

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Craig McCoy, Joseph DiStefano, and | : | |
| The Philadelphia Inquirer | : | |
| Petitioners | : | |
| v. | : | No. _____ |
| | : | |
| Public School Employees' Retirement System | : | |
| Respondent | : | |
| | : | |
| and | : | |
| AON INVESTMENTS, USA INC, | : | |
| Direct Interest Participant | : | |
| | : | |
| and | : | |
| | : | |
| BUCK GLOBAL, LLC, | : | |
| Direct Interest Participant | : | |

PETITION FOR REVIEW

Craig McCoy and Joseph DiStefano, reporters with the *Philadelphia Inquirer*, petition for review of the December 6, 2021 final determination of the Office of Open Records (“OOR”) docketed at AP 2021-1856 and in support of their petition assert:

STATEMENT OF JURISDICTION

1. This Honorable Court has de novo appellate jurisdiction over this appeal from the OOR’s Final Determination pursuant to 65 P.S. § 1301(a) of the Right to Know Law (RTKL), Rule 1511 of the Pennsylvania Rules of Appellate Procedure and Section 763(a)(2) of the Judicial Code, 42 Pa.C.S. Sec. 763(a)(2).

PARTIES

2. Petitioners are Craig McCoy and Joseph DiStefano, reporters with the *Philadelphia Inquirer* (hereinafter “Petitioners”). The *Philadelphia Inquirer*, a for-profit public benefit corporation owned by the non-profit Lenfest Institute, produces Pulitzer Prize-winning journalism that changes lives and leads to lasting reforms. The Inquirer’s mailing address is P.O. Box 8263 Philadelphia, PA 19101.
3. Respondent is the Public School Employees’ Retirement System (“PSERS”), a Commonwealth agency as defined in Section 102 of the RTKL and subject to the RTKL pursuant to section 301.
4. Aon Investment USA, Inc. was granted Direct Interest Participant status by the OOR in the December 6, 2021 Final Determination.
5. Buck Global, LLC was granted Direct Interest Participant status by the OOR in the December 6, 2021 Final Determination.

GOVERNMENTAL UNIT THAT MADE DETERMINATION SOUGHT TO BE REVIEWED

6. The OOR is a governmental unit established to receive and determine appeals of agency RTKL decisions pursuant to Sections 1101 and 1310 of the RTKL.

GENERAL STATEMENT OF MATERIAL FACTS

7. On May 19, 2021, Petitioners submitted an enumerated Right to Know Law request of seven items to PSERS seeking, among other things, written communications between PSERS staff and three consultants (ACA, AON and Buck Global) regarding fund investment performance, the “risk-sharing” calculation, and the acknowledgment of PSERS’s error in that calculation (collectively, the “Consultant Records”).
8. Thereafter, on August 25, 2021, PSERS produced some items, denied some items, and asserted that a portion of the request was insufficiently specific. PSERS claimed that all the Consultant Records constituted “records relating to a criminal investigation” and “records relating to a noncriminal investigation,” and contended that the items were exempt from disclosure.
9. On September 3, 2021, Requesters appealed to the OOR. Although Petitioners originally sought seven items, on appeal they narrowed the scope of OOR’s review to Items 3 through 5. Specifically, Requesters appealed PSERS’ decision to withhold all the Consultant Records from disclosure.
10. On October 18, 2021, the OOR issued a final determination granting in part, denying in part, and dismissing as moot in part, the appeal. Among other findings, OOR noted that because PSERS failed to address its claim that the Consultant Records are “criminal” investigative records, OOR deemed the argument abandoned. *Id* 4, n.2.

11. On October 27, 2021, Requesters petitioned the OOR for reconsideration of its final determination, asking the agency to find that PSERS's actions through December 2020 were not covered by the noncriminal investigation exemption to the RTKL.
12. OOR granted reconsideration on November 8, 2021, specifically requesting that the parties focus their arguments on whether the noncriminal exemption applied to Consultant Records generated prior to the commencement of a formal investigation of PSERS in March 2021.
13. On December 6, 2021 the Office of Open Records issued a Final Determination that granted in part, denied in part and dismissed as moot in part the Requesters' petition for reconsideration. The OOR determined that PSERS was required to perform a good faith search for written communications between PSERS and each the three firms related to the identification or discovery of the rate calculation error for the time period January 2020 to the date the summer 2020 investigation commenced and provide all responsive records within thirty days. OOR allowed PSERS to redact Excel formula and trade secrets.

DETERMINATION FOR WHICH REVIEW IS SOUGHT

14. Requesters seek review of the OOR's December 6, 2021 Final Determination, Docket No. AP 2021-1856. A true and correct copy of the OOR's December 6, 2021 Final Determination is attached as Exhibit A.

GENERAL STATEMENTS OF OBJECTIONS TO THE DETERMINATION

15. The OOR erred by determining that parts of the request were not sufficiently specific.
16. The OOR also erred by determining that the noncriminal investigative records exemption applied to communications with Aon and Buck following the commencement of the 2020 review of its investment performance.
17. Furthermore, the OOR erred in determining that the affidavit PSERS submitted from Evelyn Williams was sufficient to demonstrate that PSERS began investigating its performance due to market volatility caused by the COVID-19 pandemic, and not the required annual valuations, or the actuarial investigation performed every five years.
18. In addition, the OOR erred by allowing PSERS to covert the agency's "routine, cyclical, legislatively mandated inquiries" into exempt material by retroactively mislabeling them as "investigative."

STATEMENT OF THE RELIEF SOUGHT

WHEREFORE, Petitioners respectfully request that this Honorable Court reverse the December 6, 2021 Office of Open Records determination and order the release of the requested records.

Respectfully submitted,
/s/ Paula Knudsen Burke

Paula Knudsen Burke
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Dated: January 5, 2022

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke

Signature: /s/ *Paula Knudsen Burke*

Attorney No.: 87607

PROOF OF SERVICE

I hereby certify that I have served the foregoing document, Petition for Review, upon the persons listed on the date and in the manner indicated below, which satisfies the requirements of Pa.R.A.P. 121:

Notification by email addressed as follows:

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Dated: January 5, 2022

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