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## COMMON ISSUES CONCERNING MUNICIPAL ISSUES AND THE OPEN PUBLIC MEETINGS ACT



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Interpretations of the Open Public Meetings Act are constantly evolving.

Questions concerning the Open Public Meetings Act, or OPMA, are frequently matters of concern for municipal officials in New Jersey. While some are unique to a certain fact pattern, certain issues recur with frequency. Some of the common ones that have been brought to my attention by municipal officials over the past few years follow.

A common point of confusion is the amount of detail to be included in the resolution that must be adopted by a municipal governing body before it enters into closed session. While there has not been controlling case law on this subject, a recent unpublished Law Division case, *Paff v. Monroe Township Board of Education*, 2007 WL 191984(N.J. Super. L.), has indicated that a resolution restating or quoting the section of the Open Public Meetings Act dealing with the subjects that can be discussed in such a session does not by itself comply with the statute.

In that case, the defendant board used a resolution that supported its need to meet in closed session by stating that it needed to "discuss personnel, negotiations, legal and student matters." To determine if this resolution was sufficient, the Court looked to the section of the Open Public Meetings Act requiring the resolution, N.J.S.A. 10:4-13.

It 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 question before the Court was the meaning of "general nature of the subject" in N.J.S.A. 10:4-13 a. The Court noted that the amount of information to be given to the public in closed session resolutions must balance the open government underpinnings of OPMA against the confidential nature of the subject matter discussed in the closed session. That is why the statute requires only that the general nature of the subject must be disclosed. However, more than the simple recitation of the subjects exempted under the law is required. The court therefore determined that "The Board's resolution, which simply parrots the statutory language and encompasses all possible justifications for proceeding in closed session, is improper".

To give some idea of what would be sufficient description of the subject matter of a closed session in the resolution, the Court stated that in many cases where litigation is being discussed, the name of the case can be divulged without harm. In certain situations, however, doing so might reveal confidential information, and in such a situation, the mere statement that litigation is being discussed could be sufficient. Similarly, the resolution could state that labor negotiations or personnel matters are being considered in the closed session.

Another area of confusion for some officials is the applicability of OPMA to "executive sessions" of the governing body where municipal matters are discussed, but no action or votes are taken. All of the requirements of OPMA for meetings of the municipal governing body apply to these sessions, including not only the notice and the requirements that minutes be kept, but the requirement of a public comment period at the session. Under the Act, if a meeting of governing body is open to the public, a comment period must be provided at that meeting.

The public comment period itself, a requirement added to the Act in 2002, is also a source of questions. Unlike the other aspects of OPMA, this requirement applies only to the meetings of municipal governing bodies and Boards of Education. Therefore, for example, while the meetings of a municipal planning board are certainly subject to the Open Public Meetings Act (OPMA), and therefore must be properly noticed under the Act so that the public has the opportunity to attend, no public comment period is required at such meetings. The particular provision of OPMA, N.J.S.A. 10: 4-12 a., that requires time to be set aside at a meeting for public comment does not apply to these meetings. While allowing time for public comment at planning board meetings is good public policy, it is not a legal requirement.

The application of the Open Public Meetings Acts to subcommittees of public bodies is another area of concern. It is common for municipal governing bodies to have subcommittees that study various issues and report back to the council on their findings. The meetings of these subcommittees need not be open to the public under OPMA as long as there are not enough members of the governing body present to constitute a quorum, and as long as these subcommittees function only in a research and advisory capacity.

However, N.J.S.A. 10:4-7 states that the public has the right to be "present at all public bodies, and to witness... all phases of the deliberation, policy formation, and decision making of public bodies." Furthermore, N.J.S.A. 10:4-11 provides that "No person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this (Open Public Meetings) Act." Therefore, if subcommittees are used improperly in an effort to keep the public out of critical discussions, their meetings will be in violation of OPMA. All deliberation and decision making must occur in public, and the public meeting can never operate as a mere "rubber stamp" on decisions made in private.

The New Jersey Appellate Division has upheld closed meetings of a planning board for certain limited purposes where no decisions were made or discussed. In *Gandolfi V. Town of Hammonton*, 367 N.J.Super. 527 (March, 2004), the planning board had a closed meeting with a developer concerning some claims made by the developer. Some time later, this same developer made an application for a subdivision before the planning board. All of the subsequent subdivision proceedings before the board complied with the Open Public Meetings Act. The court ruled that the Planning Board's closed meeting did not create an OPMA problem. As long as the discussions at the closed meeting did not culminate in a vote or any other action being taken, there was no violation of the Act. The Appellate Division also found no violation of OPMA when two Planning Board members met with the Board's Engineer and representatives of a developer in a closed meeting, since no action was taken on the matter discussed except at open meetings complying with the requirements of the Act (*Neu v. Planning Board of the Township of Union*, 352 N.J. Super. 544, 2002).

Municipal officials are often concerned about the videotaping of municipal meetings by the public, both because of the possible disruption of the meeting and because some residents attending the meetings do not want to be videotaped. New Jersey case law makes it clear that a member of the public cannot be prohibited from videotaping a municipal meeting. In the case of *Tarus v. Pine Hill*, Docket No.a-93-05(2007), the New Jersey Supreme Court said "...we hold that, subject to reasonable restrictions, members of the public have a common law right to videotape municipal proceedings in New Jersey. Our conclusion is supported by an interwoven tapestry of jurisprudence and policy that demonstrates both the value of open government and the right to document governmental proceedings." As for concerns over the privacy of members of the public, the Court said "Although some citizens may be fearful of video cameras, we find that consideration insufficient to deny the right to videotape. Further, no right of privacy protects a citizen's public comments."

However, the Court did find that the common law right to videotape public meetings is neither absolute nor unqualified. A public body may impose reasonable guidelines to ensure the videotaping is not disruptive to the meeting or to the other citizens' right of access to and participation in that meeting. The court indicated that such guidelines can include restrictions on the number and positioning of cameras, lighting, and the location of the person operating the equipment. They can also include restrictions designed to control noise levels and prevent damage to public facilities. Any guidelines must be as narrow in scope as possible to accomplish these goals. Furthermore, they must be established and applied in a neutral fashion.

Interpretations of the Open Public Meetings Act are constantly evolving. If a municipal official has questions about the requirements of the Act, he or she should consult with the municipal attorney.

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