SUPREME COURT OF NEW JERSEY
A-113 September Term 2010
067787

FRANCIS J. MCGOVERN, JR., ESQ.,

Plaintiff-Respondent,

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, RUTGERS' BOARD OF GOVERNORS and M. WILLIAM HOWARD, JR., IN HIS OFFICIAL CAPACITY AS CHAIR OF THE RUTGERS BOARD OF GOVERNORS ONLY,

Defendants-Appellants.

Argued April 24, 2012 – Decided July 25, 2012

On certification to the Superior Court, Appellate Division, whose opinion is reported at 418 N.J. Super. 458 (2011).

John J. Peirano argued the cause for appellants (McElroy, Deutsch, Mulvaney & Carpenter, attorneys; Mr. Peirano, Paula M. Castaldo and David M. Alberts, on the briefs).

Francis J. McGovern, Jr., argued the cause pro se.

John P. Bender, Assistant Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Jeffrey S. Chiesa, Attorney General, attorney; Melissa H. Raksa, of counsel).

John J. Burns argued the cause for amicus curiae New Jersey School Boards Association

(Cynthia J. Jahn, General Counsel, attorney).

Edward L. Barocas, Legal Director, argued the cause for amicus curiae American Civil Liberties Union of New Jersey Foundation (Mr. Barocas, Jeanne LoCicero and Bobby D. Connor, on the brief).

JUDGE WEFING (temporarily assigned) delivered the opinion of the Court.

In this appeal we are called upon to consider the extent to which the Board of Governors of Rutgers, the State University (University), has complied with the requirements of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 to -21, and, if its compliance has been deficient, the extent to which plaintiff is entitled to a judicial remedy. Plaintiff Francis McGovern is an alumnus of the University who has attended regularly the meetings of the University's Board of Governors. Concerned at what he perceived to be a persistent disregard on the part of the Board for OPMA's mandates, he filed an action in lieu of prerogative writs. The trial court ultimately granted defendants' motion to dismiss this complaint. Plaintiff appealed, and the Appellate Division affirmed in part and reversed in part. McGovern v. Rutgers, 418 N.J. Super. 458 (App. Div. 2011). We granted certification, 207 N.J. 227 (2011). We also granted the motions of the Attorney General, the New Jersey School Boards Association (Association), and the

American Civil Liberties Union of New Jersey (ACLU) to appear as amici curiae. We now reverse the judgment of the Appellate Division and remand for entry of an order dismissing plaintiff's complaint.

I.

New Jersey adopted OPMA in 1975. The statute reflects New Jersey's long "history of commitment to public participation in government and to the corresponding need for an informed citizenry." S. Jersey Pub. Co. v. N.J. Expressway, 124 N.J. 478, 486-87 (1991). The Court has noted New Jersey's "strong tradition . . . favoring public involvement in almost every aspect of government." Polillo v. Deane, 74 N.J. 562, 569 (1977). The roots to this tradition run deep and extend back more than two centuries. Id. at 570. Greater public involvement in the affairs of government fosters two goals: fulfilling our ideal of a "government of the people" and warding off corruption. Id. at 570-71.

The Legislature included in OPMA a clear statement of New Jersey's public policy "to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way." N.J.S.A. 10:4-7. The only exceptions are instances "where otherwise the public interest would be clearly endangered or the personal privacy or

guaranteed rights of individuals would be clearly in danger of unwarranted invasion." Ibid. To advance that stated public policy, the Legislature directed that the statute should be "liberally construed in order to accomplish its purpose and the public policy of this State." N.J.S.A. 10:4-21.

The enabling statute for Rutgers, N.J.S.A. 18A:65-1 TO -93, designates Rutgers as the state university. That enabling statute provides for a Board of Governors and a Board of Trustees. The Board of Governors has overall authority to supervise the conduct of the university, its organization, administration, and development. N.J.S.A. 18A:65-25. The Board of Trustees acts in an advisory capacity and has control of certain assets. N.J.S.A. 18A:65-26. For purposes of this opinion, "Board" refers to the Board of Governors, not the Board of Trustees. The parties do not dispute that the Board of Governors of Rutgers is a public body subject to OPMA.

The bylaws adopted by the University's Board of Governors recognize the Board's statutory obligations under OPMA. They call for the Board to hold "[a]t least six regular meetings" during the year and state that these "shall" conform with OPMA. The bylaws authorize the Board to hold special meetings, which "may be called at the discretion of the Chair" or "at the request of three voting members . . . stating the purpose of the meeting." The bylaws specify that the Board "shall conduct open

meetings in accordance with [OPMA]" and that "[c]losed meetings shall be held only under circumstances and conditions in [OPMA]".

The statute directs that except for two limited exceptions, no public body may meet in the absence of having provided "adequate notice" to the public. N.J.S.A. 10:4-9. Further, the statute provides a specific definition of what constitutes "adequate notice." It is "written advance notice of at least 48 hours, giving the time, date, location and, to the extent known, the agenda . . . which notice shall accurately state whether formal action may or may not be taken. . . ." N.J.S.A. 10:4-8(d). Although the statute has been amended since its original enactment to provide for notification through the Internet, N.J.S.A. 10:4-9.1, it also specifies that electronic notice shall not "be deemed to substitute for, or be considered in lieu of" the statutory adequate notice, N.J.S.A. 10:4-9.2.

The two exceptions that permit a public body to meet without having provided such "adequate notice" are contained in N.J.S.A. 10:4-9(b) and N.J.S.A. 10:4-12(b). Under the former statute, a public body may meet without having provided notice in accordance with N.J.S.A. 10:4-8(d) if the public body must "deal with matters of such urgency and importance that a delay [to provide] adequate notice would be likely to result in substantial harm to the public interest," three-quarters of the

members present vote to hold such a meeting, the only matters discussed and acted upon are those urgent and important matters, and notice "is provided as soon as possible following the calling of such meeting." The latter statute lists nine defined subject areas which the public body may discuss in a session that is closed to the public. These include the following: legally confidential situations; matters affecting the receipt of federal funds; an individual's private data; collective bargaining negotiations; purchase of realty or investment information and decisions that could adversely affect the outcome if made public; sensitive public safety data; pending litigation and contract negotiations; employment matters; and certain deliberations following a public hearing involving imposition of civil penalties or suspension of licenses. N.J.S.A. 10:4-12(b)(1) to (9). The public body may meet without having complied with the requirements of N.J.S.A. 10:4-8(d) provided its discussion is confined to one of those nine subject areas.

II.

Plaintiff is an alumnus of Rutgers who, starting in July 2006, began attending the regularly scheduled meetings of the Board of Governors. The Board called a special meeting to be held at 3:30 p.m. on September 10, 2008, to "act on a resolution to meet in immediate closed session to discuss matters falling

within contract negotiation and attorney-client privilege." Plaintiff, in accordance with his past practice, attended the meeting. The meeting opened at approximately 3:40 p.m., at which time the Board chairman, defendant Howard, moved immediately to close the meeting to the public. Despite an objection from plaintiff and a newspaper reporter who was present, the following resolution was presented, seconded and approved by the Board:

> [b]e it resolved, that the Board meet in immediate closed session on this date, September 10, 2008, to discuss matters involving contract negotiations for sports marketing, naming rights of athletic facilities and stadium construction; employment of personnel and terms and conditions of employment; and pending litigation, investigations, and matters falling within the attorney-client privilege with respect to these subjects, in accordance with Chapter 231, Public Law 1975, Section 7, Items b.(6), b.(7) and b.(8).

The Board went into closed session at approximately 3:46 p.m. and remained in closed session until 7:55 p.m., when proceedings concluded.

Plaintiff was thereafter provided with a redacted copy of the minutes of that closed meeting. According to those redacted minutes, the Board discussed several topics, including the University's contract with Nelligan Sports Marketing, Inc., matters involving construction of the expanded football stadium,

and naming rights for the University's athletic facilities. The Board also discussed in this closed session the overview of the University president's policy recommendations that the administration was considering implementing. Further, in this closed session, the Board chairman indicated his view that there was a need for clear rules to be implemented across all facets of the University.

Plaintiff filed a one-count complaint in November 2008 in which he alleged, upon information and belief, that the Board had discussed at that closed meeting matters that did not fall within the statutory exemptions of OPMA. He sought a judgment voiding any action taken by the Board at that September 10, 2008, meeting, voiding any action taken by committees of the Board that did not conform with OPMA, an injunction directing defendants to comply with OPMA, the imposition of a fine for the Board's noncompliance, and his counsel fees. There is no indication in this record that plaintiff filed this suit for any reason other than to vindicate the rights of the public under OPMA. The trial court granted defendants' motion for a more definite statement, Rule 4:6-4(a), and in response, plaintiff filed a four-count complaint in lieu of prerogative writs.

In his first count, plaintiff alleged that the notice of the September 10, 2008, special meeting did not comply with OPMA because it did not state an agenda for the meeting and did not

state whether any formal action might or might not be taken. In his second count, he alleged that the topics the Board discussed in the closed session of September 10, 2008, did not fit within any of the statutory exemptions under OPMA. In his third count, plaintiff alleged that the University's Board of Governors was a board of education and, as such, was required pursuant to N.J.S.A. 10:4-12 to set aside a portion of each meeting for public comment. In his fourth and final count, plaintiff alleged that it was the regular practice of the Board to open its regularly-scheduled meetings at the announced time, to go immediately thereafter into executive session for an unspecified period of time, and then thereafter to return to public session. Plaintiff alleged that this practice violated OPMA. Plaintiff sought a judgment voiding actions that had been taken at meetings that had not complied with OPMA and prospective injunctive relief, compelling defendants to conduct the Board's future meetings in compliance with OPMA.

After defendants filed their answer in which they contended that none of their actions violated OPMA, they filed a motion to dismiss plaintiff's complaint. Plaintiff countered with a motion for summary judgment. After entertaining oral argument, the trial court granted defendants' motion. It concluded that defendants had complied with the notice requirements of OPMA and, after reviewing redacted minutes of the September 10, 2008,

meeting, concluded as well that each of the topics discussed by the Board at that closed session fit within one of the statutory exemptions afforded by N.J.S.A. 10:4-12(b). The trial court further ruled that the University's Board of Governors is not a board of education and thus is not required under N.J.S.A. 10:4-12 to set aside a portion of each meeting for public comment. Finally, it rejected the relief plaintiff sought in the fourth count of his complaint, finding "nothing in [OPMA] that requires a public body complete all of its business before going into closed session." The trial court entered an order dismissing plaintiff's complaint and thereafter denied plaintiff's motion for reconsideration.

Plaintiff filed a timely appeal, and the Appellate Division analyzed plaintiff's arguments in turn. It agreed with plaintiff that defendants had provided inadequate notice with respect to the special meeting of September 10, 2008. McGovern, supra, 418 N.J. Super. at 463. It noted that under N.J.S.A. 10:4-13, a public body cannot go into closed session without first adopting, in a public session, a resolution "'[s]tating the general nature of the subject to be discussed'" in that closed session. Id. at 469. The panel noted the Legislature's directive that OPMA be construed liberally and held that to satisfy the requirement that a public body set forth "the general nature of the subject to be discussed" in a closed

session requires that the public body provide "as much knowledge as possible" of those subjects. Id. at 470. It reviewed the chronology under which this matter had unfolded as well as the subjects that the Board had discussed in its closed session. Ibid. It concluded that in omitting any mention of the Nelligan Sports Marketing contract and the issue of naming rights for the University's facilities, the Board had not provided "as much knowledge as possible." Id. at 470-71.

In conjunction with plaintiff's appeal, the appellate panel was supplied with an unredacted copy of the minutes of the closed meeting of September 10. It determined that because the University's counsel was actively involved in the discussions with respect to Nelligan Sports Marketing and the question of naming rights, and because negotiations were ongoing with respect to both issues, the Board appropriately discussed those topics in closed session. Id. at 473. It agreed with plaintiff, however, that that portion of the Board's meeting that had been devoted to the University president's overview of policy recommendations and the Board chairman's comments with respect to "the need for clear rules to be implemented across all facets of the University" did not fall within any of OPMA's exceptions and, consequently, should not have been discussed during a closed session. Id. at 474.

When the appellate panel took up the next count of plaintiff's complaint, it agreed with defendants that the University's Board of Governors is not a board of education. Id. at 477-78. It reached this conclusion after examining the statutory definition of a board of education contained in N.J.S.A. 18A:10-1. Id. at 477. As a result, it agreed with defendants that the Board was not required by statute to provide the opportunity for public comment at every meeting. Id. at 478.

Finally, the panel turned to plaintiff's remaining count, and examined the manner in which the Board conducted its meetings: a very brief public meeting, followed immediately by a closed session of indeterminate length, followed by the resumption of the public meeting. Id. at 474-76. This meeting format, the panel ruled, violated OPMA because it decreased public access to the Board's meetings. Id. at 476. It was satisfied that if it upheld that practice, it "would subvert the right of public access to all meetings [and] undermine public confidence in the bodies that run the public's affairs." Ibid. It remanded the matter to the trial court for entry of an order requiring the Board to complete its open session before commencing a closed session. Ibid.

III.

On appeal to this Court, defendants contend that the panel erred in three respects. They assert that the notice provided for the special meeting of September 10, 2008, complied with the mandates of OPMA. They complain that the panel, with its requirement that notice of a special meeting provide "as much knowledge as possible," imposed a greater burden on a public body than had the Legislature when it enacted the statute.

Defendants also argue that the statute contains no support for the panel's directive that a public body must conclude the public portion of its meeting before going into a closed session. They stress that such a ruling has the potential to interfere significantly with a public body's ability to conduct its business efficiently and expeditiously.

Defendants also assert that the appellate panel's analysis of the references in the unredacted minutes to the remarks of the University's president and the Board's chairman during the Board's closed session was flawed. They argue that the panel's focus was too narrow and that the remarks must be viewed in light of the broader discussions that took place at that meeting.

Plaintiff counters these arguments. He maintains that the appellate panel's decision that the notice of the Board's special meeting was deficient under OPMA because it did not provide "as much knowledge as possible" was correct because the

notice did not include an agenda "to the extent known." He stresses that the notice of the special meeting did not contain any agenda items but merely restated certain of the statutory exceptions to the general rule that all discussions of public questions take place in a public meeting. N.J.S.A. 10:4-12(b).

Plaintiff also maintains that the Board's consistent practice of going immediately into a closed session of indeterminate length discourages public attendance and thus runs counter to the underlying philosophy of OPMA. He argues that the appellate panel's directive that the Board not go into closed session until it has concluded the items for public discussion makes it easier for members of the public to attend these meetings and thus furthers the purposes of OPMA.

Finally, plaintiff argues that the appellate panel applied correctly the directive to construe OPMA liberally when it held that the comments made in the closed session by the University's president and the Board's chairman went beyond what is permissible under N.J.S.A. 10:4-12(b).

Amicus Attorney General supports the arguments advanced by defendants. Amicus asserts that the panel looked to the wrong section of OPMA when it assessed the adequacy of the notice provided for the special meeting of September 10. Additionally, it stresses the practical difficulties it maintains will flow

from the directive that a public body must complete the public portion of its meeting before it may go into a closed session.

Amicus Association addresses only one aspect of the appellate panel's holding, the ruling that a public body cannot structure its meetings so as to go from open session to closed session and then back to open session if, in its judgment, that would result in the most efficient and expeditious manner to conduct its business. It agrees with defendants that nothing within the language of OPMA supports such a holding. The Association recognizes that interrupting public sessions with closed sessions may inconvenience some members of the public. As a result, it proposes that public bodies be required to set forth in the notice they provide of their meetings the anticipated time at which a closed session is expected to conclude and that they further be directed to come out of closed session at that time and advise those in attendance of the remaining length of the closed session, a deadline to which they must adhere.

Amicus ACLU in its brief addresses the sufficiency of the notice defendants provided of the special meeting of September 10. It agrees with plaintiff and with the appellate panel that the notice was not adequate for purposes of OPMA. It proposes the following standard by which to measure the adequacy of a notice of a meeting of a public body: the notice "must provide

sufficient information so that members of the public are apprised of what substantive issues will be discussed and whether their rights (generally or as individuals) are affected."

IV.

Before proceeding to an analysis of the questions presented, we note the standard that governs our review. We are called upon to interpret OPMA, and an issue of statutory interpretation is a question of law. Our review is thus de novo. Real v. Radir Wheels, Inc., 198 N.J. 511, 524 (2009). Consistent with the de novo standard of review, we do not owe any deference to the interpretations placed on the various provisions of OPMA by either the trial court or the Appellate Division.

Further, our analysis is guided by settled principles of statutory interpretation. Our role "is to determine and effectuate the Legislature's intent." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009) (citing D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119 (2007); Daidone v. Buterick Bulkheading, 191 N.J. 557, 565 (2007)).

To determine that intent, "'we look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen.'" Ibid. (quoting Pizzullo v. N.J.

Mfrs. Ins. Co., 196 N.J. 251, 264 (2008)). In looking at that language, we give it its ordinary meaning. Ibid. (citing D'Annunzio, supra, 192 N.J. at 119-20). If the language is clear, our task is to apply that language to the situation that confronts us. State v. Shelley, 205 N.J. 320, 323 (2011) (citing State v. D.A., 191 N.J. 158, 164 (2007)).

If, on the other hand, the language is ambiguous and "is susceptible to more than one possible meaning or interpretation," or if the statute is silent with respect to the issue at hand, we look to extrinsic sources, including the legislative history, to determine the intent of the Legislature. Ibid.

We must apply those principles, moreover, in light of OPMA's clearly stated purpose of fostering opportunities for the public to witness the conduct of public business and the legislative directive to give the statute a liberal construction. N.J.S.A. 10:4-21.

A.

We turn first to the holding of the appellate panel that the notice the Board provided of the special meeting of September 10, 2008, was inadequate because it did not provide "as much knowledge as possible" of the topics to be discussed at that meeting. We are satisfied that the panel erred in reaching this determination.

The source of its error was plaintiff's failure to distinguish between N.J.S.A. 10:4-8, which includes as part of the statutory definition of adequate notice the requirement that the notice include the agenda of the upcoming meeting "to the extent known," and N.J.S.A. 10:4-13, which describes the content of the resolution a public body must pass before it may go into a closed session. Under the latter statute, the resolution must state "the general nature of the subject to be discussed" in that closed session. The two statutes deal with distinctly different procedural steps. The first, N.J.S.A. 10:4-8, deals with the notice requirements to be provided in advance of a meeting, and the second, N.J.S.A. 10:4-13, details the content of a resolution the public body must adopt once the meeting has gotten underway before going into closed session. The notice requirements of the first procedure do not govern a situation implicating N.J.S.A. 10:4-13.

The source for the panel's conclusion that the notice of the meeting of September 10 was inadequate because it did not provide "as much knowledge as possible" of what was to be discussed at that meeting was State College Locals v. State College Board, 284 N.J. Super. 108 (Law Div. 1995). That matter was brought by several unions challenging the action of defendant's board of trustees who, in closed session, had approved the payment of large sums of money to two vice-

presidents of the college under the college's policy mandating it to provide housing for certain personnel. Id. at 110-11. The board published a notice of an open meeting to be held on December 2, 1993, but that notice was silent with respect to this issue. Id. at 111. At the meeting of December 2, 1993, the board adopted a resolution to hold a closed meeting on February 17, 1994. Ibid. The resolution stated that at that closed meeting, the board would "consider personnel matters, labor relations, any pending litigation, and any other matters specifically exempted by the Open Public Meetings Act. It is anticipated that decisions made in closed session will be made public at future meetings." Ibid. Minutes of that closed meeting and several subsequent open meetings contained no mention of this housing issue, and in April 1994, a representative of plaintiff inquired of the college's president, who confirmed that those payments had been made to settle claims with respect to a change in the college's housing policy. Id. at 111-12. Plaintiff filed suit, alleging that the board had not complied with OPMA's mandates. Id. at 112-13.

During the course of the action, the defendant acknowledged that its practice of holding closed sessions had been to pass a resolution advising that it would hold a closed session at a date and time "to consider personnel matters, labor relations, any pending litigation, and any other matters specifically

exempted by the Open Meetings Act." Id. at 113. This language, the trial court held, did not comply with N.J.S.A. 10:4-13, which mandates that such a resolution must state "the general nature of the subject to be discussed." Ibid. In the judgment of the trial court, the board, by simply listing topics that were permissible to be discussed at a closed session, "made no effort to provide the public with as much knowledge as possible." Id. at 114.

In the matter before us, the appellate panel transferred the concept of a resolution giving the public "as much knowledge as possible" of what was to be discussed in a closed session to giving the public "as much knowledge as possible" of the subjects to be discussed in a closed meeting in the notice advising the public that such a meeting was to take place. We agree with defendants and amicus Attorney General that public bodies are often confronted with fluid, ongoing situations, and it is often difficult, if not impossible, to determine at a later juncture whether the public body provided "as much knowledge as possible" of the intended scope of discussions at a closed session.

N.J.S.A. 10:4-8 requires a public body to include in its notice of an upcoming meeting the agenda of that meeting "to the extent known." We decline to impose a greater burden on public bodies than what the Legislature has required. When the Rutgers

Board convened on September 10, it adopted a resolution to go into closed session "to discuss matters involving contract negotiations for sports marketing, naming rights of athletics facilities and stadium construction; employment of personnel and terms and conditions of employment; and pending litigation, investigations, and matters falling within the attorney-client privilege with respect to these subjects." This resolution was entirely adequate to meet the requirement of N.J.S.A. 10:4-13 that the resolution advise the public of "the general nature" of what was to be discussed at the closed session.

That the appellate panel applied the wrong measure by which to evaluate the adequacy of the notice of the special meeting does not, by itself, answer the inquiry whether that notice was, in fact, adequate. The official notice that was prepared and circulated stated only that on September 10 the Board would "act on a resolution to meet in immediate closed session to discuss matters falling within contract negotiation and attorney-client privilege." The record reveals clearly that by the time this notice was prepared and published, more was known about the extent of the proposed agenda than what was conveyed by the generic references to "contract negotiation and attorney-client privilege."

This notice thus did not meet the statutory definition of adequate notice contained in N.J.S.A. 10:4-8 for it did not

include the proposed agenda for the meeting of September 10 "to the extent" it was known. The Board had an obligation to include as part of the notice of the meeting of September 10 the agenda of that meeting to the extent it was known.

The issue thus becomes whether any perceived deficiency in the notice that the meeting of September 10 was to take place entitles plaintiff to a remedy. We are satisfied that it does not. The statute provides for three forms of remedy for an OPMA violation: a prerogative writs action seeking to void any action taken at a meeting that did not meet OPMA's requirements, N.J.S.A. 10:4-15; injunctive relief to assure future compliance, N.J.S.A. 10:4-16; and imposition of fines, N.J.S.A. 10:4-17.

The Board took no action at the meeting of September 10, however, and thus N.J.S.A. 10:4-15 is inapplicable. We are also satisfied that as the record stands, injunctive relief under N.J.S.A. 10:4-16 is inappropriate. The Appellate Division has noted that injunctive relief under N.J.S.A. 10:4-16 may be appropriate if "a pattern of non-compliance has been demonstrated." Burnett v. Gloucester Cnty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 246 (App. Div. 2009). Here, the record fails to disclose a repeated pattern of OPMA violations. Finally, N.J.S.A. 10:4-17 is inapplicable because it requires that a violation of OPMA be "knowing" before a fine

may be imposed. The record before us does not support a finding of a "knowing" violation.

B.

We turn to the second issue before us, whether, in its closed session of September 10 the Board's discussion strayed from those topics permissible under N.J.S.A. 10:4-12(b). In connection with this argument, we have reviewed, as did the appellate panel, the unredacted minutes of that closed session. The minutes refer to a "closed, closed, closed session" attended only by members of the Board, Secretary to the University, and general counsel to the University. The minutes are silent as to what may have been discussed in that executive session.

The minutes then refer to a "closed, closed session" attended by members of the Board, members of the administration, including the University's president, and chairman of the Board of Trustees. This section is headed "Attorney-Client Privilege" and discusses a variety of topics, including the University's relationship with Nelligan Sports Marketing, construction of the expanded football stadium, and naming rights for athletics facilities. According to the minutes, the only speaker on these topics was the University's president; there is no indication that at any point during this portion of the meeting that the University's general counsel provided any advice or opinions to the Board. Nor do the minutes indicate that the president was

reporting on advice or opinions the University's counsel had provided. We recognize, however, that certain of these discussions could fall within N.J.S.A. 10:4-12(b)(7), under which a public body can discuss in a closed session "pending or anticipated . . . contract negotiation."

The next portion of the minutes of this meeting refers to "Discussion of matters involving ongoing litigation and investigations." The matters discussed in this section of the minutes clearly fall within the scope of N.J.S.A. 10:4-12(b)(7).

The two concluding references in the minutes are to the remarks of the University's president and Board chairman with respect to anticipated policy recommendations and formulation of clear rules or guidelines. We agree with the appellate panel that nothing within OPMA would authorize the exclusion of the public from discussion of such potentially significant policy issues. We reject the argument of defendant that so long as topics discussed in this closed session "indirectly relate" to subjects that are properly the subject of a closed meeting, there is no violation of OPMA. Such a construction could eviscerate the statute and runs counter to our mandate to construe the statute in such a manner as to maximize public participation. N.J.S.A. 10:4-21.

We recognize that, as a meeting progresses, there may be a natural progression from the discussion of topics from which the

public may be excluded to topics from which the public may not be excluded. Members of public bodies must be vigilant during closed sessions to ensure that they do not stray from the defined, circumscribed issues that may be addressed in a closed session.

As with the previous issue, however, for the reasons we stated, we are satisfied that the statute affords plaintiff no remedy. The Board took no action that could be voided, N.J.S.A. 10:4-15, there was no showing of a pattern of noncompliance justifying injunctive relief, N.J.S.A. 10:4-16, and there was no evidence that any violation was knowing, justifying a fine, N.J.S.A. 10:4-18.

C.

The third question that confronts us is the ruling of the appellate panel that upheld plaintiff's challenge to the Board's practice of conducting its meetings in a sequential fashion: an open meeting followed immediately by a closed meeting followed by a later-resumed open meeting. In reaching its conclusion, the panel noted the need to "avoid any interpretation of the Act that would subvert the right of public access to all meetings, undermine public confidence in the bodies that run the public's affairs, or that would in any way subvert the salutary purposes" of OPMA. McGovern, supra, 418 N.J. Super. at 476. While the panel summarized correctly the philosophy and goals of OPMA, the

remedy it imposed, "requiring the Board to complete its open session before commencing any closed session," lacks textual support in the statute and is too sweeping in scope. There was, by way of example, not even a contention, let alone a finding, that the Board structured purposely its meetings in this fashion with the goal of restricting the opportunity of the public to observe its meetings. It does not follow that because plaintiff may experience some inconvenience as a result of this sequence that the Board acted with the purpose to cause that inconvenience and to discourage him from attendance.

We note that the Board has included as part of its schedule of regularly-scheduled meetings both the time at which the meeting will start, with the notation that the meeting will start with a closed session, and the time at which the open session will commence. That information assists members of the public who wish to attend meetings of the Board to decide how to structure their own schedules. Other public bodies subject to OPMA might wish to include such information as part of their own schedules in light of the benefits to members of the public.

We agree with defendants and amici Attorney General and Association that a public body must be afforded discretion in determining the most advantageous and efficacious manner of proceeding through its agenda items. Absent proof of bad motive, courts should be loathe to intervene in such highly

individualized decisions and to impose rigid mandates that could prove unworkable. Here, the appellate panel remanded the matter to the trial court for entry of an order mandating that the Board of Governors complete the open portion of its meetings before proceeding into closed session. Because we are satisfied such relief is unwarranted, such an order would be inappropriate.

V.

We thus reverse the judgment of the Appellate Division and remand this matter to the trial court for entry of an order dismissing plaintiff's complaint.

CHIEF JUSTICE RABNER and JUSTICES LaVECCHIA, ALBIN, and HOENS join in JUDGE WEFING's opinion. JUSTICE PATTERSON did not participate.

SUPREME COURT OF NEW JERSEY

NO. A-113 SEPTEMBER TERM 2010

ON CERTIFICATION TO Appellate Division, Superior Court

FRANCIS J. MCGOVERN, JR., ESQ.,

Plaintiff-Respondent,

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RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, RUTGERS' BOARD OF GOVERNORS and M. WILLIAM HOWARD, JR., IN HIS OFFICIAL CAPACITY AS CHAIR OF THE RUTGERS BOARD OF GOVERNORS ONLY,

Defendants-Appellants.

DECIDED July 25, 2012

Chief Justice Rabner PRESIDING

OPINION BY Judge Wefing (temporarily assigned)

CONCURRING/DISSENTING OPINIONS BY

DISSENTING OPINION BY

CHECKLIST	REVERSE AND REMAND	
CHIEF JUSTICE RABNER	X	
JUSTICE LaVECCHIA	X	
JUSTICE ALBIN	X	
JUSTICE HOENS	X	
JUSTICE PATTERSON	----------	----------
JUDGE WEFING (t/a)	X	
TOTALS	5	

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2531-09T1

FRANCIS J. McGOVERN, JR., ESQ.,

Plaintiff-Appellant,

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, RUTGERS' BOARD OF GOVERNORS and M. WILLIAM HOWARD, JR., IN HIS OFFICIAL CAPACITY AS CHAIR OF THE RUTGERS BOARD OF GOVERNORS ONLY,

Defendants-Respondents.

APPROVED FOR PUBLICATION

February 18, 2011

APPELLATE DIVISION

Argued January 11, 2011 - Decided February 18, 2011

Before Judges Payne, Baxter and Koblitz.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-8969-08.

Francis J. McGovern, Jr., appellant, argued the cause pro se.

John J. Peirano argued the cause for respondents (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Peirano and James P. Lidon, of counsel and on the brief; Michelle A. Annese, on the brief).

The opinion of the court was delivered by

BAXTER, J.A.D.

This appeal requires us to construe portions of the Open Public Meetings Act (OPMA or Act), N.J.S.A. 10:4-6 to -21. Plaintiff, Francis J. McGovern, Jr., appeals from an October 20, 2009 Law Division order that granted summary judgment to defendants, Rutgers University and its Board of Governors (Board), thereby dismissing plaintiff's complaint with prejudice. Plaintiff also appeals from a December 18, 2009 order that denied his motion for reconsideration.

We agree with plaintiff's contention that the judge erred when he rejected plaintiff's arguments that: 1) the meeting notice the Board provided to the public concerning its September 10, 2008 special meeting contained an insufficient description of the types of matters expected to be considered in closed session; 2) one of the matters addressed behind closed doors during that meeting should have been discussed in public; and 3) the Board's practice of conducting its regular meetings with a brief open session, followed by a closed session of indeterminate duration, followed by the resumption of the open session, violates the requirements of the Act and subverts the very purposes the "Sunshine Law" was designed to achieve. In contrast, we affirm the judge's conclusion that the Board is not required to set aside a portion of each meeting for public comment. Indeed, we conclude that the Board's system for

permitting public comment, if certain conditions are satisfied, exceeds the requirements of the Act. We thus affirm in part, reverse in part, and remand for the establishing of an appropriate remedy.

I.

In 2008, Rutgers became the subject of a series of unflattering articles published in the The Star-Ledger describing numerous questionable practices in the University's Athletic Department (Department). The Department's elimination of six varsity sports from its roster had also prompted widespread criticism. On August 15, 2008, Board Chairman M. William Howard, Jr. notified members of the Board of his intention to convene a special meeting, to be held on September 10, 2008, "to provide the Board with an opportunity to receive a first hand report of actions being taken by the University to address the ongoing revelations about [Rutgers] Athletics in the media, and to decide if action by the Board is required."

In keeping with the Act, see N.J.S.A. 10:4-8(d)(3), the Board notified the Secretary of State of the upcoming special meeting. The notice sent to the Secretary of State, and published in three newspapers, specified that the Board would meet in closed session on September 10, 2008 at 3:30 p.m. at 7 College Avenue in New Brunswick to

> act on a resolution to meet in immediate closed session to discuss matters falling within contract negotiation and attorney-client privilege, in accordance with Chapter 231, Public Law 1975, Section 7, Item b.(7).

On September 10, 2008, Chairman Howard opened the meeting at approximately 3:40 p.m. and immediately announced a resolution to go into closed session. The resolution was seconded and approved by the Board. The publicly-issued minutes of the September 10, 2008 special meeting revealed the topics that the Board discussed, although the content of the discussion itself was redacted. The topics discussed were:

> CLOSED, CLOSED, CLOSED SESSION
> Discuss[ion] [of] the legal and fiduciary obligations of Board members.
>
> CLOSED, CLOSED SESSION
> ATTORNEY-CLIENT PRIVILEGE
>
> > Discussion of Matters Involving Legal Obligations, Contracts, Terms and Conditions of Employment
> >
> > Discussion of Matters Involving Stadium Construction
> >
> > Discussion of Matters Involving Naming Rights of Athletic Facilities
> >
> > Discussion of Matters Involving Ongoing Litigation and Investigations

Plaintiff, an alumnus of Rutgers, began attending the meetings of the Board in July 2006. He also attended the

September 10, 2008 special meeting and found, in accordance with the publicly-advertised notice, that the entire meeting was closed to the public.

On January 30, 2009, he filed a four-count complaint in lieu of prerogative writs. In the first count, he alleged that the Board "fail[ed] to provide adequate notice of the actual items the Board would be considering at its September 10, 2008 meeting," and failed to "accurately state whether formal action may or may not be taken." Consequently, the notice of the September 10, 2008 meeting was "inaccurate, incomplete and misleading." Plaintiff sought a judgment voiding any action taken at the September 10, 2008 Board meeting and requiring the Board in the future to provide the specific notice required by the Act.

In the second count, plaintiff alleged that the Board had improperly excluded the public from the September 10, 2008 special meeting of the Board by discussing matters in closed session that lay outside the exceptions specified in N.J.S.A. 10:4-12(b). In particular, he alleged that some of the topics discussed in closed session at the special meeting, such as the agreement between the University and Nelligan Sports Marketing

(Nelligan)[1], matters involving construction of the stadium, and the naming rights for the University's athletic facilities, all should have been discussed during an open public meeting. He maintained that the closed session discussion should have been limited to advice if any, rendered by the Board's attorney regarding those contracts. As with the first count, plaintiff sought an order voiding any action taken at the September 10, 2008 special meeting.

In the third count, plaintiff alleged that the Board's failure to set aside a portion of the September 10, 2008 meeting for public comment violated the Act. He sought an order requiring the Board to set aside a portion of any future open meetings for that purpose.

In the fourth count, plaintiff alleged that the notices of the Board's regular meetings were "confus[ing]" to the public and "discourage[d] public attendance and participation" at the meetings. In particular, the fourth count alleged that notice of the Board's meetings typically included a statement that an "'open session' (typically noted to be from 8:30 a.m. to 8:35 a.m.) will be held followed by a 'closed session' (typically noted to be from 8:35 a.m. to 10:00 a.m.), which will then be

[1] The Nelligan contract was one of the subjects discussed in disparaging terms in The Star-Ledger articles.

followed by another 'open session.'" Plaintiff maintained that the Board's practice of conducting an open session, followed by a closed session, which is then followed by another open session, "left the public attendees bewildered, not knowing what was going on and with nothing to do until the next 'open session' began later in the day." Plaintiff sought an order enjoining the Board from proceeding in that fashion, and requiring the Board to instead hold the entire open session first, followed by the closed session, "so that the public will understand what is going to be addressed when . . . ."

Three months after filing its answer, the Board moved to dismiss plaintiff's complaint for failure to state a claim, see R. 4:6-2(e), and plaintiff cross-moved for summary judgment. Prior to oral argument on the motions, plaintiff provided to the court and to defendants a color spreadsheet that compared the publicly-announced start time of the open meeting to the actual start time for twelve of the meetings that occurred between January 2008 and July 2009. Each of the open sessions started at the announced time specified in the public notice. For the same twelve meetings, the spreadsheet also compared the time the open session actually resumed after the conclusion of the closed session, to the publicly-advertised time that the open session was scheduled to resume. On the six occasions where the open

session resumed at a time later than the original notice had specified, the discrepancies were as follows: thirty-five minutes, one hour and four minutes, twenty-five minutes, fifty-seven minutes, twenty minutes, and twenty-six minutes. Finally, the spreadsheet specified that the "resumed public session began anywhere from fifty-five minutes to two hours and forty-five minutes after the meeting was called to order at 8:30 a.m."[2]

On October 20, 2009, after considering oral argument on the motions, the judge issued a written opinion and confirming order that granted defendants' motion to dismiss plaintiff's complaint with prejudice. In particular, the judge concluded that the public notice of the September 10, 2008 meeting was provided in accordance with the Act, which requires a public body to provide only "very basic" notice of the agenda items that will be under consideration. The judge also held that because the Board had taken no action on any of the agenda items that were discussed at its September 10, 2008 special meeting, even if a violation of the Act's notice requirements had been established, there was no official action for the court to void. The judge declined to presume that any future violations might occur. He did, however, observe that "the Board's broad reading (of the notice

[2] One or two of the meetings started at times other than 8:30 a.m., but our description of the elapsed intervals takes the differing start times into account.

provisions of the Act) may be contrary to the purpose of the Open Public Meetings Act," and "cautioned" the Board "to be more specific as to the content and extent of its closed sessions" in the future.

As to the second count, which alleged that the Board improperly excluded the public from the September 10, 2008 special meeting by discussing in closed session matters that should have been discussed in public, the judge disagreed. He concluded that the applicable portion of the Act, N.J.S.A. 10:4-12(b), authorizes the Board to go into closed session for the very purposes described in the public notice of the September 10, 2008 meeting. Moreover, after conducting an in camera review of the unredacted September 10, 2008 minutes, the judge concluded that no violation of the Act had occurred. He therefore rejected the claim advanced in the second count.

Addressing the third count, which concerned the sequencing of an open session, closed session, and the resumption of an open session, the judge observed that "[n]othing in the Act requires that a public body complete all its public business before going into closed session." Reasoning that the "Board is given discretion relative to the organization of its meetings," the judge rejected the claim advanced in the third count.

As to the fourth count, the judge addressed the Board's policy of not routinely setting aside a portion of each open meeting for public comment. The Board's July 12, 2007 bylaws specified that although "public participation at Board meetings is not required under the Open Public Meetings Act, it is the Board's customary practice to allow such participation with respect to specific, pending agenda items." The bylaws provide that any person who requests the opportunity to speak at a Board meeting is permitted to do so, provided that such person makes the request at least twenty-four hours before the start of the meeting and provided that the speaker confines his or her comments to a topic on that day's agenda. Ordinarily, the number of such speakers is limited to five, and each speaker is permitted to speak for no more than three minutes. Plaintiff maintained that such procedures were inadequate.

The judge concluded that because the Rutgers Board of Governors is not a "Board of Education," it is not required by N.J.S.A. 10:4-12(a) to set aside any portion of its meetings for public comment.

On appeal, plaintiff raises the same claims he presented to the trial court, but has added an additional claim, namely, that he should have been provided with an unredacted copy of the September 10, 2008 special meeting minutes.

II.

The OPMA, "frequently referred to as the 'Sunshine Law,' requires meetings of public bodies to be open to the public at all times, except in certain designated [instances]." Burnett v. Gloucester County Bd. of Chosen Freeholders, 409 N.J. Super. 219, 232 (App. Div. 2009) (citation omitted). As we observed in Burnett, "New Jersey has a history of commitment to public participation in government" and the OPMA "reflects this commitment." Ibid. Indeed, the OPMA opens with an emphatic declaration of the Legislature's strong commitment to the right of the public to be present at all meetings of public bodies because such presence enhances the decision-making process. The Act states:

> The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the

> personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.
>
> [N.J.S.A. 10:4-7.]

The OPMA expressly provides that absent the exceptions enumerated in N.J.S.A. 10:4-12(b), "all meetings of public bodies shall be opened to the public at all times." N.J.S.A. 10:4-12(a). The Act also requires that its provisions be liberally construed in favor of openness, N.J.S.A. 10:4-21, and "any exception from the full public disclosure mandated by the statute is to be strictly construed." Burnett, supra, 409 N.J. Super. at 233 (quoting Lakewood Citizens for Integrity in Gov't, Inc. v. Lakewood Twp. Comm., 306 N.J. Super. 500, 505 (Law Div. 1997)). So clear is the right of access to public meetings that "strict adherence to the letter of the law is required." Polillo v. Deane, 74 N.J. 562, 578 (1977).

With these general principles in mind, we turn to an analysis of the specific claims plaintiff raised. As to the first count, plaintiff asserts that the judge erred when he rejected plaintiff's argument that the publicly-advertised notice of the items the Board intended to discuss at the September 10, 2008 meeting failed to provide "adequate notice" of the items to be discussed at the meeting and the notice was therefore "inaccurate, incomplete and misleading."

N.J.S.A. 10:4-13 requires all public bodies seeking to move into closed session to "first adopt a resolution, at a meeting to which the public shall be admitted: a. Stating the general nature of the subject to be discussed" (emphasis added). Plaintiff maintains in the first count that the notice the Board provided of its September 10, 2008 meeting was so general as to provide no notice at all. He also maintains that the notice did nothing other than quote, verbatim, the precise statutory language of N.J.S.A. 10:4-12(b)(7). As the judge observed in Council of New Jersey State College Locals v. Trenton State College Board, 284 N.J. Super. 108, 113 (Law Div. 1994), public bodies seeking to comply with the notice requirements of N.J.S.A. 10:4-13 "must tread a fine line -- informing the public about its executive-session activities while not compromising the privacy interests of those whose business is being discussed."

In striking that balance, the public body must do more than list the exceptions that would allow it to proceed in closed session. Ibid. Of course, only the "general nature of the subject to be discussed" is required by N.J.S.A. 10:4-13(a) (emphasis added). Nonetheless, the resolution, or the public notice advertising the meeting, "should contain as much information as is consistent with full public knowledge without

doing any harm to the public interest." Id. at 114 (quoting 34 New Jersey Practice, Local Government Law § 141, at 174 (Michael A. Pane) (2d ed. 1993)).

We agree with plaintiff's contention that the Board made no effort to provide the public with as much knowledge as possible. Merely stating, as the Board did in its notice, that it would meet in closed session "to discuss matters falling within contract negotiation and attorney-client privilege" gave the public no idea of the topics to be discussed. Unquestionably, the Board could have specified that in closed session it intended to discuss the Nelligan contract and proposals for naming rights for the stadium. As to the latter, disclosing those topics would not have compromised the contractual negotiations the Board was discussing with the corporations who were seeking naming rights. As to Nelligan, the contract had already been executed, so certainly any notice to the public that the Nelligan contract would be discussed in closed session could not have impacted contract negotiations with Nelligan. We thus agree with plaintiff's contention that the notice of the September 10, 2008 special meeting was inadequate, and ran afoul of N.J.S.A. 10:4-13, because it did nothing more than track the statutory exceptions upon which the Board relied.

This conclusion is not inconsistent with our determination in La Fronz v. Weehawken Board of Education, 164 N.J. Super. 5, 8 (App. Div. 1978), certif. denied, 79 N.J. 491 (1979), that listing "personnel" on the agenda was sufficient notice. We conclude La Fronz is distinguishable, because there the privacy of particular employees was at issue. Id. at 7. Here, notice that the Nelligan contract would be discussed in closed session, and that naming rights to the stadium would be discussed in closed session, would not have disserved the public interest or invaded the privacy of particular individuals. Indeed, as to the latter, the Board itself implicitly acknowledged as much when it noted in the unredacted portion of the minutes that the Board had discussed in closed session "matters involving naming rights of athletic facilities." We therefore reject the trial judge's conclusion that the public notice of the September 10, 2008 special meeting satisfied the requirements of N.J.S.A. 10:4-13.

In connection with the first count, we also reject the judge's conclusion that because no Board "action" resulted from the September 10, 2008 meeting, no harm had occurred, even if there had been a violation of the requirements of N.J.S.A. 10:4-13. As the Legislature declared in N.J.S.A. 10:4-7, it is the public policy of this State to insure the right of the public

"to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon" (emphasis added), unless, of course, one of the statutory exceptions to the public presence is applicable. The Legislature's use of the word "or" makes it clear that even if the matter is not "acted upon," the public has a right to be present during the "discuss[ion]." We therefore reject the judge's conclusion that even if the public notice of the September 10, 2008 meeting failed to specify the "general nature of the subject to be discussed," as required by N.J.S.A. 10:4-13, any such violation was of no consequence because the Board took no vote.

III.

Next, we consider plaintiff's contention that the judge erred by dismissing the second count of plaintiff's complaint, in which plaintiff alleged that the Board discussed matters in closed session that lay outside the exceptions specified in N.J.S.A. 10:4-12(b). The relevant section of the Act provides as follows:

> a. Except as provided by subsection (b) of this section all meetings of public bodies shall be opened to the public at all times. . . .
>
> b. A public body may exclude the public only from that portion of the meeting at which the public body discusses:
>
> . . . .

> (7) Any pending or anticipated litigation or contract negotiation . . . in which the public body is, or may become a party.
>
> Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.
>
> [N.J.S.A. 10:4-12.]

When a trial judge or an appellate court reviews a defendant's claim that one or more exceptions to N.J.S.A. 10:4-12(b) authorizes the public body to exclude the public from a portion of the meeting, a separate analysis must be conducted concerning each item on the agenda. See Burnett, supra, 409 N.J. Super. at 227-31.

A portion of N.J.S.A. 10:4-12(b)(7) empowers a public body to exclude the public when necessary to protect any "material covered by the attorney-client privilege." Payton v. N.J. Tpk. Auth., 148 N.J. 524, 558 (1997). "If a communication is covered by the privilege, then the public body legitimately may meet with its attorney in closed session." Ibid. "The intent of the [(b)(7) exception] is to allow officials to meet privately with counselors and advisors in order to discuss policy, formulate plans of action and generally to have an exchange of ideas." Houman v. Mayor and Council of the Borough of Pompton Lakes, 155

N.J. Super. 129, 154-55 (Law Div. 1977) (internal quotation and citation omitted).

However, "a fine line exists between an attorney who provides legal services or advice to an organization and one who performs essentially non-legal duties. An attorney who is not performing legal services or providing legal advice in some form does not qualify as a 'lawyer' for purposes of the privilege." Payton, supra, 148 N.J. at 550-51. If the attorney-client privilege were to be deemed applicable to any discussion between an attorney and a client, even when the lawyer is not rendering legal services, the privilege's shield would be turned into "the sword of injustice." Id. at 551. Indeed, in Payton, the Supreme Court observed that if the attorney-client privilege "were to apply broadly to any internal investigation . . . undertaken by an attorney, regardless of the pendency of litigation or the provision of legal advice, then all employers would commission attorneys as investigators." Id. at 552.

Plaintiff disputes the judge's conclusion that the University's contract with Nelligan could properly be discussed in closed session as it fell within the (b)(7) exception for "contract negotiation." Plaintiff asserts that the (b)(7) exception is inapplicable because the Nelligan contract had

already been signed, and therefore it was not the subject of "negotiation." The Board responds to that argument by asserting that the University's Senior Vice President and General Counsel Jonathan Alger "actively participated with President McCormick in addressing the Board of Governors concerning . . . the University's legal obligations under existing contracts and employment agreements." We agree with the Board.

The unredacted minutes of the September 10, 2008 special meeting support the Board's contention that legal advice was rendered on two topics concerning the existing contract with Nelligan: 1) the manner in which the Nelligan contract was procured; and 2) the status of then-pending litigation in which the The Star-Ledger was seeking access under the Open Public Records Act to documents concerning the Nelligan contract. As to each of these matters, the unredacted minutes demonstrate that Alger provided considerable legal advice, thereby satisfying the (b)(7) exception, which permits public bodies to go into closed session when necessary to protect any "material covered by the attorney-client privilege." Payton, supra, 148 N.J. at 558.

We turn next to the judge's conclusion that the discussions concerning the naming rights to athletic facilities were covered by the (b)(7) exception. As the unredacted minutes demonstrate,

naming rights were the subject of ongoing "contract negotiation," and therefore fit squarely within the (b)(7) exception. Consequently, we reject plaintiff's argument that the judge erred when he concluded that this subject could properly be discussed in closed session.

Plaintiff also asserts that the portion of the September 10, 2008 meeting conducted in closed session involving President McCormick's overview of policy recommendations and Chairman Howard's comments involving "the need for clear rules to be implemented across all facets of the University" should not have been held in closed session. The judge's October 20, 2009 opinion did not address this subject. We agree with plaintiff's argument that this subject falls within no exception set forth in N.J.S.A. 10:4-12[3] and that it should have been conducted in public.

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[3] The other exceptions contained in N.J.S.A. 10:4-12 are: (1) any matter rendered confidential by federal or state statute or rule of court; (2) any matter in which public discussion would create a risk of losing federal funds; (3) any material concerning an individual's receipt of services from a publicly-funded agency if public disclosure would constitute an "unwarranted invasion of individual privacy"; (4) discussions regarding collective bargaining agreements; (5) the lease or purchase of real property with public funds or the setting of investment rates, if public discussion would impair the public interest; (6) tactics and techniques used to protect the safety and property of the public, if such disclosure could compromise those efforts; (8) personnel matters, unless the employee requests in writing that the matter be discussed in public; and (continued)

IV.

We turn to the judge's rejection of the claim plaintiff advanced in the third count, namely, that the sequencing of a five-minute open session, followed by a closed session of indeterminate duration, followed by the resumption of an open session, violates the requirements of the Act. The Board argues, and the judge found, that nothing in the Act mandates any sequence of the open session and the closed session, thereby leaving public bodies with considerable discretion on the subject of how best to organize and run their meetings. The Board argues that the public's business "cannot be conducted with alarm clock precision." The Board also contends that the public can easily avoid waiting the hour and one-half for the closed session to be completed by merely arriving at 10:00 a.m., when the public session is scheduled to resume, rather than arriving at the meeting location at 8:30 a.m.

As plaintiff correctly argues, members of the public who are intent on being present for all aspects of the Board's meetings run of the risk of important business being conducted in those first five minutes between 8:30 and 8:35 a.m. if they

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(continued)
(9) deliberations that may result, after a public hearing, in the imposition of a civil penalty or a license suspension.

choose to arrive at the meeting at 10:00 a.m., rather than at 8:30 a.m.

We now address plaintiff's principal argument in the third count, that the Board's regular practice of scheduling an open session, followed by a closed session of indeterminate duration, followed by another open session has the capacity to deter the very public participation that Act is designed to promote. See N.J.S.A. 10:4-7. The record demonstrates that not only are the members of the public forced to wait a considerable period of time while the Board goes into closed session at 8:35 a.m., but they have no guarantee that the open session will actually resume at the announced time of 10:00 a.m., rather than an hour later. Such uncertainty will inevitably cause some members of the public to leave the meeting, a result that would be avoided if the closed session did not begin until the entire public session had been completed.

The Act requires the public body to specify in advance the "time" the meeting will begin. N.J.S.A. 10:4-8(d) (defining "[a]dequate notice" as written advance notice "giving the time, date, location . . . of any regular, special or rescheduled meeting"). Because the legislation is remedial in nature and its terms must be liberally construed, Barratt v. Cushman & Wakefield, 144 N.J. 120, 127 (1996), any procedure that weakens

the Act's provisions should be viewed as presumptively unreasonable. We therefore conclude that the variable time for the resumption of the open session, in combination with the brief five-minute open session at the beginning of the meeting, creates such uncertainty about when the public session will actually resume as to impermissibly erode the reliability of the times specified in the public notices of the Board's meetings. Therefore, the judge erred when he rejected plaintiff's claim in count three that the sequencing of the meeting violates the Act.

As Judge Carchman observed while sitting as a Law Division judge in Council of New Jersey State College Locals, supra, 284 N.J. Super. at 114-115, "the statute appears to contemplate [a] procedure" under which the open meeting precedes the closed meeting. We must avoid any interpretation of the Act that would subvert the right of public access to all meetings, undermine public confidence in the bodies that run the public's affairs, or that would in any way subvert the salutary purposes the "Sunshine Law" is designed to achieve. N.J.S.A. 10:4-21; Polillo, supra, 74 N.J. at 578. We therefore reverse the trial judge's dismissal of the third count and remand for the entry of an order requiring the Board to complete its open session before commencing any closed session.[4]

[4] We need not decide whether there can ever be a justification, (continued)

V.

We now consider the judge's rejection of the claim plaintiff advanced in the fourth count. There, plaintiff argued that the Board's refusal to routinely set aside a portion of each meeting for public comment violates the provisions of the Act. The applicable statute, N.J.S.A. 10:4-12(a), specifies that the only public bodies required to "set aside a portion of every meeting . . . for public comment on any . . . issue that a member of the public feels may be of concern" are municipal governing bodies or boards of education:

> a. Except as provided by subsection (b) of this section all meetings of public bodies shall be open to the public at all times. Nothing in this Act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting, except that a municipal governing body and a board of education shall be required to set aside a portion of every meeting of the municipal governing body or board of education, the length of the portion to be determined by the municipal governing body or board of education, for public comment on any governmental or school district issue that a member of the public feels may be of concern

(continued)
on an isolated basis, for conducting the closed portion of the meeting before the open session begins. That issue is not before us, as the record demonstrates that the Rutgers Board of Governors operates as a routine practice in the manner that we have described.

> to the residents of the municipality or school district.
>
> [N.J.S.A. 10:4-12(a) (emphasis added).]

The trial court held that the Rutgers Board of Governors is not a "board of education" and thus is not required under N.J.S.A. 10:4-12(a) to set aside a portion of each meeting for public comment. The judge reasoned that the term "board of education" refers only to a local school board for a public school district, not to the board of a public university, which is not associated with any particular school district or municipality.

Unquestionably, the term "board of education" refers to the governing body of local school districts, and not to the governing body of a college or university. As N.J.S.A. 18A:10-1 makes clear, the schools "of each school district shall be conducted, by and under the supervision of a board of education, which shall be a body corporate and which shall be constituted and governed, as provided by this title, for a type I, type II or regional school district as the case may be . . . ." N.J.S.A. 18A:10-1. The reference to "type I" and "type II" and "regional school district" are, in turn references to the size of the municipality in question. A type I district is defined in N.J.S.A. 18A:9-2 as a "local school district . . . established in a city . . . ." A type II district is "[e]very

local school district hereafter established in a municipality other than a city . . . ." N.J.S.A. 18A:9-3. A "regional district" is a district comprised of multiple municipalities. N.J.S.A. 18A:13-2. Thus, Title 18A's provisions define the term board of education in such a way as to make it clear that the term applies to local and regional school districts, but not to a state university such as Rutgers.

Indeed, N.J.S.A. 18A:12-1 removes any doubt on the question of whether the term "board of education" refers to the governing body of Rutgers University, as it provides that:

> Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and . . . shall be registered to vote in the district . . . .
>
> [N.J.S.A. 18A:12-1.]

The phrase "registered to vote in the district" unquestionably is a reference to a locally-based board of education, not a statewide entity such as Rutgers.

We therefore affirm the trial judge's rejection of the argument advanced in the fourth count, as we conclude that the Rutgers University Board of Governors is not a "board of education" within the meaning of N.J.S.A. 10:4-12(a). That being so, the Board's July 2007 bylaws, which permit members of the public to address the Board concerning items being discussed

on that day's agenda, actually exceed the requirements of the Act because the Board has no legal obligation to permit public comment.

VI.

Last, we turn to plaintiff's claim that he should have been provided an unredacted copy of the minutes of the September 10, 2008 special meeting. Plaintiff maintains that he served a document request upon the University seeking production of an unredacted copy of the minutes of the September 10, 2008 special meeting, but his request was never satisfied. As the Board correctly observes, plaintiff never raised that issue before the trial court. Absent exceptions not relevant here, we will decline to consider claims raised for the first time on appeal, especially when an opportunity existed before the trial court for the resolution of the issue in question. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). We thus decline to entertain plaintiff's argument respecting access to the unredacted minutes of the meeting.

VII.

In sum, we have reversed the judge's across the board dismissal of the first count, which alleged that the public notice of the agenda items to be discussed at the September 10, 2008 closed meeting was defective. We have likewise reversed

the dismissal of the third count, which alleged that the Board's regular practice of sequencing a brief open session, followed by a closed session of indeterminate length, followed by another open session, runs afoul of the Act's requirements. We have affirmed the dismissal of the fourth count, which asserted that the Board is required to set aside a portion of each meeting for public comment. As to the second count, we have affirmed the dismissal of plaintiff's claim that the Board violated N.J.S.A. 10:4-12 when it met in closed session to discuss the contract negotiations for naming rights to an athletic stadium. We have likewise affirmed the dismissal of plaintiff's claim in the second count that the Act did not authorize the Board to go into closed session to discuss the already executed Nelligan contract. We have, however, reversed the dismissal of plaintiff's claim that the Board acted improperly when it went behind closed doors to discuss the new "policies and procedures" for the Athletics Department that will be implemented "over the next several months and years." Last, we have declined to consider plaintiff's claim that he should have been provided with an unredacted copy of the September 10, 2008 meeting minutes.

We remand this matter to the Law Division for formulation of an appropriate remedy. In fashioning a remedy, the judge

shall consider the provisions of N.J.S.A. 10:4-15 and -16, and shall be guided by the principles articulated in Burnett, supra, 409 N.J. Super. at 240-46. As in Burnett, we leave to the judge's discretion the scope of the proceedings on remand, and recommend the court conduct a case management conference to determine what, if any, discovery is required.

Affirmed in part, reversed in part, and remanded in part.