



**NEW JERSEY LAW REVISION COMMISSION**

**Final Report Regarding  
the Open Public Meaning Act**

**N.J.S. 10:4-6 *et seq.***

**December 07, 2020**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.  
Please consult the New Jersey statutes in order to determine the law of the State.

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## Executive Summary

In *Kean Federation of Teachers v. Morell*, the trial court, the Appellate Division, and ultimately the New Jersey Supreme Court addressed issues arising from the Open Public Meetings Act (the “OPMA” or the “Act”).<sup>1</sup> The Courts considered the OPMA’s notice requirement for personnel issues to be discussed by a public body<sup>2</sup> and the time within which a public body is required to release its minutes, as well as the appropriate remedy for a failure to make these minutes “promptly available” to the public.<sup>3</sup> In the time since the Court issued its opinion, there has been legislative activity in this area.<sup>4</sup>

This Report summarizes the developments in this area of the law<sup>5, 6, 7</sup> and recommends the conclusion of the Commission’s work in the area.

## 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.<sup>8</sup> The September minutes were not made available to the public until ninety-four days after the meeting, and the December minutes were made available to the public fifty-eight days after that meeting.<sup>9</sup>

The plaintiffs further alleged that the Board terminated a faculty member, Valera Hascup, without sending her the notice required by *Rice v. Union Cnty. Reg’l High Sch. Bd. of Ed.*<sup>10, 11</sup> The defendants responded that the Board’s vote not to reappoint the plaintiff Hascup to her position occurred during the public portion of its meeting, and that a *Rice* notice was not required to be sent to the plaintiff.<sup>12</sup>

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<sup>1</sup> *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).

<sup>2</sup> *Id.* at \*5.

<sup>3</sup> *Id.* at \*5.

<sup>4</sup> See discussion of pending legislation, *infra*.

<sup>5</sup> See Memorandum from Samuel M. Silver, Counsel on the Open Public Meetings Act to the New Jersey Law Revision Commission \*1 (Jul. 09, 2018) (on file with the Commission). See NEW JERSEY LAW REVISION COMMISSION (2018) ‘Open Public Meetings Act’. *Minutes of NJLRC meeting Jul. 19, 2020*, Newark, New Jersey.

<sup>6</sup> *Kean Fed’n of Tchrs. v. Morell*, 233 N.J. 566 (2018).

<sup>7</sup> S379, 2020 Leg., 219<sup>th</sup> Leg. (N.J. 2020) identical legislation A748, 2020 Leg., 219<sup>th</sup> Leg. (N.J. 2020); see also, A1865, 2020 Leg., 219<sup>th</sup> Leg. (N.J. 2020).

<sup>8</sup> *Kean Fed’n*, 448 N.J. Super. at 524-525.

<sup>9</sup> *Id.* at 525.

<sup>10</sup> *Id.*

<sup>11</sup> *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*.”

<sup>12</sup> *Kean Fed’n of Tchrs. v. Morell*, No. A-84, 2018 WL 3062207 \*7 (N.J. June 21, 2018).

The trial court granted summary judgment in favor of plaintiffs as to the defendant's untimely dissemination of the meeting minutes to the public.<sup>13</sup> Further, in an attempt to address future violations of the OPMA, the trial court issued a permanent injunction requiring the Board to make its minutes available to the public within the 45 days following a meeting.<sup>14</sup> The 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 portion of the meeting.<sup>15</sup> Furthermore, the trial court declined to void the Board's decision to terminate the plaintiffs.<sup>16</sup> The Board appealed the trial court's decision and a cross-appeal was filed by the plaintiffs.<sup>17</sup>

• *The Appellate Division*

The Appellate Division considered two issues.<sup>18</sup> First, the Court addressed whether the Board violated the OPMA when it failed to make meeting minutes "promptly available," to members of the public.<sup>19</sup> After a review of the record, the Appellate Division affirmed the decision of the trial court that the Board's production of its meeting minutes was not timely.<sup>20</sup> Although the term "promptly available" is not defined by the statute, the Court found that "[t]he words 'promptly available' in N.J.S. 10:4-14 require public bodies to make their meeting minutes available to in a manner that fulfills the Legislature's commitment to transparency in public affairs."<sup>21</sup> 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.<sup>22</sup>

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 plays in [the reappointment] process is approving the report of the subcommittee in public session."<sup>23</sup>

Disturbed by the Board's reliance on the subcommittee's report when considering issues of reappointment, the Court said that "[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."<sup>24</sup> The Court continued, "[a] silent unexplained vote to approve a list of preapproved candidates in public session gives

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<sup>13</sup> *Id.* at \*1.

<sup>14</sup> *Id.* at \*8.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Kean Fed'n of Tchrs v. Morell*, 448 N.J. Super. 520, 524 (App. Div. 2017)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 533-534.

<sup>21</sup> *Id.* at 531.

<sup>22</sup> *Id.* at 545.

<sup>23</sup> *Id.* at 540.

<sup>24</sup> *Id.*

the impression that the Board colluded to circumvent the OPMA's requirements."<sup>25</sup>

The Court expanded the notice requirements set forth in *Rice*. To “encourage, promote, and enhance the public’s participation in the democratic process”, the Court determined that

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.’<sup>26</sup>

The Court stated that “...*Rice* notices must be provided in advance of any meeting at which a personnel decision may occur.”<sup>27</sup> 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.”<sup>28</sup>

- *The New Jersey Supreme Court*

The New Jersey Supreme Court granted the Board’s petition for certification.<sup>29</sup> The Court observed that, “[t]he essential facts [of this case] are undisputed and the issues ... are questions of law.”<sup>30</sup> The Court considered the following issues: (1) the extent of a public body’s notice obligations under the OPMA, and whether the *Rice* notice requirement for the personnel exception applied; and (2) the timing of the release of minutes of public meetings and the appropriate remedy for a public body’s failure to make its meeting minutes promptly available.<sup>31</sup>

## Discussion

- *Notice under OPMA*

The OPMA generally requires the meetings of public bodies to be conducted in open session.<sup>32</sup> The Legislature recognized, however, that there are certain circumstances under which a public body should be permitted to enter into closed session discussions.<sup>33</sup> 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.

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<sup>25</sup> *Id.* at 544.

<sup>26</sup> *Id.* at 543. (Emphasis original).

<sup>27</sup> *Id.* at 544.

<sup>28</sup> *Id.*

<sup>29</sup> *Kean Fed’n of Tchrs v. Morell*, 230 N.J. 524 (2017).

<sup>30</sup> *Kean Fed’n of Tchrs v. Morell*, 233 N.J. 566, 572-573 (2018).

<sup>31</sup> *Id.* at 574.

<sup>32</sup> *Id.* at 571, citing N.J. STAT. ANN. § 10:4-12(a) (West, 2020).

<sup>33</sup> *Id.*

When a public body is considering certain employment matters, it may exclude the public from that portion of the meeting. N.J.S. 10:4-12(b)(8) 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...<sup>34</sup>

The decision of a public body to exclude members of the public from a discussion of those matters, however, may be overridden by what has come to be known as the “personnel exception”. 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”<sup>35</sup> and elect to have the employment issue discussed in a public forum.<sup>36</sup> To effectuate the right to override the public body’s decision to institute a closed session discussion of an individual’s employment matter the Appellate Division, in *Rice*, held that these individuals are entitled to notice.<sup>37</sup>

In *Kean Federation*, the Supreme Court declined to adopt the Appellate Division’s expansion of the notice requirements.<sup>38</sup> The 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. [emphasis in original]”<sup>39</sup> 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.”<sup>40</sup> 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.”<sup>41</sup> In *Kean Federation*, the discussions concerning plaintiff’s employment occurred during the public portion of the Board meeting, obviating the need for a *Rice* notice.

Accordingly, the Supreme Court reversed the decision of the Appellate Division as to the

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<sup>34</sup> N.J. STAT. ANN. § 10:4-12(b)(8) (West 2020).

<sup>35</sup> *Kean Fed’n*, at 572.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, citing *Rice v. Union Cnty. Reg’l High Sch. Bd. of Educ.*, 155 N.J. Super. 64 (App. Div. 1977).

<sup>38</sup> *Id.* at 586.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 587.

issuance of *Rice* notices and the voiding of the personnel actions taken by the Board.<sup>42</sup>

- *Minutes of Public Meetings*

The minutes of public meetings and their availability to the public is addressed in the OPMA<sup>43</sup> at N.J.S. 10:4-14, which provides, in pertinent part:

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....

The Act does not define the term “promptly available.”<sup>44</sup> Prior to *Kean Federation*, the Supreme Court had not addressed the meaning of this term,<sup>45</sup> and the legislative history concerning the phrase is scant.<sup>46</sup>

In the absence of dispositive legislative history, the Supreme Court elected to view the term’s application in context,<sup>47</sup> observing that, “[t]he Legislature’s choice of the phrase implicitly requires individual assessments as specific facts unfold in matters.”<sup>48</sup> The parties and the Court agreed with the Appellate Division’s fact-sensitive, “case-by-case” analysis.<sup>49</sup>

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.”<sup>50</sup> In articulating the standards for review of these matters, the Court indicated that “reasonableness must remain the touchstone when assessing the promptness of a public entity’s action in this area.”<sup>51</sup> Unlike the Appellate Division, the Supreme Court declined to establish a specific timeframe for the calling of meetings, or the production of minutes, indicating that this remains the prerogative of the body entrusted with running the public entity.<sup>52</sup>

In reversing this aspect of the Appellate Division’s decision, the Court cautioned public bodies that, “minutes should be released within days of their approval, unless truly extraordinary circumstances prevent their availability to the public.”<sup>53</sup>

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<sup>42</sup> *Id.* at 588-589.

<sup>43</sup> N.J.S. 10:4-14.

<sup>44</sup> *Kean Fed’n*, at 589.

<sup>45</sup> *Id.* at 590.

<sup>46</sup> *Id.* at 591.

<sup>47</sup> *Id.* at 592.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 593.

## Pending Bills

In the last several legislative sessions, both the Senate and the Assembly have introduced bills to modify the OPMA.<sup>54</sup> 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.”<sup>55</sup>

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.<sup>56</sup> The bill was not enacted during the 2018-2019 legislative session but was reintroduced in the 2020-2021 legislative session.<sup>57</sup> A number of the 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*

S379 and A748 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.<sup>58</sup> 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*

These bills also formalize the notice requirements established in *Rice v. Union Cnty. Reg. High Sch. Bd. of Ed.*<sup>59</sup> In addition, the bills significantly expand the number of individuals who will be required to receive *Rice* notices.

S379 and A748 do not alter the authority of a public body to enter into a closed session to

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<sup>54</sup> See S1045, 2016 Leg., 217<sup>th</sup> Leg. (N.J. 2016) and A2699, 2016 Leg., 2017<sup>th</sup> Leg. (N.J. 2016); see also, S106, 2018 Leg., 218<sup>th</sup> Leg. (N.J. 2018) and A1019, 2018 Leg., 218<sup>th</sup> Leg. (N.J. 2018), introduced Jan. 09, 2018; and see S379, 2020 Leg., 219<sup>th</sup> Leg. (N.J. 2020); see also, A1865, 2020 Leg., 219<sup>th</sup> Leg. (N.J. 2020) and S379, 2020 Leg., 219<sup>th</sup> Leg. (N.J. 2020), introduced Jan. 14, 2020.

<sup>55</sup> *Id.*

<sup>56</sup> *Statement to S106*, 2018 Leg., 218<sup>th</sup> Leg. \*1 (N.J. June 14, 2018).

<sup>57</sup> S379, 2020 Leg., 219<sup>th</sup> Leg. (N.J. 2020) was introduced on Jan. 14, 2020. The identical bill, A748, was introduced on the same day in the Assembly.

<sup>58</sup> *Id.* The proposed modifications to N.J.S. 10:4-14(b), set forth in S379, 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.

<sup>59</sup> *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*.”

discuss any of the topics enumerated in N.J.S. 10:4-12(b)(1)-(9). The bills 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].<sup>60</sup>

With respect to the type of notice required for a public body to discuss the aforementioned topics during a closed session, S379 and A748 provide that:

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....<sup>61</sup>

This 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. The bills, however, require that employees **and** every “adversely affected individual” must be given notice of any proposed, closed session discussions involving the subject’s employment.<sup>62</sup> This requirement, read literally, could require 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; spouses, ex-spouses, children, mortgage companies, and landlords could all arguably be adversely affected by the public body’s decision concerning the subject’s employment.

The bills partially adopt the expansion of *Rice* and N.J.S. 10:4-12(b)(8) articulated by the Appellate Division in *Kean Federation* and rejected by the Supreme Court.

- A1865

In addition to S379 and A748, A1865 was also introduced this session. If enacted, it would eliminate the requirement that public bodies discuss prospective employee matters in a public meeting when requested by the employee.<sup>63</sup>

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<sup>60</sup> S379, 2020 Leg., 219<sup>th</sup> Leg. at 9.

<sup>61</sup> *Id.*

<sup>62</sup> S379, 2020 Leg., 219<sup>th</sup> Leg. at 9.

<sup>63</sup> A1865, 219<sup>th</sup> Leg. (N.J. 2020).



On January 14, 2020, S379 was referred to the State Government, Wagering, Tourism and Historic Preservation Committee.<sup>64</sup> On the same date, A748 and A1865 were referred to the State and Local Government Committee.<sup>65</sup>

### **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" was the key to assessing the promptness of a public entity's action in this area. S379 and A748 appear to strike a balance between the public's right to information and a public entity's autonomy and logistical flexibility.

The Supreme Court also 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. For a second consecutive session, the Legislature has introduced bills to expand the group of individuals who are to receive notice pursuant to N.J.S. 10:4-12(b)(8).

The Commission has long considered its responsibilities to include bringing matters to the attention of the Legislature. Since the Legislature is actively working in this area, Staff recommends that the Commission formally conclude its work.

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<sup>64</sup> See <https://www.njleg.state.nj.us/bills/BillView.asp> (last visited Apr. 20, 2020).

<sup>65</sup> *Id.*