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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 FOR
	:	SUMMARY JUDGMENT

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

PLEASE TAKE NOTICE that on **Friday, December 7, 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 an Order granting me summary judgment on all unresolved counts of my First Amended Complaint and for costs.

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: November 8, 2007

John Paff, Plaintiff

CERTIFICATION OF SERVICE

On November 8, 2007, I served a copy of this Notice of Motion, Certification, Statement of Material Facts, Letter Brief and form of Order upon Defendant Lawnside Borough Council by regular mail to Matthew B. Wieliczko, Esq., Zeller & Bryant, LLP, 10 Melrose Ave, Suite 400, Cherry Hill, NJ 08003 and simultaneously be email.

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: November 8, 2007

____

John Paff, Plaintiff

John Paff

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November 8, 2007

<u>Francis J. Orlando, Jr., A.J.S.C.</u>
Hall of Justice
101 S Fifth St – Suite 670
Camden, New Jersey

RE: Paff v. Lawnside Borough Council
Docket No. L-7027-06
<u>Returnable: December 7, 2007</u>

Dear Judge Orlando:

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

SUMMARY OF ISSUES TO BE DETERMINED

The remaining issues in this case are:

Third Count: Whether Defendant's closed session minutes from April 24, 2006 and August 28, 2006 (Paff Cert., Exhibits 17 and 19) are "reasonably comprehensible" and thus compliant with N.J.S.A. 10:4-14.

Fourth Count: Whether the Senator Byron M. Baer Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., permits a public body to meet in closed session with the adverse party to a contract negotiation.

Costs: Whether Plaintiff is the prevailing party and ought to be awarded the costs of this action.

LEGAL ARGUMENT

Point I: Standard Of Review On A Motion For Summary Judgment

Plaintiff is entitled to summary judgment if, on the full motion record, 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).

Since the evidence is documentary and consists of meeting minutes and correspondence, there can be no genuine factual dispute as to what language those documents contain. Accordingly, the issued presented by the First Amended Complaint are ripe for summary judgment because all the Court needs to do is to apply the law to the language contained within those documents.

Point II: The minutes of Defendant's nonpublic meetings held on April 24, 2006 and August 28, 2006 are not "reasonably comprehensible" and therefore are not compliant with N.J.S.A. 10:4-14.

Defendant has admitted that Exhibits 17 and 19 to the Plaintiff's certification are true and unredacted copies its April 24, 2006 and August 28, 2006 nonpublic sessions. Statement of Material Facts, ¶ 1. The parts of those minutes that pertain to "personnel matters" state:

April 24, 2006: "Discussion re: Personnel matters."

August 28, 2006: "Personnel Matter re: [illegible][1]."

Since neither set of minutes provide any information regarding the identity of the officer or employee discussed or the nature of the discussion they are not compliant with the Supreme Court's holding in South Jersey Publishing Co. v. New Jersey Expressway Authority, 124 N.J. 478 (1991). I ask that the Court please bear with the following extensive quotation from pages 493 to 495 of this case.

> In our view, respondents have overstated the Legislature's purpose in allowing public bodies to exclude the public from

[1] Exhibit 19 reveals an obliterated word after "Personnel matter re:" Since Defendant has already certified that Exhibit 19 is unredacted, it is apparent the obliteration is not a redaction but is also present in the original minutes.

meetings at which personnel matters are to be discussed. Unlike other provisions authorizing exclusion of the public, the apparent objective of which is to preserve the secrecy of confidential information, see, e.g., N.J.S.A. 10:4-12(b)(1) and (2), the personnel exemption focuses on free and uninhibited discussion about matters relating to the hiring, firing, performance, compensation, and discipline of public employees. Such discussions necessarily involve subjective comments and evaluations of employees by members of the public body, and their willingness to comment openly and freely about such matters would obviously be inhibited if the discussion were to be conducted publicly. The statutory exemption for personnel matters, recognizing the potentially-inhibiting effect of public debate about the qualifications, performance, merit, and shortcomings of specific employees, allows that debate to occur in executive session.

The Act specifically requires, however, that the public maintain "reasonably comprehensible minutes" of all meetings including executive sessions to be "promptly available" to the public unless inconsistent with the provisions of the Act authorizing the public body to meet in executive session. N.J.S.A. 10:4-14. The Legislature thereby expressed its strong policy favoring adequate disclosure of all actions taken by public bodies, whether at public meetings or executive sessions.

Contrary to respondent's contentions, we find no inconsistency between the exemption allowing personnel matters to be discussed and debated in executive session and the Act's mandate that adequate minutes of all meetings be available to the public. **The minutes are intended to recite and disclose any official decision or action taken by a public body, and necessarily must contain sufficient facts and information to permit the public to understand and appraise the reasonableness of the public body's determination.** 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.
>
> The salutary purposes for allowing confidential discussion are neither inconsistent nor in conflict with the strong public policy requiring comprehensible disclosure of the actions taken by public bodies. **To the extent a cognizable privacy interest may be compromised by the required disclosure, the extent of disclosure may be modified appropriately, provided the public interest is not subverted.** Especially when the issue concerns the conduct of a public official that potentially affects the expenditure of public funds--in this case, continued salary and benefits for more than nine months following Vass's resignation--the public body cannot withhold permanently the minutes from disclosure and the employee cannot require it to do so. The compelling public interest in favor of informing the public of the basis for governmental decision making mandates disclosure. **Stated simply, that public interest is in access to sufficient information to enable the public to understand and evaluate the reasonableness of the public body's action.**

[Emphasis supplied, internal citation omitted]

This case establishes a two-step procedure. First, it requires a public body to include within its closed meeting minutes "sufficient facts and information to permit the public to understand and appraise the reasonableness" of whatever action (or, an election to *not* take action) of the body decided upon. Second, it requires the public body to identify any "cognizable privacy interest [that] may be compromised" if the minutes are fully disclosed, balance that interest against the public's interest in disclosure, and release the minutes, redacted as necessary, to the extent that the public's interest outweighs the privacy interest.

Unfortunately, we are not able to reach the second prong of the South Jersey Publishing analysis because Defendant's minutes fail to record any detail at all as to the nature of the personnel matters discussed. Defendant Council should have kept

"reasonably comprehensible" minutes of its private personnel discussions. For example, closed session minutes dealing with personnel matters should, hypothetically, contain statements such as:

1. Councilman John Doe said that on March 25, 2006, he observed Police Officer Mary Roe sitting in a diner on the White Horse Pike for four hours, which is far in excess of her allowed lunch break. The Council decided that Officer Roe ought to be disciplined and directed the Borough Administrator to see to it that appropriate charges were brought against Officer Roe and to report back at the next closed Council meeting, or

2. The Council discussed whether Department of Public Works employee George Smith ought to be promoted to supervisor. While several members of the Council felt that Smith was incompetent and had a poor attendance record, others pointed out that Smith came from a family that has made significant financial contributions to the Camden County Democratic Party. The Mayor then remarked that he has received word that prominent figures within the Democratic Party would be disappointed or perhaps offended if Smith was not promoted. After discussion, it was determined that Smith's political affiliations more than compensated for his lack of competence and attendance, and approved the promotion.

These hypothetical paragraphs contain "sufficient facts and information" to satisfy the first prong of the South Jersey Publishing analysis. The next question would be how much of the text, if any, should be publicly disclosed. As stated above, we are not, and never will be, in a position to make that determination because the required "sufficient facts and information" are simply absent from the minutes.

Accordingly, this Court ought to declare that Defendant's failure to record "sufficient facts and information" regarding personnel matters within its closed minutes constitutes a violation of N.J.S.A. 10:4-14 and require Defendant, going forward, to include "sufficient facts and information" as required by South Jersey Publishing, whenever it excludes the public from a meeting to discuss "personnel matters" as permitted by N.J.S.A. 10:4-12(b)(8).

The question of how much of those nonpublic minutes must be publicly disclosed will have to be addressed another day.

Point III: Redevelopers and other adverse parties to municipal contracts, other than those involving collective bargaining matters, are not allowed to attend nonpublic sessions of the governing body.

On March 7, 2006, March 8, 2006 and March 14, 2006, Defendant Council met in closed session with representatives of companies that sought to become a "redeveloper" of a portion of the Borough of Lawnside. Statement of Material Facts, ¶ 2.

N.J.S.A. 40:12A-3 defines "redeveloper" as

> any person, firm, corporation or public body that shall enter into or propose to enter into a contract with a municipality or other redevelopment entity for the redevelopment or rehabilitation of an area in need of redevelopment, or an area in need of rehabilitation, or any part thereof, under the provisions of this act, or for any construction or other work forming part of a redevelopment or rehabilitation project.

Thus, a prospective redeveloper is a party to a "contract negotiation" as contemplated by N.J.S.A. 10:4-12(b)(7).

N.J.S.A. 10:4-12(b)(7) permits a public body to privately discuss:

> 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.

In Nevin v. Asbury Park City Council, 2005 WL 2847974 (App. Div. November 1, 2005), (Paff Certification, Exhibits 25 through 29) the Appellate Division held that the (b)(7) exception "does not relate to contract negotiations with the opposing party but only . . . to discussions ***about*** contract negotiations by the public body." Nevin at page 2, emphasis in original. The Court reasoned that this conclusion was "made almost inescapable by

subsection b(4), which expressly allows the opposing party to a collective bargaining agreement to be present in a non-public session [while no] such language appears in b(7) which itself exempts collective bargaining discussions from the general rubric of contract negotiations." Ibid. The Court also agreed with and quoted extensively from the late Michael Pane's writings on local government in New Jersey Practice. Ibid.

While an unpublished Appellate Division decision is not binding on this Court, the reasoning set forth in it is sound and should persuade this Court that the presence of prospective redevelopers at Defendant Council's nonpublic meetings violated the Senator Byron M. Baer Open Public Meetings Act. Accordingly, this Court should exercise the broad powers provided by N.J.S.A. 10:4-16, and grant the declaratory and injunctive relief sought in ¶¶ D and E of the First Amended Complaint.

Point IV: Plaintiff should be awarded his 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)

The present litigation has already resulted in the entry of the Court's April 13, 2007 Order (Paff Certification, Exhibits 30 through 32) which caused substantial changes to the Defendant's closed session resolution and minute disclosure procedures. The April 13, 2007 Order, by itself, satisfies both prongs of the Singer analysis. Plaintiff hopes that the present motion will cause additional changes to the manner in which Lawnside Borough conducts and records minutes of its closed meetings.

On the present record, 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 Plaintiff's 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 Senator Byron M. Baer Open Public Meetings Act would be frustrated if citizens were dissuaded enforcing it.

Respectfully,

John Paff