Jersey Sports & Exposition Authority, 369 N.J.Super. 175, 183 (App.Div.), certif. denied, 182 N.J. 147 (2004). Recognizing of this obligation, this Court ordered Defendant to submit unredacted versions of its nonpublic meeting minutes/notes at issue "under seal . . . for an *in camera* inspection."

An *in camera* inspection "implies the necessity of recorded fact-finding by the trial judge **as well as the opportunity of the parties to address general principles relative to the claim of confidentiality and privilege . . .**" Id., (emphasis supplied). In recognition of Plaintiff's right and need to meaningfully participate in the *in camera* proceeding, this Court's April 13, 2007 Order also required the Defendant to file and serve

a certification that sets forth specific reliable evidence sufficient to meet a statutorily recognized basis for each redaction made to the nonpublic meeting minutes of January 23, 2006; February 1, 2006; February 22, 2006; March 7, 2006; March 8, 2006; March 14, 2006; March 27, 2006; April 5, 2006; April 24, 2006; May 31, 2006; June 7, 2006 (if able to be located) and August 28, 2006. Counsel's preparation of the certification required herein shall be guided by the standard included in R.4:10-2(e), which permits a party claiming privilege to "describe the nature of the documents . . . not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

The Court realized that without this detailed and specific certification, Plaintiff could not meaningfully participate in the *in camera* proceeding because the Court and the Defendant's attorney would both be privy to the contents of the minutes/notes at issue while Plaintiff would be in the dark.

In response to the Court's Order, Defendant's counsel submitted an April 27, 2007

Certification, with unredacted minutes from Defendant's March 7, 2006, March 8, 2006 and March 14, 2006 nonpublic sessions appended to it. Exhibits P4 – P12. Unfortunately, Counsel's explanations regarding the redacted matter are so general and conclusory that they provide Plaintiff with no real way of assessing or challenging them.

For example, the March 27, 2006 nonpublic minutes (attached as Exhibit P17) are entirely suppressed except that the following information about the nonpublic session is revealed: a) that it was held on March 27, 2006 between 7:56 p.m. and 9:12 p.m.; b) that Council-members Johnson-Clark, Stanton, Moore, Still and Wardlow were present and c) that "no action was taken."

The March 27, 2006 public minutes (attached as Exhibit P18 – P20) make three references to that date's closed session: a) Economic Development Solicitor Morris Smith "would like to go into Closed Caucus to give his report to Council," b) a "Tax Assessor . . . matter will be discussed in closed session," and b) an "Amending Resolution [regarding] Schoor DePalma, LLC . . . will be discussed in closed session."

Accordingly, Plaintiff is entitled to a certification regarding March 27, 2006 closed meeting containing the following, hypothetical level of detail:

- 1) Morris Smith gave his opinion on whether the Borough's proposed redevelopment plan was consistent with Camden County's Master Plan. The specific advice that Mr. Smith gave, however, is redacted because of the attorney-client privilege.
- 2) Whether or not the tax assessor should be given a raise was discussed and the Council elected to revisit that issue at a future time. The comments made by specific Council members are redacted in accordance with N.J.S.A. 10:4-12(b)(8) and South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478 (1991).
- 3) The Council discussed strategy on how to approach Schoor DePalma regarding renegotiation of the Borough's contract with that firm. The parts of the minutes that reveal the Township's negotiation strategy are exempt

from disclosure under N.J.S.A. 10:4-12(b)(7) because the negotiations are still ongoing.

Providing the type and level of detail in the above hypothetical would allow Plaintiff to truly “assess the applicability of the privilege or protection” while not disclosing information that would hurt the Borough’s interests. ¶ 7 of Counsel’s Certification, however, is completely devoid of any details and merely concludes that

the redactions were made corresponding with intra-agency advisory, consultive [sic] and deliberative material and discussions regarding personnel and payroll. This information needs to remain redacted to preserve and protect the municipal entities [sic] deliberative process and personnel proceedings/strategies.

Counsel’s Certification does not meet the requirements of the April 13, 2007 Order or of the authority cited herein because it does not provide sufficient details enabling an understanding as to whether or not the redactions were reasonable and necessary.

In an August 21, 2006 unpublished decision¹, the Appellate Division held that

The better practice would have been to submit the Vaughn² index to plaintiff. The judge indicated his concern that the summary on the privilege log may disclose too much information and inadvertently waive any privilege. Careful drafting would have avoided such a consequence. If the judge was concerned about the ability of counsel to provide a proper summary, the log could have been subject to preliminary review and redrafting, if required. Moreover, in this case the nature of the information sought does not fall within that rare circumstance where the index should be withheld. Plaintiff should have received a copy of the log.

If this Court and Defendant’s counsel are likewise concerned that providing Plaintiff with a sufficiently detailed and specific certification may “disclose too much information,” Plaintiff does not object to the Court preliminarily reviewing the Certification before

¹ Komuves v. Township Of Edison, Not Reported in A.2d, 2006 WL 2389633. A copy of this opinion is attached to this letter brief.

disclosing it to Plaintiff. Plaintiff does object, however, to participating in an *in camera* proceeding without having enough information about the matters under discussion to allow for cogent points and objections.

Plaintiff seeks relief by way of motion to enforce litigants' rights under R.1:10-3. Application of this Rule is "not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of [a] court order." Ridley v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997). In this case, the Court ordered Defendant to file and serve a detailed and comprehensive certification explaining and justifying the redactions Defendant made to its nonpublic meeting minutes/notes. Unfortunately, Counsel's explanations regarding the redacted matter are so general and conclusory as to be meaningless. Accordingly, Plaintiff requests that the Court find that Counsel's April 27, 2007 submission falls short of what the April 13, 2007 Order demands require him to resubmit a more detailed and verbose Certification, perhaps for preliminary review by the Court before it is disclosed to Plaintiff.

Respectfully,

John Paff

² A Vaughn index," named for Vaughn v. Rosen, 484 F.2d 820 (D.C.Cir.1973), is privilege log similar to the Certification that Defendant's Counsel was ordered to produce.