



New Jersey Libertarian Party

Open Government Advocacy Project

John Paff, Chairman

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April 16, 2008

Hon. Mayor Marianne Van Deursen, Mayor and Members of Council
Borough of Washington
100 Belvidere Ave
Washington, NJ 07882-1426 *(via Fax to 908-689-9485)*

Dear Mayor Van Deursen and Council members:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project.

As an initial matter, I can't find the Borough's official records request form anywhere on the Borough's Internet site. If it is there, would you please direct me to the appropriate link? If it is not there, would you consider putting a link to the form on your site to make it easier for members of the public who wish to request public records?

My main reason for writing is to request the Mayor and Council, at its May 6, 2008 meeting, to consider amending the form of resolution used to go into nonpublic (i.e. executive or closed session). The Borough's present form of resolution is typified by Resolution 79-2008 that authorized the March 4, 2008 Executive Session. That resolution states:

RESOLUTION 79 -2008

WHEREAS, Section 8 of the Open Public Meetings Act, Chapter 231, P.L. 1975 permits the exclusion of the public from a meeting under certain circumstances; and

WHEREAS, this public body is of the opinion that such circumstances presently exist.

NOW, THEREFORE, BE IT RESOLVED, by the Borough Council of the Borough of Washington, in the County of Warren and State of New Jersey as follows:

1. The public shall be excluded from the remaining portion of this meeting.

2. The general nature of the subject matter to be discussed is as follows:

Litigation and Personnel

Resolutions 41-2008 and 71-2008 which authorized, respectively, the January 15, 2008 and February 19, 2008 Executive Sessions are identical except that the last line reads "Litigation, Contract Negotiations" or "Contracts/Litigation."

This form of resolution doesn't give the public much information on what topics are being privately discussed. For example, instead of just listing "Litigation" and "Contracts," could you perhaps be a bit more descriptive and list something like "Litigation – Smith v. Borough, Docket No. WAR-1234-07" and "Negotiations – XYZ Company, regarding purchase of road salt"? This way, the public is informed of the topics being discussed, but the Borough's negotiation position or litigation strategy is still preserved.

I litigated this issue last year in Middlesex County and the judge there held¹ that "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.**" (Emphasis supplied.)

Even though this unpublished decision from Middlesex County is not binding on courts in Warren County, would the Council be willing to abide by it, in order to provide more transparency to the members of the public who attend your meetings? If so, I recommend the form of closed session resolution used by Delanco Township in Burlington County, which is available at <http://www.lpcnj.org/OGTF/DelancoResolution.pdf>

I appreciate your time and look forward to receiving your response.

Sincerely,



John Paff

cc. Richard Cushing, Esq., via email to rcushing@gklegal.com

¹ My complaint and court's unpublished decision are on-line at <http://www.lpcnj.org/OGTF/Monroe.pdf>

RESOLUTION NO.

RESOLUTION AUTHORIZING EXECUTIVE SESSION

WHEREAS, the Open Public Meetings Act; *N.J.S.A. 10:4-6 et seq.*, declares it to be the public policy of the State to insure the right of citizens to have adequate advance notice of and the right to attend meetings of public bodies at which business affecting the public is discussed or acted upon; and

WHEREAS, the Open Public Meetings Act also recognizes exceptions to the right of the public to attend portions of such meetings; and

WHEREAS, the Mayor and Council find it necessary to conduct an executive session closed to the public as permitted by the *N.J.S.A. 40:4-12*; and

WHEREAS, the Mayor and Council will reconvene in public session at the conclusion of the executive session;

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Council of the Borough of Washington, County of Warren, State of New Jersey that they will conduct an executive session to discuss the following topic(s) as permitted by *N.J.S.A. 40:4-12*:

_____A matter which Federal Law, State Statute or Rule of Court requires be kept confidential or excluded from discussion in public (Provision relied upon: _____);

_____A matter where the release of information would impair a right to receive funds from the federal government;

_____A matter whose disclosure would constitute an unwarranted invasion of individual privacy;

_____A collective bargaining agreement, or the terms and conditions thereof (Specify contract: _____);

_____A matter involving the purpose, lease or acquisition of real property with public funds, the setting of bank rates or investment of public funds where it could adversely affect the public interest if discussion of such matters were disclosed;

_____Tactics and techniques utilized in protecting the safety and property of the public provided that their disclosure could impair such protection;

_____Investigations of violations or possible violations of the law;

_____Pending or anticipated litigation or contract negotiation in which the public body is or may become a party; (The general nature of the litigation or contract negotiations is: _____ OR _____ the public

disclosure of such information at this time would have a potentially negative impact on the municipality's position in the litigation or negotiation; therefore this information will be withheld until such time as the matter is concluded or the potential for negative impact no longer exists.)

_____Matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his or her ethical duties as a lawyer; (The general nature of the matter is: _____
_____ OR _____ the public disclosure of such information at this time would have a potentially negative impact on the municipality's position with respect to the matter being discussed; therefore this information will be withheld until such time as the matter is concluded or the potential for negative impact no longer exists.);

_____Matters involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance, promotion or disciplining of any specific prospective or current public officer or employee of the public body, where all individual employees or appointees whose rights could be adversely affected have not requested in writing that the matter(s) be discussed at a public meeting; (The employee(s) and/or general nature of discussion is _____

OR _____ the public disclosure of such information at this time would violate the employee(s) privacy rights; therefore this information will be withheld until such time as the matter is concluded or the threat to privacy rights no longer exists.;

_____Deliberation occurring after a public hearing that may result in the imposition of a specific civil penalty or loss of a license or permit;

BE IT FURTHER RESOLVED that the Mayor and Council hereby declare that their discussion of the subject(s) identified above may be made public at a time when the Borough Attorney advises them that the disclosure of the discussion will not detrimentally affect any right, interest or duty of the Borough or any other entity with respect to said discussion. That time is currently estimated to be: _____
(estimated length of time) OR upon the occurrence of _____
_____;

BE IT FURTHER RESOLVED that the Mayor and Council, for the reasons set forth above, hereby declare that the public is excluded from the portion of the meeting during which the above discussion shall take place.

Founded 1884

GEBHARDT & KIEFER

A PROFESSIONAL CORPORATION

L A W O F F I C E S

MEMORANDUM

To: RPC
From: LCS
Date: May 2, 2008
Subject: BOW—OPMA & Local Public Contracts Law Issues

BACKGROUND: On April 16, 2008 John Paff, Chairman of the Open Government Advocacy Project of the New Jersey Libertarian Party sent two letters to the mayor and council. One letter requested that the mayor and council change the form of resolution that is used pursuant to *N.J.S.A. 10:4-13* to open an executive session so that more information is provided to the public about the matters to be discussed in the executive session. The second letter questions whether the Borough's published notice of an award of a professional services contract comports with the requirements of *N.J.S.A. 40A:11-5*.

ISSUES: (1) Is the Borough's form resolution for opening an executive session consistent with the requirements of the Open Public Meetings Act, *N.J.S.A. 10:4-6 et seq.*? If not, what changes should be made? (2) Is the form of notice published by the Borough when a professional services contract is awarded consistent with, the requirements of the Local Public Contracts Law, specifically *N.J.S.A. 40A:11-5*? If not, what changes should be made?

CONCLUSIONS: (1) The form of resolution authorizing an executive session must include both a general description of the topics to be discussed and when and how the minutes of the executive session will be made available to the public. The Borough's resolution is deficient in that it does not include information on when and how the minutes of the executive session will be made available to the public. Although the Borough's description of topics to be discussed in Closed session is more general than what has been described as "good practice," it might be sufficient to survive a legal challenge. The Borough could resolve any doubt by adding some descriptive information such as identifying the litigation by party name, the type of contract under negotiation, or the general type of personnel matter.

(2) The form of notice required by the Local Public Contracts Law when a contract for professional services or extraordinary unspecifiable services is awarded must include the nature,

duration, service and amount of the contract and the availability for inspection in the clerk's office of both the resolution and the contract. The resolution published by the Borough for the appointment of the Borough's Public Defender did not satisfy the statute since it did not include the amount of the contract or notify the public that the resolution and contract were available for inspection. The Borough can choose to include this information in the resolution awarding the contract and then publish the resolution or it can prepare a separate notice with only the required information.

DISCUSSION: The Open Public Meetings Act, *N.J.S.A. 10:4-6 et seq.* (OPMA) provides that meetings of public bodies shall be open to the public except for the discussion of matters specifically enumerated in *N.J.S.A. 10:4-12(b)*. In order to exclude the public from discussion of matters coming under these enumerated exceptions, the public body must adopt a resolution at a public meeting that (a) states "the general nature of the subject to be discussed," *N.J.S.A. 10:4-13(a)*; and (b) states "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." *N.J.S.A. 10:4-13(b)*. In *Council of New Jersey State College Locals v. Trenton State College Board of Trustees*, 284 *N.J. Super.* 108, 113 (Law Div. 1995) the court discussed the kind of description required by the OPMA of the subject matter to be discussed in closed session. It found that a notice that "merely recites the litany of exceptions which would allow it to proceed in closed session" does not comply with the OPMA. The court recognized that the "statutory requirement is not an onerous one—only the *general* nature of subject need be disclosed; specificity is not required. *Id.* at 114 (emphasis in original). At the same time, the court quoted with approval the discussion from 34 *New Jersey Practice, Local Government Law* § 141, at 174 (Michael A. Pane) (2d ed. 1993) which now appears as follows:

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* § 11.8, at 559 (Michael A. Pane, Jr.) (4th Ed. 2007).

The court found that the Board of Trustees "has made no effort to provide the public with as much knowledge as possible." *Id.* This decision was followed by Judge Waugh in an unreported Middlesex County Law Division opinion in *Paff v. Monroe Township Board of Education*, 2007WL191984, Docket No. L-7770-06 decided January 22, 2007. The Board of Education form resolution in that case also used a string of exceptions rather than identifying the specific exception(s) that applied to the matters to be discussed at a particular meeting.

The resolution used by the Borough is somewhere between the litany of exceptions disapproved by the courts and the "good practice" identified by Pane. It appears that the Borough adjusts the subject matter description in the resolution based on the items to be discussed, using one or two word descriptions such as personnel, litigation, contract negotiations. One could argue that the resolution describes the general nature of the matters to be discussed but it would be a stretch to say that it provides the public with as much knowledge as possible. Therefore, there is some

possibility that a court would find that the Borough's form of resolution does not comply with the OPMA, although it would be an extension of the existing court decisions on the issue. The Borough could resolve any doubt by adding some descriptive information. along the line requested by Mr. Paff. Such information might include identifying the litigation, by party name, the type of contract under negotiation, the general type of personnel matter (performance review, hiring, etc.) when doing so would not compromise negotiations, litigation or the handling of personnel matters.

Of somewhat greater concern is the fact that the Borough's form resolution authorizing an executive session does not include the information required by *N.J.S.A. 10:4-13(b)* concerning "the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public." As with the description of the topics to be considered, general language probably would suffice such as "at the conclusion of the litigation." However, it appears at the current time that the Borough says nothing at all about when the minutes of an executive session will. be available to the public.

The Local Public Contracts Law, *N.J.S.A. 40A:11-1 et seq.* provides for the publication of a brief notice upon the award of a contract for professional services or extraordinary unspecifiable services, both of which are exempt from the bidding requirements of that statute. *N.J.S.A. 40A:11-5(1)(a)* describes the notice required:

The governing body shall in each instance state supporting reasons for its action in the resolution awarding each contract and shall forthwith cause to be printed once, in the official newspaper, a brief notice stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public, inspection in the office of the clerk of the county or municipality . . .

In the example provided by Mr. Paff, the Borough printed the resolution appointing a municipal public defender as the notice required by *N.J.S.A. 40A:11-5(1)(a)*. While the resolution was close to what was needed, it did not include the amount of the contract, nor did it state that the resolution and contract were on file and available for inspection in the Borough clerk's office. In the future, if the Borough wants to continue to publish the resolution as the notice required by the statute, it should include in the resolution the five items required: nature, duration, service, amount and availability for inspection in clerk's office. Alternatively, it can publish just a notice that covers those five items and not publish the resolution.

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