

MINUTES OF COMMISSION MEETING

January 17, 2019

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were: Chairman Vito A. Gagliardi Jr.; Commissioner Andrew O. Bunn (via telephone); Commissioner Virginia Long; Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner David Lopez; Professor John K. Cornwell, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Kimberly Mutcherson.

In Memoriam

The Commission began the meeting by acknowledging the passing of Albert Burstein in December of 2018. Chairman Gagliardi noted that Commissioner Burstein was the longest-serving member of the Commission, and its last original member. Recognizing the many contributions of Commissioner Burstein during his 27 years of service, Chairman Gagliardi observed that Commissioner Burstein was first in war, first in law, and first in the heart of the New Jersey Law Revision Commission.

Minutes

Commissioner Bell requested that the text on page 6 of the Minutes, relating to the definition of “tumultuous” be amended to reflect his observation that subsection (b) of the statute may regulate noise consistent with the First Amendment and his concern regarding any attempt to regulate the content of an individual’s speech in violation of that amendment.

With the modification requested by Commissioner Bell, the Minutes of the December 20, 2018, Commission meeting were unanimously approved on the motion of Commissioner Long which was seconded by Commissioner Bell.

Public Health Definitions

Joseph Pistritto discussed with the Commission a Memorandum regarding the presence of duplicative definition sections in the Public Health Statute. In July of 2017, the Commission authorized work on a project to consolidate two potentially duplicative definition sections contained in Title 26 of the New Jersey Statutes, specifically N.J.S. 26:1-1 and N.J.S. 26:1A-1.

During the course of his research to address the definition section, Mr. Pistrutto noted that as more statutory provisions were added to Title 26, so were additional definition sections. These sections frequently duplicated definitions already contained in the Title. Words such as: State Department; Commissioner, Council, Division, Division Director and Local Board are examples of some duplicate terms with definitions.

Mr. Pistrutto requested, and the Commission granted, authorization to expand the scope of the project to examine whether it would be beneficial to further consolidate the definition sections.

Statute of Limitations

Samuel Silver discussed his Memorandum concerning the fact that an insurer that has provided personal injury protection (“PIP”) benefits must bring suit seeking reimbursement from a tortfeasor before the conclusion of the two-year statute of limitations or lose the ability to bring such an action. Pursuant to the statute, the two-year period begins upon “the filing of a claim” or such benefits. When multiple PIP applications are filed, the question arises regarding the commencement of the statute of limitations. The event that triggers the statute of limitations was the subject of the Memorandum discussed with the Commission.

Mr. Silver explained that the seeds for this issue were sown in the matter of *New Jersey Mfr. Ins. Grp. v. Holger Trucking Corp.* in which the Appellate Division analyzed whether a claim was “filed” when the insured or the service provider requests reimbursement for PIP or when the insured submits a claim form requested by the insurer. The Court in *Holger* concluded that “the claim” referred to in the statute is the submission of the claim for or application requested by the insurer.

In *Abdulai, v. Casabona*, the Appellate Division was presented with a similar issue. In this case, they were asked to whether a claim was deemed to be “filed” when an insured or health care provider submits a generic PIP form or when the insured submits an application in the form prescribed by the insurer. The Court noted in its analysis that the term “filed” is both ambiguous and undefined in the statute.

After a brief discussion regarding the Court’s analysis, Mr. Silver stated that the Court held that a claim is “filed” when an insurer receives a PIP application from an insured on the form requested by the insurer. To prevent claims from languishing at the hands of errant insurance companies, Mr. Silver observed that unreasonable delays may result in the running of the statute of limitations.

Justice Long commented that this was a worthwhile project. Staff was unanimously authorized by the Commission to engage in additional research and outreach to determine whether clarity could be brought to the statute.

Open Public Records Act – Entitles to Which Applied

In *Verry v. Franklin Fire District No. 1*, the Supreme Court considered whether the Open Public Records Act (OPRA) required the release of the constitution and bylaws of a volunteer fire company that is a member of a statutorily established fire district. Jennifer Weitz discussed this issue, relying upon a Memorandum prepared by former Legislative Law Clerk Rachael Segal.

The Millstone Valley Fire Department (MVFD) is a non-profit entity that annually enters into a contract with the Franklin Fire District No. 1 to provide firefighting services to the public. This contract allows them to receive public funds to cover the housing, equipment and training of the company. In 2013, Robert A. Verry, submitted an OPRA request to the district for a copy of the constitution and bylaws of the (MVFD).

After the District denied the plaintiff's request, he filed a complaint with the Government Records Council (GRC) in which he sought to compel the release of the requested records. After concluding that the MVFD is a "public agency" for purposes of OPRA, the GRC order that the records be turned over to the plaintiff. On appeal, the Appellate Division affirmed the GRC's interim order, concluding that the MVFD is a public agency subject to OPRA. The District appealed this decision to the New Jersey Supreme Court.

Ms. Weitz discussed with the Commission the decision of the Supreme Court in this case. The Court reasoned that a volunteer fire squad may be regarded as an instrumentality of a fire district, but because the District itself is not a political subdivision, rather an instrumentality of one, the volunteer company is only an instrumentality of an instrumentality and thus not a public entity as defined by OPRA. The District, however, was a public entity and was therefore obligated to provide access to the requested documents because they should have been on file with, or accessible to, the District pursuant to its authority to supervise the MVFD.

Justice Albin and Chief Justice Rabner filed a separate opinion dissenting in part and concurring in part. They reasoned that the release of MVFD's constitution and bylaws was the correct result. Justice Albin added that except in name, the Franklin Fire District fire department was a public agency subject to OPRA. Thus, the MVFD is an instrumentality of the district and its records subject to OPRA scrutiny.

Chairman Gagliardi opined that this project does not involve a clarification; rather, the Commission would be involving itself in a contested issue that is traditionally the subject of judicial review. Commissioner Long added that although she approves of additional study in this

area she does not see a way out of the complexity. Commissioner Bell suggested deferring to the GRC given their policy of openness and transparency.

Commissioner Cornwell inquired whether there was a way for the Commission to identify the issues involved in OPRA and note that the Legislature should provide clarity on this subject matter. In response, Laura Tharney explained that she had intended to discuss with the Commission the consolidation of OPRA projects on which Staff had been authorized to work, and said that such a consolidation could include an identification of specific areas in which the Commission has authorized substantive work and those in which the Commission simply wishes to identify issues for additional Legislative consideration.

Commissioners Long, Cornwell, Bunn, and Bertone concurred with Ms. Tharney's suggestion and the Commission unanimously authorized additional work in this area.

Learned Professionals Exception

Joseph Pistritto discussed a Memorandum proposing the codification of the "Learned Professionals Exception" to the Consumer Fraud Act (CFA) which came to the Commission's attention after a review of *Atlantic Ambulance Corp. v. Cullum*.

In *Cullum*, a group of defendants appealed the denial of their class certification claim after they were sued by an ambulance provider for failure to pay their bills. The Appellate Division suggested that class certification was proper because Atlantic Ambulance was regulated by the Department of Health, and it qualified as a learned professional.

As a part of his presentation, Mr. Pistritto brought to the Commission's attention recent input Staff received from Mr. David McMillin, Esq., of Legal Services of New Jersey. Mr. McMillin was unable to attend the meeting, but Staff assured him that his concerns would be relayed to the Commission. Mr. McMillin raised four concerns regarding potential Commission work in this area. First, the learned professionals exception is a judicially crafted doctrine with continued refinement as additional cases are decided. Second, Attorney McMillin stated that an argument could be made that *Cullum* does not reflect the comprehensive history of this area of the law and was wrongly decided. Third, the New Jersey Supreme Court's most recent discussion of the learned professionals exception seems to suggest the billing and collection practices at issue in *Cullum* might not be covered by the exception (*See Manahawkin Convalescent v. O'Neill*, 217 N.J. 99, 124 (2014)) ("We have serious doubts that the billing and collection function at issue in this case would qualify for the learned professionals exception to the CFA..."). Finally, Mr. McMillin noted that the last time legislative efforts were made in this area, the bills introduced proposed to eliminate, rather than codify, the learned professionals exception (A-2088 from 2004 which proposed subjecting advertisements by licensed professionals to the CFA passed the Assembly but did not move forward in the Senate; S-1259, also from 2004, which also proposed subjecting advertisements by learned professionals to the CFA but did not move forward in the Senate).

Mr. Pistritto noted that New Jersey case law has exempted attorneys, hospitals, accountants, doctors, nursing homes, home inspectors, and insurance brokers from the CFA under the learned professionals exception. Real estate brokers were previously exempt from the CFA until they were explicitly incorporated in the Act. Even if a profession is deemed covered by the learned professionals exception, Mr. Pistritto clarified that the professionals remain subject to the CFA if they engage in conduct outside the scope of their professional licenses.

In conducting a survey of state approaches to learned professionals within the context of the Consumer Fraud Act, Mr. Pistritto discovered that a majority of states create exceptions for learned professionals through case law, but seven states do so by way of statute. He noted the statutory approaches to this problem include either expressly stating which professions remain outside the reach of consumer fraud laws or simply stating that learned professionals are exempt and allowing courts to define what a learned professional is.

After conclusion of Mr. Pistritto's presentation, Ms. Tharney stated that Staff remained unsure of whether the Commission wished to consider undertaking a project in this area, or awaiting additional judicial evolution of the doctrine.

Commissioner Cornwell asked what the goal of this project would be. Ms. Tharney responded that the goal of the project would be to make individuals consulting the CFA aware there are certain professions that have been exempted.

Commissioner Bell said that this proposed project highlights that someone might not know they have the protection of the learned professionals exception until their case is decided by the Supreme Court; after the parties have spent time and resources litigating. He added, however, that attempting to list professions would be difficult and could involve policy determinations.

Commissioner Bunn suggested that the doctrine has matured enough to make codification appropriate. He added that developing statutory elements would make it easier for trial courts to implement the exception moving forward. He also stressed that whatever definition the Commission develops must be flexible and work to the benefit of those who follow the CFA.

Commissioner Bertone stated that any statutory provision the Commission formulates should ensure it is covering conduct that is in line with the activities of a learned professional.

Chairman Gagliardi said that, at the very least, the Commission should add something to the CFA to address learned professionals. He favored defining the term "learned professional" but cautioned against including licensing in a definition given the large number of professions already subject to licensure. The Commission unanimously authorized Staff to work in this area.

Open Public Records Act – Redacted Information

In *Paff v. Bergen County* the Appellate Division considered whether the Bergen County Sheriff's Department violated the Open Public Records Act (OPRA) when it provided the requesting party with redacted documents in response to his request. Samuel Silver discussed this issue, relying upon a Memorandum prepared by Legislative Law Clerk Renee Wilson.

The Plaintiff in *Paff* sought the list of complaints that had been levied against Corrections Officers at the Bergen County Jail. The Plaintiff was ultimately provided with a response to his inquiry. Bergen County, however, redacted the personal identifiers of the parties, the names of the complainants and the names of the officers.

After receiving the redacted information from Bergen County, the Plaintiff filed a complaint and order to show cause. The County maintained that it was exempt from having to provide the requested information because it followed the Attorney General's directive regarding "Internal Affairs Policy and Procedure." The Trial Court ordered the County to disclose the requested information, finding no statutory basis to exempt the disclosure of this information. The County appealed.

The Appellate Division reversed the decision of the trial court and held that the County was exempt from providing the information requested by the Plaintiff. All records are subject to access under OPRA unless they are exempt by OPRA, any statute, the Legislature, or by Executive Order. The Court noted that the Attorney General does not issue directives in the same way as other agencies, but has the authority to adopt guidelines on how to handle certain matters. The Appellate Division engaged in a complicated analysis, and concluded that because the Guidelines adopted by the County were akin to those promulgated by the Attorney General, and because the Attorney General issues Guidelines by way of a statutory mandate, the County was exempt from producing the requested information.

Commissioner Cornwell suggested that the statute could benefit from coherence. Commissioner Bertone observed that there has to be a clearer way to arrive at the decision issued by the Court than the path taken in the case. Commissioner Bunn said that this is an unpublished Appellate Division decision that seems to have misinterpreted the statute and expressed concern that working in this area would enshrine a seemingly erroneous decision. Chairman Gagliardi observed that the general consensus of the Commission appears to be one of discomfort with the Appellate Division's decision in this matter. He said that perhaps there is something within the statute that could be identified and brought to the attention of the Legislature or incorporated into a larger project dealing with OPRA. With that clarification, Commissioner Bunn stated that he did not have an objection to permitting Staff to conduct further research in this area, which was unanimously authorized.

Tort Claims Act

Relying on the Memorandum prepared by former Legislative Law Clerk Eileen Funnell, Jennifer Weitz discussed the 90 day deadline set forth in the Tort Claims Act (TCA) as addressed

by the New Jersey Supreme Court in *Jones v. Morey's Piers, Inc.* In *Jones*, the Supreme Court considered whether the TCA barred the defendants from asserting contribution and common law indemnification claims against a public entity.

Jones arose after an eleven-year-old child, on a public school trip, died after falling from one of the rides at Morey's Piers. Neither the Plaintiffs nor the Morey-Defendants served a notice of claim upon the school, which was considered a public entity. As a result, the school moved for summary judgment asserting that the TCA barred the Morey defendants' claims. The Morey-Defendants cross-claimed and suggested that the TCA applies only to claims asserted by plaintiffs. The trial Court agreed with the Morey-Defendants and dismissed the school's motion for summary judgment. The school appealed.

Ms. Weitz stated that judicial opinions interpreting the statute have reached divergent results because the statute is expansively phrased. The Legislature has not distinguished between a plaintiff's claim and a defendant's cross-claim or third-party claim against a public entity; nor has it exempt any category of claims from the 90-day time limit. There is no language that addresses a defendant's cross-claim or third-party claim as it relates to the 90-day limit in the statute. Thus, defendants are subject to the time restriction based on the plain language of the statute.

Chairman Gagliardi expressed surprise that this significant issue has never been addressed by the judiciary. He suggested that this is a worthy project and that the Commission should endeavor to clarify the statute. Commissioner Long concurred with Chairman Gagliardi's comments and observations. Staff was authorized by the Commission to engage in additional research and outreach to determine whether clarity could be brought to the statute.

Open Public Records Act – “Meaning of Name and Identity”

Laura Tharney presented a Memorandum addressing the Open Public Records Act (“OPRA”) exception for records of an ongoing investigation which had been prepared by former Legislative Law Clerk Rachel Segal. Ms. Tharney noted that this issue came to the attention of Staff after the New Jersey Supreme Court decided *North Jersey Media Group, Inc. v. Township of Lyndhurst*, 229 N.J. 541 (2017).

In *North Jersey Media* the Court addressed what information was subject to an OPRA request after a car chase in which a suspect eluded police, crashed into a guardrail, and allegedly placed officers in danger as he attempted to drive away. Officers fired their weapons and the suspect was killed. North Jersey Media Group filed an OPRA request for the names of officers who used deadly force. When the requested documents were not provided, North Jersey Media filed suit.

On appeal to the New Jersey Supreme Court, the Court considered two OPRA exemptions, one of which was the exemption of records of an ongoing investigation, which

includes section 3(b). Defendants argued that “section 3(b) does not require disclosure of the ‘names’ of the officers involved in a shooting incident and, in any event, allows law enforcement to withhold that information under circumstances that apply here.” Defendants maintained that Section 3(b) required them to release information, not records. One of the certifications provided to the Court focused on arguments in opposition to the release of the names of the officers involved in a shooting, arguing that that the stigma of being associated with a law enforcement investigation was “palpable,” “potentially devastating,” and “not easily removed” even if “no charges are substantiated”, that “officers would face extensive media coverage with real consequences to them, their families, and the agencies they serve”, that “officers and their families would face the ‘risk of retaliation’” and that disclosure “would greatly prejudice” the integrity of “the ongoing [. . .] investigation.”

The Court said that these reasons would apply to “nearly all cases in which a law enforcement officer uses deadly force” and said that the arguments “could lead to a change in the current law” if “accepted by the Legislature,” but that the courts were not the vehicle for that change.

Chairman Gagliardi noted that there is currently a case pending before the New Jersey Supreme Court addressing similar issues and it would be beneficial to place this project on hold until the Supreme Court has issued an opinion in that case. Ms. Tharney said that Staff would do so and would revisit the issue in June.

Annual Report

Laura Tharney advised the Commission that Staff has completed the 2018 Annual Report and that, as in prior years, Staff would like to continue to proofread the Report prior to its distribution to the Legislature on or before the February 1st statutory deadline. In the absence of any substantive changes, the Commission unanimously moved to authorize the release of the Annual Report on the motion of Commissioner Cornwell, which was seconded by Commissioner Long.

Miscellaneous

The Commission unanimously approved of the proposed meeting dates for 2019.

Adjournment

The meeting was adjourned on the motion of Commissioner Long, seconded by Commissioner Bell. The next Commission meeting is scheduled to be held on February 21, 2019, at 10:00 a.m.