

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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No. 1083 C.D. 2023  
No. 1092 C.D. 2023  
No. 1207 C.D. 2023

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DEPARTMENT OF EDUCATION,  
Petitioner,

v.

WYATT MASSEY and SPOTLIGHT PA  
(OFFICE OF OPEN RECORDS),  
Respondent.

PENNSYLVANIA STATE UNIVERSITY,  
Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF AGRICULTURE,  
WYATT MASSEY, AND SPOTLIGHT PA  
(OFFICE OF OPEN RECORDS),  
Respondents

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**BRIEF OF PETITIONER DEPARTMENT OF EDUCATION**

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*Appeal of the Final Determination of the Office of Open Records Issued on  
September 1, 2023, OOR Docket No. AP 2023-1492*

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**STATEMENT OF JURISDICTION**

This Honorable Court has appellate jurisdiction over this matter under section 1301(a) of the Right-to-Know Law, 65 P.S. § 67.1301(a), and section 763(a)(2) of the Judicial Code, 42 Pa.C.S. § 763(a).

## **ORDER OR OTHER DETERMINATION IN QUESTION**

This appeal concerns the final determination of the Office of Open Records (OOR) issued on September 1, 2023, in *Wyatt Massey v. Pa. Dep't of Education*, OOR Docket No. AP 2023-1492. In the final determination in question, OOR concluded:

For the foregoing reasons, the appeal is granted in part and denied in part, and the Department is required to provide all records responsive to Items 3 and 4 of the Request within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 1, 2023**

DEPUTY CHIEF COUNSEL  
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## **STATEMENT OF THE SCOPE AND STANDARD OF REVIEW**

In an appeal under the Right-to-Know Law from a final determination of the Office of Open Records, this Court exercises *de novo* review. This Court's scope of review is plenary respecting both questions of fact and law. Thus, this Court reviews OOR's orders independently and may substitute its own findings of fact for those of OOR. *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013).

**STATEMENT OF THE QUESTIONS INVOLVED**

I. Does PDE have possession, custody, or control of the documents hosted on “Diligent,” an information system purchased and maintained by a non-agency entity for the conduct of that entity’s business?

Answer Below: Yes.  
Suggested Answer: No.

II. Does PDE have constructive possession of the documents hosted on Diligent?

Answer Below: Yes.  
Suggested Answer: No.

III. Is PDE required to create a document which it has no legal, physical or electronic means to reproduce?

Answer Below: Yes.  
Suggested Answer: No.

## STATEMENT OF THE CASE

On May 18, 2023, the Pennsylvania Department of Education (PDE) received a Right-to-Know Law (RTKL) request from Wyatt Massey (Requester). The RTKL request seeks the following four items:

“1) An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Eric Hagarty’s role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.

2) An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Khalid Mumin’s role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.

3) An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.

4) An electronic copy of all materials hosted on Diligent in relation to the November 16, 2022, meeting of Penn State’s Academic Affairs, Research and Student Life committee, of which Mr. Hagarty was a member.”

(R. 20a-21a).

By letter dated May 25, 2023, PDE advised Requester that it would need up to an additional 30 days to respond as permitted under 65 P.S. § 67.902(b). By letter dated June 26, 2023, PDE issued a Final Response. PDE’s Final Response informed the Requester that “PDE does not have possession, custody, or control of the

requested records. It is not a denial of access when an agency does not possess records and [there is no] legal obligation to obtain them.” (R. 17a).

On July 5, 2023, Requester filed with the OOR a timely appeal of PDE’s Final Response (R. 10a-21a). PDE opposed Requester’s appeal. Before the OOR, PDE argued that it does not have possession, custody, or control of the requested documents because the documents reside on a computer system controlled by Penn State University (PSU), PDE does not have the ability to print or download any documents from the PSU system, and PDE never received or created any physical or electronic versions it could produce. (R. 33a-114a).

In its Final Determination dated September 1, 2023, the OOR granted Requester’s appeal in part and denied Requester’s appeal in part. The OOR held that PDE is not required to create a document in response to a RTKL request and therefore PDE is not required to create the screenshots of the folders and files as requested in Items 1 and 2 of the Request. However, the OOR held that PDE has possession, custody, and control of the records responsive, and by doing so holds that PDE has constructive possession of Items 3 and 4 of the Request under *Bagwell v. Pennsylvania Department of Education*, 76 A.3d 81 (Pa. Cmwlth. 2013) and the OOR ordered PDE to provide such records by October 1, 2023. PDE timely filed a Petition for Review in the appellate jurisdiction of this Honorable Court. PDE

respectfully requests that the Court reverse the OOR's Final Determination and affirm PDE's denial of the RTKL request.

## SUMMARY OF THE ARGUMENT

In the present matter, the OOR erred in holding that this matter is controlled by *Bagwell*, and in finding that PDE has possession, custody, or control of the requested documents.

This case is clearly distinguishable from *Bagwell* because PDE does not have custody, possession, or control of the documents requested in the instant matter; whereas in *Bagwell*, PDE admitted that it had physical possession of the records requested therein. The documents sought in the instant matter are Pennsylvania State University Board of Trustees (Board) documents that reside on an online portal tool called Diligent, maintained by PSU through its Board of Trustees Office (Board Office). The Board, with the assistance of other PSU staff members as appropriate, maintains and controls all aspects of Diligent and the documentation residing thereon, including the ability to access, print, and download any documentation. The Board does not allow, and physically and electronically prohibits, ex-officio, voting members of the Board, including PDE former Acting Secretary Hagarty and current Secretary Mumin, to print or download any documents from Diligent. The OOR erred in ruling that *Bagwell* controls Items 3 and 4 of the Request as such documentation was not in PDE's possession, custody, or control. Furthermore, the OOR erred in its ruling as the ruling implies that PDE has constructive possession

of the requested documents, despite the fact that PDE does not have constructive control of such documents.

The OOR correctly ruled that PDE has met its burden of proof that it does not possess the screenshots responsive to Items 1 and 2 of the Request, and correctly held that, pursuant to 65 P.S. § 67.705, PDE is not required to create a record (i.e., a screen shot) to respond to the Request. However, the OOR's ruling that PDE must provide the documentation requested in Items 3 and 4 of the Request is contrary to the OOR's ruling that PDE is not required to create the screenshots responsive to Items 1 and 2 of the Request. PDE has no means to physically or electronically produce the documents in response to Items 3 and 4 of the Request and the only means for PDE to comply with the Request is to create screenshots, which it is not statutorily required to do under the RTKL. The OOR erred in ordering PDE to create a document which it is not legally required to do.

## ARGUMENT

### I. THE OOR ERRED IN FINDING THAT PDE HAS POSSESSION, CUSTODY, OR CONTROL OF THE DOCUMENTS HOSTED ON DILIGENT.

OOR erred when it ruled that PDE has possession, custody, or control of the documents requested in Items 3 and 4 of the Request.

The matter before this Court is clearly distinguishable from *Bagwell* and thus *Bagwell* is not controlling in the instant matter.

In *Bagwell* the requester sought the following:

“copies of letters, emails, reports and memorand[a] received by Secretary of Education Ronald J. Tomalis that were: (1) received by Secretary Tomalis in April, May, June and July of 2012; (2) sent to Secretary Tomalis during his official capacity as a member of [PSU]'s Board of Trustees; and, (3) sent by any of the below-mentioned individuals who are associated with [PSU] . . . .”

*Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 83 (Pa. Cmwlth. 2013).

In *Bagwell*, PDE did not deny that it had possession of the documentation sought by the requester therein, importantly the Court found it significant that “the Department did not challenge whether the records were “of” the Department or contest possession of the records.” *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 83 (Pa. Cmwlth. 2013). Further, in *Bagwell* “the Department provided some responsive records and additional records in redacted form.” *Id.* at 84. But nevertheless, PDE denied the request in *Bagwell* based on various exemptions available under the RTKL and, for the first time on appeal argued that the documents were not records

of PDE. *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 83 (Pa. Cmwlth. 2013). Because PDE admitted it had possession of the documentation responsive to the request in *Bagwell*, the *Bagwell* Court had no need to address, and did not address, the issue of whether PDE was in possession, custody, or control of the requested records.

Here, however, the Requester seeks documents that are not and have never been in the possession of PDE. PDE does not and has not provided any documentation to the Requester as it does not possess such records. Rather, such records reside on an online portal tool called Diligent, which is maintained by PSU through its Board Office. Therefore, *Bagwell* is both factually and legally distinguishable from the instant matter.

Indeed, Requester does not even dispute that PDE does not have any hard copy versions of any documentation responsive to the Request. Nor do the parties dispute that the requested records are not maintained on any electronic system purchased or maintained by or for PDE. Rather, Requester appears to argue that PDE is in possession, custody, or control of PSU's records because the Secretary was permitted to use Diligent for the conduct of PSU business. Such assertion fails.

Diligent is an online portal tool utilized by the Board to facilitate secure digital communication with the Board. (R. 42a). PSU utilizes Diligent to securely share board meeting agendas, meeting materials, and other documents. *Id.* Any materials shared through Diligent remain within Diligent's online portal. PDE's former Acting

Secretary Hagarty and current Secretary Mumin have only read-only access to the materials through the Diligent online portal. (R. 42a-43a). PSU maintains control over all aspects of Diligent, including control over access, printing, and downloading of documents, posting of documents, deleting documents, and posting other information. (R. 43a). Ex-officio, voting members of the Board, including PDE former Acting Secretary Hagarty and current Secretary Mumin, have no means to print or download any of the documents posted on Diligent. It is these records that Requester seeks.

Eric Hagarty served as Pennsylvania Acting Secretary of Education beginning on or about April 2022, and he left Commonwealth service on or about January 15, 2023. (R. 40a). During his time as Acting Secretary, Mr. Hagarty did not screen capture, save, download, or print any documents from Diligent. *Id.* Khalid N. Mumin, Ed.D., began serving as Pennsylvania Acting Secretary of Education on or about January 17, 2023, and was confirmed as Pennsylvania Secretary of Education on or about June 26, 2023. *Id.* At all times relevant to this matter, Secretary Mumin never accessed Diligent and never screen captured, saved, downloaded, or printed any documents from Diligent. (R. 41a). Neither Acting Secretary Hagarty nor Secretary Mumin ever created or had possession of any physical hard-copy versions of any materials from Diligent. *Id.*

Acting Secretary Hagarty and Secretary Mumin are the only individuals within PDE who have access to Diligent. (R. 43a). Acting Secretary Hagarty and Secretary Mumin did not, and do not, have the ability to post or delete any materials which reside in Diligent. (R. 36a). The ability to print or download documents on Diligent is controlled solely by PSU and PDE does not have the ability to print or download the requested documents even if PDE wanted to or is ordered to by this Court. (R. 36a).

Although Acting Secretary Hagarty and Secretary Mumin had the ability to physically see the documents through the Diligent portal, neither of them are in possession of the documents. Possession, custody, and control lies solely with PSU.

Acting Secretary Hagarty and Secretary Mumin, like all other members of the Board are subject to the University's Bylaws and Board of Trustees' Standing Orders. The PSU bylaws require that:

“Members of the Board of Trustees stand in a fiduciary relationship to the University which reposes special confidence in each member. Members of the Board of Trustees shall act in good faith, with due regard to the interests of the University, and shall comply with the fiduciary principles of conduct in addition to any other state or federal requirements. Trustees bring to their roles varied backgrounds and expertise, and they are selected in different ways, but they must keep the welfare of the entire University, not just a particular constituency, at all times paramount.”

(R. 36a, R. 43a); Section 8.07 of the Bylaws (Fiduciary Duty).

Additionally, PSU Standing Orders further provide that:

(d)...It is expected that each Trustee will ....

(x) Maintain the confidentiality of confidential information without exception; it being recognized and understood that for this purpose “confidential information” includes nonpublic information concerning the University, including its finances, operations and personnel, as well as nonpublic information about internal Board discussions and dynamics;

Order VIII, Section 1(d)(x) (Expectations of Membership). (R. 44a, R. 109a).

The Pennsylvania Supreme Court has held that Section 506(d)(1) of the RTKL controls when documents are not in the possession of an agency but are in the possession of a third party. *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932 (Pa. Cmwlth. 2015). Section 506(d)(1) provides:

[a] public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

65 P.S. § 67.506(d)(1).

While Requester and OOR attempt to rely on section 506(d)(1) to grant access here, in *Dental Benefit Providers*, the Supreme Court held that Section 506(d)(1) only provides access to records that relate to an actual contract to perform a governmental function with the third party. *Dental Benefit Providers*. The mere fact that a third party holds records that may be of some interest to an agency is insufficient to render such records “public records of an agency.”

Here, the records do not relate to any contracted government function. Rather, Requester and OOR assert that such records are records of PDE merely because they were momentarily accessible to Secretary Mumin. Such assertion flies in the face of *Dental Benefit Providers*. Indeed, because there exists no contract whatsoever between PDE and PSU with respect to these records, Section 506(d)(1) is inapplicable, and PDE should not be compelled to produce the documentation residing on the Diligent system. For all the foregoing reasons, the Final Determination of the OOR must be reversed.

## **II. THE OOR ERRED IN FINDING THAT PDE HAS CONSTRUCTIVE POSSESSION OF THE DOCUMENTS HOSTED ON DILIGENT.**

The OOR's opinion implies that PDE has constructive possession of the records at issue. (R. 207a-208a). Simply because Acting Secretary Hagarty formerly, and Secretary Mumin at the time of the request, had access, via login credentials, to Diligent at the time of the request does not mean that either Secretary had constructive possession of the documents hosted on Diligent.

In *Dental Benefit Providers* the Court stated that “this Court does not infer constructive possession from the mere availability of the records to an agency upon request.” *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938. *Dental Benefit Providers* stated that the “litmus test under Section 901 remains whether the

records document a transaction of the agency to which the request was directed, not whether they document a transaction of a private contractor.” *Id* at 938.

It is true that Acting Secretary Hagarty formerly, and Secretary Mumin at the date of the request, had access to Diligent for the purpose of performing their duties as *ex officio* voting members of the Board. (R. 43a). However, the OOR was incorrect in assuming that just because Acting Secretary Hagarty and Secretary Mumin had access to Diligent means that they possess the records. (R. 207a-208a).

As noted previously, at all times relevant to this matter, Secretary Mumin never accessed Diligent and never screen captured, saved, downloaded, or printed any documents from Diligent. (R. 41a). Neither Acting Secretary Hagarty nor Secretary Mumin ever created or had possession of any physical hard-copy versions of any materials from Diligent. *Id.* Further, the Board Staff, with the assistance of other PSU staff members as appropriate, maintains all aspects of the Diligent site, including with respect to access controls posting of documents, deleting documents, and posting other information. (R. 43a).

In *Office of the Budget v. Office of Open Records, 11 A.3d 618, 620 (Pa. Cmwlth. 2011)*, the Office of the Budget received a request seeking “[c]opies of Weekly Payroll Certification for Public Works Project for Contractor and/or Subcontract Tolbert Mas[o]nry performing work on . . . Learning Center.” Budget “rejected the Request on the grounds that the requested records were not in its

possession and that it was not obligated to obtain the records pursuant to Section 506(d) because RACP grant agreements are not contracts relating to governmental functions...” *Id.* at 619. The Court in *Office of the Budget* ultimately found “while Budget has the right to audit these payroll records, there is no evidence that they have ever been in Budget's possession or that Budget is attempting to play some sort of shell game by shifting these records to a nongovernmental body.” *Id.* at 623.

In the instant matter, there is no allegation that PDE has shifted governmental records to a nongovernmental body. Rather, PDE’s access to the documentation hosted on Diligent is available to the Secretaries at the discretion of PSU. (R. 43a.) PSU controls a Secretary’s access to these documents and if PSU wants to restrict access to the Secretary it can do so. *Id.* Further, PSU controls posting of documents, deleting documents, and posting other information. *Id.* Therefore, even if Secretary Mumin or Acting Secretary Hagarty had access to Diligent at one point in time, that does not mean they have possession of the records hosted on Diligent.

### **III. THE OOR ERRED IN REQUIRING PDE TO CREATE A DOCUMENT WHICH IT HAS NO PHYSICAL OR ELECTRONIC MEANS TO REPRODUCE.**

In its Final Determination, the OOR ruling that PDE is required to provide the documentation listed in Items 3 and 4 of the Request is contrary to the OOR’s ruling that PDE is not required to create a record to respond to Items 1 and 2 of the Request. (R. 207a-209a). The OOR held that under the RTKL, PDE is not required to create

a record in order to respond to a request and therefore does not need to produce screenshots of the documents responsive to Items 1 and 2 of the Request. (R. 208a-209a). However, the OOR's Final Determination also requires PDE to produce the documentation requested in Items 3 and 4 of the Request, which PDE cannot do without being required to create a record, contrary to its holding with regards to Items 1 and 2 of the Request. (R. 209a).

Section 705 of the RTKL reads “[w]hen responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format, or organize a record in a manner in which the agency does not currently compile, maintain, format, or organize the record.” 65 P.S. § 67.705. Before the OOR, PDE argued that asking PDE to take electronic screenshots of the records in Diligent would require PDE to create records and that if PDE were to respond to Items 1 and 2 of the Request it would be required to create a record. (R. 39a). The OOR agreed with PDE and held that under Section 705 of the RTKL, PDE is not required to create screenshots of the materials on Diligent.

As set forth above, under Section I of this Brief, PDE has no physical or electronic means to download, print, or make electronic versions of any materials responsive to Items 3 and 4 of the Request. The Diligent materials are compiled, maintained, formatted, and organized by PSU, not PDE. Therefore, to comply with the request for Items 3 and 4, PDE would be required to compile, maintain, format,

or organize the materials in a manner in which PDE does not currently do, and which PDE has no physical or electronic means to do so, even if required. PDE's only means to comply with the Request is to create screenshots of the materials. As the OOR correctly held, PDE is not required to create such screenshots under Section 705 of the RTKL. Therefore, the Final Determination of the OOR requiring PDE to produce such documents must be reversed.

## CONCLUSION

Based upon the foregoing, Petitioner Pennsylvania Department of Education respectfully requests that this Honorable Court reverse the Final Determination of the Office of Open Records and affirm the denial of the Right-to-Know Law request at issue on the basis that PDE does not have possession, custody, or control of the documentation requested in Items 3 and 4 of the Request or, in the alternative, on the basis that PDE is not required to create the records requested in Items 3 and 4 of the Request.

Respectfully submitted,

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Dated: February 8, 2024

**APPENDIX A**

Final Determination of the Office of Open Records

*Wyatt Massey v. Pennsylvania Department of Education and Direct Interest  
Participants, OOR Docket No. AP 2023-1492*



# pennsylvania

OFFICE OF OPEN RECORDS

## FINAL DETERMINATION

<b>IN THE MATTER OF</b>	:
	:
<b>WYATT MASSEY AND SPOTLIGHT PA,</b>	:
<b>Requester</b>	:
	:
<b>v.</b>	: <b>Docket No.: AP 2023-1492</b>
	:
<b>PENNSYLVANIA DEPARTMENT OF</b>	:
<b>EDUCATION,</b>	:
<b>Respondent</b>	:
	:
<b>And</b>	:
	:
<b>THE PENNSYLVANIA STATE</b>	:
<b>UNIVERSITY,</b>	:
<b>Direct Interest Participant</b>	:

### FACTUAL BACKGROUND

On May 18, 2023, Wyatt Massey, a reporter with Spotlight PA (collectively “Requester”), submitted a request (“Request”) to the Pennsylvania Department of Education (“Department” or “PDE”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Eric Hagarty’s role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.
2. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Khalid Mumin’s role on the Penn

State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.

3. An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.
4. An electronic copy of all materials hosted on Diligent in relation to the November 16, 2022 meeting of Penn State's Academic Affairs, Research and Student Life committee, of which Mr. Hagarty was a member.

On June 26, 2023, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the Department denied the Request, stating that the records do not exist within the Department's possession, custody or control.

On July 6, 2023, the Requester filed an appeal with the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.<sup>1</sup> Specifically, the Requester states that "controlling law on this issue makes clear that the records are public." The Requester cites to three cases in support of his argument: (1) *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013); (2) *Edinboro Univ. of Pa. v. Ford*, 18 A.3d 1278 (Pa. Commw. Ct. 2010); and (3) *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 939 (Pa. Commw. Ct. 2014), *aff'd*, 124 A.3d 1214 (Pa. 2015). The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

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<sup>1</sup> In the appeal, the Requester granted the OOR an additional thirty days to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1).

On July 18, 2023, the Department submitted a position statement reiterating its grounds for denial. In support, the Department provided the attestations of Angela Riegel (“Riegel Attestation”), the Department’s Open Records Officer; Kari Worley (“Worley Attestation”), an Executive Assistant with the Department; and Shannon Harvey (“Harvey Attestation”), the Assistant Vice President and Secretary, Office of the Board of Trustees at The Pennsylvania State University.

On July 14, 2023, The Pennsylvania State University (“University” or “Penn State”) submitted a Request to Participate in the appeal pursuant to 65 P.S. § 67.1101(c). The University argues, in part, that the Department “does not have possession, custody or control of the requested documents....” On the same day, the OOR granted the request to participate.

### **LEGAL ANALYSIS**

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Commonwealth is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as “such proof as leads the factfinder ... to find that the existence of a contested fact is more probable than its nonexistence.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Department asserts that the responsive records do not exist in its possession, custody or control. By way of background, the Department explains that Eric Hagarty (“Hagarty”) “served as Pennsylvania Acting Secretary of Education beginning on or about April 2022 and he left

[C]ommonwealth service on or about January 15, 2023.” Dr. Khalid Mumin (“Mumin”) “began service as Pennsylvania Acting Secretary of Education on or about January 17, 2023 and was confirmed as Pennsylvania Secretary of Education on or about June 26, 2023.” The Department further states that the “Pennsylvania Secretary of Education serves [as] an Ex Officio Voting Member of the Pennsylvania State University Board of Trustees (“PSU Board”).” As such, Hagarty was an ex officio voting member from April 2022 to January 2023, and Mumin became an ex officio voting member of the PSU Board in January 2023.

With respect to Diligent, the Department explains that Diligent “is board management software used by the PSU Board as a platform for sharing documents and other information with the Trustees.” According to the Department, the PSU Board “maintains all aspects of Diligent, including with respect to access, controls, posting of documents, deleting documents and other posting information.” The Department contends that Hagarty and Mumin “do not have the ability to post or delete anything in Diligent” and that “there is no [Department] record that indicated ... Hagarty formerly or ... Mumin currently printed or downloaded the requested documents.”

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020). An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

In support of the Department's argument that it does not possess responsive records, the Riegel Attestation<sup>2</sup> states, in part, as follows:

3. PDE does not have any records in its possession or under its custody or control that are responsive to the ... [R]equest.
4. I have confirmed this by personally checking with the appropriate PDE staff member Kari Worley, Executive Assistant.
5. Upon receipt of the Request, the Request was provided to Kari Worley, so that she could inform me as to whether Mr. Hagarty formerly and Dr. Mumin, currently, had any documents relevant to the [R]equest.
6. After Kari Worley was notified of the Request, she discussed the [R]equest with Secretary Mumin.
7. Kari Worley informed me that Mr. Hagarty did not screen capture, save, print, or in any way maintain information accessible on *Diligent* outside of the *Diligent* software.
8. After speaking with Secretary Mumin, Kari Worley informed me that Secretary Mumin did not receive access to *Diligent* until May 8, 2023 and that on the date of the [R]equest, May 18, 2023 Secretary Mumin still had not accessed *Diligent*.

Additionally, the Worley Attestation provides, in part, as follows:

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<sup>2</sup> Under the RTKL, an attestation may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, "the averments in [the attestations] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

2. In my capacity as Executive Assistant, I perform a wide variety of highly responsible management duties such as serving as the primary executive staff assistant to the Secretary and Executive Deputy Secretary of the Pennsylvania Department of Education (PDE). I work and collaborate with the senior leadership team to plan and direct PDE operations.
3. Eric Hagarty served as Pennsylvania Acting Secretary of Education beginning on or about April 2022, and he left [C]ommonwealth service on or about January 15, 2023.
4. Khalid N. Mumin, Ed.d., began serving as Pennsylvania Acting Secretary of Education on or about January 17, 2023 and was confirmed as Pennsylvania Secretary of Education on or about June 26, 2023.
5. As Executive Assistant, I worked closely with Mr. Hagarty during his tenure as Acting Pennsylvania Secretary of Education.
6. Since Secretary Mumin's appointment as Pennsylvania Acting Secretary of Education and currently since being confirmed as Pennsylvania Secretary of Education, as Executive Assistant I have worked closely with Secretary Mumin.
7. The Pennsylvania Secretary of Education serves an Ex Officio Voting Member of the ... [PSU Board].
8. Mr. Hagarty served as an Ex Officio Voting Member of the PSU Board during his term as Pennsylvania Acting Secretary of Education.
9. Dr. Mumin currently serves as an Ex Officio Voting Member of the PSU Board.
10. During his tenure as Acting Secretary, Mr. Hagarty was granted access to *Diligent* individually in his capacity as a trustee to the PSU Board. During Mr. Hagarty's tenure as Acting Secretary he was the only member of PDE who had access to *Diligent* for PSU Board purposes.
11. Secretary Mumin, as Pennsylvania Secretary of Education is currently granted access to *Diligent* individually in his capacity as a trustee to the Trustees. No one else in PDE has access to *Diligent* for PSU Board purposes.
12. As of the date of the Right-to-Know-Law [R]equest at issue in the above captioned appeal, May 18, 2023, Dr. Mumin did not attempt to access *Diligent*.

13. Mr. Hagarty has not screen captured, saved, printed, or in any way maintained information accessible on *Diligent* in any format outside of the *Diligent* software.
14. Secretary Mumin has not screen captured, saved, printed, or in any way maintained information accessible on *Diligent* in any format outside of the *Diligent* software.
15. Mr. Hagarty, while serving as Pennsylvania Acting Secretary of Education was the only member of PDE who had access to *Diligent*.
16. Currently, Secretary Mumin is the only member of PDE who has access to *Diligent*.

Both the Department and University submitted the Harvey Attestation, which states, in part, the following:

2. I am the Assistant Vice President and Secretary, Office of the Board of Trustees at [t]he ... University.... In this capacity, I serve as the elected Secretary of the University with responsibilities as outlined in Section 5.06 of the University Bylaws (Exhibit PSU #1). I am also responsible for the management and operation of the Office of the Board of Trustees including oversight of all activities, meetings, agenda preparation and filing of minutes, Trustee certifications and questionnaires in compliance with legal requirements and University policy to ensure the Board is as effective and efficient as possible in the conduct of its oversight responsibilities.

...

4. For approximately three years, the University's Office of the Board of Trustees (the "Board Office") has utilized the services of Diligent as a platform for sharing documents and other information with the members of its Board of Trustees ("Trustees"). Diligent Boards is an online board portal tool that facilitates secure digital communication from the Board Office to Trustees. We utilize Diligent to securely share board meeting agendas, meeting materials, and other documents.
5. The Board Office staff, with the assistance of other University staff members as appropriate, maintains all aspects of the Diligent site, including with respect to access controls, posting of documents, deleting documents and posting other information.

6. Former Acting Secretary of Education Eric Hagarty was an ex officio Trustee from April of 2022 to January 2023. Dr. Mumin became an ex officio member of the Board of Trustees in January of 2023 when he was appointed to serve as the Acting Secretary of the Department....
7. Mr. Hagarty was granted Diligent access on May 18, 2022 and removed from access on January 22, 2023. Dr. Mumin was granted Diligent access on May 3, 2023.
8. The Board Office controls the Secretary's ability to print or download any document from the Diligent platform. The Secretary does not have the ability to post or delete anything in the Diligent platform.
9. Access is given to the Secretary of Education individually, in their capacity as a Trustee. No one else in the ... Department ... is given access to Diligent by the University.
10. The Secretary, like all other members of the Board of Trustees is subject to the University's Bylaws and Board of Trustees' Standing Orders, attached herein as Exhibits PSU #1 and PSU #2, stating in relevant part:

“Members of the Board of Trustees stand in a fiduciary relationship to the University which reposes special confidence in each member. Members of the Board of Trustees shall act in good faith, with due regard to the interests of the University, and shall comply with the fiduciary principles of conduct in addition to any other state or federal requirements. Trustees bring to their roles varied backgrounds and expertise, and they are selected in different ways, but they must keep the welfare of the entire University, not just a particular constituency, at all times paramount.”

*Section 8.07 of the Bylaws (Fiduciary Duty) (See Exhibit PSU #1)*

“It is expected that each Trustee will ....

(x) Maintain the confidentiality of confidential information without exception; it being recognized and understood that for this purpose ‘confidential information’ includes nonpublic information concerning the University, including its finances, operations and personnel, as well as nonpublic information about internal Board discussions and dynamics;”

*Order VIII, Section 1(d)(x) (Expectations of Membership) (See Exhibit PSU #2)*

The Requester, in response, contends that “controlling law on this issue makes clear that the records are public.” The Requester relies on *Bagwell v. Pa. Dep’t of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013), in support of his claim. In *Bagwell*, the Commonwealth Court held that certain records received by the Secretary of the Department in his ex officio capacity as a board member of PSU Board constituted “records” that may be subject to public access. *Id.* at 90. The RTKL request at issue in *Bagwell* sought “copies of letters, emails, reports and memoranda received by Secretary of Education Ronald J. Tomalis....” *Id.* at 83. The Court determined that “the records the Secretary receives as a Board member are received by the Department pursuant to its statutory function as supporter and influencer of education at state-related institutions. Because the records are received by a Commonwealth agency to enable it to perform its statutory governmental function, they qualify as ‘records’ under the RTKL.” *Id.* at 92.

Both the Department and the University attempt to distinguish the within matter from the facts set forth in *Bagwell*. Specifically, the Department asserts that unlike *Bagwell*, the instant Request “does not ask for any physical documents such as letters, emails, reports and memoranda.” Similarly, the University argues that the “documents were not received by the Secretary. To receive a document, it must come into one’s possession, that is, one must receive a modicum of control over the document.”

Contrary to the arguments raised, the documents hosted on Diligent are no different than the records at issue in *Bagwell*. In particular, Item 3 of the Request seeks materials hosted on Diligent related to the August 2022 PSU Board retreat, while Item 4 seeks materials hosted on Diligent “in relation to the November 16, 2022 meeting of Penn State’s Academic Affairs, Research and Student Life committee, of which ... Hagarty was a member.” Notably, these documents were accessible to Hagarty formerly and are accessible to Mumin currently for the sole

purpose of allowing them to carry out their respective role as an Ex Officio Voting Member of the PSU Board. Accordingly, *Bagwell* controls in this matter, and responsive records hosted on Diligent are accessible.<sup>3</sup>

The Department further maintains that it is not required to create a record that does not exist. Specifically, the Department argues that “[a]sking PDE to take electronic screen shots of the records in Diligent would require PDE to create records.”

Section 705 of the RTKL provides that when responding to a request, “an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705; *see also Moore*, 992 A.2d at 909 (holding that an agency cannot be made to create a record that does not exist). Here, Items 1 and 2 of the Request seek an “electronic screenshot of all folders and files hosted on Diligent” relative to Hagarty and Mumin’s roles on the PSU Board. The Worley Attestation states that neither Hagarty nor Mumin have “screen captured ... information accessible on Diligent in any format outside of the Diligent software.” Worley Attestation, ¶¶ 13-14. Therefore, based on the evidence provided, the Department has met its burden of proof that it does not possess the screenshots responsive to Items 1 and 2 of the Request, and, pursuant to 65 P.S. § 67.705, the Department is not required to create a record, i.e., a screen shot, in order to respond to the Request. *See Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011); *see also Pa. Dep’t of Health v. Mahon*, 283 A.3d

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<sup>3</sup> The Department did not raise any RTKL exemptions or other legal authority for denying access to the records. The University argues that “to the extent that documents on the Diligent platform are determined to be within the possession, custody, or control of the PDE, the documents would be subject to exclusions and the exceptions provided in the RTKL under 65 P.S. § 67.708(b), as well as any other relevant protections afforded through other legal authorities.” Notably, however, the University did not identify what RTKL exemptions or “other legal authorities” are applicable and did not submit any evidence in support of this argument. Although the University references its Bylaws, which state, in part, that “[i]t is expected that each Trustee will ... [m]aintain the confidentiality of confidential information ....” such Bylaws to not have the force and effect of law.

929, 936 (holding that, when there is evidence that a record does not exist, “[i]t is questionable to what degree additional detail and explanation are necessary....”); *Campbell v. Pa. Interscholastic Athletic Ass’n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry); *Moore*, 992 A.2d at 909.

### CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Department is required to provide all records responsive to Items 3 and 4 of the Request within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review to the Commonwealth Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>4</sup> This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

**FINAL DETERMINATION ISSUED AND MAILED: September 1, 2023**

*/s/ Magdalene C. Zeppos-Brown*  
MAGDALENE C. ZEPPOS-BROWN, ESQ.  
DEPUTY CHIEF COUNSEL

Sent via OOR e-file portal: Wyatt Massey; Angela Riegel, AORO; Zachary Stritzinger, Esq.;  
and Natalie Voris Grosse, Esq.

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<sup>4</sup> *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

**APPENDIX B**

Response to Petitions for Reconsideration

*Wyatt Massey v. Pennsylvania Department of Education and Direct Interest  
Participants, OOR Docket No. AP 2023-1492*

## **RESPONSE TO PETITIONS FOR RECONSIDERATION**

DATE ISSUED AND MAILED: September 20, 2023

IN RE: *Wyatt Massey and Spotlight PA v. Pa. Dep't of Educ. and the Pennsylvania State Univ.*, OOR Dkt. AP 2023-1492

The Office of Open Records (“OOR”) is in receipt of Petitions for Reconsideration (“Petitions”) submitted by the Pennsylvania Department of Education (“Department”) and the Pennsylvania State University (“PSU”), respectively. The Petitions largely challenge the underlying Final Determination’s holding that documents hosted on Diligent<sup>1</sup> are subject to public access under Pennsylvania’s Right-to-Know Law (“RTKL”).

I have reviewed the Final Determination, as well as the Petitions, and I find the arguments set forth in the Petitions to be unavailing. The Request at issue seeks two categories of records: 1) electronic screenshots “of all folders and files hosted on Diligent” as related to the Department’s former Acting Secretary and current Secretary, and 2) records hosted on Diligent concerning the former Department Acting Secretary’s role as an ex officio member of the PSU Board of Trustees. The Final Determination treats the two categories of records differently. It finds that the Department met its burden of proving that it does not possess the requested screenshots, and is not required to create them; however, it grants access to the records hosted on Diligent. Both the Department and PSU argue that this holding is contradictory. However, the first category of records (electronic screenshots of folders and files) clearly contemplates the creation of a record that does not currently exist,<sup>2</sup> while the second category of records (records hosted on Diligent) asks the Department to provide access to currently existing records/information. I cannot find that the holding is contradictory or warrants reconsideration.

The second category of records, those hosted on Diligent, are clearly subject to access under *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013). These records are not merely PSU records, but records of the PSU Board of Trustees, and specifically concern the former Department Acting Secretary’s participation on the Board.<sup>3</sup> The Commonwealth Court held in

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<sup>1</sup> The Final Determination quotes the Department, who explains that Diligent “is board management software used by the PSU Board as a platform for sharing documents and other information with the Trustees.”

<sup>2</sup> A request for an electronic screenshot of folders and files is no different than asking an agency to take a photograph of a filing cabinet or box of records. While the documents contained within constitute records under the RTKL, 65 P.S. § 67.102, the organizational scheme is not its own record.

<sup>3</sup> Item 3 of the Request seeks “all materials ... related to the August 2022 [PSU] Board of Trustees retreat,” while Item 4 seeks “all materials ... in relation to the November 16, 2022 meeting of [PSU]’s Academic Affairs, Research and Student Life committee, of which [the former Acting Secretary] was a member.”

*Bagwell* that “the records the Secretary receives as a Board member are received by the Department pursuant to its statutory function as supporter and influencer of education at state-related institutions.” *Id.* at 92. Both the Department and PSU argue that the records’ presence on Diligent somehow renders them inaccessible under the RTKL because access to Diligent is read-only, making the Department unable to print or download documents. There is no legal support for these arguments. Agencies or other parties that may possess public records cannot save or store records in software or databases as “read-only” and then argue the records are incapable of duplication; permitting that conduct would lead to an absurd result wherein the public would be unable to obtain public records. Further, it would encourage agencies in similar situations to use file sharing platforms and software to avoid releasing those records. The Commonwealth Court has interpreted the RTKL to avoid such loopholes to access. *See, e.g., Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012) (finding that pulling information from a database does not constitute the creation of a record because “[t]o hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases”). The fact remains that Department secretaries have access to public records on Diligent because of their status as an ex officio member of the PSU Board of Trustees.

As explained in *Bagwell*, the records “[d]ocument’ the Department’s participation on PSU’s Board.... The Secretary only has a place on PSU’s Board because he represents the Department. The records he receives to enable him to perform his *ex officio* duties thus evidence the Department’s governmental function of representing the Commonwealth’s education interests on the Board.” *Bagwell*, 76 A.3d at 91. While the Department Secretary in *Bagwell* had physical possession of the documents at issue, it is difficult to sanction an arrangement wherein a Department Secretary is able to view documents containing public information but is then permitted to avoid public disclosure of those documents simply by proclaiming they have never actually *received* them.<sup>4</sup> When Department secretaries are granted access to Diligent, they clearly **receive** the documents and information necessary to enable them to perform their duties. Regardless, I note that the definition of “record” under the RTKL does not necessarily require physical receipt; indeed, the document/information must merely be “created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. To the extent that access on Diligent does not constitute receipt, *Bagwell* makes clear that the records are retained on Diligent in connection with a Department

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<sup>4</sup> PSU argues that the Final Determination “would seem to include information on the Diligent platform that the Commonwealth Secretary might not have ever viewed, which highlights the untenable nature of the ... Final Determination when contrasted with the legislative intent of the RTKL.” However, this argument is speculative, and it is unclear how PSU would demonstrate that the former Department Acting Secretary has not reviewed these records. This alleged ambiguity exists no matter how the records would have been transmitted, as there is no guarantee that an individual has actually reviewed the material transmitted to them. Regardless, the definition of “record” in the RTKL does not impose any requirement of proof that an individual has reviewed the document. 65 P.S. § 67.102.

Secretary's duties. Thus, they remain records of the Department. If the records did not have a connection to Department business or activity, there would not be any reason for a Department Secretary to access the records on Diligent.

The Harvey Attestation explains that “[t]he Board Office controls the Secretary’s ability to print or download any document from the Diligent platform.” As a result, a situation exists where a third party is directly impeding the public’s right to access public records. There is no legal authority for a third party to do so, and pursuant to *Bagwell*, PSU cannot dictate what records may be disclosed. The RTKL is clear that “[a] Commonwealth agency shall provide public records in accordance with this act.” 65 P.S. § 67.301(a). How the Department provides these records is within its discretion.

Finally, with respect to PSU’s argument that it “reserves the right to raise additional legal arguments should this matter proceed to the judicial system for adjudication,” we note that PSU had an ample opportunity to raise and support those arguments before the OOR, and PSU was clearly aware of the Commonwealth Court’s holding *Bagwell*. PSU’s Request to Participate in this matter acknowledges that “the request may seek information that is subject to protection from disclosure, whether that protection is afforded under the RTKL itself or other legal authorities and doctrines such as a privilege....,” but PSU did not provide any evidence in support of withholding records. PSU has had sufficient notice and an opportunity to participate in this appeal as a Direct Interest Participant. Nevertheless, as the record shows, PSU has not developed or supported any grounds for withholding the records at issue, and the consideration of any “additional legal arguments” would mean “the proverbial second bite at the apple.” *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (declining to accept additional evidence or remand to the OOR when a third party had an adequate opportunity to submit evidence and defend itself).

For the above reasons, the Petitions are **DENIED**.

Issued by:

/s/ Kyle Applegate

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CHIEF COUNSEL

Sent via email and portal to: Wyatt Massey; Zachary Stritzinger, Esq.; Natalie Voris Grosse, Esq.

**CERTIFICATE OF COMPLIANCE Pa.R.A.P. 2135(d)**

Undersigned counsel, pursuant to Pa.R.A.P. 2135(d), hereby certifies that the attached Brief of Respondent contains 3,787 words, in compliance with the count limit imposed by Pa.R.A.P. 2135(a)(1). I am relying upon the word count provided by the word processing software used to prepare the attached filing.

/s/ Zachary Stritzinger

Zachary Stritzinger, Assistant Counsel

I.D. No. 328879

**CERTIFICATE OF COMPLIANCE Pa.R.A.P. 127**

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.

/s/ Zachary Stritzinger

Zachary Stritzinger, Assistant Counsel  
I.D. No. 328879