

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
OCEAN COUNTY
DOCKET NO. L-2165-07
A.D. # _____

JOHN PAFF,)
)
 Plaintiff,) TRANSCRIPT
) OF
 vs.) MOTION
) (Excerpt)
 DOVER TOWNSHIP COUNCIL,)
)
 Defendant.)

Place: Ocean County Courthouse
118 Washington Street
Toms River, New Jersey 08753

Date: July 18, 2008

BEFORE

HON. VINCENT J. GRASSO, A.J.S.C.

TRANSCRIPT ORDERED BY:

JOHN PAFF
P.O. Box 5424
Somerset, NJ 08875

APPEARANCES:

WALTER M. LUERS, ESQ. (Walter M. Luers, LLC)
Attorney for the Plaintiff

DANIEL K. SIMMONS, ESQ. (Steven A. Pepe, Esq.)
Attorney for the Defendant

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Audio Recorded
Audio Operator, Carey Calame

1 (Whereupon, the requested excerpt begins as
2 follows:)

3 THE COURT: All right. The Court thanks
4 Counsel for their briefing and oral argument.

5 This application comes before the Court by
6 way of Defendant Toms River Council's Motion for
7 Summary Judgment. Plaintiff Paff opposes the Motion
8 and has filed a Cross-Motion for Summary Judgment.

9 The undisputed statement of facts, in the
10 Court's view, having reviewed the respective
11 certifications, would be as follows:

12 On October 27, 2006, Plaintiff forwarded a
13 request that the Defendant Township Records Custodian,
14 the Township Clerk for copies of,

15 "Any and all Minutes of any non-public
16 meetings held by the Council on October 24,
17 2006, September 26, 2006, and September 12,
18 2006."

19 On November 2, 2006, the Office of the Clerk
20 advised the Plaintiff that the Minutes did not exist
21 because they had not yet been prepared and approved.

22 On March 29, 2007, Plaintiff submitted another request
23 for the Minutes of the aforementioned non-public
24 meetings. On April 4, 2007, the Assistant Township
25 Attorney advised Plaintiff that the requested records

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1 had not been drafted or approved.

2 On April 11, 2007, Plaintiff, by letter,
3 advised the Council that he intended to institute suit
4 for not making the requested Minutes "promptly
5 available" pursuant to N.J.S.A. 10:4-14 unless the
6 Township took steps to comply. Plaintiff further
7 requested that the Council discuss the anticipated
8 litigation at the May 8, 2000 (sic) meeting, and
9 advised the Plaintiff so that Plaintiff would
10 understand whether or not his position was being
11 considered.

12 The Minutes of the Township's September 12,
13 2006, September 26, 2006, and October 24, 2006
14 Executive Meetings were approved by the Township on May
15 8, 2007. On May 9, 2007, Defendant Clerk forwarded to
16 Plaintiff the requested Minutes of the Executive
17 Meetings in question. And when the Court refers to
18 Executive Meetings, it refers to the Closed Session.

19 According to a certified submission by the
20 Township to the Government Records Council, the
21 Township has taken more than one month to approve
22 regular meetings on at least 15 occasions in 2006.

23 Plaintiff instituted their suit on June 22,
24 2007. The Court has indicated that the suit, which was
25 two-fold, one alleging a violation of OPRA, Open Public

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1 Records Act, and Open Public Meetings Act, the Open
2 Public Records Act aspect of this litigation now having
3 been dismissed by Plaintiff, the Court is of the view
4 that it was timely in terms of it being treated as a
5 Prerogative Writ challenge with the institution of the
6 suit on June 22, 2007.

7 The Court believes that the public interest
8 exception here, under the circumstances in this case,
9 invokes the start date of May 9, 2007, when the
10 Plaintiff was provided with the Minutes.

11 The thrust of the Plaintiff's suit is that
12 the preparation and submission of the Minutes is not
13 promptly or had not been made promptly available, as
14 provided by statute. Secondly, that certain aspects of
15 the Minutes were not reasonably comprehensible. And,
16 thirdly, that certain subject matters or items
17 addressed in Executive Session did not fall within the
18 appropriate exception under N.J.S.A. 10:4-12, but
19 rather should have been more promptly addressed in the
20 public session. And in that regard, the Plaintiff
21 seeks declaratory relief, declaring that the actions of
22 the Council in this regard violated the Open Public
23 Meetings Act.

24 During oral argument this morning, the
25 Plaintiff has stipulated that they are not alleging any
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1 bad faith or chicanery, nor are seeking any punitive or
2 financial penalties against the Township, rather only
3 compliance with the letter and spirit of the Act itself.

4 The standard for Summary Judgment is set
5 forth under R. 4:46-2. And Summary Judgment should be
6 granted when the pleadings, depositions, answers,
7 admissions on file, together with affidavits, if any,
8 show that there's no genuine issue of material fact
9 challenged and that the moving party is entitled to
10 Summary Judgment as a matter of law.

11 The role of the Trial Court is to determine
12 whether or not there exists a genuine issue of material
13 fact by considering whether the evidence, as presented,
14 viewed in a light most favorable to the non-moving
15 party, is sufficient to permit a rational fact-finder
16 to resolve the dispute in the favor of the non-moving
17 party, citing the well-settled cases of Brill and
18 Judson.

19 The Court has addressed the timeliness of the
20 application, and it's determined it is not time-barred,
21 will now address the substance of the matter itself.

22 The Court is of the view, given the Municipal
23 records, which speak for themselves -- and there's no
24 issue as to their authenticity -- the time frames
25 involved of the content of the Minutes, that there is

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1 sufficient facts before the Court to address and treat
2 the respective positions of the parties in a summary
3 manner.

4 The Court, most respectfully, does not feel,
5 not withstanding the Affidavit of Township Clerk
6 Mutter, that his involvement in the name change from
7 Dover to Toms River Township creates a fact issue here
8 when cast in the obligation of governing bodies to
9 comply with the Open Public Meetings Act.

10 With respect to the obligation of a governing
11 body, or Council in this instance, to make Minutes of
12 their meetings promptly available, it is the finding of
13 this Court that the preparation and submission of these
14 Minutes from the three sessions in question, September
15 12th, 24th, and October 24, 2006, the preparation and
16 submission of those on May 9, 2007, is not in
17 compliance with the obligation of the governing body to
18 make such Minutes promptly available, notwithstanding
19 the Clerk's involvement in what has been viewed as an
20 extraordinary time commitment on the name change.

21 With respect to Issue 2, going to the content
22 of the Minutes themselves, which are Exhibits 8, 10,
23 and 12, as to whether or not the content of those
24 Minutes is reasonably comprehensible, the Court has
25 reviewed the provisions of N.J.S.A. 10:4-14, which

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1 provides, in part, that, each public body shall keep
2 reasonably comprehensible Minutes of all of its
3 meetings, showing the time and place, the members
4 present, the subjects considered, the actions taken,
5 the vote of each member, and any and all other
6 information required to be shown in the Minutes by law.

7 As interpreted by case law, the statute
8 simply requires the public body to keep reasonably
9 comprehensive Minutes. This does not mean word-for-
10 word recitation of every event or verbatim detailing of
11 every public comment or objection, citing Liebeskind
12 case, 265 N.J. Super 401.

13 The statute requires that what took place at
14 the meeting and what final action was taken reflected
15 in the Minutes and does not mean that the public body
16 must reveal why it took the legislative action it did,
17 citing Township of Bernards vs. State D.E.P. at
18 233 N.J. Super 1 at Page 28.

19 The Court finds that the Minutes of the
20 meetings in question, the three meetings in question
21 which the Court has detailed earlier in its opinion,
22 are reasonably comprehensible to the extent they
23 identify the subject matter, who was involved. And, of
24 course, it is not disputed in this case that the action
25 taken, if any, is at issue. In fact, the Plaintiff has
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1 indicated that their application is not one which seeks
2 to invalidate or void any action. So the Court does
3 not have to engage in that analysis.

4 However, what the Court does view as
5 inappropriate in terms of the statute is reference --
6 and this is really an instance of form -- "Index of
7 Items Not Released." It's the Court's view that that
8 terminology should be excised from court's Minutes for
9 a couple of reasons: One, the Open Public Meetings
10 Act, the intention is to release all Minutes unless
11 there is some exception under 10:4-12, sensitive
12 employee issues, by way of example, which would enable
13 a Township or Council to redact certain portions.

14 So the suggestion that certain items would
15 not be released is not consistent with the letter or
16 spirit of the Open Public Meetings Act. And the Court
17 recommends that be excised, and that the Council
18 endeavor to render these Minutes reasonably
19 comprehensible unless some exception exists.

20 As stated in Pelillo vs. Dean, 74 N.J. at
21 570, the policy reasons for opening up government to
22 the public have been expressed on numerous occasions
23 throughout the nation's history. Foremost among them
24 is the goal of fulfilling our cherished ideal of
25 creating government of the people. The Court went on
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1 to express that a second reason for conducting
2 government in the sunshine is it prevents corruption.
3 However, that's not at issue here, of course.

4 The Pelillo case stands for the proposition,
5 it permits a Court to exercise discretion in fashioning
6 remedies for technical violations of the Open Public
7 Meetings Act which do not result in bad faith motives
8 and which do not undermine the fundamental purposes of
9 the Act. In that case, Pelillo, the Trial Court Judge
10 determined that the late publication of Minutes was not
11 the result of chicanery but oversight.

12 In Loigman vs. Committee of Middletown, it
13 was held that Courts may issue Orders requiring a
14 public entity to comply with OPRA and such Order can be
15 prospective in operation. The Court went on to say the
16 remedies under the Act are not limited to invalidating
17 actions, but can include equitable, declaratory, or
18 other kinds of relief under N.J.S.A. 10:4-16.

19 That section can be invoked to question
20 meetings even when no action is taken, but when some
21 violation has occurred, such as inadequate notice,
22 exclusion of all, or some, or part of a public or
23 keeping -- or not keeping Minutes and making them
24 promptly available.

25 It is the Court's view, given the submission

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1 of the Minutes in question almost six months after the
2 meetings took place, that the Township, in order to
3 comply with the Open Public Meetings Act, should
4 prepare its Minutes, even if in draft form, and have
5 them available for the next Council meeting, unless
6 good cause would exist for them not being available.
7 The spirit and intent of the Open Public Meetings Act
8 are served by items discussed in Closed Session being
9 available to the public at the next ensuing session
10 and, in that regard, the Council is directed to comply
11 with that guideline.

12 As indicated on Issue 2, in terms of being
13 reasonably comprehensible, the Township should excise
14 the term "Index of Items Not Released," and endeavor on
15 items which it believes fall within the protection of
16 N.J.S.A. 10:4-12 to redact and/or excise those portions
17 which it believes are sensitive or privileged, and
18 disclose, to the extent possible, all information,
19 unless privileged or protected for public consumption.

20 The third issue deals with the items
21 themselves. At September 12, 2006, there was reference
22 to a CAP rate ordinance discussed in Executive Session.
23 The Court cannot find any basis under N.J.S.A. 10:4-12
24 to discuss that in Executive Session, and that issue
25 was more appropriate for the public portion of the

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1 hearing.

2 With respect to Item 6, on September 12,
3 2006, the Court will give the Council the benefit of
4 the doubt inasmuch as N.J.S.A. 10:4-12, Subsection 8,
5 involves an exception for matters dealing with, in
6 pertinent part, the appointment of a specific
7 prospective officer or employee. And there is
8 reference there to the need to establish a position
9 with a salary range with a designation of individuals.

10 And I think that fairly informs the public as
11 to what was being discussed, salary ranges, and
12 identified the individuals, which would enable the
13 public, if a member of the public deemed it appropriate
14 to address that issue with the governing Council at a
15 public session.

16 Turning to the Executive Session Minutes of
17 September 12, 2006, Pay-to-Play appointments, 2007,
18 under Item 9, discussion re appointment process to be
19 used for 2007; what process should we use in 2007; Greg
20 McGuckin wants to know Paul Brush's recommendation
21 first. It would strike the Court that that subject
22 matter could have been discussed in a public session
23 but, frankly, does not rise to the level, in the
24 Court's view, of being a violation. It appears merely
25 to reflect an inquiry on a particular topic. And that,
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1 again, if the public wish to engage the Council on that
2 subject matter, they certainly had sufficient notice of
3 the topic and the position of the governing body which,
4 in terms of this particular Minute, only suggested that
5 Council member McGuckin was seeking Mr. Brush's
6 recommendation. There's no indication of where that
7 went.

8 Finally, October 24 -- and, Mr. Luers, on
9 that date, was it No. 15, Pay-to-Play appointments?

10 MR. LUERS: It was -- yes, it was -- well, it
11 was 5 and 15.

12 THE COURT: 5 and 15, appointment of Storm
13 Water Management Coordinator, Mark Troncone, Township
14 Council says Council needs to act on this. Court views
15 that as not violating N.J.S.A. 10:4-12 inasmuch as it
16 involved the appointment of a member. There's nothing
17 to suggest there was any discussion. And Pay-to-Play
18 appointments is, frankly, a gray area which, again,
19 would have been better served, at least on the face of
20 these Minutes in view of the subject matter, but a
21 matter that the Court would consider to be an innocuous
22 one.

23 The record should reflect that the Court
24 makes no finding that the Township and/or Council, in
25 this instance, engaged in any bad faith or chicanery,
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1 only that with the representation of Mr. Simmons with
2 the appointment of a Confidential Assistant, the
3 Township should endeavor to be more vigilant with
4 respect to these matters and, presumably, will be.

5 There is no action which the Plaintiff seeks
6 to void or invalidate. And the Court is confident with
7 the representations of Mr. Simmons that the ability of
8 the Township or governing body to have Minutes
9 available for the next regular public meeting will be
10 facilitated by the appointment of the Confidential
11 Assistant.

12 The Court will reserve on the issue of costs,
13 if any, awardable to the Plaintiff, subject to Mr.
14 Luers providing the Court with a rule and some basis
15 for the award of costs, giving, of course, an
16 opportunity to Mr. Simmons to respond on the propriety
17 of same.

18 Now, do you think you gentleman can agree on
19 a form of the Order?

20 MR. LUERS: Yes, Your Honor.

21 THE COURT: Why don't you try to mark -- I
22 don't want a lot of time spent on the form of the
23 Order.

24 Do either of you have any other courts you
25 have to be in this morning?

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1 MR. SIMMONS: No.

2 MR. LUERS: No, Your Honor.

3 THE COURT: Why don't I give you a blank
4 piece of paper if need be. Why don't you work up a
5 form of the Order which you believe comports with the
6 findings of the Court. If there's any problem, I'm
7 happy to discuss resolving it with you in chambers.

8 Anything else, gentlemen?

9 MR. SIMMONS: If the Court please, just to
10 clarify, because the Township is going to ask me, the
11 Court had asked me if I thought 30 days was a
12 reasonable time, and I said yes. Dover meets every two
13 weeks, so then that would be -- is it the Court's --

14 THE COURT: I think that's a bit ambitious,
15 and I think the 30-day time frame -- in other words,
16 the 30 days, in the Court's view, is not so much to
17 place that burden on the public, rather to prevent an
18 issue from becoming stale. So I think perhaps if it's
19 not ready for the meeting in two weeks, as long as it's
20 ready for the one in four weeks, I think that's fair
21 and reasonable.

22 Mr. Luers?

23 MR. LUERS: I think -- I would respectfully
24 disagree. I don't want to look a gift horse in the
25 mouth, but on the other hand, I think the general rule

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1 is 30 days or for the next meeting. And I think there
2 is a little bit of a tension there that, on the one
3 hand, you don't want to put too much pressure on the
4 town. On the other hand, if you're going --

5 THE COURT: Well, I mean, the Township of
6 Toms River is the third largest in the state?

7 MR. SIMMONS: Sixth.

8 THE COURT: Sixth largest. They have a very
9 busy agenda. They do have an assistant. And I think
10 matters can still be ripe for public discussion with a
11 30-day guideline. So I'm going to stick to that and
12 not require -- look, if they can have it ready within
13 two weeks, that's the most desirable result. But if
14 they fail to, and there is a reason why not, that's
15 fine. I think at least for the meeting after that, I
16 think that's a fair direction for them to take. Okay.

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18 MR. SIMMONS: Thank you, Your Honor.

19 MR. LUERS: Thank you, Your Honor.

20 THE COURT: All right, gentlemen, thank you.

21 Let me know.

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C E R T I F I C A T E

I, KATHLEEN CONNOLLY, Certified Court Transcriber, AOC #441, do hereby certify the foregoing transcript of proceedings on July 18, 2008, tape number VJG-102-08, index number from 0015-4833, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of proceedings as recorded.

/s/ Kathleen Connolly

Kathleen Connolly AOC #441
COLE TRANSCRIPTION AND RECORDING SERVICE

Dated: October 20, 2008