

**REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS**

1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300
www.rcfp.org

Bruce D. Brown
Executive Director
bbrown@rcfp.org
(202) 795-9301
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ProPublica

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identification.



October 26, 2023

VIA EMAIL

Tabitha Oman, Esq.
Penn State General Counsel
227 West Beaver Avenue, Suite 507
State College, PA 16801
GeneralCounsel@psu.edu

Matthew W. Schuyler
Chair, Penn State
University Board of
Trustees
201 Old Main
University Park, PA 16802
bot@psu.edu

Neeli Bendapudi
President, Penn State University
201 Old Main
University Park, PA 16802
president@psu.edu

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

1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300 • www.rcfp.org

Bruce D. Brown, Executive Director
bruce.brown@rcfp.org
(202) 795-9301

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VICE CHAIR

MARGARET LOW
WBUR

SECRETARY-TREASURER

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MATT THOMPSON
The New York Times

VICKIE WALTON-JAMES
NPR

SUSAN ZIRINSKY
CBS News

Paula Knudsen Burke
Local Legal Initiative attorney (PA ID 87607)
(717) 951-6314
pknudsen@rcfp.org

CC:

Penn State Board of Trustees
201 Old Main
University Park, PA 16802
bot@psu.edu

Rachel Pell
Penn State Vice President for Strategic Communications
309 Old Main
University Park, PA 16802
rap142@psu.edu

Affiliations appear only for purposes of identification.

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.