

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
ALEXANDER P. WAUGH, JR.
JUDGE



MIDDLESEX COUNTY COURT HOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903 - 0864

LETTER OPINION - NOT FOR PUBLICATION

January 22, 2007

John Paff
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James F. Schwerin, Esquire
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Re: Paff v. Monroe Township Board of Education
Docket No. L-11146-99

Dear Counsel:

This matter is before the Court on cross-motions for summary judgment. Oral argument took place on January 19, 2007, following which I reserved decision.

Plaintiff John Paff (Paff) is a resident of Franklin Township, Somerset County, New Jersey. According to his complaint, he is the Chairman of the Open Government Task Force of the Libertarian Party of Central New Jersey. Defendant Monroe Township Board of Education (Board) is a municipal corporation of the State of New Jersey.

Paff filed his Complaint on September 26, 2006, seeking a declaration that the Board fails to comply with the terms of the Open Public Meetings Act (N.J.S.A. 10:4-6 to 21) (Act) with respect to closed session resolutions. Specifically, Paff contends that the Board's regular practice of adopting a closed session resolution that allows it to "discuss personnel, negotiations, legal and student matters" and "to convene into closed session as the need may arise at any time during the public session, immediately after adjournment or at any time prior to the next public meeting" fails to comply with the requirements of N.J.S.A. 10:4-13. The Board filed its Answer on November 7, 2007, taking the position that its actions comply with the statute. There being no material facts at issue, the parties have filed motions for summary judgment.

The general legislative purpose of the Open Public Meetings Act is set forth in N.J.S.A. 10:4-7, in pertinent part, as follows:

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

The Legislature further declares it to be the public policy of this State to insure that the aforesaid rights are implemented pursuant to

the provisions of this act so that no confusion, misconstructions or misinterpretations may thwart the purposes hereof.

(Emphasis added). Pursuant to N.J.S.A. 10:4-21, the Act is to "be liberally construed in order to accomplish its purpose and the public policy of this State as set forth in [N.J.S.A. 10:4-7]."

Consistent with its stated public purpose, N.J.S.A. 10:4-12a requires meetings of public bodies to be open to the public at all times, unless the subject matter of the meeting falls into one of the statutory exceptions. Those exceptions are articulated as follows:

A public body may exclude the public only from that portion of a meeting at which the public body discusses:

- (1) Any matter which, by express provision of Federal law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section.
- (2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States.
- (3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or incompetent, his guardian) shall request in writing that the same be disclosed publicly.

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.

(5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

(6) Any tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair such protection. Any investigations of violations or possible violations of the law.

(7) 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.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

(9) Any deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit

belonging to the responding party as a result of an act or omission for which the responding party bears responsibility.

N.J.S.A. 10:4-12b.

If an entity subject to the Act intends to hold a closed session, it must comply with the provisions of N.J.S.A. 10:4-13, which provides:

No public body shall exclude the public from any meeting to discuss any matter described in subsection 7. b. until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:

- a. Stating the general nature of the subject to be discussed; and
- b. Stating 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.

The underlined provision is the one at issue in this case.

It is my understanding that the Board typically meets at 8 p.m. for a public session. One of the first items of business is a resolution to go into closed session to discuss "personnel, negotiations, legal and student matters". The motion also provides as follows:

The discussion conducted in closed session can be disclosed to the public at such time as the matters have been resolved. This resolution authorizes the Board to convene into closed session as the need may arise at any time during the public session, immediately after adjournment or at any time prior to the next public meeting.

Typically, however, the Board does not then go into closed session, but instead continues the public session. Again typically, the Board holds a regular closed session meeting as early as 5 p.m. on the day of its next public meeting on the basis

of the resolution passed at the preceding public meeting. (Holliday Certification, Paragraph 5).

Paff argues that the Board is not complying with N.J.S.A. 10:4-13 because (1) it is merely listing topics that are permissible for closed session discussion without disclosing what will actually be discussed and (2) it appears to be noticing, at least potentially, multiple closed session meetings that could take place on different days. The Board contends that it is complying with the statute because it is giving the "general" subjects that may be discussed. The Board also argues that it does not always know at the time the resolution is offered what topics might need to be discussed in the future. However, counsel for the Board acknowledged at oral argument that the Board could not meet in closed session between noticed public meetings without giving separate notice of such a meeting.

There does not appear to be an Appellate Division decision that addresses the issue squarely. Then Mercer County Assignment Judge Carchman addressed the issue at some length in a reported case - Council of New Jersey State College Locals v. Trenton State College, 284 N.J. Super. 108 (Law Div. 1995). That case is mentioned in Loigman v. Committee of Middletown, 308 N.J. Super. 500, 502 (App. Div. 1998), as having been relied upon by the court below. The issue in Loigman, however, was the manner of enforcement of the order below, and apparently not the merits of the decision. Nevertheless, there is nothing in the Loigman opinion that suggests the Appellate Division questions the correctness of the approach taken by Judge Carchman in the Trenton State case.

In Trenton State, the Board of Trustees utilized the type of broad closed session resolution at issue in this case, one that listed a variety of permitted closed session topics. Judge Carchman concluded that the resolution did not comply with

the statutory requirement.

* * * The Act mandates that the public be informed of "the general nature of the subject to be discussed." The Board, like many other public bodies, must tread a fine line--informing the public about its executive-session activities while not compromising the privacy interests of those whose business is being discussed. Nevertheless, the Board has struck a balance which does not afford the public any real knowledge of the Board's executive-session proceedings. The Board's notice is framed so broadly that it does no more than tell the public that there will be a meeting in executive session. The notice merely recites the litany of exceptions which would allow it to proceed in closed session. No attempt is made to indicate which one or ones of these exceptions are relevant to a particular closed-session proceeding. This complete failure to delineate which subject or subjects will be discussed in closed session does not comply with the statutory mandate that the public know the general nature of the agenda.

The statutory requirement is not an onerous one--only the general nature of subject need be disclosed; specificity is not required. For example, a resolution authorizing a closed session meeting to "Review the performance of individual personnel" comports with N.J.S.A. 10:4-13. Cole v. Woodcliff Lake Bd. Of Educ., 155 N.J. Super. 398, 407 (Law Div. 1978); see also Houman v. Mayor of Pompton Lakes, 155 N.J. Super. 129, 149-50 (Law Div. 1977) ("[T]he statement that personnel matters would be considered, without specific disclosure that the personnel question involved the retention of legal counsel, is arguably sufficient. However, the resolution made no mention of the fact that the closed meeting would also involve the discussion of whether, in the first instance, to pursue the appeals. Therefore, this resolution is not in conformity with the mandatory requirements of N.J.S.A. 10:4-13.").

[A]lthough there is no case law on the subject 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* § 141, at 174 (Michael A. Pane) (2d ed. 1993).]

The Board has made no effort to provide the public with as much knowledge as possible. It has merely recited the provisions of the statute, not made an attempt to comply with it. N.J.S.A. 10:4-13, which requires a public body to state the general nature of the subject or subjects to be discussed in closed session, would be devoid of all substantive meaning if mere reiteration of all potential reasons for moving into closed session were sufficient for compliance. The Legislature, in enacting N.J.S.A. 10:4-13, certainly did not intend that result. The Board's resolution, which simply parrots the statutory language and encompasses all possible justifications for proceeding in closed session, is improper.

The Board argues that the scheduling of the closed meeting precedes the public meeting and precludes the publication of notice more specific than the language presently utilized. Plaintiff suggests a practical solution--rather than have the closed meeting precede the public meeting, reverse the order and issue appropriate notice. Not only is there no statutory impediment to this proposal, the statute appears to contemplate this procedure. The Board's argument is illusory; the problem is easily remedied.

This court holds that the statutory reference to general notice mandates more than a restatement of the statutory language and requires that the public be informed of the matters to be discussed, albeit in general terms rather than with the specificity required by the notice requirements for a public meeting.

284 N.J. Super. 114-16 (emphasis in original). See also Houman v. Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977).

Judge Carchman's position 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. This requires some balancing by the public entity and its counsel. Obviously, the Board discusses issues, such as student discipline, that are very confidential and it would be inappropriate even to identify the student involved. Other issues, such as labor negotiations, generally need to be discussed in closed session, but not necessarily without giving the public notice that the topic is being discussed.

Litigation against public entities is frequently settled, subject to approval by the entity. In most cases, there is no reason why the Board cannot announce that the specific litigation is being discussed in closed session, during which the arguments in favor and against a proposed settlement can be fully and freely discussed with counsel. If, in a specific case, the mere fact of an entity's discussion of specific litigation could adversely affect its litigation strategy or disclose confidential information, it might well be appropriate not to identify the litigation being discussed.

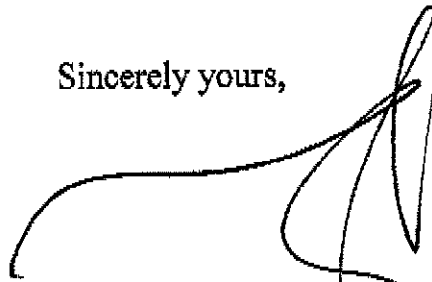
The Board's argument that it cannot know at the time of one meeting what will be discussed at the closed session held before its next public meeting is, in my view, as "illusory" as Trenton State's similar argument before Judge Carchman. There is no reason why the Board cannot notice its public meeting to start whenever it intends to hold the closed meeting, go into public session and then immediately into closed session after passing the appropriate resolution. At that time, the Board should be in a position to know what matters need to be discussed

in closed session. It can certainly advise members of the public that, although the public meeting will be convened at, for example 5 p.m., the Board will immediately go into closed session and not discuss public business until, for example, 8 p.m.

The paramount public policy here is not the convenience of the public entity, but rather the right of New Jersey "citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion." N.J.S.A. 10:4-7 (emphasis added). In order to vindicate that right, the Board must make a good faith effort to provide the public with as much knowledge as possible without endangering the "public interest" or the rights of others.

For the reasons expressed above, I will grant Mr. Paff's motion for summary judgment and deny the Board's cross-motion. As the prevailing party, Mr. Paff will be entitled to taxed costs pursuant to R. 4:42-8.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Alexander P. Waugh, Jr.", with a long horizontal flourish extending to the left.

Alexander P. Waugh, Jr.
Judge of the Superior Court