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June 18, 2021

VIA EMAIL

The Honorable Christopher SantaMaria  
Chairman of the Board of Trustees  
Public School Employees Retirement System  
5 N 5th St  
Harrisburg, PA 17101  
[chsanta@pa.gov](mailto:chsanta@pa.gov)

RE: Sunshine Act Violations and Transparency Concerns

Dear Mr. Chairman,

The purpose of my correspondence is underscore several transparency concerns relating to public meetings and executive sessions of the Pennsylvania School Employees' Retirement System, and to offer guidance as the Board moves forward related to compliance with the Sunshine Act, 65 Pa.C.S.A. § 701 et seq.

My primary concerns stems from at least two incidents where the Board violated the Act at its meeting last week. When the Board entered executive session at its June 10-June 11, 2021 meetings, counsel announced an Executive Session "to discuss the general counsel's report," and in a separate instance announced executive session to discuss "fees."

My goal is to provide a legal roadmap to assist Board counsel and members with future compliance.

The Supreme Court of Pennsylvania has stated that the purpose of the Sunshine Act is to provide transparency at the highest levels of government and to open the decision-making process of state government to greater public scrutiny and accountability. *Consumers Education and Protective Association v. Nolan*, 368 A.2d 675, 682-83 (Pa. 1977). Under the Act, "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at **a meeting open to the public**" unless an "exception" to the general rule applies. 65 Pa.C.S.A. § 704.

Executive sessions, defined in the law as meetings “from which the public is excluded”, are permissible and in some instances even necessary and advisable.

The Court has stated that there are instances when “the public would be better served in certain matters if the governing body had a private discussion of the matter prior to a public resolution.” *Reading Eagle Company v. Council of the City of Reading*, 627 A.2d 305, 306 (Pa. Cmwlth. 1993).

An entity subject to this Act may meet in executive sessions **for only seven specified purpose**, and Section 708 of the Sunshine Act enumerates the type of situations an agency may hold an Executive Session as follows:

1. Discussing personnel matters;
2. Holding an information, strategy and negotiation session related to the negotiation of a collective bargaining agreement;
3. Considering the purchase or lease of real property;
4. Consulting with an attorney about active or pending litigation;
5. Discussing agency business which, if conducted in public, would violate a lawful privilege or lead to the disclosure of information or confidentiality protected by law;
6. Discussing certain academic matters (this reason is specifically limited to certain institutions of higher education); and
7. Discussing certain public safety issues if disclosure of the information discussed would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection.

While public boards in Pennsylvania are permitted, but not required, under the Sunshine Act to hold executive sessions – they must do so in a particular way with particular specificity. An executive session may be held during an open meeting, at the conclusion of an opening meeting, or it may be announced for a future time. Id. § 708(b). The reason for holding an executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session.

Please be advised that decades of Pennsylvania jurisprudence have held that the subject matter of executive sessions must be announced with enough specificity for the public to know the nature of the matter being discussed.

When going into an executive session:

*“[t]he reason given, of course, must be meaningful. It must be more than some generalized term which in reality tells the public nothing. To simply say “personnel matters” or “litigation” tells nothing. The reason stated must be of sufficient specificity to inform those present that there is, in reality, a specific, discrete matter or area which the board had determined should be discussed in executive session.... When a board chairman tells a citizen he may not hear the board discuss certain business, he is taking liberties with the rights of that citizen, and the reason given for this interference must be genuine and meaningful, and one the citizen can understand. To permit generalized fluff would frustrate the very purpose of the Act.”*

*Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 306 (Pa. Commw. Ct. 1993).

The Commonwealth Court in 1993 affirmed a trial court's holding that before an executive session to discuss litigation could be held, the 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." *Id.* When dealing with "identifiable complaints or threatened litigation," the agency must state the nature of the complaint, but not the identity of the complainant." *See id.* This is where the key failure occurred, by merely telling the public that the Board would shut its doors to discuss the general counsel's report. This is a failure of both the letter and the spirit of the law. Entering executive session by merely announcing you will be providing a general counsel report is insufficient, in direct contravention of the Court's mandates, and deprives the taxpayers and teachers Sunshine Act protection. At the risk of sounding pedestrian with the federal investigation into the \$64 Billion fund, now more than the ever PSERS must hold itself to the highest standard of transparency to foster public confidence.

Additionally, the same legal foundations would apply when you are enter executive to discuss "fees" are in appropriate. The Board must comply with the mandates of the law and be specific as outlined above.

Should it be helpful, our team would make ourselves available to provide a transparency training to the Board and counsel. Alternatively, I recommend that you contact the Executive Director of the Office of Open Records, who can provide a training on the Board related to compliance the Sunshine Act as it is one of its enumerated functions.

Respectfully,

A handwritten signature in black ink, appearing to read "Terry Mutchler". The signature is fluid and cursive, written in a professional style.

Terry Mutchler