

ZELLER & BRYANT, LLP  
Attorneys for Defendant,  
Lawnside Borough Council

Woodcrest Pavilion  
Ten Melrose Avenue - Suite 400  
Cherry Hill, New Jersey 08003  
Phone: (856) 428-6600

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
CAMDEN COUNTY  
DOCKET NO: L-7027-06

JOHN PAFF,

Plaintiff,

vs.

Civil Action

LAWNSIDE BOROUGH COUNCIL,

Defendant.

**CERTIFICATION OF COUNSEL,  
MATTHEW B. WIELICZKO, ESQUIRE**

I, Matthew B. Wieliczko, Esquire of full age, do hereby  
certify as follows:

1. I am an attorney at law of the State of New Jersey and I  
am employed by ZELLER & BRYANT, LLP, attorneys for Defendant,  
Borough of Lawnside, in the above-entitled matter.

2. Of the meetings that have been identified by the Plaintiff  
in this matter, of either the Borough of Lawnside City Council or  
the Borough of Lawnside Redevelopment Agency, copies of

the minutes from the public meeting, along with the record of the corresponding executive session, which has been redacted in some instances, have been attached to the Certification of the Borough Administrator, Jessie Harris ("Harris Cert. ").<sup>1</sup>

3. For the January 23, 2006 regular caucus meeting, the minutes detail that the Economic Development Solicitor requested going to closed session to give his report to Mayor and Council, that the Borough's Economic Development Consultant stated that he would give the Mayor and Council a report in closed session and that subsequent to closed session, Mayor Bryant gave a brief summary to the attendees at the meeting of what was discussed in closed session.

4. For the February 1, 2006 regular council meeting, the minutes reflect that subsequent to closed session, the Mayor stated to those in attendance at the meeting that legal matters were discussed in closed caucus. As detailed in the Harris Cert., prior to going to closed session, a statement was made concerning what the anticipated topics were to be discussed during closed session.

5. For the February 22, 2006 regular caucus meeting, the minutes reflect that the Economic Development Solicitor, Morris Smith, stated that he would like to go into closed session to give his report to Mayor and Council. In addition, the minutes reflect that subsequent to closed executive session, Mayor Bryant gave a brief summary of what was discussed in closed session.

6. For the March 7, 2006 redevelopment meeting, the minutes

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<sup>1</sup> This is with the exception of the record from the June 7, 2006 council executive session.

reflect that the Economic Development Solicitor, Morris Smith, stated that the Mayor and Council go into closed session regarding certain matters that are under the Public Meetings Act. Mr. Smith detailed that he will be hearing different developer's ideas and that is why that part of the meeting is closed. He stated that no decision will be made tonight until they hear each developers' plan. Mayor Bryant detailed that while no recording or transcripts were made of the closed session, some minutes would be taken. The minutes from the public redevelopment meeting reflect that Mr. Smith, the Economic Development Solicitor, stated that none of the minutes would be made for the public until all developers have been heard. Mr. Smith then explained the process of the Public Meetings Act. In addition, after executive session, the Economic Development Solicitor stated what was discussed in closed session.

7. For the March 8, 2006 redevelopment meeting, the minutes reflect that the Mayor detailed that the developer that would be making a presentation in closed session would be Vineland Construction and Looney Ritz and Kiss. In addition, the Mayor detailed that the developers that spoke in executive session at the March 7, 2006 meeting were American Estate Developers and North Star, KAG. As detailed in the Harris Cert., subsequent to executive session, a statement was made to the attendees summarizing what was discussed at executive session.

8. For the March 14, 2006 redevelopment meeting, the minutes reflect that the economic developer consultant detailed that the developers would introduce themselves prior to closed session. In

addition, and as set forth in the Harris Cert. subsequent to the closed session, a summary was provided to those in attendance concerning what was discussed during closed session.

9. For the March 27, 2006 regular caucus meeting, the minutes reflect that the Economic Development Solicitor stated that he would like to go into closed caucus to give his report to Council. In addition, the President of Council, Wardlow, stated that a resolution authorizing promotion to lieutenant would be discussed in closed caucus. In addition, the minutes from the public meeting reflect that Council stated that the Tax Assessor would be discussed in closed session along with a third party vendor, Schoor DePalma. The minutes also reflect that subsequent to the closed session, the Borough Solicitor gave a brief summary of what was discussed in closed session.

10. For the April 5, 2006 regular Council meeting, and as detailed in the Harris Cert., statements were made prior to going into executive session detailing what would be discussed during executive session. In addition, the public meeting minutes reflect that subsequent to executive session Mayor Bryant gave a summary of what was discussed in closed caucus.

11. For the April 24, 2006 regular caucus meeting, the Harris Cert. details that statements were made both before and after the executive session detailing what would be, and what was, discussed at executive session. In addition, the meeting minutes reflect that in conjunction with moving to go to closed session, the statement was made that personnel (the meeting minutes reflect a

typo, "personal") matters would be discussed during closed session. In addition, the meeting minutes detail that subsequent to executive session, the Borough Solicitor gave a brief summary of what was discussed in closed caucus and stated that council spoke about a contract to sell a fire engine and stated that "a public sale notice" needs to be done.

12. With regard to the May 31, 2006 regular caucus meeting, the minutes reflect that in conjunction with moving to go into closed session, a statement was made that during the closed session personnel matters would be discussed (the meeting minutes contain a typo, "personal"). In addition, and as detailed in the Harris Cert., subsequent to reconvening after executive session, a statement was made to the public concerning what was discussed during executive session.

13. With regard to the June 7, 2006 regular council meeting, as detailed in the Harris Cert. prior to going to executive session, a statement was made detailing what would be discussed during executive session. In addition, the meeting notes reflect that subsequent to executive session, Mayor Bryant gave a brief summary of what was discussed in closed caucus.

14. With regard to the August 28, 2006 regular caucus meeting, as detailed in the Harris Cert. prior to going into closed session, a statement was made concerning what would be discussed during closed executive session. In addition, and as detailed in the meeting minutes, subsequent to executive session the Solicitor

gave a summary of what was discussed in closed caucus/executive session.

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

DATED: March 20, 2007

ZELLER AND BRYANT  
Attorneys for Defendant,  
Borough of Lawnside

By: \_/s/ Matthew B. Wieliczko  
MATTHEW B. WIELICZKO, Esquire

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JOHN PAFF,

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LAWNSIDE BOROUGH COUNCIL,

Defendant.

**DEFENDANT, BOROUGH OF  
LAWNSIDE'S RESPONSE TO THE  
PLAINTIFF'S STATEMENT OF  
MATERIAL FACTS AND  
COUNTERSTATEMENT**

In support of its Motion for Partial Summary Judgment returnable on March 30, 2007, the Plaintiff has provided the Court with a Statement of Material Facts. Defendant Borough of Lawnside, ("Borough") responds pursuant to R. 4:46-2(b) as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.

**COUNTERSTATEMENT**

In support of its counterstatement of facts in opposition to the Plaintiff's motion for partial summary judgment, the Defendant Borough relies upon, as if fully set forth herein, the contents of the Certifications of Jesse Harris and counsel, Matthew B. Wieliczko, Esquire.

DATED: March 20, 2007

ZELLER AND BRYANT  
Attorneys for Defendant,  
Borough of Lawnside

By: /s/ Matthew B. Wieliczko  
MATTHEW B. WIELICZKO, Esquire

ZELLER & BRYANT, LLP  
Attorneys for Defendant,  
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LAWNSIDE BOROUGH COUNCIL,

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**DEFENDANT, BOROUGH OF  
LAWNSIDE'S MEMORANDUM OF  
LAW IN OPPOSITION TO THE  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

#### INTRODUCTION

Plaintiff comes before this Court on a motion for partial summary judgment seeking the following:

(1) A "Declaration" that motions in twelve public meetings passed by the Defendant Borough of Lawnside ("Borough") to go into nonpublic session violated the Open Public Meetings Act, N.J.S.A. 10:4-13 ("OPMA"); and,

(2) A "Declaration" for prospective relief that resolutions to be passed by the Defendant Borough prior going into future nonpublic session contain certain information; and

(3) A prospective Order enjoining the Defendant Borough from passing motions or resolutions in the future, authorizing nonpublic executive sessions, which motions or resolutions do not meet the requirements the Plaintiff sets forth in a proposed form of Order; and

(4) A "Declaration" that the Borough has violated the Plaintiff's rights under OPMA and the Open Public Records Act ("OPRA"), and the common law, by not providing access to "the minutes and notes" from twelve nonpublic meetings; and

(5) An Order compelling the Defendant Borough to produce within seven (7) days copies of its notes and minutes from nonpublic meetings held on twelve occasions, with the exception that the Defendant Borough shall be permitted to redact the record from executive session "as narrowly as possible" and provide Plaintiff with a written explanation of its reasons for each redaction; and

(6) An prospective Order that permanently enjoins the Defendant Borough from failing or refusing to make nonpublic meeting minutes, with the appropriate redactions properly explained, available to the public within an unspecified number of days of receiving future requests.

**STATEMENT OF FACTS**

In opposing this motion, Defendant, Borough of Lawnside relies upon this Memorandum of Law, the Certifications ("Cert.") of Matthew B. Wieliczko, Esquire ("MBW") and Jesse Harris ("Harris"), along with Defendant's responses to the Plaintiff's Statement of Material Facts, and the Defendant's counterstatement of facts, all of which are incorporated herein by reference as if set forth at length.

**LEGAL ARGUMENT**

**POINT I**

**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED INsofar AS THERE IS A GENUINE ISSUE OF MATERIAL FACT WITH REGARD TO NUMEROUS ISSUES RELATED TO THE "RELIEF" AND "DECLARATIONS" SOUGHT BY THE PLAINTIFF.**

Summary Judgment is not warranted on the facts of this case. The facts, documentary evidence and admissions by the parties show that numerous genuine issues of material fact exist. Accordingly, summary judgment is not warranted in favor of Plaintiff Paff.

Court R. 4:46-2 et seq., provides that the court should grant summary judgment when "the pleadings . . . answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or Order as a matter of law." Id. In Brill v. Guardian Life Insurance of America, 142 N.J. 520 (1995), the Supreme Court of New Jersey considered R. 4:46-2(c) and articulated a reformulative standard for resolving summary judgment motions:

Consistent with the national trend, we hold that under R. 4:46-2, when deciding summary judgment motions trial courts are required to

engage the same type of evaluation, analysis or sifting of evidential materials as required by R. 4:37-2(b) [governing motions for directed verdict] in light of the burden of persuasion that applies if the matter goes to trial.

\* \* \*

Under this new standard, determination whether there exists a "genuine issue" of material facts that precludes summary judgment requires the motion judge to consider whether the competent evidential material presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party . . . The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment.

Brill v. Guardian Life, 142 N.J. at 539-540 [quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Court 2505, 2512 (1986)].

Significantly, and as detailed above, the current motion by Paff must be viewed in a light most favorable to the non-moving party, Borough. In accepting the disputed evidence in the light most favorable to the non-movant Borough, and given the series of factual contentions and evidential material which has been detailed above, and which is contained in and attached to the Wieliczko and Harris Certs., and the very moving papers of Plaintiff Paff, evidence and facts have been set forth establishing genuine issues of material fact and, therefore, Plaintiff's motion should be denied.

**POINT II**

**A PORTION OF THE PLAINTIFF'S APPLICATION IS MOOT INSOFAR AS THE RELIEF SOUGHT, THE PRODUCTION OF THE RECORD OF EXECUTIVE SESSIONS, HAS BEEN PRODUCED.**

Plaintiff seeks the record of at twelve executive session meetings. Defendant has produced the redacted record from eleven of twelve of those meetings, which in some instances has been redacted. See Harris Cert. and MBW Cert<sup>1</sup>. Accordingly, that portion of Plaintiff's complaint and this application regarding the non-production of these materials is moot. A case is moot when the issue which was the subject of litigation has been resolved, at least as it relates to the original parties who were responsible for initiating litigation. De Vesa v. Dorsey, 134 N.J. 420, 428 (1993). New Jersey Courts will generally not entertain a case when the issue has become moot. *Ibid*.

**POINT III**

**PLAINTIFF'S CLAIMS FOR RELIEF UNDER THE OPEN PUBLIC MEETINGS ACT ARE UNTIMELY, AND THEREFORE, SHOULD BE DISMISSED**

N.J.S.A. 10:4-15, headed "Proceedings to void actions in violation of act" provides, in part, the following:

any action taken by a public body at a meeting which does not conform with the provisions of this Act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public . . .

The Plaintiff makes a series of assertions concerning alleged violations of OPMA at a series of twelve meetings, the last of which

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<sup>1</sup> Defendant continues in its effort to locate the record from the June 7, 2006 regular council meeting executive session. Discovery in this case continues. The discovery end date is currently June 2, 2007.

occurred on August 28, 2006. The actions taken by the Defendant in going into and coming out of public session, at the meetings at issue, were certainly made public when the actions were taken. Even with regard to the latest date of the alleged improper municipal action complained of under OPMA, the August 28, 2006 meeting, the Plaintiff's Complaint pursuant to this 45 day time period needed to be filed by October 12, 2006. The Plaintiff's Complaint was not filed until October 16, 2006. Accordingly, it is apparent that the Complaint for alleged violations of OPMA was filed well after the 45 day limit under OPRA, is out of time, and therefore, Plaintiff's demands for relief under OPMA in this regard should be denied. Liebeskind v. Mayor and Mun. Council of Bayonne, 265 N.J. Super. 389 (App. Div. 1993).

**POINT IV**

**THE MOTIONS PASSED BY THE DEFENDANT PRIOR TO GOING INTO NONPUBLIC SESSIONS DID NOT VIOLATE N.J.S.A. 10:4-13.**

In the alternative, and notwithstanding the arguments raised in Point III above, N.J.S.A. 10:4-13(a) requires only that the "general nature" of the subject to be discussed be set forth in the notice of the closed session. As one Court has stated, "the statutory requirement is not an onerous one - - only the general nature of the subject need be disclosed; specificity is not required." N.J. State Col. Locals v. Trenton State Col. Bd., 284

N.J. 108, 114 (Law Div. 1995). As set forth in both the Harris Cert. and in the actual public meeting minutes, the Defendant disclosed the general nature of the subject or subjects to be discussed prior to going into, and coming out of, executive or closed session. Accordingly, the requirements of the statute cited have been satisfied.

POINT V

PLAINTIFF'S DEMAND FOR INJUNCTIONS CONCERNING FUTURE CONDUCT SHOULD BE DENIED.

As set forth in the introductory statement, Plaintiff seeks various prospective "declarations" and/or orders that resolutions passed by the Defendant in the future, prior to going into public session, must contain certain information or material. Plaintiff also seeks a prospective Order permanently enjoining the Defendant from passing motions or resolutions authorizing nonpublic sessions that do not meet the requirements set forth in the Plaintiff's proposed form of Order. Plaintiff also seeks a prospective Order that enjoins the Defendant in the future from failing or refusing to make its nonpublic meeting minutes available to the public, with any appropriate redaction.

An injunction is an extraordinary equitable remedy utilized primarily to forbid and prevent irreparable injury. It must be administered with sound discretion and always upon considerations of justice, equity, and morality involved in a given case. N.J. State Bar Ass'n v. The Northern N.J. Mortgage Assoc., 22 N.J. 184, 194 (1956). The use of such an extraordinary remedy requiring specific

future action with respect to factual situations that will vary over time is at best problematic. A fact sensitive, case by case analysis would be much more appropriate. In requesting this relief the Plaintiff seeks, in essence, an advisory opinion in the form of an injunction directing the conduct of the Defendant in the future.

An injunction requiring future action in a factual vacuum would not be an appropriate exercise of this Court's discretion. Even if the Court determines that there has been a violation of the Open Public Meetings Act, which the Defendant denies, no remedies are called for since no action was taken by Council at the executive session meetings. As detailed in the Harris and MBW Cert., notwithstanding any of the arguments concerning alleged violations of OPMA or OPRA, it is unrefuted that no actions were taken by Council for the Borough of Lawnside or for the Redevelopment Agency at or during executive session. Hence, there is no need for the Court to void any act to the Board under N.J.S.A. 10:4-15(a).

While N.J.S.A. 10:4-16 permits a member of the public to apply for an injunction to insure compliance with the Open Public Meetings Act, it also empowers the Court to provide other relief as it deems necessary. Even if the Court determines that the Defendant failed to comply with OPMA and OPRA in some way, which the Defendant denies, OPMA contemplates "maximum flexibility in rectifying governmental action which falls short of the standards of openness prescribed." Polillo v. Deane, 74 N.J. 562, 579 (1997). The Court may examine the nature, quality and effect of any noncompliance, as

well as any substantial compliance found in the record in fashioning a corrective measure. *Ibid.*

In addition, even pursuant to the formal opinion number 1 - 1998 from Assistant Attorney General Mark J. Flemming, attached as P 10,11,12 to the Plaintiff's moving papers, the AG detailed that "we can express no general opinion as to when such minutes (closed session) must be disclosed because that fact - sensitive issue must be determined on a case-by-case basis consistent with applicable law."

POINT VI

THE DEFENDANT BOROUGH PROPERLY REFUSED TO PRODUCE DOCUMENTS IN RESPONSE TO PLAINTIFF'S OPRA REQUEST GIVEN THAT THE DOCUMENTS DO NOT FALL WITHIN THE DEFINITION OF A "GOVERNMENT RECORD." IN ADDITION, THE RECORD PRODUCED OF THE EXECUTIVE SESSION MEETINGS AT ISSUE HAS BEEN APPROPRIATELY REDACTED

As detailed in the Harris and MBW Certs., the record from execution session from eleven of the twelve executive session meetings at issue has been produced, in some instances in a redacted format.<sup>2</sup> There are numerous items that are not considered "government records" under OPRA, or are otherwise exempt from disclosure under OPRA. These include inter-agency or intra-agency advisory, consultive, or deliberative material, records within the attorney-client privilege, information that would give an advantage to competitors or bidders, information pertaining to any grievance,

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<sup>2</sup> While Plaintiff asserts that he is entitled to relief pursuant to common law, in addition to the authority cited (OPMA and OPRA), OPRA simply preserves the common law right to access public records. N.J.S.A. 47:1-A-8. See also Mag Entn't, 375 N.J. Super. at 543 (App. Div. 19).

records exempt from disclosure under any other statute; resolution of either or both of houses of the legislature; regulation promulgated under authority of any statute or Executive Order, and personnel and pension records. N.J.S.A. 47:1A-1. Based upon these and all other applicable exceptions under OPRA, the Defendant initially did not produce its record of executive session for the meetings at issue insofar as that record represented material which fell within the exemptions of "government records" defined by OPRA. Nevertheless, in good faith and in an effort to resolve any dispute, the record from the executive sessions at issue have in fact now been produced in an appropriately redacted format, redacting "material", and notations in the record, which fall within the exceptions of OPRA.

N.J.S.A. 47:1A-9(b) provides:

The provisions of [OPRA] shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or *judicial case law*, which privilege or grant of confidentiality may duly be claimed to restrict public access to a public record or a government record.

In addition, the Rules of Court extend broad protection from disclosure to attorney work product relating to litigation. Rule 4:10-2(c) provides in pertinent part:

in ordering discovery . . . the court shall protect against disclosure of a mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Consequently, if a document is protected work product under Rule 4:10-2(c) it is also protected from disclosure under OPRA. Gannett New Jersey Partners v. County Middlesex, 379 N.J. Super. 205 at 218 (App. Div. 2005).

The exemption from disclosure provided by N.J.S.A. 47:1A-1.1, which is often referred to as the deliberative process privilege, is aimed at protecting the quality of government decisions by shielding the communications received by a decision maker from public disclosure. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151, 95 S.Ct. 1504, 1516-17, 44 L.Ed.2d 29, 47-48 (1975). To qualify for this privilege, two conditions must be satisfied: (1) the document must be predecisional, meaning it was "generated before the adoption of an agency's policy or decision," and (2) it "must be deliberative in nature, containing opinions, recommendations, or advice about agency policies." In re the Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85, 754 A.2d 1177 (2000). The privilege does not extend to "[p]urely factual material that does not reflect deliberative processes." Id. at 85, 754 A.2d 1177. Therefore, if a document contains both deliberative and factual materials, the deliberative materials must be redacted and the factual materials disclosed. See Id. at 87, 754, A.2d 1177 (quoting McClain v. Coll. Hosp., 99 N.J. 346, 363, 492 A.2d 991 (1985)); See also Schreiber v. Soc. For Sav. Bancorp., Inc., 11 F.3d 217, 220-21 (D.C.Cir. 1993). Although Integrity Insurance did not involve the interpretation of OPRA, the deliberative process exemption incorporated in N.J.S.A. 47:1A-1.1

adopts the principles set forth in that opinion. Gannett New Jersey Partners, Supra. at p.220.

It is clear from a reading of OPRA that redaction of material from public records is legislatively recognized and sanctioned. Courier Post v. Lenape, 360 N.J. Super. 191 at 196 (Law Div. 2002). For example, N.J.S.A. 47:1A-5(g) provides, in part, that:

If a custodian of a government record asserts that part of a particular record is exempt from public access pursuant to P.L. 1963, c. 73 (C.47:1A-1, et seq.) . . . the custodian shall delete or excise from a copy of the record that portion which the custodian asserts is exempt from access . . .

With regard to this deliberative-process privilege the Defendant Borough, in claiming the privilege, has asserted that the material in the documents in question is "predecisional" insofar as no actions were taken in executive session concerning discussions in executive sessions. Moreover, and consistent with the initial advices of counsel for the Defendant in this matter to Plaintiff pre-suit, the material redacted from the record of the executive session is, in part, attorney client privileged, attorney work product and "deliberative in nature, containing opinions, recommendations or advice about agency policies." In re Liq. Of Integrity Ins. Co., 165 N.J. 75, 83-88 (2000). Moreover, purely factual material contained in the record of executive session has in fact been produced. Lastly, and with regard to the Plaintiff's common law arguments, the Plaintiff certainly is not able to demonstrate a need that overrides the government interest in nondisclosure, which includes, in part, consideration of the extent

to which disclosure would hinder frank and independent discussions regarding contemplative policies and decisions. Id. at 85-86.

**VII. CONCLUSION**

For the reasons set forth herein, and in the supporting Certifications of Harris and MBW, along with the Defendant's response to the Plaintiff's Statement of Material Facts and the Defendant's Counterstatement of Facts, the Plaintiff's Motion for Partial Summary Judgment should be denied.

DATED: March 20, 2007

ZELLER AND BRYANT  
Attorneys for Defendant,  
Borough of Lawnside

By: /s/ Matthew B. Wieliczko  
MATTHEW B. WIELICZKO, Esquire