

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Counsel
Re: Open Public Meetings Act
Date: July 09, 2018

MEMORANDUM

Executive Summary

In *Kean Federation of Teachers v. Morell* the trial court, the Appellate Division, and ultimately the New Jersey Supreme Court were confronted with issues arising from the Open Public Meetings Act (the “OPMA” or the “Act”).¹ In turn, each level of the judiciary analyzed the OPMA’s notice requirement in the context of personnel issues to be discussed by a public body.² The courts also confronted the time constraints under which a public body was required to release its minutes, along with the appropriate remedy for a failure to make these minutes “promptly available” to the public.³ Over the past several months, there has also been legislative activity regarding the OPMA.

Accordingly, this Memorandum is provided to update the Commission regarding the recent New Jersey Supreme Court decision in the matter of *Kean Federation of Teachers v. Morel*⁴ and other developments.⁵

Background

• *The Trial Court*

In *Kean Federation of Teachers v. Morell*, the plaintiffs alleged that the Board of Trustees of Kean University (the “Board”) violated the OPMA when it failed to make the Board’s minutes from both its September and December 2014 meetings “promptly available” to members of the public.⁶ The litigants did not contest that the September minutes were not made available to the public until ninety-four days after the meeting and the December minutes were only made available to the public fifty-eight days after that meeting.⁷ The plaintiffs further alleged that the Board terminated a faculty member, Valera Hascup, without sending her the requisite notice required by *Rice v. Union Cnty. Reg’l High Sch. Bd. of Ed.*^{8, 9} The defendants

¹ *Kean Fed’n of Tchrs. v. Morell*, 2015 WL 3460030 (Law Div., 2015); 448 N.J. Super. 520 (App. Div. 2017); *cert. granted* No. A-84, 2018 WL 3062207 (N.J. June 21, 2018).

² *Id.* at *5.

³ *Id.* at *5.

⁴ *Kean Fed’n of Tchrs. v. Morell*, No. A-84, 2018 WL 3062207 (N.J. June 21, 2018).

⁵ S106, 2018 Leg., 218th Leg. (N.J. 2018); *see also*, A1019, 2018 Leg. 218th Leg. (N.J. 2018).

⁶ *Kean Fed’n*, 448 N.J. Super. at 524-525.

⁷ *Id.* at 525.

⁸ *Id.*

⁹ *Rice v. Union Cnty. Reg’l High Sch. Bd. of Educ.*, 155 N.J. Super. 64 (App. Div. 1977). The notice required to be issued by public entities would eventually be referred to as a “*Rice Notice*.”

maintain that the Board's vote, not to reappoint the plaintiff Hascup occurred during the public portion of its meeting and that a *Rice* notice was therefore not required to be sent to the plaintiff.¹⁰

The trial court granted summary judgment for plaintiffs as to the defendant's untimely dissemination of the meeting minutes to the public.¹¹ Ultimately, in an attempt to remedy further violations of the OPMA, the trial court issued a permanent injunction that required the Board to make its minutes available to the public within the 45 days following a meeting.¹² The trial court agreed with the defendants that they were not required to provide the Plaintiff with the type of notice established, and subsequently mandated, by *Rice v. Union Cnty. Reg'l High Sch. Bd. of Ed.*, because the personnel actions occurred during the public session of the meeting.¹³ Furthermore, the trial court declined to void the Board's decision to terminate the plaintiffs.¹⁴ The Board appealed the trial court decision and a cross-appeal was filed by the plaintiffs.¹⁵

• *The Appellate Division*

On appeal, the Appellate Division considered two issues.¹⁶ First, the Court addressed whether the Board violated the OPMA when it failed to make meeting minutes "promptly available," to members of the public.¹⁷ After a review of the record, the Appellate Division affirmed the decision of the trial court concerning the Board's untimely production of its meeting minutes.¹⁸ Although the term "promptly available" is not defined by the statute, the Court found that "[t]he words 'promptly available' in N.J.S.A. 10:4-14 require public bodies to make their meeting minutes available to the public in a manner that fulfills the Legislature's commitment to transparency in public affairs."¹⁹ To remedy this defalcation, the Court ordered the Board to adopt a meeting schedule that would enable them to make "minutes" available within 45 days from the date of the last meeting.²⁰

The Court then addressed the type of notice that must be given to employees under the Act. Before considering whether the Board was required to give an employee notice under OPMA, the Appellate Court examined the process used by the Board concerning appointments and non-appointment of faculty members. The Court observed that, "[t]he only role the Board

¹⁰ *Kean Fed'n of Tchrs. v. Morell*, No. A-84, 2018 WL 3062207 *7 (N.J. June 21, 2018).

¹¹ *Id.* at *1.

¹² *Id.* at *8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Kean Fed'n of Tchrs v. Morell*, 448 N.J. Super. 520, 524 (App. Div. 2017)

¹⁷ *Id.*

¹⁸ *Id.* at 533-534.

¹⁹ *Id.* at 531.

²⁰ *Id.* at 545.

plays in [the reappointment] process is approving the report of the subcommittee in public session.”²¹ Disturbed by the Board’s reliance upon the subcommittee’s report when considering issues of reappointment, the court opined, “[w]hen a public body acts on a personnel matter without prior discussion of any kind, the silent unexplained vote cast by the Board member reduced the event to a perfunctory exercise, devoid of both substance and meaning.”²² The Court continued, “[a] silent unexplained vote to approve a list of preapproved candidates in public session gives the impression that the Board colluded to circumvent the OPMA’s requirements.”²³

The Court proceeded to expand the notice requirements set forth in *Rice*. In an attempt to encourage, promote and enhance the public’s participation in the democratic process, the Court held, “...a public body is required to send out a *Rice* notice any time it has placed on the agenda any matter ‘involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body.’”²⁴ In expanding the holding in *Rice* the Court stated that “...*Rice* notices must be provided in advance of any meeting at which a personnel decision may occur.”²⁵ The Court went on to reason, “[t]his protocol provides the Board with the flexibility to discuss matters in executive session when necessary and affords the affected employees the opportunity to request that any proposed discussion occur publicly.”²⁶ The Board petitioned for certification.²⁷

Discussion

• *The Supreme Court of New Jersey*

The New Jersey Supreme Court granted the Board’s petition for certification.²⁸ After reviewing the record, the Supreme Court observed that, “[t]he essential facts [of this case] are undisputed and the issues ... are questions of law.”²⁹ The Court considered the following legal issues: (1) the extent of the public body’s notice obligations under the OPMA and whether the *Rice* notice for the personnel exception applied; (2) timing parameters for the release of minutes of meetings and the appropriate remedy for a public body’s failure to make their meeting minutes promptly available to the public.³⁰

²¹ *Id.* at 540.

²² *Id.*

²³ *Id.* at 544.

²⁴ *Id.* at 543. (Emphasis original).

²⁵ *Id.* at 544.

²⁶ *Id.*

²⁷ *Kean Fed’n of Tchrs. v. Morell*, No. A-84, 2018 WL 3062207 *1 (N.J. June 21, 2018).

²⁸ *Kean Fed’n of Tchrs v. Morell*, 230 N.J. 524 (2017).

²⁹ *Kean Fed’n*, No. A-84, 2018 WL 3062207 at *10.

³⁰ *Id.* at *5.

• *Notice under OPMA*

The OPMA generally requires the meetings of public bodies to be conducted in open session.³¹ When enacting the OPMA, the Legislature recognized that there are certain circumstances under which a public body should be permitted to enter into closed session discussions.³² The exceptions to the open session requirements of the OPMA are set forth in N.J.S. 10:4-12(b). In *Kean Federation*, the Supreme Court focused on the exception to the open session requirement set forth in N.J.S. 10:4-12(b)(8), relating to personnel matters.

When a public body is considering certain employment matters, it may exclude the public from that portion of the meeting.³³ The Act provides, in relevant part:

A public body may exclude the public only from that portion of the meeting at which the public body discusses any:

... matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion, or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting....

The authority of a public body to exclude the public from a portion of a meeting is clearly set forth in N.J.S. 10:4-12(b)(8).³⁴ The decision of a public body to exclude members of the public from a discussion of those matters set forth in N.J.S. 10:4-12(b)(8), however, may be overridden by what has come to be known as the “personnel exception” to the OPMA.³⁵

The “personnel exception” to the OPMA permits employees “whose employment interests could be adversely affected ... to waive the protection of having their matter discussed in closed session”³⁶ and elect to have his, or her, employment issue discussed in a public forum.³⁷ To effectuate the right to override the public body’s decision to institute a closed

³¹ *Id.* at 4, *citing* N.J.S. 10:4-12(a).

³² *Id.*

³³ N.J.S. 10:4-12(b)(8).

³⁴ *Kean Fed’n*, No. A-84, 2018 WL 3062207 at *10.

³⁵ N.J.S. 10:4-12(b)(8).

³⁶ *Kean Fed’n*, No. A-84, 2018 WL 3062207 at *4.

³⁷ *Id.*

session discussion of an individual's employment matter the Appellate Division, in *Rice*, held that these individuals are entitled to notice.³⁸

In *Kean Federation*, the Supreme Court declined to adopt the Appellate Division's expansion of the notice requirements set forth in *Rice*.³⁹ The Supreme Court held, "[n]either N.J.S.A. 10:4-12(b)(8) nor *Rice* supports the interpretation that notice must be given to all potentially affected employees, regardless of whether the employee is affected, whenever a personnel matter appears on a governing body's public meeting agenda."⁴⁰ Further, the Court specifically found that the Appellate Division's extension of *Rice* to all employment matters discussed by a public body whether in open or closed session, "... is not logical in light of the express language of N.J.S.A. 10:4-12(b)(8), and it intrudes upon the discretion recognized for [public bodies] in the legislative language."⁴¹ Simply put, "[t]he personnel exception's language is not applicable when a public entity already intends to take public action on a personnel matter..."⁴² In the instant case, the discussions concerning plaintiff's employment occurred during the public portion of the Board meeting thereby obviating the need for a *Rice* notice.

Accordingly, the Supreme Court reversed the decision of the Appellate Division regarding both the issuance of *Rice* notices and the voiding of the personnel actions taken by the Board.⁴³

The Court then turned its attention to a public entities' responsibility to make meeting minutes "promptly available" to the public.

- *Public Minutes*

The minutes of public meetings and their availability to the public is addressed in the OPMA.⁴⁴ The statute, N.J.S. 10:4-14, provides:

Each public body shall keep reasonably comprehensible minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public....

³⁸ *Id.*, citing *Rice v. Union Cnty. Reg'l High Sch. Bd. of Educ.*, 155 N.J. Super. 64 (App. Div. 1977).

³⁹ *Id.* at *11.

⁴⁰ *Id.* (Emphasis original).

⁴¹ *Id.*

⁴² *Id.* at *12.

⁴³ *Id.* at *13.

⁴⁴ N.J.S. 10:4-14.

Currently, the Act does not define the term “promptly available.”⁴⁵ Prior to *Kean Federation*, the Supreme Court had not specifically addressed the meaning of this term.⁴⁶ The legislative history concerning the meaning of the phrase is scant.⁴⁷

In the absence of a significant legislative history on this topic, the Supreme Court elected to view the term’s application in context.⁴⁸ The Court observed that, “[t]he Legislature’s choice of the phrase implicitly requires individual assessments as specific facts unfold in matters....”⁴⁹ The parties in *Kean Federation*, and ultimately the Supreme Court, agreed with the Appellate Division’s fact-sensitive, “case-by-case” approach to analyzing whether a public entity has made its minutes promptly available to the public.⁵⁰

The Court reminded public entities that there is a “legislative expectation that the release of minutes must be considered a priority, an obligation, and not a nuisance to be addressed when convenient.”⁵¹ In articulating the standard with which court were to review these matters, the Supreme Court opined that “reasonableness must remain the touchstone when assessing the promptness of a public entity’s action in this area.”⁵² Unlike the Appellate Division, the Supreme Court declined to establish a specific timeframe for the calling of meetings, and the production of minutes.⁵³ The timing of meetings, the Supreme Court held, remains the prerogative of the body entrusted with running the public entity.⁵⁴

In reversing this aspect of the decision of the Appellate Division, the Supreme Court cautioned public bodies that, “minutes should be released within days of their approval, unless truly extraordinary circumstances prevent their availability to the public.”

Pending Legislation

Since 2016, both the Senate and the Assembly have introduced legislation to modify the OPMA.⁵⁵ The stated purpose of these bills is to “...clarify and expand the public’s right to receive notice of meetings of public bodies, to be present at such meetings, as well as to have access to the minutes of meetings.”⁵⁶

⁴⁵ *Kean Fed’n*, No. A-84, 2018 WL 3062207 at *13.

⁴⁶ *Id.* at *13.

⁴⁷ *Id.*

⁴⁸ *Id.* at *15.

⁴⁹ *Id.*

⁵⁰ *Id.* at *14.

⁵¹ *Id.* at *15.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ S1045, 2016 Leg., 217th Leg. (N.J. 2016) and A2699, 2016 Leg., 2017th Leg. (N.J. 2016); *see also*, S106, 2018 Leg., 218th Leg. (N.J. 2018) and A1019, 2018 Leg., 218th Leg. (N.J. 2018), introduced January 09, 2018.

⁵⁶ *Id.*

On June 14, 2018, one week before the Supreme Court issued its decision in *Kean Federation*, S106 was amended by the Senate State Government, Wagering, Tourism & Historic Preservation Committee.⁵⁷ A number of the legislative modifications contained in that bill address the same sections of the Act that were addressed by the Supreme Court in *Kean Federation*; specifically, the provision of meeting minutes to members of the public.

- *Public Minutes*

A public entity is responsible for establishing its meeting schedule to suit the managerial obligations of its public responsibilities.⁵⁸ The entity must consider this responsibility in conjunction with its obligation to make minutes promptly available to the public.⁵⁹ As noted earlier, the term “promptly available” is not defined by the Act. In the absence of such a definition, and because, “[t]he OPMA’s requirements apply to a diverse range of public entities...” the Supreme Court has been reluctant to mandate a “...set amount of time for the release of minutes...”⁶⁰ A legislative solution that balances the managerial prerogatives of the public body with the right of the public to promptly obtain these minutes would eliminate the need for future litigation to define the term “promptly available.”

S106 and A1019 require a public body to make its minutes “...available to the public as soon as possible but not later than 15 business days after the next meeting of the public body occurring after the meeting for which the minutes were prepared, to the extent that making such matters public shall not be inconsistent” with the Act.⁶¹ This modification exchanges the “reasonableness” test, announced by the Supreme Court in *Kean Federation*, with a specific timeframe within which a public body must make its meeting minutes available to the public, while affording the public body the discretion to determine the most effective way to conduct its proceedings.

- *The Notice Requirement*

Within the context of N.J.S. 10:4-12(b)(8), the impact of the pending legislation is significant. The bills formalize the notice requirements established in *Rice v. Union Cnty. Reg.*

⁵⁷ *Statement to S106*, 2018 Leg., 218th Leg. *1 (N.J. June 14, 2018)

⁵⁸ *Kean Fed’n*, No. A-84, 2018 WL 3062207 at *15.

⁵⁹ *Id.*

⁶⁰ *Kean Fed’n*, No. A-84, 2018 WL 3062207 at *15.

⁶¹ *Id.* The proposed legislation allows municipalities with a population of 5,000 or fewer inhabitants, a board of education having a total district enrollment of 500 or fewer pupils, or a public authority having less than \$10 million in assets to make their minutes available no later than 20 days after the next subsequent meeting.

*High Sch. Bd. of Ed.*⁶² In addition, the bills significantly expand the number of individuals who will be required to receive *Rice* notices.

S106 and A1019 do not alter the authority of a public body to enter into a closed session to discuss any of the topics enumerated in N.J.S. 10:4-12(b)(1)-(9). Discussions of employment related matters may still be discussed by a public body during a closed session, pursuant to N.J.S. 10:4-12(b)(8). The bills do provide that a public body may exclude the public to discuss any:

matter involving the employment, appointment, termination of employment, [terms and conditions of employment,] evaluation of the performance of, promotion, or disciplining of any specific [prospective public officer or employee or current] public officer or employee, prospective or current, employed or appointed by the public body [, unless all the individual employees or appointees whose rights could be adversely affected request in writing that the matter or matters be discussed at a public meeting].

With respect to the type of notice required for a public body to discuss the aforementioned topics during a closed session, S106 and A1019 provide:

Public bodies shall give written notice of at least two business days to any officer or employee, and any adversely affected individual or individuals, in advance of any proposed meeting at which his or her employment, appointment, termination, evaluation of the performance of, promotion or discipline may be discussed.

This modification to the statute eliminates the ambiguity of what is considered to be “reasonable notice” and clearly sets forth a specific timeframe within which a public body must give notice to individuals who may be the subject of personnel discussions.

Currently, public body is required to provide an employee with “reasonable notice” only when it intends to consider taking adverse employment action related to them during a closed session.⁶³ The proposals seek to alter the current notice requirement. The proposed language states that employees **and** every “adversely affected individual” must be given notice of any proposed, closed session discussions involving the subject’s employment. On its face, this requirement could force public bodies to give notice of a meeting to a wide range of individuals with, at most, a peripheral connection to the employment matter in question. For example: spouses, ex-spouses, children, mortgage companies, and landlords could all be adversely affected by the public body’s decision concerning the subject’s employment.

⁶²*Rice v. Union Cnty. Reg’l High Sch. Bd. of Educ.*, 155 N.J. Super. 64 (App. Div. 1977). The notice required to be issued by public entities would eventually be referred to as a “*Rice Notice*.”

⁶³ *Kean Fed’n*, No. A-84, 2018 WL 3062207 at *11.

The current legislation partially adopts the expansion of *Rice* and N.J.S. 10:4-12(b)(8) announced by the Appellate Division in *Kean Federation* and ultimately rejected by the Supreme Court in the same case.⁶⁴ The Supreme Court reasoned that to extend *Rice* to the extent suggested by the Appellate Division, "...would risk throwing off the careful balance that the Legislature struck between a public body's need to control its own proceedings and at the same time determine when and how to protect confidential interests of the public body or others."⁶⁵ The confidential interests of an employee might be abrogated if the public entity is required to send notice to "*any adversely affected individual or individuals*" in advance of any proposed meeting.

On June 14, 2018, one week before the Supreme Court issued its opinion in *Kean Federation*, S106 was reported out of the Senate Committee and referred to the Senate Budget and Appropriations Committee.⁶⁶ The companion bill, A1019, was introduced in the Assembly on January 09, 2018, and referred to the Assembly State and Local Government Committee, but no further action has yet been taken.

Conclusion

In *Kean Federation*, the New Jersey Supreme Court addressed a public entity's obligation to make meeting minutes promptly available to the public and decided that "reasonableness" must remain the touchstone when assessing the promptness of a public entity's action in this area. S106 and A1019 appear to strike a balance between the public's right to information and a public entity's autonomy and logistical flexibility.

In that same case, the Supreme Court examined a public body's notice obligations under the OPMA and affirmed the current practice of providing a *Rice* notice only when a public body intends to consider taking adverse employment action related to an employee during a closed session. S106 and A1019 expand the group of individuals who are to receive notice pursuant to N.J.S. 10:4-12(b)(8).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ The decision in *Kean Fed'n of Tchrs. v. Morell*, No. A-84, 2018 WL 3062207 *1 was issued by the Supreme Court on June 21, 2018.