

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA  
CIVIL DIVISION

**Make the Road States, d/b/a Make the Road  
Pennsylvania; Julia Minotto; Tonya Wenger;  
Celine Elizabeth Schrier; Jesse D. Royer; Dean  
Kendall; Eric Gjertsen; and Alex Crawford,**

*Plaintiffs,*

v.

**Christian Leinbach, Kevin Barnhardt, and Michael  
Rivera, in their official capacities; the Board of  
Commissioners of Berks County; and Berks  
County,**

*Defendants.*

No. 21-2696

**PLAINTIFFS' BRIEF IN OPPOSITION TO  
DEFENDANTS' PRELIMINARY OBJECTIONS**

**Questions Involved**

1. Whether Plaintiffs have sufficiently pled a claim under the Sunshine Act that Defendant Commissioners engaged in private deliberations based on a reasonable inference from the circumstances (Count I)?
2. Whether Defendants' assertion that any such private deliberations were covered by executive session is grounds for dismissal of Plaintiffs' claim under the Sunshine Act (Count I)?
3. Whether Plaintiffs have properly pled a claim under the Sunshine Act that Defendants failed to provide a reasonable opportunity for public comment (Count II)?
4. Whether Plaintiffs have properly pled a claim under the Sunshine Act that Defendants failed to provide the substance of the official action in the minutes (Count III)?

### Statement of the Case

Plaintiffs filed their complaint on March 26, 2021. Their complaint challenges the official action taken by Berks County Commissioners on February 25, 2021 surrounding the Berks County Residential Center (“BCRC”). Plaintiffs allege that Defendants have hid their decision-making from the public in violation of the Sunshine Act. Defendants filed Preliminary Objections on April 2, 2021. The Court held a status conference on April 23, 2021, scheduling oral argument on Defendants’ Preliminary Objections for June 7, 2021.

### Argument

This dispute concerns a decision of the Berks County Commissioners “ratifying, confirming, and approving execution of a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the Berks County Residential Center.” Defendants approved this resolution without engaging in *any* public deliberation concerning the content or the merits of the proposal, which implicates millions of dollars in county revenues, a significant intergovernmental agreement, and a highly controversial use of a county-owned facility.

In their monthly meetings, pursuant to the requirements of the Sunshine Law, Defendants routinely reveal information about the matters of county business on which they vote – including matters of significant importance as well as routine and uncontroversial items. However, Defendants handled this matter completely differently, revealing no information whatsoever about the substance of the issue thereby effectively preventing public discussion of it before committing the County to a position.

Given the significance of the issue here, Plaintiffs have alleged, on information and belief, that Defendants engaged in at least some discussion of its merits before reaching their decision. Plaintiffs also allege that, by providing no information about the nature of the proposal, Defendants

failed to offer the public a reasonable opportunity to comment. Finally, Plaintiffs allege that Defendants failed to provide legally adequate minutes concerning their decision. Each of these omissions, Plaintiffs allege, constitutes a violation of the Sunshine Law.

It is well established that for a preliminary objection to succeed “it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections.” *Pa. State Lodge, Fraternal Order of Police v. Dep't of Conservation & Nat. Res.*, 909 A.2d 413, 416 (Pa. Commw. Ct. 2006). In their Preliminary Objections, Defendants have failed to establish “with certainty” that the law will not permit recovery. For the reasons set forth below, Plaintiffs have alleged actionable claims under the Sunshine Act and should be allowed to proceed with their lawsuit.

I. Plaintiffs’ Allegation that Defendant Commissioners Engaged in Private Deliberations Is a Reasonable Inference from the Circumstances (Count I).

Plaintiffs have a good faith reason to allege that Defendant Commissioners engaged in private deliberations. On February 25, 2021, Defendant Commissioners voted 2-1 on Resolution 73.2021. Pls.’ Compl. ¶ 36. This Resolution was: “ratifying, confirming, and approving execution of a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the Berks County Residential Center.” *Id.* Defendant Commissioners did not engage in public deliberation at the meeting about Resolution 73.2021. *Id.* ¶ 37. Nor was there discussion about the subject matter relating to Resolution 73.2021 at any of the prior public meetings. *Id.* ¶ 44.

Resolution 73.2021 was a significant decision. It appears to potentially alter the existing relationship between Berks County and the federal government. This alteration may involve changing the purpose or use of BCRC. It also potentially implicates millions of dollars that Berks County receives from the federal government to operate BCRC. *Id.* ¶ 24. Such a decision is also

of public importance given that BCRC has been the focus of local, statewide, and national public interest, various lawsuits, and media coverage. *Id.* ¶¶ 29-31, 33-34. More specifically, Berks County residents have previously attended County Commissioner meetings to advocate for the termination of the federal contract and the closure of BCRC. *Id.* ¶ 32.

Given the importance of BCRC, it seems likely that the Defendant Commissioners had private deliberations prior to taking official action on Resolution 73.2021 on February 25, 2021. *Id.* ¶ 32. It is hard to imagine that Defendant Commissioners arrived at a decision of this magnitude without *any* discussion of the issues pertaining to the Resolution. For this reason, Plaintiffs alleged that “[o]n information and belief, Defendant Commissioners privately deliberated about the Resolution prior to their vote.” *Id.* ¶ 50.

Since the filing of Plaintiffs’ Complaint, additional information has come to light further supporting Plaintiffs’ allegation about private deliberations. On May 5, 2021, Assistant County Solicitor Cody Kauffman provided a copy of the letter of support to Plaintiffs’ counsel. Pls.’ Response to Defs.’ Prelim. Obj., Exhibit A. The letter of support referenced in Resolution 73.2021 is dated two days before the February 25, 2021 and signed by Defendant Commissioners Leinbach and Rivera.

The Pennsylvania Rules of Civil Procedure expressly permit Plaintiffs to allege facts on information and belief when they are facts outside of their personal knowledge. Pa.R.C.P. No. 1023.1(c). Although Plaintiffs have no way of knowing if such private deliberations took place, they have good reason to suspect that they did. Such facts, therefore, are “likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” Pa.R.C.P. No. 1023.1(c)(3). Plaintiffs, as residents of Berks County, are entitled to engage in discovery to ascertain whether such discussions took place in violation of the Sunshine Act.

Notably, Defendants never deny that such discussions occurred. (They even offer an alternative argument that contemplates that such discussions did occur. Defs.’ Prelim. Obj. ¶ 30.) Rather they argue that a Preliminary Objection must be sustained because Plaintiffs’ allegation about such discussions are “unwarranted inferences from facts, argumentative allegations, or expressions of opinion.” *Id.* ¶ 28.<sup>1</sup> But anyone reading the factual allegation about the Defendant Commissioners’ private deliberations would note that it is neither argumentative nor an expression of an opinion. As set forth above, Plaintiffs’ allegation is a reasonable inference that discussion took place outside of the vote on February 25, 2021. Under the circumstances presented here, it is impossible to say “with certainty” that Plaintiffs’ claim cannot succeed.

II. Defendants’ Alternative Claim about an Executive Session Is Not Grounds for Dismissal (Count I).

Plaintiffs’ claim cannot be dismissed simply because Defendants have alleged a defense. Defendants alternatively claim that if Defendant Commissioners did engage in deliberations, such deliberations took place during nonpublic executive sessions. Defs.’ Prelim. Obj. ¶¶ 29-30. Defendants are free to assert this claim as a regular defense. Yet as with any other defense, Plaintiffs should have an opportunity to contest it.

The Sunshine Act provides that certain deliberations by elected officials can be nonpublic if they qualify for executive sessions. 65 Pa.C.S. § 707(a). It delineates a set of seven categories of information that can be the subject of executive sessions. 65 Pa.C.S. § 708(a)(1)-(7). Further, it sets forth a specific procedure that must be followed for executive sessions. 65 Pa.C.S. § 708(b).

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<sup>1</sup> Defendants cite two cases that have the quoted language. Defs. Prelim. Obj. ¶ 28. These cases are otherwise inapposite. See, e.g., *Donegal Mut. Ins. Co. v. Stroker*, 15 Pa. D. & C. 5th 245, 247 (CP 2010 Monroe County) (granting preliminary objections because “defendants are merely stating all possible affirmative defenses without determining if they truly have a basis in this case”); *Myers v. Ridge*, 712 A.2d 791, 794 (Pa. Cmwlth. 1998) (dismissing a *pro se* action in mandamus related to the denial of parole for failing to plead sufficient facts for due process, ex post facto, and equal protection violations).

Plaintiffs dispute that deliberations concerning Resolution 73.2021 fit within any of these specified categories. Nor does Defendants' claim that ICE ordered them to keep the letter of support and white paper proposal "confidential" fit within any of the delineated categories. *Compare* Defs.' Prelim. Obj. ¶ 31 with 65 Pa.C.S. § 708(a)(1)-(7). Further, Plaintiffs contest that Defendants have met the procedural requirements for an executive session. In fact, the Sunshine Act admonishes that executive sessions are not to be "used as subterfuge to defeat" the open government requirements. 65 Pa.C.S. § 708(c).

As with any defense, Defendants will need to prove the validity of their defense. Plaintiffs should also have the opportunity to engage in discovery in order to test the validity of Defendants' defense. Defendants appear to confuse the standard for preliminary objections believing that their allegations of facts, rather than Plaintiffs' allegations, should be taken as true. *Compare Pa. State Lodge, Fraternal Order of Police*, 909 A.2d at 416. As Defendants' defense cannot be taken as true at this juncture, Plaintiffs' claim should not be dismissed.

III. Defendants Failed to Provide a Reasonable Opportunity for Public Comment (Count II).

Plaintiffs allege there was no "reasonable opportunity" for the public to comment on Resolution 73.2021. 65 Pa.C.S. § 710.1(a). The key to Plaintiffs' claim is the word "reasonable." Given the lack of public deliberation about the Resolution, the only substantive content shared with the public was that approval had been given for "a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the Berks County Residential Center." Pls.' Compl. ¶ 36. Beyond this one single statement, there was no further information provided about the contents of the letter of support or the white paper proposal at the February 25, 2021 meeting.

Imagine a member of the public trying to comment on the above Resolution in the absence of *any* information about the content of the proposal in question. Is the letter of support about altering the contract between Berks County and the federal government? Is the white paper proposal about expanding BCRC? Alternatively, does the proposal change what population would be detained at BCRC? Given the one cryptic sentence provided by Defendants, any member of the public would be hard pressed to understand the subject matter of the Resolution. The public, therefore, could not have had a “reasonable opportunity” to comment because there was no way they could understand the subject matter of the Resolution. What is more, Defendants have revealed that the obfuscation is intentional. In effect, they claim that the subject matter of the Resolution is confidential and cannot be shared with the public. *Id.* ¶¶ 54-64.

Defendants’ preliminary objection does not directly address Plaintiffs’ claim. Defs.’ Prelim. Obj. ¶¶ 32-38. Defendants simply argue that they have met the requirements of the statute by having afforded an opportunity for public comment at the February 25, 2021 meeting. *Id.* ¶ 37. The gravamen of Plaintiffs’ claim is not whether or not this opportunity for public comment existed. Rather, Plaintiffs’ claim is premised on whether this opportunity was reasonable. Defendants do not attempt to counter Plaintiffs’ argument about what is reasonable or even claim that Plaintiffs’ reading of the statute is somehow incorrect or unwarranted. For this reason, Defendants’ argument to dismiss Count II must fail.

IV. Defendants Failed to Provide the Substance of the Official Action in the Minutes.

Plaintiffs allege that Defendants failed to comply with the requirement that they keep written minutes of “[t]he substance of all official actions.” Pls.’ Compl. ¶¶ 86-95. The operative word here is “substance.” 65 Pa.C.S. § 706.3. While the statute itself provides no definition for “substance,” Black’s Law Dictionary defines “substance” as the “essence; the material or essential

part of a thing, as distinguished from ‘form.’” *Substance*, BLACK’S LAW DICTIONARY (6th ed. 1990).

Here, Defendants failed to provide “material” or “essential” information about Resolution 73.2021. The only information provided was:

73.2021        Adopt a resolution ratifying, confirming, and approving execution of a letter of support to the U.S. Immigration and Customs Enforcement for white paper proposal for the Berks County Residential Center.

*See Commissioners’ Board Meeting Minutes* (Feb. 25, 2021) attached as Exhibit A. The minutes did not otherwise provide any information about the subject matter of either the letter of support or the white paper proposal.

In contrast, other resolutions from the February 25, 2021 minutes provide the kind of “material” or “essential information” that would inform the public about the material substance of such resolutions. Exhibit A. A few examples are:

66.2021        Adopt a resolution authorizing Christian Y. Leinbach, Chair, to execute the Memorandum of Understanding between the County of Delaware and SEPA Regional Partners, of which Berks County is a member, for purposes of setting forth the terms and conditions with respect to the configuration, installation, and maintenance of a software application and related hardware that will be used to establish bi-directional interoperability between the SEPA Partners Computer Aided Dispatch system to assist with delivery of 911 and disaster recovery services to the public.

75.2021        Adopt a resolution authorizing Christian Y. Leinbach, Chair, to execute the Amendment to County Application for GEMS Program Funds to the Pennsylvania Department of State for reimbursement in the amount of \$65,670 for the purchase of privacy screens.

Plaintiffs, therefore, argue that the Sunshine Act requires substance in the minutes themselves about the “material” or “essential information” about the Resolution 73.2021.<sup>2</sup> As set forth above,

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<sup>2</sup> Contrary to Defendants’ assertion, Plaintiffs are not arguing that Defendants would have had to attach the letter of support or white paper proposal referred to in Resolution 73.2021 as part of the minutes. Defs.’ Prelim. Obj. ¶ 45.

Defendants have crafted minutes that obfuscate the substance of the official action, which they themselves have claimed must be kept confidential. Pls.’ Compl. ¶¶ 54-64.

In their Preliminary Objections, Defendants attempt to argue that they complied with the Sunshine Act requirement as their minutes record the vote on Resolution 73.2021. Defs.’ Prelim. Obj. ¶ 46. The vote in and of itself, however, cannot constitute “[t]he substance of [the] official action[.]” 65 Pa.C.S. § 706.3. Plaintiffs have properly alleged that Defendants have failed to comply with the Sunshine Act because the public cannot understand what the actual purpose of the vote is from the minutes. For this reason, Defendants’ preliminary objection should be denied with respect to Count III.

### **Conclusion**

**WHEREFORE**, Plaintiffs respectfully request that this Honorable Court overrule Defendants’ Preliminary Objections.

Dated: May 19, 2021

/s/ Jennifer J. Lee

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**CERTIFICATE OF SERVICE**

I, Roshonda Scipio, hereby certify that on this May 19, 2021, a copy of the foregoing was served upon the following counsel via electronic notification of the Berks County Electronic Court Filing system:

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