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CLIENT ALERT
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APPELLATE COURT HOLDS THAT CLOSED SESSIONS MAY NOT BE HELD AT BEGINNING OF MEETING

In a significant ruling which may affect the way that public bodies conduct business throughout the State, the Appellate Division of the New Jersey Superior Court recently struck down the Rutgers Board of Governors' practice of beginning their meetings with a brief open session, followed by a closed session of indeterminate length, which was then followed by another open session. McGovern v. Rutgers, et al., Dkt. No. A-2531-09T1 (App. Div. 2011, approved for publication).

The facts in the case reveal that notice of the Board's meetings usually included a statement that an open session would be held from 8:30 a.m. to 8:35 a.m., followed by a closed session from 8:35 a.m. to 10:00 a.m. which would then be followed by another open session. In actuality, however, at six of its twelve meetings spanning over a year's time, the Board would resume its open session discussions anywhere from twenty-six minutes to one hour and four minutes later than the time specified in the original notice. This practice, according to the Plaintiff, "left the public attendees bewildered, not knowing what was going on . . ."

The Appellate Court reversed the decision of trial judge, who 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." Rather, the Appellate Court held 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." The Court found this practice to be detrimental to the public confidence and subverted the purpose of the Open Public Meetings Act ("OPMA"), otherwise known as the "Sunshine Law." Noting that the statute appears to contemplate a procedure where the open meeting precedes the closed meeting, the Appellate Division directed the lower court to issue an order *requiring* the Board to complete its open session before commencing any closed session. In a footnote, the Court stated that it would not rule on whether there can ever be a justification "on an isolated basis" for having the closed session portion of the meeting prior to the open session, since that specific issue was not before it.

The Appellate Court also found that the meeting notice and resolution to go into closed session were defective by merely stating that the Board would meet in closed session to "discuss matters falling within contract negotiation and attorney-client privilege". The Court explained that, while only the general nature of the subject matter to be discussed must be identified, the meeting notice or resolution nonetheless "should contain as much information as is consistent with full public knowledge without doing any harm to the public interest." According to the Court, the notice should have identified the contract to be discussed, particularly since the contract with the vendor at issue had already been executed. The Court stressed that in striking the delicate balance between informing the public and not violating privacy interests, it is simply not enough for a public entity to merely list the OPMA exceptions to public discussion in its meeting notice or resolution. (The court did, however, acknowledge and agree with prior case law holding that notice of a personnel discussion does not have to be any more specific than simply listing "personnel" on the agenda as the basis for the closed session discussion.)

This case is a good example of bad facts making bad law. Had the Rutgers Board of Governors strictly adhered to the 10:00 a.m. start time for the resumption of the public portion of its meeting, it is unlikely that the Court would have adopted such a strict interpretation of the OPMA. Now, a public entity which routinely conducts its closed session discussion before the open session must rethink this practice or risk a Sunshine Law violation. Moreover, public entities are well-advised to include greater detail in their meeting notices and resolutions to go into closed session without, of course, compromising the confidentiality of such discussions. Please contact the School/Municipal Law Attorneys at SPSK for further guidance on the implications of the McGovern decision on your public entity.