

EXHIBIT 1

**IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – EQUITY**

)	
)	
	)	Docket No. 2023-cv-2998-C1
)	
SPOTLIGHT PA,	)	TYPE OF PLEADING
	)	Second Amended Complaint in Equity
Plaintiff;)	
	)	FILED ON BEHALF OF
)	
BOARD OF TRUSTEES OF THE	)	Spotlight PA
PENNSYLVANIA STATE)	
UNIVERSITY,	)	COUNSEL OF RECORD
	)	Paula Knudsen Burke
Defendant.)	
	)	PA I.D. NUMBER
	)	87607
)	
)	

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by an attorney and filling in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff.

You may lose money or property or other rights important to you. You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to the telephone or the office set forth below to find where you can get legal help.

**Centre County Bar Association
192 Match Factory Pl
Bellefonte, PA 16823
(814) 548-0052**

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**SECOND AMENDED COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Plaintiff, by and through its undersigned counsel, hereby files this Second Amended Complaint against the Pennsylvania State University (“Penn State”) Board of Trustees (“the Board”).

INTRODUCTION

1. Pennsylvania citizens have a statutorily protected right to observe and comment upon the workings of their government. The Sunshine Act, 65 Pa.C.S. §§ 701 *et seq.* (the “Act”), the Commonwealth’s open meetings law, was enacted with the legislative purpose of allowing citizens to witness and participate in actions of their government officials to enhance democratic control over and involvement in local affairs. “[S]ecrecy in public affairs undermines the faith of the public in government,” the General Assembly reasoned; as such, all political subdivisions are required to conduct governmental proceedings publicly. *Id.* § 702(a). Specifically, the public has a right to be “present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies.” *Id.*

2. Plaintiff Spotlight PA relies on public meetings to ensure that its readership is properly informed about happenings within local government and institutions receiving public money. Without access to meetings held by public bodies, Spotlight PA cannot bring its diverse readership the crucial insight that bolsters “faith of the public in government,” nor facilitate the democratic self-

governance that the Act was enacted to promote. *See* 65 Pa.C.S. §§ 701 *et seq.*

3. Since opening its State College bureau in Centre County, Spotlight PA has reported on Penn State's operations, including how journalists' and the public's inability to attend Penn State Board meetings has hampered meaningful understanding of how Penn State operates and upholds its obligations to the community and beyond. *See, e.g.,* Wyatt Massey, *Regular Private Meetings Among Top Penn State Trustees May Be Violating Pa.'s Transparency Law*, Spotlight PA (Sept. 15, 2022), <https://perma.cc/VQ5T-7DFE>.

4. Indeed, despite the General Assembly's explicit mandate that government bodies hold open meetings, Penn State's Board of Trustees has repeatedly refused to do so. Given the university's import and influence in Centre County, as well as its annual multi-million-dollar public funding, community members and politicians have been dismayed by Penn State's lacking transparency and accountability practices.

5. The mandate of the Sunshine Act cannot be realized until the Board's closed meetings are opened. The allegations contained herein demonstrate the Board's failure to abide by its Sunshine Act obligations and its misuse of exceptions to the Act's open meetings requirement to avoid public scrutiny. Due to the Board's failure to uphold its obligations to the public, nonprofit news outlet Spotlight PA seeks this Court's intervention in the form of declaratory and injunctive relief. In support thereof, Plaintiff avers as follows:

PARTIES

6. Spotlight PA is a Pennsylvania nonprofit corporation with federal 501(c)(3) status dedicated to independent, nonpartisan journalism about the Pennsylvania state government and urgent statewide issues. Spotlight PA operates the largest statewide distribution network of its kind in the United States, providing free access to vital public service and investigative journalism to millions of Pennsylvanians via partnerships with more than 100 news outlets across the state. Spotlight PA also posts its work online at spotlightpa.org. Spotlight PA's journalism has regularly prompted meaningful reform and been recognized by its peers at the state and national level as among the best local investigative journalism in the country. In addition to its reporting, Spotlight PA's State College bureau journalists regularly engage with community members through listening sessions and local events. They also host workshops for the Penn State student outlet *The Daily Collegian*, and participate in other opportunities to mentor student journalists. Spotlight PA's general mailing address is P.O. Box 11728, Harrisburg, Pennsylvania 17108-1728 and its State College bureau mailing address is 210 W. Hamilton Ave #331, State College, Pennsylvania 16801.

7. Spotlight PA's State College bureau employs three reporters and an editor. These Centre County-based reporters rely on public access to local governmental body meetings to provide news coverage to the Penn State community in Centre County and beyond. Reporters working for Spotlight PA regularly attend

meetings held by various Penn State bodies and its Board of Trustees.

8. Defendant Pennsylvania State University Board of Trustees is comprised of thirty-eight individual Trustees and is the managing and governing body of Penn State. *See* Current Trustees, Penn State Office of the Board of Trustees, <https://trustees.psu.edu/trustees/> (last visited Dec. 5, 2023); Corporate Charter of The Pennsylvania State University, <https://trustees.psu.edu/files/2019/03/Charter-November-2017-1.pdf> (last visited Dec. 5, 2023). Trustees include Penn State alumni, community business and industry leaders, the governor, and secretaries of several Pennsylvania state agencies. The Board's office is in Centre County at 201 Old Main, University Park, Pennsylvania 16802.

9. The Board is a government agency under the Sunshine Act, 65 Pa.C.S. § 703. An “agency” under the Act is a governmental decision-making body “and all committees thereof authorized by the body to take official action or render advice on matters of agency business,” including such committees that exist as part of “the boards of trustees of all State-related universities,” including Penn State. *Id.*

JURISDICTION AND VENUE

10. This Court has original jurisdiction over this action involving the Board of a state-related university pursuant to 42 Pa.C.S. § 931(a) and 65 Pa.C.S. § 715.

11. All parties are located in this County and the Court can exercise personal jurisdiction over them.

12. This action arose in Centre County and is a lawsuit against a

government agency located within the county. Therefore, venue is appropriate pursuant to Pennsylvania Rules of Civil Procedure 1006 and 2103, as well as 65 Pa.C.S. § 715.

STATEMENT OF FACTS

A. Background

13. On October 26, 2023, Spotlight PA sent the Board, President Neeli Bendapudi, and Penn State General Counsel Tabitha Oman a letter (“Letter”) demanding that Penn State abide by the open meetings requirements of the Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701 *et seq.*, and requesting a reply in advance of its next meeting, which was to be held on November 9, 2023. A copy of the Letter is attached hereto as Exhibit A.

14. The Letter outlined the Board’s routine practice of excluding Spotlight PA reporters and the public from its meetings on the asserted basis that the meetings were “conferences” or “executive sessions,” and thus exempt from the Act’s openness requirement. *Id.*

15. For instance, the Letter relied on documents secured by Spotlight PA through Right-to-Know Law requests that revealed the Board held a closed meeting in April 2023 for the purpose of reviewing the Board’s Finance, Business, and Capital Planning materials, and requested that trustees ask questions “during the closed session” so that they could be “answered in the run up to”—as opposed to during—the Board’s public May 2023 meeting. *Id.*

16. Concluding the Letter, Spotlight PA and its counsel offered to meet directly with the Board for Sunshine Act compliance training and referred the Board to the Pennsylvania Office of Open Records for the same. *Id.*

17. The Board responded to the Letter on November 9, 2023, stating that Penn State's General Counsel was "confident that the Board has taken its official actions and conducted its deliberations in compliance with the Act." The Board's response is attached hereto as Exhibit B.

18. A complaint alleging multiple violations of the Act was filed December 6, 2023.

19. A first amended complaint was filed March 26, 2024.

20. The allegations contained within the December 6, 2023 complaint and the March 26, 2024 first amended complaint are incorporated herein.

B. Specific Violations

21. The Board held a series of meetings that took place on November 9 and 10, 2023 at the Eric J. Barron Innovation Hub at 123 South Burrowes Street, State College, Centre County.

22. The Board excluded the public from its November 2023 meetings even though it was on notice that its transparency practices were inconsistent with the Act. *See Ex. A.*

23. On both November 9 and 10, 2023, Spotlight PA reporter Wyatt Massey attempted to attend the Board's meetings.

24. At approximately 3:17 p.m. ET on November 9, 2023, Massey entered Room 603 of the Eric J. Barron Innovation Hub, which was the advertised location of two Board committee meetings—the Committee on Audit and Risk and the Committee on Finance, Business, and Capital Planning.

25. When Massey entered Room 603, he heard and saw trustees speaking around a table. Upon seeing Massey enter the room, Rachel Pell, vice president of the Penn State Office of Strategic Communications, signaled to the trustees to stop talking. Shannon Harvey, assistant vice president and secretary of the Board, approached Massey and told him that the Board was meeting in an executive session. Harvey then requested that Massey step out of the room until the public meeting began, which he did.

26. It was unclear to Massey whether this alleged executive session was being held by a Board committee or the entire Board.

27. Several minutes later, Harvey came outside Room 603 and informed Massey that the Audit and Risk Committee’s public meeting was beginning.

28. The Audit and Risk Committee’s public meeting lasted fewer than ten minutes before the committee went into what it called an executive session at approximately 3:30 p.m.

29. The Board did not explain why it was holding two executive sessions—not to Massey in his one-on-one conversation with Secretary Harvey, nor to the public during the ten-minute meeting that took place between the supposed

executive sessions.

30. During the full Board's public meeting on November 10, 2023, the Committee on Audit and Risk chair, Randy Black, summarized that committee's public meeting the previous day but did not provide a reason for the alleged executive sessions that occurred before and after the committee's November 9 public meeting.

31. At approximately 7:38 a.m. ET on November 10, 2023, Massey attempted to enter the Eric J. Barron Innovation Hub building, which was the advertised location of the Board's "Conference and/or Privileged Executive Session" from 8:00 a.m. ET to 12:30 p.m. that day.

32. Thomas J. Oziemblowsky, the Board's associate director, was standing outside of the building, seemingly there to open the door for arriving trustees.

33. When Massey approached, Oziemblowsky identified himself verbally as a Board and Penn State employee. Oziemblowsky was wearing a name tag containing similar information. Oziemblowsky then identified Massey verbally and Massey confirmed his name and position as a Spotlight PA reporter.

34. Massey asked Oziemblowsky whether the Board was meeting that morning and whether the meeting was open to the public. Oziemblowsky confirmed verbally that the trustees were gathering that morning but said that the event was not open to the public.

35. Massey asked Oziemblowsky to clarify whether the trustees were

gathering that morning in a “conference” or an “executive session” since the Board’s webpage noting the Board would be in a “Conference and/or Privileged Executive Session” was not clear. Oziemblowsky said the event was a “conference” and that there was a legal distinction between conferences and executive sessions.

36. Finally, Oziemblowsky told Massey that a public Board meeting would occur later that day in the afternoon.

37. Neither before nor after the asserted November 10 “conference” did the Board, or a representative of the Board, state that the closed session involved a training program, seminar, or session, called by a state or federal agency to provide Board members information on matters directly related to their official responsibilities.

38. During the Board’s public meeting on the afternoon of November 10, Board chair Matthew Schuyler did not indicate that the morning meeting was a conference and instead stated that the Board had met “in executive session to discuss various privileged matters.” No further information about the gathering was provided to the public at that time.

39. The Board website and Schuyler’s statement failed to properly identify which section of the Act permitted the Board to meet in a closed session.

40. The Board held another series of meetings on February 15 and 16, 2024 at the Hintz Family Alumni Center at University Park, PA 16802 in Centre County.

41. The Board excluded the public from its February 2024 meetings even

though it was on notice that its transparency practices were inconsistent with the Act. *See* Ex. A and December 6, 2023 Initial Complaint in the above-referenced matter.

42. On both February 15 and 16, 2024, Spotlight PA State College reporter Wyatt Massey and editor Sarah Rafacz attempted to attend various Board meetings.

43. The Board Subcommittee on Compensation met in closed session on February 15, 2024, at 12:45 p.m. in Robb Hall, a large meeting room surrounded by floor-to-ceiling glass windows.

44. Massey sat outside Robb Hall, while Oziemblowsky and several other individuals stood in front of the large windows that look onto Robb Hall for nearly the entirety of the 45-minute meeting.

45. At approximately 1:30 p.m. on February 15, 2024, the Board Subcommittee on Compensation opened their meeting to the public, at which point Massey entered Robb Hall.

46. Thereafter, the Board Subcommittee on Compensation held a public session beginning at 1:30 p.m.

47. At that meeting, a representative of the Subcommittee shared that it had met in closed session prior to the public meeting to review compensation changes for Penn State President Bendapudi.

48. The representative stated that the Subcommittee and the larger Board met together in executive session to discuss and reached an agreement on a recommendation to the full Board regarding compensation changes.

49. The public Board Subcommittee on Compensation meeting lasted fewer than two minutes.

50. At approximately 3:00 p.m. on February 15, 2024, the Board's Committee on Audit and Risk met publicly for several minutes to introduce the new director of internal audits to the larger Board.

51. At the conclusion of the Board Committee on Audit and Risk public meeting, Committee chair Randall Black stated that the next two meetings would be closed to the public as working and executive sessions. He further stated that: "During the executive session the committee will meet individually and privately with management, the Plante Moran representatives, and the internal audit director. The committee will not take any official action following the working session or the executive session. At this time, this concludes the public meeting"

52. From 3:45 to 4:00 p.m. on February 15, 2024, the Board's Committee on Audit and Risk held what it called an executive session meeting.

53. The Board met privately again beginning at 8:00 a.m., on February 16, 2024. This meeting was not noted on the Board's website.

54. At approximately 8:30 a.m. on February 16, Spotlight PA State College editor Sarah Rafacz entered the Hintz Alumni Center. She observed that trustees were again meeting in Robb Hall.

55. When Rafacz approached the doors to Robb Hall, two unidentified individuals emerged from the room. Rafacz asked if the Board was meeting, and

one of the individuals replied that they were meeting in executive session. Rafacz asked what the Board was meeting about, and the individual replied that Rafacz would have to ask the Board and that the individual would get someone who could speak to Rafacz further on the matter.

56. Pell then came out of the room across from Robb Hall and Rafacz asked her why the Board was in executive session. Pell replied that they were not in executive session, but instead meeting in conference. Rafacz asked which state or federal agency was relaying information to the trustees. Pell replied that Rafacz would have to speak with General Counsel Oman.

57. Oman then came over to Rafacz, and Rafacz identified herself. Rafacz asked if the Board was meeting in conference, and if so, which state or federal agency was relaying information to the trustees. Oman stated that the Board was meeting for informational purposes only and that they were confident the meeting was in compliance with the Sunshine Act.

58. On the afternoon of February 16, 2024, Rafacz and Massey attended the 1:00 p.m. Board meeting, held again in Robb Hall. During that meeting, Board chair Schuyler shared that the Board had met on January 29, 2024 in executive session to discuss Board initiatives.

59. Of the January 29 executive session, Chairman Schuyler stated that: “[t]he board did not take any action following that executive session.”

60. As to the February 16 morning meeting, Schuyler said: “The Board also

met this morning [February 16, 2024] in conference session and received informational updates on a variety of topics including Penn State’s health enterprise, strategic initiatives related to President Bendapudi's university road map for the future, philanthropy, and Penn State’s upcoming campaign, and the governor’s budget.”

61. On May 21, 2024, the Board’s Committee on Finance, Business, and Capital Planning, as well as the full Board, met publicly via Zoom. *See* Committee on Finance, Business and Capital Planning and Board of Trustees Meeting, Penn State (Published: May 21, 2024), https://psu.mediaspace.kaltura.com/media/Committee+on+Finance%2C+Business+and+Capital+Planning+and+Board+of+Trustees+Meeting/1_26npe460. The meetings were held back-to-back exclusively on the virtual platform. A certified court reporter has prepared a transcript of the May 21 Zoom meeting and it is attached hereto as Exhibit C.

62. Massey attended virtual May 21 Committee and full Board meetings.

63. At the beginning of the May 21 Committee meeting, Board Chair Schuyler stated, “Please note pursuant to Section 708(a)(5) of the Pennsylvania Sunshine law, the Board held an executive session prior to this meeting to review and discuss elements of the Beaver Stadium renovation that, if conducted in public, would lead to the disclosure of information or confidentiality protected by law.” Ex. C at 3:8–15.

64. At the beginning of the full Board meeting, Schuyler announced that trustees were limited to one question per turn speaking, and that statements made would have to be fewer than two minutes long. *See id.* at 47:13–24.

65. Immediately following this announcement, alumni-elected trustee Alvin de Levie raised his virtual hand and stated: “[R]egarding the time constraints that Chair Schuyler has just stated, we have received statements in the public ... that we will have full opportunity to ask questions and to deliberate. This is the only time in accordance with Sunshine Law that we can deliberate. I would like to make some comments for deliberation, not necessarily ask questions.” *Id.* at 48:6–15.

66. Schuyler indicated that trustees already had “many, many sessions to discuss this. So parliamentarily we just want to limit it to the extent that we can.” *Id.* at 48:24–25. Upon information and belief, the previous sessions to which Schuyler referred were closed, non-public meetings. *Id.* at 56:19–21.

67. Schuyler refuted that any Board members felt rushed to vote on Beaver Stadium renovation proposals, stating that “We’ve had months and months of dialogue on this and years of discussion.” *Id.* at 50:16–18.

68. De Levie began to mention Penn State’s budget deficit, *id.* at 52:20–21, but was cut off by Schuyler asking, “[D]o you have a question?” *Id.* at 52:23–24. De Levie replied, “I’m making comments for purposes of deliberation.” *Id.* at 52:25–53:1. Schuyler stated that the “session” underway was “not meant to be point, counterpoint debating.” *Id.* at 53:2–3.

69. Trustee Anthony Lubrano criticized Schuyler’s approach, stating that the Board has “little time to ever publicly discuss anything.” *Id.* at 53:20–23.

70. De Levie also criticized Schuyler’s limitation on debate, stating “I don’t know yet how I’m voting because I want to deliberate. And quite frankly we’re not being given the opportunity to do so.” *Id.* at 56:15–18. Schuyler replied, “Well, Alvin, we’ve had multiple opportunities to deliberate in our executive sessions as you’re aware.” *Id.* at 56:19–21.

71. Trustee Brandon Short confirmed that the Board had debated during executive session, noting that he had “reviewed our model and our assumption” regarding the renovation and had “challenged them in executive session.” *Id.* at 64:12–14.

72. Trustee Barry Fenchak further agreed that the Board required “time for us to actually have a robust discussion and deliberation as opposed to saying we’ve had a robust deliberation.” *Id.* at 72:24–73:2.

73. Fenchak moved to formally postpone the vote, and de Levie seconded the motion. *Id.* at 73:2–8. Delaying, de Levie said, would “give[] trustees and the public an opportunity to have a truly robust opportunity to deliberate.” *Id.* at 77:1–4.

74. Schuyler denied that the trustees had not been provided sufficient time to contemplate and deliberate about the renovation. *See id.* at 77:12–17. He did not mention whether the public had been given similar opportunities.

75. Soon after, trustee Lubrano stated: “Yeah, I just want to remind all of us under the Sunshine Law an executive session can’t be used as a method to defeat the quote/unquote open meeting requirements of the Act. So when the chair says that we’ve had plenty of time to deliberate, I would argue that, in fact, that’s not the case because deliberation would have been a clear violation of the Act.” *Id.* at 78:1–9.

76. General Counsel Oman replied, “That’s not a correct interpretation of the law, Anthony. We may—the Board may deliberate in executive session.” *Id.* at 78:10–13.

77. In 2024, after being served with the Initial Complaint in this lawsuit, the Board met privately on at least five separate occasions in what it claims were either executive or conference sessions: January 29; February 15 from 12:45–1:30 p.m.; February 15 from 3:45–4:00 p.m.; February 16 beginning at 8:00 a.m. for an indeterminate amount of time; and “many, many” times for indeterminate lengths of time in order to deliberate and discuss Beaver Stadium renovations.

CAUSES OF ACTION

COUNT I

Violation of the Sunshine Act; Improper Use of the “Conference” Exception

78. Plaintiff hereby incorporates and adopts the allegations set forth in the foregoing paragraphs of the Complaint.

79. The Sunshine Act permits an agency to participate in a conference

which need not be open to the public. 65 Pa.C.S. § 707(b).

80. A “conference” is defined as “[a]ny training program or seminar, or any session arranged by State or Federal agencies for local agencies, organized and conducted for the sole purpose of providing information to agency members on matters directly related to their official responsibilities.” *Id.* § 703.

81. There is no evidence that the Board held a conference, as described by the Act, on November 10, 2023. *See id.* No state or federal agencies were identified as being present, nor was any topic provided to the public about an alleged course of programming or training.

82. Accordingly, Defendant violated the Act by labeling its closed meeting on November 10, 2023, a “conference” and conducted its business in a closed session when the meeting was required to be open to the public.

83. There is furthermore no evidence that the Board held a conference, as described by the Act, on the morning of February 16, 2024. *See id.* No state or federal agencies were identified as being present, nor was any topic provided to the public about an alleged course of programming or training. Oman refused to provide any such affirmation, and Chairman Schuyler made no suggestion that a state or federal agency presented to the Board on the topics of Penn State’s health enterprise, strategic initiatives, philanthropy, university campaigns, or the governor’s budget, as is required for a “conference,” under the Act.

84. Accordingly, Defendant violated the Act by labeling its closed meeting

on February 16, 2024, a “conference” and conducted its business in a closed session when the meeting was required to be open to the public.

85. Absent injunctive relief, Plaintiff will be irreparably harmed because the Board improperly closed its meetings on important government matters, misused the “conference” exception to the Sunshine Act, and has not committed to altering its present course of action.

COUNT II

Violation of the Sunshine Act; Improper Use of the “Executive Session” Exception

86. Plaintiff hereby incorporates and adopts the allegations set forth in the foregoing paragraphs of the Complaint.

87. The Act’s “executive session” exception may be employed to exclude the public from meetings that would otherwise be open to the public. 65 Pa.C.S. § 708.

88. There are just seven narrow justifications for which an agency may claim it is holding an “executive session.” *Id.* § 708(a)(1)–(7).

89. There is no evidence that the Board adhered strictly to any one of the seven topics that justify holding an executive session during its November 9 closed meeting held until approximately 3:20 p.m.

90. There is no evidence that the Board’s Audit and Risk Committee adhered strictly to any one of the seven topics that justify holding an executive

session during its November 9 closed meeting at 3:30 p.m. for an unknown quantity of time.

91. There is no evidence that the Board adhered strictly to any one of the seven topics that justify holding an executive session during its November 10 four-and-a-half-hour closed meeting.

92. The Board's explanation that it met in a closed session to "discuss various privileged matters" is too vague and fails to identify with specificity which of the seven justifications applied.

93. Accordingly, the Board did not hold legitimate "executive sessions" on November 9 or 10, 2023, and conducted its business in a closed session when the meeting was required to be open to the public.

94. There is also no evidence that the Board adhered strictly to any one of the seven topics that justify holding an executive session during the Subcommittee on Compensation's 12:45–1:30 p.m. meeting on February 15, 2024. Though a representative of the Subcommittee announced at the public meeting thereafter that the Board had met to review and to discuss compensation changes to President Bendapudi's salary, the Subcommittee's closed-door meeting lasted approximately 45 minutes and it is unclear if the scope of the conversation exceeded the allowable parameters of the Act. *See* 65 Pa.C.S. § 708(a)(1).

95. There is no evidence that the Board adhered strictly to any one of the seven topics that justify holding an executive session during the Subcommittee on

Audit and Risk’s 3:45–4:00 p.m. meeting on February 15, 2024.

96. Finally, Plaintiff first learned on May 21, 2024, that the Board held what it called “executive sessions” multiple times leading up to the May 21 meeting to provide Trustees the opportunity to “deliberate” and discuss renovations to Beaver Stadium.

97. During the May 21 meeting, a trustee stated that the Board discussed financial models and projections for the stadium renovation in executive sessions, even though such discussions do not fall under any of the seven justifications for holding an executive session.

98. A trustee at the May 21 meeting also disputed that deliberations held in executive session regarding Beaver Stadium renovations were being held in compliance with the Act.

99. Without emergency injunctive relief, Plaintiff will be irreparably harmed since the Board historically and presently prevents the public and press from attending meetings that should be open by claiming it is holding “executive sessions.”

COUNT III

Violation of the Sunshine Act; Failure to Adhere to Executive Session Procedure

100. Plaintiff hereby incorporates and adopts the allegations set forth in the foregoing paragraphs of the Complaint.

101. The Act obligates Defendant to announce “[t]he reason for holding the executive session,” from among the list of seven justifications, “at the open meeting occurring immediately prior or subsequent to the executive session.” 65 Pa.C.S. § 708(b).

102. Defendant violated the Act when it failed to provide the public an explanation for why the Board and/or its committees entered executive sessions on November 9, 2023.

103. Defendant violated the Act when it refused to articulate a specific justification for holding an executive session on the morning of November 10, 2023.

104. Defendant violated the Act when it refused to articulate a proper and specific justification for holding an executive session on February 15, 2024 from 12:45–1:30 p.m.

105. Defendant violated the Act when it refused to articulate a proper and specific justification for holding an executive session on February 15, 2024 from 3:45–4:00 p.m.

106. Defendant violated the Act when it refused to articulate proper and specific justifications for holding executive sessions regarding the stadium renovation prior to the Board’s public meetings on May 21, 2024.

107. Plaintiff stands to suffer continued harm if Defendant carries on obscuring its reasons for holding “executive sessions,” and fails to communicate timely and intelligibly its reasons with the public.

COUNT IV

Violation of the Sunshine Act; Deliberating at Non-Public Meetings

108. Plaintiff hereby incorporates and adopts the allegations set forth in the foregoing paragraphs of the Complaint.

109. Pursuant to the Sunshine Act, when a quorum of an agency body engages in deliberation, it must publicly advertise and hold that meeting, as well as keep minutes. 65 Pa.C.S. §§ 704, 706.

110. Notably, an agency may not use a conference to deliberate on any “agency business,” whether or not the conference exception is otherwise properly invoked. *Id.* § 707(b).

111. “Deliberation” is any “discussion of agency business”—including “[t]he framing, preparation, making or enactment of laws, policy or regulations, the creation of liability . . . or the adjudication of rights, duties and responsibilities”—for the purpose of “making a decision.” *Id.* § 703.

112. There is no evidence that the Board held a conference, as described by the Act, on November 10, 2023. *See id.* No state or federal agencies were identified as being present, nor was any topic provided to the public about an alleged course of programming or training.

113. Therefore, on information and belief, the Board used the “conference” exception to close the morning portion of its November 10, 2023, meeting and deliberate agency business in violation of the Act. If any deliberation of agency

business occurs at a “conference,” those portions must be public. *Id.* § 707(b).

114. There is also no evidence that the Board held a conference, as described by the Act, on February 16, 2024. *See id.* No state or federal agencies were identified as being present, nor was any topic provided to the public about an alleged course of programming or training provided by such an agency. Oman’s personal communication to Rafacz that the meeting was “informational ... only” is not sufficient. Neither does Chairman Schuyler’s public announcement that the Board met in conference to discuss a bevy of topics, without any description of the format or invocation of any state or federal agency, meet the requirements of the Act.

115. Therefore, on information and belief, the Board used the “conference” exception to close the morning portion of its February 16, 2024 meeting and deliberate agency business in violation of the Act. If any deliberation of agency business occurs at a “conference,” those portions must be public. *Id.* § 707(b).

116. On May 21, 2024, the Board admitted publicly that it deliberated at non-public executive sessions.

117. While deliberation *may* occur during an executive session, a meeting may not be closed simply *because* deliberations are to take place—quite the opposite is true. *See* 65 Pa.C.S. § 704 (“Official actions and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public, unless closed” pursuant to the Act’s exceptions) (emphasis added); *Smith v. Twp. of Richmond*, 623 Pa. 209, 221 (2013) (“A ‘meeting’ occurs, and thus must be open to the public, if the

agency convenes it to deliberate agency business.”) (the Act “proscribe[s] ... private ‘deliberations.’”).

118. While certain meetings held “for informational purposes” may, in limited circumstances, constitute an executive session, deliberation requires openness in all meetings that are not proper executive sessions. *See Smith*, 623 Pa. at 224 (“closed-door gatherings did not violate the Act because they were held for informational purposes only and did not involve deliberations”).

119. Notably, of the seven justifications for holding an executive session under 708(a)(1)–(7), only one justification permits “deliberation”—but that pertains only to “quasi-judicial deliberations.” 65 Pa.C.S. § 708(a)(5).

120. At the May 21 meeting, trustees repeatedly expressed concerns that the public was being closed out of deliberations or not allowed the opportunity to deliberate on issues that ought to have been discussed in public.

121. In particular, a trustee at the May 21 meeting noted that Beaver Stadium renovation financial proposals were discussed behind closed doors, which violates the Act’s prohibition on deliberating since the Board is not permitted to hold an executive session for discussion on a subject matter of this type.

122. Where the Board held improper executive sessions regarding renovations to Beaver Stadium or where the scope of its deliberations went beyond the limited justifications to deliberate in private pursuant to the Act, the Board’s deliberations at these “many, many” meetings were in violation of the Act.

123. Plaintiff faces irreparable harm if the Board continues deliberating in secret without affording the public or the press the chance to observe and contribute to discussion of significant community issues.

COUNT V

Violation of the Sunshine Act; Taking Official Action at Non-Public Meetings

124. Plaintiff hereby incorporates and adopts the allegations set forth in the foregoing paragraphs of the Complaint.

125. The Sunshine Act requires that whenever an agency takes an “[o]fficial action” it must do so “at an open meeting.” 65 Pa.C.S. § 708(c). The executive session exception cannot “be used as a subterfuge to defeat the purposes of” the Act by allowing officials to shield their official actions from public view. *Id.*

126. There is no evidence that the Board adhered strictly to any one of the seven topics that justify holding an executive session during its November 10 four-and-a-half-hour closed meeting.

127. The Board’s explanation that it met in a closed session to “discuss various privileged matters” is too vague and fails to identify with specificity which of the seven justifications applied.

128. Defendant’s claim that it met in executive session on February 15, 2024 from 12:45–1:30 p.m. to discuss and recommend compensation does not identify with sufficient particularity which of the seven justifications justified closing that meeting to the public.

129. There is also insufficient evidence that the Board met in executive session on February 15, 2024 from 3:45–4:00 p.m. without taking official action. Without more information about the nature of the meeting, and without identifying specifically which of the seven justifications justified closing that meeting, there is not enough public information to know that official action was avoided at the meeting.

130. Therefore, on information and belief, and in conformity with the Board’s previous conduct, *see* Ex. A, the Board held “executive sessions” on November 9 and 10, 2023, and on February 15, 2024, in name only. Specifically, Defendant used the “executive session” exception “as a subterfuge to defeat the purposes of” the Act and dispensed with its obligation to refrain from taking official action during an executive session. 65 Pa.C.S. § 708(c).

131. Absent emergency injunctive relief, Plaintiff will be irreparably harmed because by hiding behind the “executive session” exception and taking official action on important government matters in secret, the Board deprives Plaintiff and the public of their statutory right to participate in the decision making of government, undermining the very purposes of the Act.

PRAYER FOR RELIEF

The Pennsylvania Sunshine Act provides Plaintiff the only avenue for relief from Defendant’s violations of the Act. 65 Pa.C.S. § 713. Defendant’s unlawful actions and policies have harmed Plaintiff and Plaintiff will continue to suffer harm

if the Court does not grant relief as stated below. WHEREFORE, Plaintiff requests that this Honorable Court enter judgment in its favor and against Defendant and:

- a. Declare that the Pennsylvania State University Board of Trustees violated the Sunshine Act;
- b. Enjoin the Pennsylvania State University Board of Trustees from unlawfully invoking the executive or conference session exception to overcome the open meetings requirements of the Sunshine Act;
- c. Mandate Defendant to receive Sunshine Act training from the Pennsylvania Office of Open Records; and
- d. Award Plaintiff's attorneys fees pursuant to 65 Pa.C.S. § 714.1.

Dated: June 3, 2024

Respectfully submitted,

/s/ Paula Knudsen Burke

Paula Knudsen Burke

PA I.D. No. 87607

REPORTERS COMMITTEE FOR

FREEDOM OF THE

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Counsel for Plaintiff Spotlight PA

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke
Signature: /s/ Paula Knudsen Burke
Attorney No.: 87607

**IN THE COURT OF COMMON PLEAS
CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – EQUITY**

)	
)	
	)	Docket No. 2023-cv-2998-C1
)	
SPOTLIGHT PA,	)	TYPE OF PLEADING
	)	Second Amended Complaint in Equity
Plaintiff;)	
	)	FILED ON BEHALF OF
)	
BOARD OF TRUSTEES OF THE	)	Spotlight PA
PENNSYLVANIA STATE)	
UNIVERSITY,	)	COUNSEL OF RECORD
	)	Paula Knudsen Burke
Defendant.)	
	)	PA I.D. NUMBER
	)	87607
)	
)	

PROPOSED ORDER OF COURT

AND NOW, this _____ day of _____, 2024, the Court ORDERS
as follows:

1. The Pennsylvania State University Board of Trustees violated the Sunshine Act;
2. The Pennsylvania State University Board of Trustees is hereby enjoined from invoking the executive or conference session exceptions to overcome the open meetings requirements of the Sunshine Act;

3. The Pennsylvania State University Board of Trustees is to receive Sunshine Act training from the Pennsylvania Office of Open Records, to be completed within thirty days of the issuance of this Order; and
4. Plaintiff is entitled to attorneys fees pursuant to 65 Pa.C.S. § 714.1.

EXHIBIT A

**REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS**

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Jigsaw Productions

SUSAN GOLDBERG
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LAURA HANDMAN
Davis Wright Tremaine

DIEGO IBARGUEN
Hearst

KAREN KAISER
The Associated Press

DAVID LAUTER
The Los Angeles Times

MARGARET LOW
WBUR

JANE MAYER
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COLLEEN MCCAIN NELSON
The McClatchy Company

MAGGIE MULVIHILL
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CAROL ROSENBERG
The New York Times

PAUL STEIGER
ProPublica

Affiliations appear only
for purposes of
identification.



October 26, 2023

VIA EMAIL

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Re: Maintaining Open Meetings as Required by the Sunshine Act

Dear President Bendapudi, Chair Schuyler and Ms. Oman:

I write on behalf of my client, Spotlight PA. As you know, Spotlight PA has provided high-quality investigative journalism to the citizens of Pennsylvania since 2019, and it continues to do so today. Part of Spotlight PA's coverage includes reporting from its State College bureau where journalists are dedicated to bringing first-rate local news to the citizens of north-central Pennsylvania, including information about The Pennsylvania State University ("PSU").

As part of its newsgathering practices, Spotlight PA relies on public records and meetings to ensure that its readership is properly informed about happenings within local government and institutions receiving public money, including PSU. Unfortunately, past and continuing practices of the PSU Board of Trustees ("the Board") have been less than transparent and raise significant Sunshine Act compliance concerns. We respectfully request that you immediately review the concerns outlined below and address them ahead of the next Board of Trustees meeting scheduled for November 9 and 10, 2023.

A. Penn State Trustee meetings are subject to the Sunshine Act.

The Sunshine Act ("the Act") was enacted in 1974 with the purpose of providing Pennsylvania citizens comprehensive access to government

meetings¹. It enshrined in statute the long-held right of citizens to observe and participate in government decisionmaking. The Act requires political subdivisions to conduct governmental proceedings that are transparent and open to the public. 65 Pa.C.S. § 702(a). Specifically, the public has a right to be “present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies.” *Id.*

In 2004, following PSU’s controversial acquisition of an independent law school and related litigation,² the legislature amended the Act to explicitly include bodies such as the Penn State Board of Trustees within its scope. 65 Pa.C.S. §703. Speaking in support of making Penn State subject to the Sunshine Act, Senator Harold F. Mowery, Jr. said “[t]his amendment is drawn to make it clear that the Board of Governors, charged with making recommendations that affect degree programs, is covered by the Sunshine Law.” S. 188-41, Sess. 2004, at 1852 (Pa. 2004). He explained that it was important to bring “sunshine” to a process that involved millions of public dollars and that by improving transparency, the Act would allow citizens to “visibly not only see, but also hear what is going into this decisionmaking process.” *Id.*

It is beyond question that both the Board and the various committees conducting the Board’s business are “agencies” within the meaning of the Act. *See* 65 Pa.C.S. §703. Yet, the Board and its thirteen-member Executive Committee often hold closed meetings, with the latter group not having held a public meeting in nearly twelve years.³

B. The Sunshine Act forbids public bodies from deliberating or taking official action outside public meetings and exceptions to the Act are narrow.

A quorum of an agency body that convenes and takes official action or engages in deliberation is subject to the Sunshine Act and must therefore publicly advertise and hold such a meeting, as well as keep minutes of all public meetings. 65 Pa.C.S. §701 *et seq.* There are only three exceptions to this provision, and they are exceptionally narrow. Two pertinent exceptions are discussed in turn.

1. The Executive Session Exception

It is important to note at the outset that the Sunshine Act is not a confidentiality statute. It is a public access law that establishes the floor for public access, not the ceiling. Its exceptions are not mandatory. The “executive session” exception may be employed to exclude the public from meetings that would otherwise be open. *Id.* at §708. An agency may only hold an executive session for specifically enumerated reasons. *Id.*; *Reading Eagle, Co. v. Council of Reading*, 627 A.2d 305, 307 (Pa. Commw. 1993). These reasons

¹ *See* Craig J. Staudenmaier, *The Commonwealth Court: Guardian of Access to Public Records and Meetings*, 21 Widener L.J. 137 (2011).

² *See Lee Publications v. Dickinson School of Law*, 848 A.2d 178 (Pa. Commw. 2004).

³ Wyatt Massey, *Regular Private Meetings Among Top Penn State Trustees May Be Violating Pa.’s Transparency Laws*, Spotlight PA (Sept. 15, 2022), <https://perma.cc/ZAM3-G8JG> (hereinafter “Massey, *Regular Private Meetings*”) (noting that the last time the Executive Committee met publicly was on December 2, 2011 to approve “a previous board decision to accept Graham Spanier’s resignation as university president and to end Joe Paterno’s tenure as head football coach.”).

must “be genuine and meaningful, and one the citizen can understand,” so as not to frustrate the “purpose of the Act” and to help the public “determine from the reason given whether they are being properly excluded from the session.” *Reading Eagle, Co.*, 627 A.2d at 307. There are “only six narrow reasons for which an agency is permitted to conduct an executive session.” *Trib Total Media, Inc. v. Highlands Sch. Dist.*, 3 A.3d 695, 700 (Pa. Commw. 2010); *see also* 65 Pa.C.S. §708(a)(1)–(6).

One of the most-frequently invoked reasons for holding an executive session is the litigation exception. *See* 65 Pa.C.S. §708(a)(4). This exception is strictly circumscribed and is meant for agencies to consult with an attorney regarding current or anticipated litigation. The presence of an attorney at an agency meeting, even when that attorney is sharing information, is not sufficient on its own to invoke the executive session exception. *See id.* at §708. Moreover, “consultation” is a limited activity, “confined to private consultations between the agency and its counsel or advisors regarding litigation strategy and information—subjects that must be kept confidential to protect an agency’s ability to settle or defend those matters.” *Trib Total Media, Inc.*, 3 A.3d at 700. To properly call an executive session, an agency “must spell out in connection with existing litigation the names of the parties, the docket number of the case and the court in which it is filed” or if litigation is only threatened, “announce the nature of these matters.” *Reading Eagle Co.*, 627 A.2d at 306.

Finally, official action “on discussions held” pursuant to the executive session exception must “be taken at an open meeting.” 65 Pa.C.S. §708(c). Even if an agency properly notices and holds an executive session, it may not abuse the exception by establishing policy, making decisions on agency business, or taking votes that “commit the agency to a particular course of conduct” in secret. *Id.* at §708(c); *Preston v. Saucon Valley School Dist.*, 666 A.2d 1120, 1122 (Pa. Commw. 1995).

2. The Conference Exception

In addition to the executive session exemption, the Act also permits an agency to participate in a conference which need not be open to the public. A “conference” is defined as “[a]ny training program or seminar, or any session arranged by State or Federal agencies for local agencies, organized and conducted for the sole purpose of providing information to agency members on matters directly related to their official responsibilities.” *Id.* at §703.

Notably, an agency may not use a conference to deliberate on “any agency business,” whether or not the conference exception is otherwise properly invoked. *Id.* at §707(b). The Pennsylvania Senate considered the meaning of the “conference” exception carefully, up until the final unanimous vote authorizing its addition to the Act. *See* S. 170-15, Sess. 1986, at 1751 (Pa. 1986). On the floor, Centre County Senator Doyle Corman advocated that the conference exception’s strict confines be respected, stating that “the exact reasoning for” putting tight boundaries around the definition of “conference” was to ensure that agencies would still be required to deliberate publicly “in [their] home communit[ies].” S. 169-46, Sess. 1985, at 782–83 (Pa. 1985).

Though “*learning* about the salient issues so as to reach an informed resolution at some later time does not in itself constitute deliberation,” *Smith v. Twp. of Richmond*, 82 A.3d 407, 416 (2013) (emphasis added), when a majority of agency committee members gather to *discuss* a matter, and those discussions merely go “toward the purpose of ultimately making a decision at *some time*,” the agency is considered to have deliberated agency business. *Ackerman v. Upper Mt. Bethel Twp.*, 567 A.2d 1116, 1119 (Pa. Commw. 1989) (emphasis added). The court in *Smith* held that gatherings whose “sole[] ... purpose” was “collecting information or educating agency members about an issue” was not deliberation but that, conversely, “discussion consist[ing] of debate or discourse directed toward the exercise of” “judgment to determine which of multiple options is preferred” is, indeed, deliberation that must be undertaken publicly. 82 A.3d, at 415. Echoing *Ackerman*, the *Smith* court clarified that when an agency body “weighs the ‘pros and cons’ of the various options involved” or compares “different choices available to them as an aid in reaching a decision on the topic,” “even if the decision is ultimately reached at a later point,” it is deliberating. *Id.*

Additionally, in *Times Leader v. Dallas School District*, a news outlet sought access to school board meetings that were closed to the public after the district invoked the conference exception. 49 Pa. D. & C.3d 329, 330 (Pa. Com. Pl. 1988). A Luzerne County Court of Common Pleas judge held that the definition of “conference” in the Act is narrowly defined and rejected the board’s attempt to shield its internal discussions by casting the meeting as an “informational conference.” *Id.* at 331–32.

C. The Penn State Board of Trustees improperly deliberates, takes official action, and uses the executive session and conference exceptions in violation of the Sunshine Act.

Reporting by Spotlight PA reveals that the Penn State University Board of Trustees has taken official action and conducted deliberations outside of public meetings in contravention of the Sunshine Act, all while improperly claiming it is exempt from conducting public meetings via the “conference” and “executive session” exceptions. *See generally* Massey, *Regular Private Meetings*.

Reporting shows that the Board uses the Sunshine Act’s limited conference and executive session exceptions interchangeably, indiscriminately, and in error. *See* Appendix A ¶¶1–4 (listing numerous instances where the Board and its committees declared non-public meetings “conferences,” “executive sessions,” or both). Internal communications between various Board administrators and members demonstrate that the Board opts to hold “conferences” to avoid violating the Act’s bar on secret deliberation. *See, e.g.*, Email from Associate Director of the Board of Trustees Staff Thomas J. Penkala (Aug. 10, 2020) (“This call will be conducted as a conference, not a meeting. There will be no deliberation permitted in order to comply with the Sunshine Law [sic].”); Email from Board Secretary and Assistant Vice President Shannon S. Harvey to Finance Committee (July 18, 2022) (“This call will be conducted as a conference, not a meeting, to go through the new tuition, fee, GSI and state budget update. There will be no deliberation permitted in order to comply with the Sunshine Law.”).

These emails reveal a misapplication of the conference exception and a fundamental misreading of the law’s requirement of public deliberation. The terminology used to describe a meeting is irrelevant. If a quorum is discussing agency business, the discussion must happen in a public meeting unless a valid exception applies. Simply referring to a meeting as a “conference” does not permit the board to discuss public business in secret, nor does it excuse the board from potential liability under the Act.

In May, Spotlight PA reported that in spring 2022, a select set of Board leaders held a non-public meeting with university leadership to discuss budgeting issues to be brought forward at the Board’s public July 2022 meeting. Wyatt Massey, *Penn State’s Budget Proposal Shifted After Private Meeting of Trustees, University Leadership*, Spotlight PA (May 19, 2023), <https://perma.cc/KDY4-YS5W> (hereinafter “Massey, *Budget Proposal*”). After presenting a budget, the Board members in attendance allegedly “suggested that [a \$245 million] deficit would likely not” receive the full Board’s support. *Id.*

In response to Spotlight PA’s questions on the meeting—for which there is no public record—Secretary Harvey contended that the Sunshine Act does not “restrict discussions between board leadership, board committee leadership and the university administration.” Emails between Wyatt Massey and Shannon Harvey (May 2023), <https://tinyurl.com/ysr2byvw>. Harvey further wrote that “the Sunshine Law [sic] permits conference sessions in which information may be provided to trustees for the purpose of fulfilling their fiduciary duties at which trustees are permitted to ask questions.” *Id.*

Secretary Harvey is wrong. Conference sessions are expressly not “informational” meetings for trustees to “ask questions” or to simply learn about their duties. *See Times Leader*, 49 Pa. D. & C.3d at 331 (“informational” meetings are not “conferences”). This is especially true for a meeting that does not satisfy the statute’s other conference requirements—that the meeting is a “training,” “seminar,” or other type of program arranged by a state or federal agency (not by the Board or University leadership itself). 65 Pa.C.S. §703. It is blatantly clear, based on the University’s own description of the meeting, that this budget meeting was not a conference.

Even if, as the Board asserts, a “conference” took place, it nonetheless ran afoul of the Act. The Board appears to ignore what it clearly already understands: an agency may not deliberate during a conference. 65 Pa.C.S. §707(b). If at this meeting, the Board merely suggested that deficit approval was unlikely, the Board nevertheless “deliberated” in violation of the Act because it discussed financial policy “for the purpose of making a final decision.” *See* 65 Pa.C.S. §703; *see also Ackerman*, 567 A.2d at 1119 (finding “deliberation” where discussion went “toward the purpose of ultimately making a decision at some time”); *Smith*, 82 A.3d at 415–16 (noting that weighing and debating options is not permitted during a closed meeting). This fact alone demands that the claimed “conference” be open to the public, even if the exception may have otherwise applied. *See* 65 Pa.C.S. §707(b).

The Board has also taken the position that its thirteen-member Executive Committee has lawfully held non-public “conferences” for nearly twelve years. *See Massey, Regular Public Meetings*. Secretary Harvey told Spotlight PA that the Executive Committee meets

in private only to discuss agendas and plan. *See* Massey, *Regular Private Meetings*; *see also* Appendix A ¶1 (detailing the Board’s Committee on Governance and Long-Range Planning’s improper use of the conference exception for “planning”). State and federal agencies are not party to the Executive Committee’s meetings and, moreover, agenda planning is far from a “training program or seminar.” *See* 65 Pa.C.S. §703. Instead, the Executive Committee’s agenda-setting meetings are “deliberative” in nature and must be publicly noticed, open, and documented, whether the Committee labels them a “conference” or not. 65 Pa.C.S. §707(b); *see also* Appendix A ¶¶1–4 (citing numerous instances where the Board labeled meetings “conferences” to overcome the Act). That is, even if the Executive Committee used “conferences” solely to plan, discuss, and set agendas for open meetings, these activities still qualify as deliberation of agency business (picking and choosing which policies and items to discuss at later open meetings). *See Smith*, 82 A.3d at 415; *Ackerman*, 567 A.2d at 1119; *see also Patterson v. DeCarbo*, 46 Pa. D. & C.4th 148, 155 (Com. Pl. 2000) (finding that a secret meeting held to “amend the agenda of the public meeting” and “to add items” to the agenda “should have been discussed and acted upon during the open meeting” and failure to do so violated the Act). Determining which issues will be discussed and acted on by the full board is also “official action” because it is a “decision on agency business,” e.g., the decision about which issues merit further action and which do not. Both the decision itself and the discussion leading up to it are required to happen at a public meeting. 65 Pa.C.S. §704. The Executive Committee cannot maintain exclusive and private control over which issues and policies are to be discussed and how policy is framed.

Relying errantly on the conference exception, the full Board also routinely closes the morning portion of its regular meetings. In a 2022 email sent to Board members regarding an upcoming meeting, Board Chair Matthew Schuyler and Vice Chair David Kleppinger wrote: “During our executive conference session we’ll spend some time talking about Trustee requests for information and revised approaches to Board communications to improve clarity and information flow to all Trustees” and “[w]e will then spend the remainder of our time engaged in discussion ... on Big Ten expansion, a possible contract extension,” among other items. Email from Matthew Schuyler and David Kleppinger to trustees (July 11, 2022). This meeting was obviously not a “conference,” as defined by the Act. Additionally, not only did the Committee plan to discuss agency business (its policies around trustee transparency, Big Ten expansion, and contract matters), but it also appears to have planned to reach a final decision as to some or all of those policies during the closed meeting. This violates the Act’s prohibition on deliberating during a conference session and the Act’s requirement that all decisions on agency business occur at a public meeting. *See* 65 Pa.C.S. §§ 704, 707(b); *Ackerman*, 567 A.2d at 1119.

In April 2023, Chair Schuyler and Vice Chair Kleppinger sent an email to all members in advance of the full Board’s May 5 meeting, noting that the Board would conduct a closed “trustee conference and executive session,” as it had “for the past few cycles.” Email from Matthew Schuyler and David Kleppinger to Board (Apr. 24, 2023). The Board chairs additionally requested that trustees ask questions regarding the Board’s Finance, Business and Capital Planning materials “during the conference session” so that they could be “answered in the run up to”—as opposed to during—“the [open] meeting.” *Id.* At the

open afternoon meeting, one trustee brought his concerns about the Board’s financial plans to light in public, upsetting Schuyler who chided the trustee for not “mentioning these [issues] in [the] previous three sessions discussing these matters.” Massey, *Budget Proposal*.

While the Board currently operates behind closed doors, it cannot continue to do so in any future “cycles.” It is enough that the Board’s financial business meetings are not “conferences”—as they do not involve training and have not been initiated or held by state or federal agencies—to require that the meetings be open. See 65 Pa.C.S. §703. Courts have also held that it is inimical to the purposes of the Act to allow public agencies to collect votes and opinions during secret gatherings, giving them the opportunity to “conduct all of [their] business secretly, and then to simply announce their decisions at [a] public meeting.” *Public Opinion v. Chambersburg Area School District*, 654 A.2d 284, 287 (Pa. Commw. 1995); see also *Ackerman*, 567 A.2d at 1119 (a “vote” occurs whenever a “quorum of agency members reach a consensus or decision on an action, policy or recommendation.”). The Board leadership’s guidance to restrict discussion of certain matters to the Board’s private meetings—and its displeasure when that guidance was not strictly heeded—suggests that it has attempted to work out “consensus” on its policies in private. At the very least, it appears that the Board engaged in a widely condemned Sunshine Act avoidance practice known as “walking the halls,” whereby agency members privately discuss issues ahead of public meetings so that they can ensure that they are on the same page. See Grand Jury Report, *In re: Lancaster Cnty. Investigating Grand Jury II, 2005*, Pa. Ct. Common Pleas (Dec. 14, 2006) at 32–33 (available at: <https://perma.cc/B4SC-AYJY>) (Grand Jury report resulting in recommendation of criminal Sunshine Act charges in Lancaster County, where county commissioners would round up votes to avoid “that issue having to be discussed, deliberated, or voted on at a public meeting.”). All agency rules and regulations governing the conduct of public meetings must be consistent with the intent of the Act, and so must the agency’s practices. 65 Pa.C.S. §710.

Critically, whereas public notice is not required for legitimate conference sessions, when a quorum of agency members is to deliberate or undertake official action the Board must provide—with very few exceptions—public notice, alongside an agenda listing agency business to be discussed. 65 Pa.C.S. §709 (public notice and agendas for meetings); *id.* at §712.1 (listing notice exceptions). The Board has neither issued notice nor affirmed it kept minutes for any of the foregoing closed meetings, further failing to uphold its obligations under the Act.

Much like the conference exception, the executive session exception applies in precious few situations. See 65 Pa.C.S. §708(a) (listing only six executive session justifications).

At this year’s September Board meeting, Spotlight PA State College editor Sarah Rafacz arrived at the morning meeting on September 8, 2023, and was told that it was closed to the public and press. In the afternoon, prior to the public meeting, she asked PSU’s vice president for Strategic Communications, Rachel Pell, why the meeting was closed; Pell replied that the meeting is “always” closed and refused to offer an explanation as to why.

During the open afternoon session, Board Chair Matt Schuyler referenced the morning meeting, which he said was convened to discuss “privileged matters,” and later reiterated that to Rafacz.

PSU’s bare assertion of “privilege” is not sufficient to meet its Sunshine Act burden. If the Board meant to claim that the morning session was an “executive session” where members would be discussing agency business that would “violate a lawful privilege,” it was required to provide the public and press a “specific” explanation of a “discrete” reason for entering the executive session, so as to ensure that the public can evaluate “whether they are being properly excluded from the session.” *See Reading Eagle, Co.*, 627 A.2d at 307. And, if instead Schuyler and Pell meant to communicate that the Board’s executive session pertained to “privileged matters” more generally, insofar as it was consulting with an attorney or legal advisor, it was additionally required to “spell out in connection with existing litigation the names of the parties, the docket number of the case and the court in which it is filed” or in the case of threatened litigation, “the nature of the[] matter.” *Id.* at 306. A meeting in this category is restricted to “private consultations” with legal advisors on the sole topic of the litigation and with the express purpose of keeping the information confidential to “protect [the Board’s] ability to settle or defend in those matters.” *Trib Total Media, Inc.*, 3 A.3d at 700. Accordingly, the Board was required to avoid taking any official action, whatsoever, during the meeting. *See* 65 Pa.C.S. §708(c). If during the September meeting the Board ventured to establish policy, made decisions on agency business, or took votes that “commit[ed] the agency to a particular course of conduct,” at any time during the many hours it kept the public shut out, those portions of the meeting ought to have been open. *See id.* at §703; *Preston*, 666 A.2d at 1122.

PSU’s lack of transparency harms the public it is designed to serve and educate. The PSU Board of Trustees’ misuse of conferences and executive sessions violates the letter and intent of the Sunshine Act and, consequently, erodes the public’s faith.

For these reasons, on behalf of our client and the public, we ask that the PSU Board of Trustees immediately cease holding improper executive sessions and conferences, advertise and record meeting minutes for all public meetings, and halt the practice of deliberating in secret. 65 Pa.C.S. §§701–710. In the event that the University is interested in further information about the Act, the state Office of Open Records is a potential resource. Although the OOR does not have enforcement authority for open meetings violations, it does provide training on the Act. We would also be happy to meet with you and provide additional training resources.

Thank you for your time and attention to this matter. I look forward to your response before the next Board meeting on November 9, 2023.

Sincerely,

/s/Paula Knudsen Burke

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Appendix A: Additional Uses of Sunshine Act Exceptions

1. The Board's Committee on Governance and Long-Range Planning ("GLRP") has engaged in improperly private meetings. In an internal email from GLRP Chair Julie Anna Potts, Potts wrote to GLRP Committee members thanking them for their contributions to two non-public August 2020 gatherings. *See* Email from Julie Anna Potts to GLRP Committee (Aug. 27, 2020). She further noted that the August 11 meeting was a "planning call" and that the August 27 meeting was a "committee conference." *Id.* She wrote that the "result of those conversations" was attached to the email and would "serve as [the Committee's] initial outlook for th[e] year." She finally announced that the Committee would be "implementing the important changes resulting from the year-long deep dive into governance lead by th[e] committee." *Id.* If the GLRP Committee or the Board at large opted to "implement" changes finalized during two—or, as the email seems to imply, several more—secret meetings, this Committee flouted the Act's open meetings mandate, as there is no hint that the meetings were "conferences" under the Act's limited definition.
2. The Committees on Equity and Human Resources ("EQHR"), Finance, Business and Capital Planning ("FBCP"), Audit and Risk, and other unenumerated committees all hold "off-cycle" non-public meetings, claiming that they are "conferences." *See* Email from Board Secretary and Assistant Vice President Shannon S. Harvey to EQHR (Dec. 17, 2021) (noting that the committee would hold a "planning session" and that "off-cycle meetings are conference sessions"); Email from Board Secretary and Assistant Vice President Shannon S. Harvey (Mar. 17, 2022) (regarding "off-cycle board/committee meetings"); Email from Board Secretary and Assistant Vice President Shannon S. Harvey (Apr. 21, 2022) (regarding "off-cycle board/committee meetings"); Email from Board Secretary and Assistant Vice President Shannon S. Harvey (June 16, 2022) (regarding "off-cycle board/committee meetings"); Email from Board Secretary and Assistant Vice President Shannon S. Harvey (July 6, 2022) (noting "conference" meetings for the Audit and Risk and FBCP Committees); Email from Board Secretary and Assistant Vice President Shannon S. Harvey (July 11, 2022) (noting a "conference" meeting for the FBCP Committee); Email from Board Secretary and Assistant Vice President Shannon S. Harvey (Aug. 18, 2022) (regarding "off-cycle board/committee meetings"). Without more information, it is unclear whether any of these meetings rightly qualified as "conferences," especially since none of them were publicly noted on the Board's website or otherwise. *See* Penn State Office of the Board of Trustees, *2021-2022 Meeting Dates, Agendas, and Minutes* (last visited: Oct. 11, 2023), <https://trustees.psu.edu/board-and-committee-meetings-2022-23/>. Importantly, "off-cycle meetings" are not synonymous with "conferences"; there is no statutory language or other legal justification for holding "off-cycle" meetings in private just because they are "off-cycle." The public is left to speculate whether it has been "properly excluded" from the Board's "off-cycle" meetings, though the Board's history of wrongly invoking the Act's extremely narrow exception for state or federally organized "conferences" suggests it has not. *See* 65 Pa.C.S. §702(a); *see also Reading Eagle, Co.*, 627 A.2d at 307.
3. Since 2018, the Board has deemed numerous of its meetings "conferences" and "executive sessions." *See* Audit and Risk Committee Minutes (Oct. 23, 2018) (noting in meeting minutes that the Audit and Risk Committee went into both "conference"

and “executive session”); Email from Board member Mark H. Dambly to the Board (July 18, 2019) (writing in an email to all trustees “[o]n Thursday morning, we will begin with a legal briefing over breakfast, followed by the FBCP committee meeting and our privileged conference/executive session”); Audit and Risk Committee Minutes (Oct. 25, 2019) (noting in minutes that the Audit and Risk Committee went into both “conference” and “executive session”); Audit and Risk Committee Minutes (Sept. 17, 2020) (noting in minutes that the Audit and Risk Committee went into both “conference” and “executive session”); Audit and Risk Committee Minutes (Nov. 4, 2020) (noting in minutes that the Audit and Risk Committee went into both “conference” and “executive session”); Audit and Risk Committee Minutes (Feb. 18, 2021) (noting in minutes that the Audit and Risk Committee went into both “conference” and “executive session”); Equity and Human Resources Committee Minutes (Feb. 18, 2021) (noting in minutes that the Equity and Human Resources Committee went into both “conference” and “executive session”); Equity and Human Resources Committee Minutes (Sept. 16, 2021) (noting in minutes that the Equity and Human Resources Committee went into both “conference” and “executive session”); Email from Board Secretary and Assistant Vice President Shannon S. Harvey (Apr. 27, 2022) (noting an FBCP “conference” call); Email from Board Chair Matthew W. Schuyler and Vice Chair David M. Kleppinger (Oct. 20, 2022) (“[t]he October committee meetings will be livestreamed and conducted as public meetings, except for the Legal and Compliance Committee which will be conducted as a Conference/Executive session.”); Email from Board Chair Matthew W. Schuyler (Nov. 10, 2022) (regarding the Audit Committee’s meeting “in conference”); UPUA President’s Report (Feb. 1, 2023) (noting that the Board of Trustees Finance and Business Committee met “in conference”). These alleged “conferences” and “executive sessions” represent just a fraction of the publicly unaccounted-for meetings that the PSU Board of Trustees has held in just the past few years.

4. The Board’s Legal and Compliance Committee, which is responsible for liaising with the PSU Ethics Office, has held over “twenty public meetings since 2018,” but “only once ... has the [ethics] office presented data on trends and outcomes of misconduct reports.” Massey & Moyer, *Missed Conduct*. The Ethics Office also reports to the Audit and Risk Committee, which allegedly receives the Office’s “annual report on its [misconduct] hotline.” *Id.* Among the Audit and Risk Committee’s twenty-five open meetings in the last five years, there is “not a single mention of such a report.” *Id.* PSU officials claimed that the “reports are presented to trustees during executive or conference sessions.” *Id.* Given the Board’s own explanation of how the Ethics Office and the Board’s Committees interact—wherein the Office presents the Board with updates and reports—there is a vanishingly small chance that their meetings are “conferences” organized by state or federal agencies. *See* 65 Pa.C.S. §703. If, in the alternative, the Board committees’ meetings with the Ethics Office are properly categorized as “executive sessions,” the Board must have provided the public with an explanation of why such meetings were closed “either just before or immediately after” the sessions. *See id.* at § 708(b). This the Board has not done. Finally, even if the Board attempts to portray the meetings as “informational” rather than deliberative, the Board may not go beyond merely “learning about the salient issues” and cannot

“weigh[] the ‘pros and cons’” of various approaches to misconduct problems without violating the Act. *Smith*, 82 A.3d at 415–16.

EXHIBIT B



PennState

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November 9, 2023

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Dear Ms. Burke:

I am writing in response to your letter of October 26 regarding The Pennsylvania State University Board of Trustees and its compliance with the Pennsylvania Sunshine Act (the “Act”). We remain confident that the Board has taken its official actions and conducted its deliberations in compliance with the Act.

We continuously review the Board’s and the University’s planning and communications, remain mindful of our obligations under the Act and will continue to operate in compliance with such obligations.

Sincerely,

Tabitha R. Oman
Vice President and General Counsel