IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

Montgomery County Residents Jules Epstein, Sara Atkins, Marc Bookman, Michael Conley, Christine Cregar, Christa Dunleavy, John Fagan, Peter Hall, Chris Koschier, Rev. Beth Lyon, Elena Margolis, Emily Robb, Karl Schwartz, Adrian Seltzer, and Leonard Sosnov, Plaintiffs, v. Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale, Karen Sanchez, the Montgomery County Board of Commissioners, the Montgomery County Salary Board; and Montgomery County, Defendants.	No. 2020-04978 CIVIL ACTION – LAW

PLAINTIFFS' ANSWER TO
DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT

Plaintiffs, Montgomery County Residents Jules Epstein, Sara Atkins, Marc Bookman, Michael Conley, Christine Cregar, Christa Dunleavy, John Fagan, Peter Hall, Chris Koschier, Rev. Beth Lyon, Elena Margolis, Emily Robb, Karl Schwartz, Adrian Seltzer, and Leonard Sosnov, hereby respond to the Preliminary Objections of Defendants Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale, the Montgomery County Board of Commissioners, and Montgomery County,[1] as follows:

[1] Pursuant to a Stipulation signed by the Court on July 28, 2020, the Montgomery County Salary Board and Karen Sanchez are dismissed as defendants to this action. *See* Ex. A (Stipulation & Order).

INTRODUCTION

1. Denied. The assertions in paragraph 1 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law, in which they explain that (a) the text of the Sunshine Act and the published case law interpreting it demonstrate that the Board of Commissioners' votes to terminate Dean Beer and Keisha Hudson and to promote Carol Sweeney and Gregory Nester were "official action" that the Sunshine Act requires to take place at a public meeting with prior public comment and that (b) the unreported cases on which the Defendants rely do not warrant finding otherwise.

2. Denied. The assertions in paragraph 2 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

3. Denied. The assertions in paragraph 3 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

THE FACTS ALLEGED

4. Admitted, except that the Complaint alleges that the Board of Commissioners "voted" on the terminations at the meeting, not that they "decided" on the terminations at the meeting.

5. Admitted, except that the Complaint alleges that the Board of Commissioners "voted" on the promotions at the meeting, not that they "decided" on the promotions at the meeting.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. Admitted.

THE CLAIMS ASSERTED

18. Denied. The assertions in paragraph 18 are conclusions of law and characterizations to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

19. Admitted in part and denied in part. It is admitted only that Count I of Plaintiffs' complaint alleges that the Commissioners violated the Sunshine Act by taking "official action" to terminate Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nestor in the February 25, 2020 closed door meeting. The remaining assertions in this paragraph are conclusions of law and characterizations of Count I to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

20. Admitted.

21. Admitted.

22. Admitted.

23-24. These assertions pertain to Counts V and VI, both of which have been resolved and dismissed. *See* Ex. A (Stipulation & Order).

THE RELIEF SOUGHT

25. Admitted in part and denied in part. It is admitted only that Plaintiffs seek declaratory relief declaring that the official actions terminating Mr. Beer and Ms. Hudson and promoting Ms. Sweeney and Mr. Nester violated the Sunshine Act and are thus void. The remaining assertions in this paragraph are conclusions of law and characterizations of that relief to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

26. Admitted in part and denied in part. It is admitted only that Plaintiffs seek injunctive relief reinstating Mr. Beer and Ms. Hudson. The remaining assertions in this paragraph are conclusions of law and characterizations of that relief to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

27. Admitted in part and denied in part. It is admitted only that Plaintiffs seek injunctive relief requiring future compliance with the Sunshine Act. The remaining assertions in this paragraph are conclusions of law and characterizations of that relief to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

28. Admitted in part and denied in part. It is admitted only that Plaintiffs seek injunctive relief requiring future compliance with the Sunshine Act. The remaining

assertions in this paragraph are conclusions of law and characterizations of that relief to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

29. Admitted in part and denied in part. It is admitted only that Plaintiffs seek attorneys' fees and costs. The remaining assertions in this paragraph are conclusions of law and characterizations of that relief to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

30. Denied. The assertions in paragraph 30 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

I. DEMURRER – ALL COUNTS

31. Plaintiffs incorporate by reference responses to paragraphs 1 through 30 of Defendants' Preliminary Objections set forth above.

32. Denied. The assertions in paragraph 32 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

33. Denied. The assertions in paragraph 33 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

34. Denied. The assertions in paragraph 34 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

35. Denied. The assertions in paragraph 35 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

36. Denied. The assertions in paragraph 36 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

37. Denied. The assertions in paragraph 37 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

38. Denied. The assertions in paragraph 38 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

39. Denied. The allegations in paragraph 39 are conclusions of law to which no response is required. Plaintiffs respond further by referring the Court to the attached memorandum of law and to their response to paragraph 1.

II. DEMURRER – COUNTS V AND VI

40-50. These allegations pertain to Counts V and VI, both of which have been resolved and dismissed. *See* Ex. A (Stipulation & Order).

WHEREFORE, as explained in their attached memorandum of law, which is incorporated here as though full set forth, the Plaintiffs ask that the Defendants' Preliminary Objections be overruled as to Counts I, II, III, and IV.

Dated: August 5, 2020

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Montgomery County Residents Jules Epstein, Sara Atkins, Marc Bookman, Michael Conley, Christine Cregar, Christa Dunleavy, John Fagan, Peter Hall, Chris Koschier, Rev. Beth Lyon, Elena Margolis, Emily Robb, Karl Schwartz, Adrian Seltzer, and Leonard Sosnov, Plaintiffs, v. Valerie Arkoosh, Kenneth Lawrence, Jr., Joseph Gale, Karen Sanchez, the Montgomery County Board of Commissioners, the Montgomery County Salary Board, and Montgomery County, Defendants.	No. 2020-04978 CIVIL ACTION – LAW

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT

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I. MATTER BEFORE THE COURT

Earlier this year, President Judge Thomas Del Ricci and Chief Operating Officer Lee Soltysiak both reprimanded Chief Public Defender Dean Beer because the Office of the Public Defender had filed an *amicus curiae* brief in the Pennsylvania Supreme Court that criticized cash bail practices in Montgomery County. Shortly thereafter, the Board of Commissioners voted to terminate Mr. Beer and Deputy Chief Public Defender Keisha Hudson, and to promote Carol Sweeney and Gregory Nester to lead the Office. The Commissioners did so (1) in private, rather than at a public meeting; (2) without an opportunity for public comment in advance of the vote; (3) without giving any explanation as to what transpired behind closed doors; and (4) without an opportunity for Mr. Beer and Ms. Hudson to request that their employment fate be discussed in the open. The citizens of Montgomery County had no opportunity to implore the Commissioners not to take this action. Because each of these four failures was a violation of the Pennsylvania Sunshine Act—legislation rooted in the fundamental principle that government transparency is "vital to the enhancement and proper functioning of the democratic process," 65 Pa. C.S. § 702—the Defendants' Preliminary Objections should be overruled. [1] As discussed below, none of the arguments raised in the Defendants' Preliminary Objections dictate otherwise.

II. STATEMENT OF QUESTIONS INVOLVED

1. Should the Defendants' Preliminary Objections be overruled as to Counts I and II because the Commissioners' votes to terminate Mr. Beer and Ms. Hudson and to

[1] These four failures are the bases for Counts I, II, III, and IV, respectively. Pursuant to a Stipulation approved by the Court on July 28, 2020, the Plaintiffs have withdrawn Counts V and VI, which relate to the Salary Board, and have dismissed the Salary Board and its sole non-Commissioner member, Karen Sanchez, as Defendants. *See* Ex. A (Stipulation & Order).

promote Ms. Sweeney and Mr. Nester were "official action" taken in private and without an opportunity for public comment?

SUGGESTED ANSWER: Yes.

2. Should the Defendants' Preliminary Objections be overruled as to Counts III and IV because the Commissioners did not adequately disclose the reason for the February 25, 2020 executive session and because the Commissioners did not give Mr. Beer and Ms. Hudson the opportunity to request that their potential terminations be discussed at an open meeting?

SUGGESTED ANSWER: Yes.

III. FACTS

Mr. Beer became Deputy Chief Public Defender of the Office of Public Defender (the "Office") in September 2013 and was appointed Chief Public Defender by the Commissioners in January 2016. Compl. ¶ 36. Ms. Hudson became Deputy Chief Public Defender in May 2016, after serving for ten years as an Assistant Federal Defender for the Federal Community Defender of the Eastern District of Pennsylvania, Capital Habeas Unit. Compl. ¶ 37.

The terminations of Mr. Beer and Ms. Hudson came less than one month after the Office filed an *amicus curiae* brief with the Supreme Court of Pennsylvania in a case challenging cash bail practices in Philadelphia. Compl. ¶ 38. The brief detailed the experiences of the Office's clients with cash bail in Montgomery County, and asserted that Philadelphia was no outlier:

> While specific approaches to cash bail practices may differ between counties, the systemic failures found in Philadelphia's current cash bail practices are ubiquitous throughout the state. Montgomery County is one of many in which the judicial decision-makers of minor courts frequently fail to consider alternatives to

> cash bail, do not take into account the accused's ability to pay, and impose excessive bail for the purpose of ensuring pretrial incarceration.

Compl. ¶ 38 (quoting Brief of *Amicus Curiae* the Montgomery County Office of the Public Defender, 21 EM 2019 at 2 (Pa. filed Feb. 3, 2020)).

The Washington Post reported that two days after this brief was filed, Mr. Beer was summoned to meet with Montgomery County Court of Common Pleas President Judge Thomas Del Ricci, where he was verbally reprimanded for filing the brief. Compl. ¶ 39. Four days later, Montgomery County Chief Operating Officer Lee Soltysiak instructed Mr. Beer to withdraw the *amicus curiae* brief, which he did on February 11, 2020. Compl. ¶¶ 40-41.

Following the withdrawal of the brief, Mr. Beer and Mr. Soltysiak exchanged letters regarding Mr. Beer's role as the Chief Public Defender. Compl. ¶¶ 42-43. In Mr. Beer's February 13, 2020 letter to Mr. Soltysiak, he asked for "clarification, both regarding the course of events concerning the amicus brief . . . and my independent role as Chief Public Defender." Compl. ¶ 42, quoting Ex. 2. Mr. Soltysiak's February 20, 2020 response expressed that he was "very disappointed in the manner in which" Mr. Beer had sought to advance "overall justice reform." Compl. ¶ 43, quoting Ex. 3.

Five days later, on February 25, 2020, the Board of Commissioners held a closed-door executive session regarding what was later described as "personnel matters." Compl. ¶ 44. Upon information and belief, it was at this meeting that votes were taken on proposals to terminate Mr. Beer and Ms. Hudson and to promote Carol Sweeney and Gregory Nester to lead the Office as co-chief deputy public defenders. Compl. ¶ 45. Defendant Commissioners Arkoosh, Lawrence, and Gale did not give Mr. Beer or Ms. Hudson notice that this executive session was taking place, let alone an opportunity to request that their potential terminations be discussed at an open meeting. Compl. ¶ 49. Further, the Commissioners did not provide an

opportunity for public comment before taking the official action of terminating Mr. Beer and Ms. Hudson and promoting Ms. Sweeney and Mr. Nester. Compl. ¶ 48.

The day after this unannounced executive session, Mr. Beer and Ms. Hudson were told by County officials that they had been terminated, and the Commissioners issued a press release stating that "effective immediately, the Montgomery County Public Defender's Office will be led by Carol Sweeney and Greg Nester, who will serve as co-chief deputy public defenders going forward." Compl. ¶¶ 46-47, quoting Ex, 4.

The public responded swiftly in support of Mr. Beer and Ms. Hudson. Compl. ¶ 52. Montgomery County residents and local organizations condemned the closed-door firings and praised the work of Mr. Beer and Ms. Hudson, in an outcry that was then echoed by criminal justice advocates across the county and ultimately reached national media outlets. *Id.* On March 2, 2020, a majority of the Office wrote an open letter expressing that Mr. Beer and Ms. Hudson had "earned our support by fiercely and zealously advocating for each and every client, establishing a holistic and trauma-informed approach to Public Defense, engaging in community outreach and organization, striving for policy reform, and serving as strong mentors and support systems to us, their employees." Compl. ¶ 54, quoting Ex. 6. On March 4, 2020, a group of nineteen private criminal defense attorneys in Montgomery County filed an *amicus curiae* brief that was substantively the same as the brief the Office had been ordered to withdraw. Compl. ¶ 57. In their Application for leave to file the brief, the *amici* defense attorneys explained that they felt it "necessary to submit the brief" "[d]ue to the accuracy of the Public Defender's brief, the retaliation against the Public Defender for filing an accurate brief, the illegal and unconstitutional bail practices in Montgomery County, and the importance of bringing the situation in Montgomery County to the Court's attention." Compl. ¶ 58, quoting Ex. 7. Local media

featured multiple opinion pieces that likewise criticized the decision to terminate Mr. Beer and Ms. Hudson. Compl. ¶ 55.

At the next regularly scheduled Board of Commissioners' meeting on March 5, 2020, Defendant Arkoosh acknowledged that the Commissioners had held an executive session on February 25, stating: "Finally, I need to mention that an executive session was held on February 25, 2020 regarding personnel matters." Compl. ¶¶ 59-60. The Commissioners did not provide any other detail about that executive session. Compl. ¶ 60. The terminations of Mr. Beer and Ms. Hudson and promotions of Ms. Sweeney and Mr. Nester were not on the agenda of the March 5 Commissioners' meeting. Compl. ¶ 61. At the conclusion of the meeting's agenda, during a general public comment period, forty-five individuals, including many of the Plaintiffs, asked the Commissioners to reverse their decision to terminate Mr. Beer and Ms. Hudson. Compl. ¶ 62. No commenter supported the terminations. Compl. ¶ 62. During the meeting, over 100 people gathered across the street on the steps of the courthouse to protest the terminations of Mr. Beer and Ms. Hudson. Compl. ¶ 69.

After public comment, Commissioner Arkoosh stated that the decision to terminate Mr. Beer and Ms. Hudson had been difficult for her to make because she remained committed to criminal justice reform. Compl. ¶ 63. Commissioner Lawrence stated that "I know that I didn't ask enough questions, I know that I need to demand better answers. I know I didn't educate myself as I should have when this decision was made[.]" Compl. ¶ 64. Commissioner Gale did not speak to the terminations. Compl. ¶ 65.

Immediately following the Board of Commissioners' meeting, the Salary Board—comprised of the three Commissioners and Controller Karen Sanchez—convened its own meeting. Compl. ¶ 70. Donna Pardieu, the Director of Human Services, gave a "presentation"

for "Salary Board consideration" that listed the names and salaries of forty-five people who had been newly hired by the County, who were no longer on the County pay roll, or whose salaries had been changed. Compl. ¶¶ 72, 74 & Ex. 9. This list included Mr. Beer, Ms. Hudson, Ms. Sweeney, and Mr. Nester. Compl. ¶ 73 & Ex. 9. The Salary Board voted unanimously to approve the presentation, but Commissioner Arkoosh did not call for public comment "related to the Salary Board" until after that vote. Compl. ¶ 78.

In Counts I, II, III, and IV of their Complaint, the Plaintiffs assert that the Commissioners violated the Sunshine Act by (1) voting to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester in private; (2) voting to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester without an opportunity for public comment before the votes; (3) not disclosing the reason for holding the February 25 executive session at which the Plaintiffs believe the Commissioners voted to terminate Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nester; and (4) not providing Mr. Beer and Ms. Hudson the opportunity to request that their employment fate be discussed in public, rather than at an executive session. The Defendants as to these four counts are the Board of Commissioners, the individual Commissioners themselves, and the County.[2]

[2] The Plaintiffs included Count V in their Complaint to require the Salary Board to permit public comment before voting on agenda item, and they included Count VI in case the Commissioners asserted that the Salary Board (not the Board of Commissioners) terminated Mr. Beer and Ms. Hudson and promoted Ms. Sweeney and Mr. Nester. As noted above, on July 28, 2020, the Court approved a Stipulation resolving Counts V and VI and dismissing the Salary Board. *See* Ex. A.

IV. ARGUMENT

A. The Defendants' Preliminary Objections should be overruled as to Counts I and II because the Commissioners' votes to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester were "official action" taken in private and without an opportunity for public comment.

The General Assembly enacted the Sunshine Act based on its findings "that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decisionmaking of agencies is vital to the enhancement and proper functioning of the democratic process and 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." 65 Pa. C.S. § 702. In light of these legislative findings, the Act requires that any "[o]fficial action and deliberations by a quorum of the members of an agency shall take place at a meeting open to the public" unless one of several narrow exceptions applies. 65 Pa. C.S. § 704. Moreover, the Sunshine Act requires "a reasonable opportunity" for members of the public "to comment on matters of concern, official action or deliberation which are or may be before the board or council prior to taking official action." 65 Pa. C.S. § 710.1(a).

One of the few exceptions to these general rules permits an agency to discuss employment matters privately, in an executive session:

> An agency may hold an executive session . . . [t]o *discuss* any matter involving the employment, appointment, *termination of employment*, terms and conditions of employment, evaluation of performance, *promotion* or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the agency, or former public officer or employee[.]

65 Pa. C.S. § 708(a)(1) (emphasis added). Crucially, the Act goes on to make clear that this provision only applies to *discussions* regarding employment matters and not to *official actions* regarding employment matters, specifying that "[o]fficial action on discussions" held at such an

executive session "shall be taken at an open meeting." 65 Pa. C.S. § 708(c); *see also* 1 Pa. C.S. § 1924 ("Exceptions expressed in a statute shall be construed to exclude all others.").

The Defendants do not dispute that the Board of Commissioners may only take "official action" at an open meeting or that the Board must provide an opportunity for public comment before doing so. Rather, they contend that the Commissioners' votes to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester were not "official action" in the first place and thus did not require the public vote and opportunity for comment that the Plaintiffs demand in Counts I and II, respectively. As discussed below, the Defendants are wrong, and Counts I and II therefore state a claim.

1. The text of the Sunshine Act and published case law interpreting it demonstrate that the Commissioners' votes to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester were "official action"

For at least four reasons, this Court should conclude that the Commissioners' votes to terminate Mr. Beer and Ms. Hudson and promote Ms. Sweeney and Mr. Nester were "official action" under the Sunshine Act.

First, the Board of Commissioners' votes to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester fall within the fourth prong of the Sunshine Act's "official action" definition, which provides that "official action" includes "*[t]he vote taken by any agency on any* motion, *proposal*, resolution, rule, regulation, ordinance, report or order." 65 Pa. C.S. § 703 (emphasis added). [3] The Commonwealth Court has explained that a "vote" for

[3] The Defendants only discuss the third prong of the "official action" definition. *See* Defs. Br. at 8-9. In addition, they maintain that "the essence of official action is its connection to agency business," *id.* at 8, even though "agency business" only appears in that third prong of the definition, 65 Pa. C.S. § 703 (defining "official action" to include: "(1) Recommendations made by an agency pursuant to statute, ordinance or executive order. (2) The establishment of policy by an agency. (3) The decisions on agency business made by an agency. (4) The vote taken by any agency on any motion, proposal, resolution, rule, regulation, ordinance, report or order.")

Sunshine Act purposes is one that "commits the agency to a course of conduct." *Morning Call v. Board of School Directors*, 642 A.2d 619, 623 (Pa. Commw. Ct. 1994). While Pennsylvania courts do not appear to have defined "proposal" in the Sunshine Act context, Black's Law Dictionary (11th ed. 2019) defines it as "[s]omething offered for consideration or acceptance; a suggestion."

Thus, putting the two definitions together, the Commissioners take "official action" whenever they vote to commit the Board to a course of conduct on something offered to the Board for consideration or acceptance—which is just what happened here. Again, the Plaintiffs allege that, at the February 25, 2020 executive session, the Commissioners voted on "proposals" to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester that were before the Commissioners for their consideration. Compl. ¶ 45. And by voting in favor of those proposals, the Commissioners committed the Board to a course of conduct—namely, the termination of Mr. Beer and Ms. Hudson and the promotion of Ms. Sweeney and Mr. Nester. These votes thus constitute "official action" and triggered the open meeting and public comment requirements of the Sunshine Act.

Second, in addition to constituting "official action" as "votes" on "proposals," the Commissioners' votes to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester also constitute "official action" for the separate and independently sufficient reason that they fall within the third prong of the Sunshine Act's definition. That third prong provides that "official action" includes "decisions on agency business by an agency." 65 Pa. C.S. § 703. The Act in turn defines "agency business" as "[t]he framing, preparation, making or enactment of laws, policy or regulations, *the creation of liability by contract or otherwise* or the

adjudication of rights, duties and responsibilities, but not including administrative action." *Id.* (emphasis added).[4]

By promoting Ms. Sweeney and Mr. Nester, the Commissioners "creat[ed] a liability by contract or otherwise" and thereby made a "decision on agency business." Black's Law Dictionary (11th ed. 2019) defines "liability" as a "[t]he quality, state, or condition of being legally obligated or accountable." And regardless of whether the new co-heads of the Office of the Public Defender were "at will" employees, the Board of Commissioners' vote made the County legally obligated to compensate Ms. Sweeney and Mr. Nester for performing the duties of the new positions to which they were appointed—positions that entailed substantial raises, Compl., Ex. 9—unless and until they resigned or were reassigned or terminated. A termination does not fit as neatly in this category of "official action" but, particularly given that the Act's executive session provision groups "promotion[s]" and "termination[s]" together and thus suggests a legislative intent to treat both similarly, *see* 65 Pa. C.S. § 708(a)(1), it would be inconsistent to classify a promotion but not a termination as "official action." Moreover, in this case, the terminations of Mr. Beer and Ms. Hudson have "created" at least a potential "liability" for the County, as evidenced by the lawsuits that both have filed in light of the allegedly retaliatory nature of their terminations.

Third, the Act's provisions regarding executive sessions for discussing employment matters would make no sense if final decisions on such matters did not constitute "official action." The Defendants stress that no provision in the Sunshine Act explicitly states

[4] The "agency business" definition's carve-out for "administrative action," which is in turn defined as "[t]he execution of policies relating to persons or things as previously authorized or required by official action of the agency adopted at an open meeting of the agency," is not relevant here. 65 Pa. C.S. § 703.

that decisions to hire, fire, or promote an at-will employee are subject to the Act. *See* Defs. Br. at 8-9. But the Sunshine Act does not include a laundry list of the specific situations to which the Act applies. Rather, it establishes broad, general rules and then provides a detailed list of discrete exceptions to those general rules. *See* 65 Pa. C.S. § 708(a)(1)-(7). Again, one of those discrete exceptions permits a quorum of agency members "[t]o *discuss* any matter involving the employment, appointment, *termination of employment*, terms and conditions of employment, evaluation of performance, *promotion* or disciplining" of a past, present, or prospective employee at a private, executive session. 65 Pa. C.S. § 708(a)(1) (emphasis added). And the Act clarifies the limited scope of this exception, expressly providing that "[o]fficial action on discussions" about employment matters "shall be taken at an open meeting," even though the discussions themselves could take place at an executive session. 65 Pa. C.S. § 708(c). Simply put, if final decisions on employment matters—such as "termination[s]" and "promotion[s]"—were not "official action," there would have been no reason for the General Assembly to have specified that such matters can be "discuss[ed]" in private or that "official action" on such matters nonetheless must take place in public. A fundamental tenet of statutory interpretation requires that all words and provisions in the Sunshine Act be given effect. *See* 1 Pa. C.S. § 1921(a) ("Every statute shall be construed, if possible, to give effect to all its provisions.").

Fourth, in at least five published and binding opinions, the Commonwealth Court has repeatedly indicated that final employment-related decisions constitute "official action":

- *Silver v. Borough of Wilkinsburg*, 58 A.3d 125, 129 (Pa. Commw. Ct. 2012): The Court held that an employment termination was an "official action" for purposes of the Sunshine Act and that the Act's "express exemption from public disclosure" for discussions of employment matters "further supports the position that the act of terminating the employee's

employment"—as opposed to the discussions leading up to that termination—"is available to the public."[5]

- *Taylor v. Borough Council Emmaus Borough*, 721 A.2d 388, 391 (Pa. Commw. Ct. 1998): The court held that a Borough Council could take witness testimony in private as part of an ongoing investigation into the Chief of Police, but "hasten[ed] to note, however, that once the Council's investigation of [the Chief] is complete and the Council is ready to take 'official action,' for example by firing or suspending [the Chief], the Sunshine Act will apply."

- *Preston v. Saucon Valley Sch. Dist.*, 666 A.2d 1120, 1123 (Pa. Commw. Ct. 1995): The court held that hiring a superintendent was "official action" under the Sunshine Act and explained that, "[w]hile [the Sunshine Act] permits an agency to discuss employment matters in a private executive session, the final vote on those matters must be taken at a public meeting."

- *Cumberland Publishers, Inc. v. Carlisle Area Board of School Directors*, 646 A.2d 69, 71 (Pa. Commw. Ct. 1994): The court held that a *discussion* regarding the "appointment" of a school board member could occur in executive session but went on to "note that pursuant to [the identical precursor to 65 Pa. C.S. § 708(c)], the vote on [the member's] appointment was conducted at an open meeting."

- *Morning Call*, 642 A.2d at 625: The court held that "[t]he Sunshine Act allows for a private executive session" to discuss a pool of superintendent candidates to "insure

[5] Although *Silver* is a case under the Right to Know Law, the court looked to the Sunshine Act's definition of "official action" for guidance in ruling on the claim and concluded that "the employment termination itself is the 'official action'" under that definition. *Silver*, 58 A.3d at 129.

the confidentiality in the selection process to be maintained in order to attract the best candidates" and that "[t]he official action required by the Sunshine Act to be done in public session is the vote to hire a specific individual as superintendent."

Therefore, in light of the statutory language and the published case law, the Plaintiffs have adequately alleged that the Commissioners' votes to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester were "official action" under the Sunshine Act and thus should have occurred at an open meeting at which the public had an opportunity to comment before the Commissioners cast their votes.

2. The Defendants' policy argument and unreported opinions do not warrant finding a lack of "official action" here.

In arguing that their votes to terminate Mr. Beer and Ms. Hudson and to promote Ms. Sweeney and Mr. Nester were not "official action," the Defendants rely on one policy argument and two unreported court opinions. None of the three is a reason to sustain their Preliminary Objections.

First, the Defendants maintain that it would constitute a "breathtaking overreach," "monopolize the agendas of the Board of Commissioners," and "impede essential government functions" to require (a) an opportunity for public comment and (b) a public vote on any final hiring, promotion, or termination decision by the Board. Defs. Br. at 6-7, 11. But the regular practice of the Salary Board—of which all three Commissioners are members—proves that this cry of governmental paralysis is unfounded. As discussed above, the Salary Board voted to approve a presentation that listed *forty-five* different salary and title changes at its March 5 public meeting—some due to new hiring, some due to promotions, and some due to terminations. *See* Compl., Ex. 9. There has been no suggestion that this number was at all unusual or burdensome for the Salary Board to consider at a single meeting. And while the Salary Board unlawfully

took public comment only *after* its vote that day, it has agreed to "chang[e] the order of its proceedings for future meetings to permit public comment before considering and voting upon the items on its meeting agenda, rather than soliciting public comment after action on its agenda items." Ex. A. The Defendants do not explain how it would nonetheless be unworkable for the Commissioners—sitting as the Board of Commissioners rather than as three of the four members of the Salary Board—to take the same, public, comment-and-vote approach to final employment-related decisions.

To be clear, the Plaintiffs are not asking that the Board of Commissioners hold a separate public vote on each individual employment decision that it makes. The Salary Board took a single, yes-or-no vote as to all forty-five salary and title changes before it at its March 5 meeting. The Board of Commissioners could likewise take a single, yes-or-no vote on all employment matters before it at a particular meeting (unless, of course, one or more Commissioners wished to treat one of those employment matters differently than the other matters). The Plaintiffs also are not asking that there be a separate public comment period for each individual employment matter to be voted upon during a particular Board of Commissioners meeting. To the contrary, the Board of Commissioners could allow attendees to comment on any such employment matters during the portion of the meeting that is already devoted to public comment on agenda items to be voted upon.

Moreover, the relief that the Plaintiffs seek applies only to those final employment decisions that the Commissioners retain for themselves, as opposed to any that they delegate to other County officials. Some decisions, such as the hiring or firing of the Chief Public Defender, must be made by the Commissioners. *See* 16 Pa C.S. § 9960.4 ("The public defender shall be appointed by the Board of County Commissioners."); *Sasinoski v. Cannon*, 696

A.2d 267, 272 (Pa Commw. Ct. 1997) (explaining that, because the county commissioners have the exclusive authority to appoint the public defender, only the county commissioners can remove the public defender). But there is no legal requirement that the Commissioners keep for themselves every hiring, promotion, and firing decision as to every County employee. This, too, offers a practical and easily implementable solution to the Defendants' over-wrought concerns.

Second, the Defendants rely on an unreported, non-binding, 2017 Commonwealth Court opinion, in which the court affirmed the denial of a preliminary injunction that sought to remove two at-will County appointees who were appointed in private. *Notarianni v. O'Malley*, No. 733 C.D. 2016, 2017 Pa. Commw. Unpub. LEXIS 259 (Pa. Commw. Ct. Apr. 12, 2017). Given the procedural posture, however, the Commonwealth Court did not rule that an appointment—let alone a termination or promotion—of an at-will employee was not official action subject to the Sunshine Act's opening meeting requirement. Rather, the court held that there were "reasonable grounds" for the trial court to have concluded that the movants had not shown the "clear right to relief" required for a preliminary injunction. *Id.* at *8-17. That, of course, is a fundamentally different question from the one currently before this Court: whether the Plaintiffs, who are not seeking a preliminary injunction, have properly pled Sunshine Act violations such that their Complaint should survive dismissal.

Moreover, the "reasonable grounds" that the *Notarianni* court identified to support the trial court's denial of the preliminary injunction motion included the governmental paralysis concern that, as discussed above, is overblown—in addition to being an insufficient basis to ignore the dictates of a statute. *See Notarianni,* at *13. Another ground the court offered was the fact that the 1994 and 1995 *Morning Call* and *Preston* cases—the published cases discussed at pages 11 and 12 above in which the Commonwealth Court held that the hiring

of a superintendent was "official action" under the Sunshine Act—involved the Public School Code. *See id.* at *15-17. Yet *Morning Call* and *Preston* should not be cabined in that manner, as the Sunshine Act reasoning of those cases was not limited to that narrow context. And neither the *Silver* nor *Taylor* published opinions discussed at pages 11 and 12 above involved the Public School Code or mentioned an employment contract. Published appellate authority recognizes that the Sunshine Act mandates that the *discussion* of employment matters can occur in a private executive session but that any *vote* on such matters is an "official action" that must occur in public after public comment. *See supra* pp. 11–12. Nothing in *Notarianni* should cause this Court to conclude otherwise.

Third, the Defendants rely on an unreported preliminary injunction opinion by the Lackawanna County Court of Common Pleas, in which the court ruled that the termination of multiple County employees by the Board of Commissioners was not "official action." *Maloney v. Lackawanna County Commissioners*, No. 2004 Civil 339, 2004 Pa. Dist. & Cnty. Dec. LEXIS 789, at *4-13, *19-23 (Pa. Com. Pl. Jan. 23, 2004), *aff'd*, 862 A.2d 182 (Pa. Commw. Ct. Oct. 6, 2004). But *Maloney*, like *Notarriani*, is at odds with the binding Commonwealth Court authority discussed above. Indeed, the court in *Maloney* likewise relied on (a) an unwarranted concern about governmental paralysis and (b) the Public School Code backdrop in *Morning Call* and *Preston*. *See id.* at *8, *11-12, *19-20. Further, the *Maloney* Court's statutory analysis was thin. After limiting binding Sunshine Act precedent, without good reason, to situations in which "some other accompanying statute" separately requires that the action take place at a public meeting, the court quickly ticked through the Sunshine Act's "official action" definition and concluded that the plaintiffs could not demonstrate a clear right to relief. *Id.* at *20-22.

What really seemed to drive the court's ruling, however, was its view that the lawsuit before it was inconsistent with the purpose of the Sunshine Act because—unlike here—the plaintiffs were the terminated employees themselves and their lawsuit had "nothing to do with [their] interest in the greater common public's right to know but solely in protecting their own personal employment." *Id.* at * 19-21. As the court emphasized—and also unlike here—there was "not even . . . a request that the County Commissioners be required to follow the Sunshine Act in future proceedings." *Id.* at *20; *see also id.* at *12 ("We do not believe that the Plaintiff's proposed use of the Sunshine Law as a basis for injunctive relief to protect his personal, private employment right is fundamentally sound."). While the motive of the party asserting a Sunshine Act violation should not matter anyway, this is another reason why *Maloney* should not impact the outcome here.

Therefore, the overarching policy and unreported case law on which the Defendants rely do not change the fact that their Preliminary Objections should be overruled as to Counts I and II.

B. The Defendants' Preliminary Objections should be overruled as to Counts III and IV because the Commissioners did not adequately disclose the reason for the February 25, 2020 executive session and because the Commissioners did not give Mr. Beer and Ms. Hudson the opportunity to request that their potential terminations be discussed at an open meeting.

As discussed above, the Sunshine Act permits "discuss[ion]" of employment matters to take place at private, executive sessions. 65 Pa. C.S. § 708(a)(1). But in addition to emphasizing that no "official action" can take place at such executive sessions, 65 Pa. C.S. § 708(c), the Act places two additional relevant conditions on them. First, the Act provides that "[t]he reason for holding the executive session must be announced at the open meeting occurring immediately prior or subsequent to the executive session." 65 Pa. C.S. § 708(b). Second, the Act provides that "the individual employees or appointees whose rights could be adversely

affected may request, in writing, that the matter or matters be discussed at an open meeting." 65 Pa. C.S. § 708(a)(1).

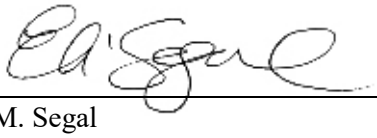
Here, Commissioner Arkoosh did state at the March 5 public Commissioners' meeting that the Commissioners had held an executive session on February 25—but all she said was that they met to discuss "personnel matters." Compl. ¶ 44. While the Plaintiffs allege that those "personnel matters" were the terminations of Mr. Beer and Ms. Hudson and the promotions of Ms. Sweeney and Mr. Nester, neither Commissioner Arkoosh nor either of the other two Commissioners provided any further detail regarding the reason for that executive session or regarding the "personnel matters" discussed at it. This was a legally insufficient explanation of what occurred at the executive session. The Commonwealth Court has explained that by "requiring that the executive session can only be held when reasons are given, the General Assembly intended that the public be able to determine from the reason given whether they are being properly excluded from the session." *Reading Eagle Co. v. Council of City of Reading*, 627 A.2d 305, 307 (Pa. Commw. Ct. 1993). Thus, it naturally follows, "the reasons stated by the public agency must be specific, indicating a real, discrete matter that is best addressed in private." *Id.* at 307. Because "personnel matters" is not "specific" at all, Count III states a claim for a violation of § 708(b) of the Sunshine Act. *See Reading Eagle*, A.2d at 308 (holding that, while 65 Pa. C.S. § 708(a)(4) permits discussions of litigation in executive sessions, "for litigation" was an insufficiently specific explanation); *id.* at 307 ("'To simply say "personnel matters" or "litigation" tells nothing.'" (quoting with approval the Mississippi Supreme Court's explanation of the importance of specificity in *Hinds County Board of Supervisors v. Common Cause of Miss.*, 551 So.2d 107, 111 (Miss.1989)). Instead, the Commissioners were required to specifically explain that they met to discuss and vote to terminate Mr. Beer and Ms. Hudson, and

to discuss and vote to promote Ms. Sweeney and Mr. Nester. Their failure to do so violated the Sunshine Act.

In addition, as the Plaintiffs allege that the Commissioners in fact discussed terminating Mr. Beer and Ms. Hudson at the February 25 execution session on "personnel matters," the Commissioners *also* violated § 708(a)(1) of the Sunshine Act by not providing Mr. Beer and Ms. Hudson the opportunity "to request, in writing" that their potential terminations "be discussed at an open meeting." *See* Compl. ¶ 49 (alleging that Defendants did not inform Mr. Beer and Ms. Hudson about the February 25 executive session prior to its convening or give them an opportunity to request that the matter of their employment be discussed at an open meeting). This provision in the Sunshine Act draws a careful balance between protecting the privacy and reputational rights of employees to have their personnel matters discussed in private, on the one hand, and allowing employees to waive those rights and ensure that the public is fully informed of why an agency is engaging in such employment discussions, on the other hand. The Commonwealth Court's decision in *Easton Area Joint Sewer Authority v. Morning Call*, 581 A.2d 684 (Pa. Commw. Ct. 1990), controls on this issue. There, a newspaper challenged an executive session at which a Sewer Authority discussed potentially terminating an individual without giving the individual an opportunity to request that the discussion take place at an open meeting. *Id.* at 685, 687. The Commonwealth Court agreed with the trial court that this violated the identical precursor to § 708(a)(1) of the current version of Sunshine Act. *Id.* at 687. Because the Commissioners failed to afford Mr. Beer and Ms. Hudson an opportunity to have their employment matters discussed in public, the Commissioners deprived the public of its opportunity to peek behind the curtain and understand what truly motivated the Commissioners' decision. Count IV thus states a claim under § 708(a)(1).

V. RELIEF REQUESTED

For all of these reasons, the Defendants' Preliminary Objections should be overruled.



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Counsel for Plaintiffs

Dated: August 5, 2020

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

MONTGOMERY COUNTY RESIDENTS JULES EPSTEIN; SARA ATKINS; MARC BOOKMAN; MICHAEL CONLEY, CHRISTINE CREGAR; CHRISTA DUNLEAVY; JOHN FAGAN; PETER HALL; CHRIS KOSCHLER; REV. BETH LYON; ELENA MARGOLIS; EMILY ROBB; KARL SCHWARTZ; ADRIAN SELTZER; AND LEONARD SOSNOV, **Plaintiffs,**	:	
v.	:	**No. 2020-04978**
VALERIE ARKOOSH, et al., **Defendants.**	:	

STIPULATION FOR DISCONTINUANCE OF COUNTS V & VI OF PLAINTIFFS' COMPLAINT

The parties, through their undersigned counsel, hereby stipulate and agree as follows:

WHEREAS, the parties agree that the Montgomery County Salary Board ("Salary Board") performs the administrative functions of fixing the number and salaries/compensation of county employees described in 16 P.S. § 1623, that the Salary Board lacks the statutory authority to terminate the employment of county employees or to hire or promote county employees, and that the Salary Board did not act or purport to act on March 5, 2020 to terminate the employment of Dean Beer and Keisha Hudson or to promote Carol Sweeney and Greg Nester; and

WHEREAS, the employment of Dean Beer and Keisha Hudson was terminated and Carol Sweeney and Greg Nester were promoted, effective February 26, 2020, by the Montgomery County Board of Commissioners and not by the Salary Board; and

WHEREAS, the Salary Board henceforth is changing the order of its proceedings for future meetings to permit public comment before considering and voting upon the items on its meeting agenda, rather than soliciting public comment after action on its agenda items;

NOW, THEREFORE, it is **STIPULATED AND AGREED**, and the Court does hereby **ORDER**, as follows:

1. Counts V and VI of Plaintiffs' Complaint are DISCONTINUED, pursuant to Pa. R.C.P. 229, with the parties to bear their own attorneys' fees and costs of suit with respect to said Counts.
2. The Montgomery County Salary Board and Karen Sanchez are DISMISSED as Defendants to this action.
3. Counts I through IV are unaffected by this Stipulation and Order.

Troutman Pepper Hamilton Sanders LLP

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Counsel for Plaintiffs

Montgomery County Solicitor's Office

Philip W. Newcomer, Esquire
Counsel for Defendants

American Civil Liberties Union of PA

Mary C. Roper, Esquire
Counsel for Plaintiffs

APPROVED BY THE COURT:

J.

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA

Montgomery County Residents JULES EPSTEIN, SARA ATKINS, MARC BOOKMAN; MICHAEL CONLEY; CHRISTINE CREGAR; CHRISTA DUNLEAVY; JOHN FAGAN; PETER HALL; CHRIS KOSCHIER; REV. BETH LYON; ELENA MARGOLIS; EMILY ROBB; KARL SCHWARTZ; ADRIAN SELTZER; and LEONARD SOSNOV, ,	
Plaintiffs,	No. 2020-04978
vs.	CIVIL ACTION – LAW
VALERIE ARKOOSH, KENNETH LAWRENCE, JR., JOSEPH GALE, AND KAREN SANCHEZ, in their official capacities; THE MONTGOMERY COUNTY BOARD OF COMMISSIONERS; THE MONTGOMERY COUNTY SALARY BOARD, and MONTGOMERY COUNTY,	
Defendants.	

ORDER

AND NOW, this____ day of _____, 2020, upon consideration of the Defendants' Preliminary Objections to Plaintiffs' Complaint, and any response or opposition thereto, it is hereby ORDERED that Defendants' Preliminary Objections to Counts I, II, III, and IV of Plaintiffs' Complaint are OVERRULED and that Defendants' Preliminary Objections to Counts V and VI are MOOT. Defendants are directed to file an Answer to Plaintiffs' Complaint, other than as to Counts V and VI, within twenty (20) days of the date of this Order.

BY THE COURT:

_____

CERTIFICATE OF SERVICE

I, Martha E. Guarnieri, hereby certify that on August 5, 2020 a true and correct copy of the foregoing Answer to Defendants' Preliminary Objections to Plaintiffs' Compliant was filed electronically and served via e-mail upon the following:

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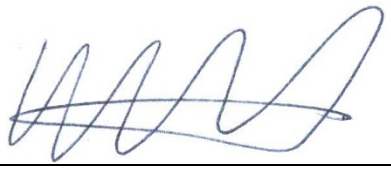

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August 5, 2020