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

SPOTLIGHT PA,)
)
Plaintiff,) Docket No. 2023-2998
)
 vs.) Type of Case: Civil Action - Equity
)
BOARD OF TRUSTEES OF THE)
PENNSYLVANIA STATE)
UNIVERSITY,) Type of Pleading: Brief in Support of
) Preliminary Objections
Defendant)
) Filed on behalf of Defendant
)
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SPOTLIGHT PA,	:	COURT OF COMMON PLEAS
Plaintiff,	:	CENTRE COUNTY,
	:	PENNSYLVANIA
	:	
v.	:	
	:	CIVIL ACTION - EQUITY
BOARD OF TRUSTEES OF THE	:	
PENNSYLVANIA STATE	:	
UNIVERSITY	:	NO. 2023-2998
Defendant.	:	

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TABLE OF CONTENTS

Table of Authorities.....5

Introduction.....7

I. Background.....8

A. The Defendant Board of Trustees of The Pennsylvania State University.....8

B. The Plaintiff Spotlight PA.....9

C. Board Meetings.....9

i. November 9, 2023 – Board Committee Sessions: Committee on Audit and Risk and Committee on Finance, Business, and Capital Planning.....9

ii. November 10, 2023 – Board’s Conference and/or Privileged Executive Session.....10

iii. February 15, 2024 – Board Subcommittee on Compensation and Board’s Committee on Audit and Risk.....10

iv. February 16, 2024 – Board Conference Session.....11

II. Argument.....12

A. Legal Standard.....12

B. Plaintiff’s Claims Should Be Dismissed With Prejudice.....15

i. All claims in the Amended Complaint should be dismissed because the law says with certainty that no recovery is possible.....15

ii. Count I of the Amended Complaint should be dismissed because there are no allegations as how/why the conferences were not held solely for the purpose of collecting

	information or educating Board members.....	17
iii.	Count II of the Amended Complaint should be dismissed because Plaintiff fails to rebut, and allege any specific facts to overcome, the presumption of regularity and legality that the Board complied with the Act.....	22
iv.	Count III of the Amended Complaint should be dismissed based upon Plaintiff’s admissions that the Board complied with the Act and its failure to provide any facts to support its claims that any violations occurred.....	26
v.	Count IV of the Amended Complaint should be dismissed because Plaintiff admits that it has no evidence to support its claims and relies upon conjecture in its failed attempt to overcome the presumption of regularity and legality that the Board complied with the Act.....	28
vi.	Count V of the Amended Complaint should be dismissed because Plaintiff does not identify any official action taken by the Board in any executive session to support its claim.....	29
vii.	All claims in the Amended Complaint should be dismissed because Plaintiff fails to inform the Board with accuracy and completeness the specific basis for which recovery is sought.....	30
viii.	Any and all claims arising from the April or May 2023 Board executive sessions, conferences and/or working sessions should be dismissed because Plaintiff is time-barred under the Act for asserting any such claims.....	31
ix.	Any and all claims arising from the Board’s January 29, 2024 executive session should be dismissed because Plaintiff is time-barred under the Act for asserting any such claims.	33

III. Conclusion.....33

TABLE OF AUTHORITIES

Cases

Bayada Nurses, Inc. v. Comm., Dept. of Labor and Industry.....12

Belle Vernon Area Concerned Citizens v. Bd. of Comm'rs of Rostraver Twp., 487 A.2d 490 (Pa. Commw. Ct. 1985).....19

Connors v. West Greene Sch. Dist., 569 A. 2d 978 (Pa. Commw. Ct. 1989).....19

Conrad v. Pittsburgh, 218 A.2d 906 (Pa. 1966).....14

Day v. Civil Service Com 'n of Borough of Carlisle, 931 A.2d 646 (Pa. 2007).....32

Detweiler v. Sch. Dist. of Hald, 104 A.2d 110 (Pa. 1954).....14

Feldman v. Hoffman, 107 A.3d 821 (Pa. Commw. Ct. 2014).....13, 14

Grove v. Penns Valley Area School Board, Centre County Case No. 2018-cv-4124, Jan. 28, 2021.....7

Highlands Sch. Dist. v. Rittmeyer, 243 A.3d 755 (Pa. Commw. Ct. 2020).....23

Joyce v. Erie Ins. Exchange, 74 A.3d 157 (Pa. Super. Ct. 2013).....13

Kennedy v. Upper Milford Zoning Hearing Bd., 834 A.2d 1104 (Pa. 2003).....15, 16, 23, 28, 29, 31

Mamallis v. Melbourne Borough, 164 A.2d 209 (Pa. 1960).....16, 23, 28, 29, 31

Rambo v. Greene, 906 A.2d 1232 (Pa. Super. Ct. 2006).....13, 30

Reading Eagle v. Council of City of Reading, 627 A.2d 305 (Pa. Cmwlt. Ct. 1993).....26

Smith v. Twp. of Richmond, 82 A.3d 407 (Pa. 2013).....8, 20

Solomon v. U.S. Healthcare Sys. of Pa., Inc., 797 A.2d 346 (Pa. Super. Ct. 2002).....13

Sovich v. Shaughnessy, 705 A.2d 942 (Pa. Cmwlt. 1998).....7, 19

St. Peter's Roman Catholic Par. v. Urban Redevel. Auth. of Pittsburgh, 146 A.2d 724 (Pa. 1958).....14

Unified Sportsmen of Pa. v. Pa. Game Comm'n, (PGC), 950 A.2d 1120 (Pa. Commw. Ct. 2008).....13

Wurth v. City of Phila., 584 A.2d 403 (Pa. Commw. Ct. 1990).....12

<i>2303 Bainbridge, LLC v. Steel River Bldg. Sys., Inc.</i> , 239 A.3d 1107 (Pa. Super. Ct. 2020).....	19
--	----

Statutes

1 Pa. C.S. §1903.....	19
1 Pa.C.S § 1921.....	19
65 Pa.C.S. § 701.....	7
65 Pa.C.S. § 702.....	7
65 Pa.C.S. § 703.....	18, 19
65 Pa.C.S. § 704.....	7
65 Pa. C.S. §707.....	8,24, 27
65 Pa.C.S. § 708.....	23,24
65 Pa.C.S. § 713.....	31, 32

Other Authorities

Pa. R. Civ. P. 1019.....	14
Pa. R. Civ. P. 1028.....	12
Pa. R. Civ. P. 1028(a)(3).....	12
Pa. R. Civ. P. 1028(a)(4).....	12
Pa. R. Evid. 201.....	13

INTRODUCTION

The Board of Trustees of The Pennsylvania State University stands firm in its commitment to openness and transparency as required by Pennsylvania Sunshine Act, 65 Pa.C.S. §§ 701 *et seq* (“the Act”). The basic tenet of the Act is clear – when an agency holds a meeting with a quorum of its members to deliberate or take official action on agency business, the meeting must be open to the public after public notice of the meeting. 65 Pa.C.S. § 704. Pursuant to case law addressing the Act, there is a legal presumption that agency activities are conducted in compliance with the Act. Conjecture and speculation that they somehow were not conducted in compliance with the Act are not adequate to overcome this presumption.

As an “agency” under the Act, the Board recognizes that “the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formation and decision making of agencies is vital to the enhancement and property functioning of the democratic process.” 65 Pa. C.S. § 702(a). The Act, however, “does not require agency members to inquire and learn about issues *only* at open meetings.” *Grove v. Penns Valley Area School Board*, Centre County Case No. 2018-cv-4124, Opinion and Verdict Jan. 28, 2021, at p. 4 (quoting *Sovich v. Shaughnessy*, 705 A. 2d 942, 945-46 (Pa. Cmwlth. 1998)).¹ There are certain exceptions to the Act’s open meeting requirements where the Board is permitted to

¹ See Exhibit “A” attached per Local Rule 210.

hold executive sessions, conferences, and working sessions, where the public is not present, to fulfill its statutory and fiduciary responsibilities. 65 Pa. C.S. § 707. Further, not all gatherings of the Board fall within the scope of the Act and may be appropriately closed to the public to allow Board members to fulfill their fiduciary responsibilities. *Smith v. Twp. of Richmond*, 82 A. 3d 407, 415–16 (Pa. 2013). The allegations of the Amended Complaint misapply the law, rely on conjecture and speculation, and do not accurately represent the Board’s dedication to compliance under the Act. The Amended Complaint should be dismissed in its entirety with prejudice.

I. BACKGROUND

A. Defendant Board of Trustees of The Pennsylvania State University

The Pennsylvania State University (“Penn State” or the “University”) is a state related institution of higher education and instrumentality of the Commonwealth organized and existing under the nonprofit corporation laws of Pennsylvania. The Board of Trustees of the University (“Board”) is the corporate body established by the University’s Charter with overall responsibility for the governance and welfare of the University and all the interests pertaining thereto. The Board and its Committees and Subcommittees hold sessions and meetings to conduct University business and conferences to gather information about topics for which no official action is pending. The meetings are held in either public or private session in

accordance with the relevant sections of the Act. Executive sessions, conferences, and certain working sessions are recognized statutory exceptions to open meetings under the Act utilized by the Board to fulfill its duties. Moreover, conferences and gatherings where no official action is deliberated or taken are not subject to the Act and are properly utilized by the Board.

B. Plaintiff Spotlight PA

Plaintiff is a Pennsylvania corporation that describes itself as a news source on Pennsylvania government and statewide matters. (Amended Complaint, ¶ 6). Plaintiff's State College office employs three reporters and an editor. (Amended Complaint, ¶ 7). Plaintiff claims that its reporters attend the Board's open meetings and report on Penn State's business. (Amended Complaint, ¶¶ 3, 7).

C. Board Meetings

i. November 9, 2023 – Board Committee Sessions: Committee on Audit and Risk and Committee on Finance, Business, and Capital Planning.

On November 5, 2023, the Board advertised the November 9 and 10, 2023 Board meetings, conferences, and sessions in the Centre Daily Times and with PennLive (*See* Defendant's Preliminary Objections, Exhibit "B," Legal Notices and Proofs of Publication for November 9 and 10, 2023 Board meetings and sessions). Plaintiff's reporter arrived for a meeting of the Board's Committee on Audit and Risk on November 9, 2023, and attempted to enter the executive session held prior

to the public meeting. (Amended Complaint, ¶ 22). Plaintiff was advised that the Committee on Audit and Risk was holding an executive session prior to, and after, the Committee’s public meeting on November 9, 2023. (Amended Complaint, ¶ 23).

ii. November 10, 2023 – Board’s Conference and/or Privileged Executive Session.

Plaintiff’s reporter attempted to attend a conference/executive session on November 10, 2023, that was publicly advertised as such. (Amended Complaint, ¶ 29). Plaintiff alleges that the reporter was not permitted to attend the conference/executive session and challenges the Board’s description of the November 10, 2023 gathering. (Amended Complaint, ¶¶ 33, 35). The reporter was advised that there was a public meeting of the Board later that day. (Amended Complaint, ¶ 34).

iii. February 15, 2024 – Board Subcommittee on Compensation and Board’s Committee on Audit and Risk.

On February 5, 2024, the Board advertised the February 15 and 16, 2024 Board meetings and sessions in the Centre Daily Times and with PennLive (*See* Defendant’s Preliminary Objections, Exhibit “C,” Legal Notices and Proofs of Publication for February 15 and 16, 2024 Board meetings). Various subcommittees of the Board held meetings and sessions on February 15, 2024 at the Hintz Family Alumni Center at University Park. (Amended Complaint, ¶ 38). The Board’s Subcommittee on Compensation met in an executive session on February 15, 2024

at 12:45 p.m. in Robb Hall. (Amended Complaint, ¶ 41). At approximately 1:30 p.m. on February 15, 2024, the Board’s Subcommittee on Compensation opened its meeting and held a public session. (Amended Complaint, ¶¶ 43-44). Spotlight alleges that, during the public meeting, a representative of the Subcommittee stated that the Subcommittee on Compensation “met in closed session prior to the public meeting to review compensation changes for Penn State President Bendapudi.” (Amended Complaint, ¶ 45-46).

On February 15, 2024 at approximately 3:00 p.m., the Board’s Committee on Audit and Risk convened a public meeting. (Amended Complaint ¶ 48). At the conclusion of the public meeting, Committee Chair Randall Black stated that the next two sessions would be closed as working and executive sessions and explained that: “[d]uring the executive session the committee will meet individually and privately with management, Plante Moran representatives, and the internal audit director. The committee will not take any official action following the working session or the executive session.” (Amended Complaint, ¶ 49).

iv. February 16, 2024 – Board Conference Session.

Plaintiff’s editor entered Hintz Alumni Center at 8:30 a.m. where the Board’s Trustees were in a conference as defined by the Act. (Amended Complaint, ¶ 51-52). The editor was told that the Board was holding a conference as they were gathering for informational purposes only in compliance with the Act. (Amended

Complaint, ¶ 55). Plaintiff admits that the Board announced later that day in a public meeting that it “also met this morning [February 16, 2024] in conference session and received informational updates on a variety of topics including Penn State health’s 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.” (Amended Complaint, ¶ 58).

II. ARGUMENT

A. Legal Standard

Rule 1028 of the Pennsylvania Rules of Civil Procedure provides that a party may file preliminary objections asserting that the pleading is legally deficient. Pa. R. Civ. P. 1028(a)(4). Generally, where a legal deficiency is "apparent on the face of the complaint," it "is needless to prolong proceedings when the matter can be correctly and quickly decided on preliminary objections in the nature of a demurrer." *Wurth v. City of Phila.*, 584 A. 2d 403, 407 (Pa. Commw. Ct. 1990). Moreover, “a court need not accept as true conclusions of law, unwarranted inferences, or expressions of opinion.” *Bayada Nurses, Inc. v. Comm., Dept. of Labor and Industry*, 8 A. 3d 866, 884 (Pa. 2010).

Rule 1028 of the Pennsylvania Rules of Civil Procedure also provides that a party may file preliminary objections asserting that the pleading lacks sufficient specificity. Pa. R. Civ. P. 1028(a)(3). The pertinent question under Rule 1028(a)(3)

is “whether the complaint is sufficiently clear to enable the defendant to prepare his defense,” or “whether the plaintiff’s complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that he may know without question upon what grounds to make his defense.” *Rambo v. Greene*, 906 A. 2d 1232, 1236 (Pa. Super. Ct. 2006). Clearly, a complaint must provide the defendant with notice of what the plaintiff’s claims are, the grounds upon which they rest and formulate the issues by summarizing the material facts to support the claims. *Unified Sportsmen of Pa. v. Pa. Game Comm’n, (PGC)*, 950 A.2d 1120, 1134 (Pa. Commw. Ct. 2008).

The Pennsylvania Rules of Evidence allow this Court to judicially notice a fact that is not subject to reasonable dispute because it is generally known within the trial court’s territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *See* Pa. R. Evid. 201(b). Because a court may take judicial notice “at any stage of the proceeding,” *see* Rule 201(d), this Court may consider such facts in ruling on a party’s preliminary objections. *See, e.g., Joyce v. Erie Ins. Exchange*, 74 A.3d 157 (Pa. Super. Ct. 2013); *Solomon v. U.S. Healthcare Systems of Pa., Inc.*, 797 A.2d 346, 352 (Pa. Super. Ct. 2002).

This Court may also “rely on documents forming in part the foundation of the suit even where a plaintiff does not attach such documents to its complaint.” *Feldman v.*

Hoffman, 107 A. 3d 821, 836 (Pa. Commw. Ct. 2014). *See Conrad v. Pittsburgh*, 218 A. 2d 906, 907 n. 3 (Pa. 1966); *St. Peter's Roman Catholic Par. v. Urban Redevelopment Auth. of Pittsburgh*, 146 A.2d 724, 725 (Pa. 1958); *Detweiler v. Sch. Dist. of Haled*, 104 A.2d 110, 11 (Pa. 1954). *See also* Pa. R. Civ. P. 1019(i). "Documents, the contents of which are alleged in [the] Complaint and which no party questions, but which are not physically attached to the pleading, may be considered" by this Court in addressing Defendant's Preliminary Objections in the nature of demurrer. *Id.*

In its Amended Complaint, Plaintiff alleges violations of the Act at the November 2023 and February 2024 Board meetings and sessions. Therefore, Plaintiff has put at issue in its Amended Complaint the Board's compliance with its obligations under the Act and any undisputed, public documents regarding same can properly be considered by this Court. On November 5, 2023, the Board advertised the November 9 and 10, 2023 Board meetings and sessions in the Centre Daily Times and with PennLive (*See* Defendant's Preliminary Objections, Exhibit "B," Legal Notices and Proofs of Publication for November 9 and 10, 2023 Board meetings and sessions). On February 5, 2024, the Board advertised the February 15 and 16, 2024 Board meetings and sessions in the Centre Daily Times and with PennLive (*See* Defendant's Preliminary Objections, Exhibit "C," Legal Notices and Proofs of Publication for February 15 and 16, 2024 Board meetings). Since Plaintiff claims that the Board violated certain provisions of the Act with respect to the November

2023 and February 2024 Board meetings, the Court may consider the legal notices and proofs of publication for those meetings.

B. Plaintiff's Claims Should Be Dismissed With Prejudice

Plaintiff asserts five causes of action against Defendant and each fails on its own terms. For the reasons that follow, Defendant requests that this Court dismiss each of Plaintiff's five causes of action with prejudice.

i. All claims in the Amended Complaint should be dismissed because the law says with certainty that no recovery is possible.

The Amended Complaint is replete with conclusions of law, unwarranted inferences, and expressions of opinion. Plaintiff does not set forth any specific facts to support any of its claims. Rather, Plaintiff attempts to support its claims on the basis that it is relying on conjecture to support its "information and belief" without specifying the information. Instead of satisfying the pleading requirements to support its claims, Plaintiff improperly alleges that there is no evidence to support the Board's characterization of conferences, meetings, and gatherings in a misplaced attempt to shift its burden to plead specific facts to the Board.

The party alleging a violation of the Sunshine Act carries the burden of proof to establish a violation. *Kennedy v. Upper Milford Twp. Zoning Hearing Bd.*, 834 A.2d 1104, 1123 (Pa. 2003) (citation omitted). To carry its burden, the party must overcome a "presumption of regularity and legality that obtains in connection with proceedings of local agencies." *Id.* In Pennsylvania, there is a legal presumption

that municipal officers have properly performed their duties and have taken the steps necessary to give validity to their official acts. *See Mamallis v. Melbourne Borough*, 164 A.2d 209 (Pa. 1960); *see also* Defendant's Preliminary Objections, Exhibit A at p. 4). Thus, a plaintiff alleging a violation of the Sunshine Act bears the burden of proof "to overcome the presumption of regularity and legality that obtains in connection with proceedings of local agencies." *Kennedy supra*.

In the case, *sub judice*, Plaintiff attempts to overcome the presumption of regularity and legality by employing a logical fallacy, repeatedly making claims that because there is no evidence to support that the Board adhered to the Act, it must have violated the Act. Plaintiff does not specifically identify any official action that was taken in a closed meeting, any information that was shared with the Board in a conference that was not for informational purposes only, any matters discussed in an executive session that do not fall with the categories identified by the Act, or any deliberations which occurred at a conference.

The embodiment of Plaintiff's attempts to shift its burden to the Board lie in Count IV of the Amended Complaint. Plaintiff alleges that "there is no evidence that the Board held a conference" on November 10, 2023 and February 16, 2024. (Amended Complaint, ¶¶ 90, 92). Paragraph 93 of the Amended Complaint further provides that, "*on information and belief*, the Board used a '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.” (Amended Complaint, ¶ 91) (emphasis added). Plaintiff does not identify any deliberation of agency business that was conducted by the Board and admits that it has no information to support its claim. Plaintiff should not be permitted to circumvent its pleading requirements and shift that burden to the Board to affirmatively provide facts to establish it complied with the Act.

Based upon the overall lack of information and its attempt to shift its pleading requirements and burden of proof to the Board, Plaintiff concludes that the Board violated the Act in each Count of the Amended Complaint. These unsupported, vague allegations and bald conclusions of law in the Amended Complaint are wholly inadequate to support any claim that the Board violated the Act. Simply put, Spotlight PA has failed to rebut the presumption of legality and regularity that the Board complied with the Act in a creative attempt to shift its burden to the Board. Accordingly, the law says with certainty that no recovery is possible by Plaintiff, and the Amended Complaint should be dismissed with prejudice in its entirety.

ii. Count I of the Amended Complaint should be dismissed because there are no allegations as how/why the conferences were not held solely for the purpose of collecting information or educating Board members.

Initially, it is important to note that Plaintiff does not identify the subject matter of the November 10, 2023 conference/executive session and/ or specifically

allege how/why the information presented to the Board at the November 10, 2023 conference/executive session was a violation of the Act. Additionally, Plaintiff does not identify the subject matter of the February 16, 2024 morning conference and/or allege how/why the information presented to the Board during the February 16, 2024 morning conference was a violation of the Act. Therefore, as discussed, *supra*, Plaintiff fails to rebut the presumption of legality and regularity that the Board was in full compliance with the Act.

In addition to not providing any specific details to support its claims in Count I, Plaintiff's application of the Act's definition of "conference" is wrong and misinterprets the plain language of the statute. Plaintiff asserts a conclusory allegation that the Board violated the Act because it improperly characterized a gathering as a "conference" on November 10, 2023 and February 16, 2024, based upon Plaintiff's improper application of the Act's definition of a "conference." Plaintiff primarily argues that the only appropriate application of the recognized "conference" exception to open meetings is when a State or Federal agency presents a session. (*See Amended Complaint*, ¶¶ 57, 63). Plaintiff's argument misconstrues the plain language of the statute and is a misapplication of basic rules of grammar because the Act does not require the presence of an external State or Federal agency to invoke the conference exception properly under the Act. (*See 65 Pa. C.S. § 703*).

The Act defines “conference” 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.” (See 65 Pa. C.S. § 703, emphasis supplied). When construing a statute, the court’s primary goal is “to ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a). “Every statute shall be construed, if possible, to give effect to all its provisions.” *Id.* “Words and phrases shall be construed according to the rules of grammar and according to their common and approved usage.” *Id.* at §1903(a); *2303 Bainbridge, LLC v. Steel River Bldg. Sys., Inc.*, 239 A.3d 1107, 1114 (Pa. Super. Ct. 2020).

Moreover, it has been well established by Pennsylvania Courts that: (1) fact-finding need not take place in public, *see Sovich supra* at 945–46 (stating the Sunshine Act does not require agency members to inquire and learn about issues only at open meetings); (2) public officials have an affirmative duty to be fully informed and, as such, may “study, investigate, discuss and argue problems and issues” outside the confines of public meetings, *see Belle Vernon Area Concerned Citizens v. Bd. of Comm'rs of Rostraver Twp.*, 487 A. 2d 490, 494 (Pa. Commw. Ct. 1985) (internal quotation marks omitted); and (3) agency members may informally discuss and debate proposals among themselves without violating the Act. *See Connors v. West Greene Sch. Dist.*, 569 A. 2d 978, 983 (Pa. Commw. Ct. 1989).

The Pennsylvania Supreme Court has held:

Gatherings held solely for the purpose of collecting information or educating agency members about an issue do not fit this description [of deliberation], notwithstanding that the information may later assist the members in taking official action on the issue. To conclude that such information-gathering discussions are held for the purpose of making a decision would amount to a strained interpretation not reflective of legislative intent. In this regard, it bears noting that, although the Act is designed to enhance the proper functioning of the democratic process by curtailing secrecy in public affairs, *see* 65 Pa.C.S. § 702 (relating to legislative findings and declaration); *Babac v. Pa. Milk Mktg. Bd.*, 531 Pa. 391, 395, 613 A.2d 551, 553 (1992), the legislative body has expressly cabined the openness directive by reference to a specific discussional purpose (“making a decision”), thereby leaving room for closed-door discussions held for other purposes. *See generally* 1 Pa.C.S. § 1922(2) (reflecting a presumption that the General Assembly intends the entire statute to be effective and certain).

Smith, 82 A. 3d at 415–16.

It is abundantly clear from the plain language of the Act, and the relevant case law construing the same, that conferences can be held for the purpose of collecting information or educating Board members. Accordingly, to satisfy the pleading requirements and to rebut the burden of legality and regularity, Plaintiff is required to set forth facts that the conferences were not held for that purpose. Plaintiff has failed to do so. There are no facts which specifically state, or from which it can be inferred, that the conferences identified were not held solely for the purpose of collecting information or educating Board members. Therefore, based upon the correct interpretation of “conference” under the Act, and Plaintiff’s failure to

identify any facts that the conferences were not held for the purpose permitted, Count I should be dismissed on this basis alone.

Moreover, Plaintiff admits that the Board announced in a public meeting, later that day on February 16, 2024, that it had met in conference earlier that day 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”, which meets the definition of a “conference” under the Act as construed by Pennsylvania Courts. (Amended Complaint, ¶ 58). It is therefore axiomatic that the conference on February 16, 2024 meets the definition under the Act because the purpose was to provide information to the Board as specifically declared later that day. Plaintiff does not set forth any allegations that the conference was not held for that purpose. There are also no specific allegations of any deliberations of Board business during the conferences and/or that the conferences were held for the reason of taking official action. Thus, the allegations in Count I of the Amended Complaint do not provide a cause of action for which the law provides recovery, and the Court should dismiss Count I of Plaintiff’s Amended Complaint with prejudice.

iii. Count II of the Amended Complaint should be dismissed because Plaintiff fails to rebut, and allege any specific facts to overcome, the presumption of regularity and legality that the Board complied with the Act.

In Count II of the Amended Complaint, Plaintiff asserts a conclusory allegation that the Board did not strictly adhere to one of the seven exceptions for an “executive session” during the November 9, 2023 Board’s Committee on Audit and Risk executive session, or the February 15, 2024 executive sessions of the Committee on Compensation and the Committee on Audit and Risk. Plaintiff makes similar allegations about the November 10, 2023 conference. Conspicuously, Plaintiff does not identify the subject matter of the November 10, 2023 conference/executive session and/or allege why the information presented during the November 10, 2023 conference/executive session subjected it to the requirements for open meetings under the Act.

Regarding the executive sessions, Plaintiff fails to identify specifically any subject matter at any of the executive sessions that would not qualify as one of topics permitted under the Act as an executive session and/or otherwise not fall with any exception to open meetings under the Act. Instead of satisfying the pleading requirements to support its claim, Plaintiff continued its pattern of alleging that there is no evidence that the Board adhered to the seven topics permitted under the Act as an executive session, even if the same applied, in an attempt to shift its burden to the Board. Again, Plaintiff fails to rebut the presumption and allege any specific facts

to overcome the presumption of regularity and legality that the Board complied with the Act. (*See Mamallis and Kennedy, supra*).

Moreover, Plaintiff makes no allegation and asserts no plausible claim that the conduct of the Board's gatherings was irregular or improper. To the contrary, Plaintiff admits that a reason was announced for the executive session held on February 15, 2024 from 12:45 – 1:30 p.m. by the Board Subcommittee on Compensation, *to wit*, to review compensation for the University's President and that said reason was provided to the public. (Amended Complaint, ¶ 45). This reason for executive session is permitted under Section 708(a)(1) of the Act since the matter involved employment. Section 708(a)(1) of the Act provides that an agency may hold executive sessions closed to the public for several reasons, including “[t]o discuss any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of performance, promotion or disciplining [*sic*] of any ... employee employed or appointed by the agency.” *Id.* § 708(a)(1). *Highlands Sch. Dist. v. Rittmeyer*, 243 A.3d 755, 763 (Pa. Commw. Ct. 2020). The Board was permitted to meet in executive session to discuss the University President's compensation and did not violate the Act in doing so.

Furthermore, Plaintiff admits that a reason was announced for the executive session held on February 15, 2024 from 3:45 – 4:00 p.m. by the Committee on Audit

and Risk, *to wit*, that the Committee would meet individually and privately with management, Plante Moran representatives, and the internal audit director. (Amended Complaint, ¶ 49). This reason for executive session is permitted under Section 708(a)(5) of the Act since the matter involved Board business involving confidential information. Section 708(a)(5) provides that the Board may meet in executive session to “review and discuss agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law.” Confidential information that is reviewed may include, but is not limited to, student records, employee records, financial information related to ongoing negotiations or investments, intellectual property, and healthcare records. Plaintiff does not allege that confidential information was not discussed.

Additionally, the Committee on Audit and Risk is permitted to meet in a closed session as provided for by Section 707(c) of the Act. Specifically, Section 707(c) of the Act provides that “[b]oards of auditors may conduct working sessions not open to the public for the purpose of examining, analyzing, discussing and deliberating the various accounts and records with respect to which such boards are responsible, so long as official action of a board with respect to such records and accounts is taken at a meeting open to the public and subject to the provisions of this chapter.” As Plaintiff admits, “[a]t the conclusion of the Board Committee on Audit

and Risk public meeting, Committee chair Randall Black . . . 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.’”² (Amended Complaint, ¶ 49). Therefore, based upon Plaintiff’s own admissions, the Board Committee on Audit and Risk announced that it conducted a working session to examine, analyze, discuss, and deliberate the accounts and records with respect to which the Board is responsible. As such, there was no violation of the Act as a result of the session held on February 15, 2024 from 3:45 – 4:00 p.m. by the Committee on Audit and Risk.

Finally, there are no specific allegations of any deliberations of Board business or official action taken by the Committee on Audit and Risk to rebut the presumption that the Committee was acting in compliance with the Act. Without any such allegations, there is no viable claim that the Board violated the Act as a matter of law. Accordingly, Count II of the Amended Complaint fails to provide a viable cause of action for which the law provides recovery, and the Court should dismiss Count II of Plaintiff’s Amended Complaint with prejudice.

² Regardless of whether the executive session was correctly labeled as such by Black, the content of the meeting was also identified as a working session for the reasons announced, which is unequivocally an exception to the public meeting requirements pursuant to Section 707(c) of the Act.

iv. **Count III of the Amended Complaint should be dismissed based upon Plaintiff’s admissions that the Board complied with the Act and its failure to provide any facts to support its claims that any violations occurred.**

Count III of the Amended Complaint asserts a conclusory allegation that the Board violated the Act when it failed to announce the reason for the executive sessions held on November 9 and 10, 2023, and February 15, 2024. Pennsylvania courts have held that, “in order to effectuate purpose of Sunshine Act requirement that reasons for public's exclusion from executive session be given—so that public can determine if it is properly being excluded—reasons stated by public agency must be specific, identifying a real, discrete matter that is best addressed in private.” *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 307 (Pa. Cmwlth. 1993). As the allegations in Plaintiff’s Amended Complaint confirm, the Board complied with the announcement requirements for executive sessions.

First, to the extent the November 10, 2023 gathering was an “executive session,” Plaintiff admits that the Board announced at a public session later that day that it had met “in executive session to discuss various privileged matters.” (Amended Complaint, ¶ 36). Additionally, Plaintiff admits that a reason was announced for the executive session held on February 15, 2024 from 12:45 – 1:30 p.m. by the Board Subcommittee on Compensation, *to wit*, to review compensation for the University’s President and that said reason was provided to the public. (Amended Complaint, ¶ 45).

Plaintiff further concedes that a reason was announced for the executive session held on February 15, 2024 from 3:45 – 4:00 p.m. by the Committee on Audit and Risk, *to wit*, that the Committee would meet individually and privately with management, Plante Moran representatives, and the internal audit director. (Amended Complaint, ¶ 49). Specifically, Plaintiff recognizes that “[a]t the conclusion of the Board Committee on Audit and Risk public meeting, Committee chair Randall Black . . . 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.’” (*Id.*) Accordingly, Plaintiff’s claim related to the November 10, 2023 gathering and the February 15, 2024 executive sessions fails as a matter of law based upon the allegations of the Amended Complaint.

Finally, Section 707(c) of the Act permits the Committee on Audit and Risk to hold “certain working sessions” involving “[b]oards of auditors” that are “not open to the public.” Since the Committee on Audit and Risk can also hold working sessions under the Act, no announcement of the reason for the sessions is required, and Plaintiff’s claim fails on this basis as well. Plaintiff has therefore failed to set forth facts to support a cause of action for which the law provides recovery in Count

III of the Amended Complaint, and the Court should dismiss Count III of Plaintiff's Amended Complaint with prejudice.

- v. **Count IV of the Amended Complaint should be dismissed because Plaintiff admits that it has no evidence to support its claims and relies upon conjecture in its failed attempt to overcome the presumption of regularity and legality that the Board complied with the Act.**

Count IV of the Amended Complaint asserts a conclusory allegation that the Board deliberated official University business in violation of the Act during the executive session/conference held on November 10, 2023 and the conference held on February 16, 2024. Plaintiff admits that it has no evidence to support its claims and relies upon conjecture to support its “information and belief.” (Amended Complaint, ¶ 91). There are also no specific allegations of any deliberations of Board business during the conferences and/or that the conferences were held for the reason of taking official action.

Instead of satisfying the pleading requirements to support its claim, Plaintiff claims that there is no evidence to support the Board's characterization of these conferences as such in an attempt to shift its burden to plead specific facts to the Board. (Amended Complaint, ¶ 92). Plaintiff therefore fails to rebut the presumption and allege any specific facts to overcome the presumption of regularity and legality that the Board complied with the Act. (*See Mamallis and Kennedy, supra*). Without any factual allegations that deliberation of Board business or

official action occurred at the conferences identified, Plaintiff fails to set forth a viable cause of action in Count IV of the Amended Complaint, and the Court should dismiss Count IV of Plaintiff's Amended Complaint with prejudice.

vi. **Count V of the Amended Complaint should be dismissed because Plaintiff does not identify any official action taken by the Board in any executive session to support its claim.**

Count V of the Amended Complaint asserts a conclusory allegation that the Board deliberated official University business in violation of the Act during the executive session/conference held on November 10, 2023 and the conference held on February 16, 2024. However, Plaintiff admits that it has no evidence to support its claims and relies upon conjecture to support its "information and belief." (Amended Complaint, ¶ 91). Instead of satisfying the pleading requirements to support its claim, Plaintiff claims that there is no evidence to support the Board's characterization of these conferences as such in an attempt to shift its burden to plead specific facts to the Board. (Amended Complaint, ¶ 92). Plaintiff therefore fails to rebut the presumption and allege any specific facts to overcome the presumption of regularity and legality that the Board complied with the Act. (*See Mamallis and Kennedy, supra*).

Additionally, there are also no specific allegations of any deliberations of Board business during the conferences and/or that the conferences were held for the reason of taking official action. Absent any official action or deliberations, there

can be no violation of the Act during the executive session/conference held on November 10, 2023 and the conference held on February 16, 2024. Without any factual allegations that deliberation of Board business or official action occurred at the conferences identified, Plaintiff fails to set forth a viable cause of action in Count V of the Amended Complaint, and the Court should dismiss Count V of Plaintiff's Amended Complaint with prejudice.

vii. **All claims in the Amended Complaint should be dismissed because Plaintiff fails to inform the Board with accuracy and completeness the specific basis for which recovery is sought.**

The Amended Complaint fails to inform the Board with accuracy and completeness of the specific basis on which recovery is sought. (*See Rambo, supra*). Defendant does not know on what grounds to make its defense. (*Id.*). Plaintiff has failed to allege any specific facts to support any of its claims and Defendant would be significantly prejudiced in having to defend against same.

The Amended Complaint fails to specifically allege:

- (1) the subject matter of any conference or executive session identified;
- (2) how or why the executive sessions do not fall within the categories provided for under the Act;
- (3) how or why the information presented to the Board during the conferences is a violation of the Act;
- (4) any deliberation that occurred at any conference or executive session;

(5) any official action that took place at any conference or executive session;

(6) how or why the non-public executive sessions, conferences, or working sessions would be required to be held in public under the Act;

Simply put, the Amended Complaint is littered with conjecture and mere speculation that does not satisfy the pleading requirements. As such, Plaintiff fails to rebut the presumption and allege any specific facts to overcome the presumption of regularity and legality that the Board complied with the Act. (*See Mamallis and Kennedy, supra*). Plaintiff cannot shirk itself of such responsibility by claiming that the Board has not presented evidence when it is Plaintiff who has the burden to set forth specific facts to support its claims. Since Plaintiff has failed to sufficiently plead any claims in the Amended Complaint, this action should be dismissed with prejudice because any amendment would be futile.

viii. Any and all claims arising from the April or May 2023 Board executive sessions, conferences and/or working sessions should be dismissed because Plaintiff is time-barred under the Act for asserting any such claims.

Plaintiff alleges that violations of the Act occurred during the Board's April and May 2023 executive sessions, conferences and/or working sessions and that it advised the Board of same in a letter sent to the University on October 26, 2023. (Amended Complaint, ¶¶ 13-15).

Section 713 of the Act states:

[a] legal challenge under this chapter shall be filed within 30 days from the date of a meeting which is open, or within 30 days from the discovery of any action that occurred at a meeting which was not open at which this chapter was violated, provided that, hi the case of a meeting which was not open, no legal challenge may be commenced more than one year from the date of said meeting.

65 Pa. C.S. § 713(a).

Section 713 of the Act requires that any challenge under the Act must be raised within thirty days of the discovery of the action alleged to have violated the Act. *Day v. Civil Service Com 'n of Borough of Carlisle*, 931 A. 2d 646, 650 (Pa. 2007). In *Day*, the Supreme Court stated “[a]lthough this Court has yet to pass upon the time requirements of Section 713, the Commonwealth Court, consistently with the plain language of the Act, has previously interpreted the provision to require a legal challenge under the Act to be filed within thirty days of the date that an individual becomes aware of a violation of the Act.” *Id.* at 458.

The initial Complaint was filed on December 6, 2023. Plaintiff is time-barred under the Act from challenging the legality of Board sessions or conferences in April and/or May 2023 because the initial Complaint was not filed within thirty days of those gatherings. Accordingly, to the extent that the Amended Complaint sets forth claims arising from the Board’s executive sessions, conferences or working sessions in April and/or May 2023, any such claims are time-barred under the Act and should be dismissed with prejudice.

- ix. **Any and all claims arising from the Board’s January 29, 2024 executive session should be dismissed because Plaintiff is time-barred under the Act for asserting any such claims.**

Plaintiff added in the Amended Complaint general allegations that an executive session occurred on January 29, 2024 under a section titled “Specific Violations.” (Amended Complaint, ¶¶ 56-57). The Amended Complaint was filed on March 6, 2024. Plaintiff is time-barred under the Act from challenging the legality of Board executive session on January 24, 2024 because the Amended Complaint was not filed within thirty days of that session. Accordingly, to the extent that the Amended Complaint sets forth claims arising from the Board’s executive session on January 29, 2024, any such claims are time-barred under the Act and should be dismissed with prejudice.

III. CONCLUSION

The Amended Complaint should be dismissed because Plaintiff fails to rebut the presumption of regularity and legality that the Board complied with the Act. The Amended Complaint contains conjecture and speculation that the Board did not comply with the act and fails to allege any specific facts to support its claims that any violations were committed. Moreover, Plaintiff’s application of the Act’s definition of “conference” is wrong and misinterprets the plain language of the statute. Furthermore, Plaintiff’s attempt to shift its burden to the Board does not satisfy the pleading requirements and the failure to allege any specific facts does not

permit the Board to prepare its defense. Accordingly, the Amended Complaint should be dismissed with prejudice because any amendment would be futile.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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

Submitted by: Defendant Board of Trustees of the
Pennsylvania State University

Signature: /s/ Christopher J. Conrad

Name: Christopher J. Conrad, Esquire

Attorney No. (if applicable): 202348

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served upon the following known counsel and parties of record this 6th day of May, 2024, **via email** as follows:

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