
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1083 C.D. 2023

No. 1092 C.D. 2023

No. 1207 C.D. 2023

Cases Consolidated

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

Petitions for Review of the Final Determinations of
the Pennsylvania Office of Open Records entered at
Docket Nos. AP 2023-1492 & AP 2023-1520

**BRIEF OF PETITIONER:
THE PENNSYLVANIA STATE UNIVERSITY**

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INTRODUCTION

These consolidated appeals arise from two Right-to-Know Law¹ Requests filed by Wyatt Massey (“Requester”), a reporter with Spotlight PA, with the Pennsylvania Department of Education (“PDE”) and the Pennsylvania Department of Agriculture (“PDA”). Under the Amended and Restated Bylaws of the Pennsylvania State University (“Penn State”), the Secretaries of PDE and PDA serve as *ex officio* members of the Penn State Board of Trustees. Through his RTKL Requests, Requester seeks documents of Penn State that, at all times relevant hereto, were merely accessible to the Secretaries of PDE and PDA solely by virtue of their membership on the Penn State Board of Trustees.

The requested documents were made accessible to the Penn State Board of Trustees, including the Secretaries of PDE and PDA, through Diligent, a cloud-based software used by Penn State to host documents for its Board. Other than a single 65-page document possessed by PDA, neither PDE nor PDA independently maintained the requested documents in either electronic or physical form. For the reasons set forth below, the requested documents, except as otherwise noted, are not subject to disclosure under the RTKL given that they were not independently maintained by PDE or PDA. Requiring the disclosure of Penn State documents that are merely accessible to the Secretaries of PDE and PDA would negate the limited

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

scope of Penn State information that is subject to disclosure under the RTKL by making all Penn State documents accessible to the Secretaries of PDE and PDA subject to disclosure. Had the Pennsylvania General Assembly intended for Penn State documents to be generally accessible through the RTKL, it would not have narrowed the scope of Penn State information that is subject to disclosure. Accordingly, Penn State respectfully requests this Court reverse the Final Determinations of the Pennsylvania Office of Open Records (the “OOR”) entered below, which ordered the disclosure of the requested documents on the basis that the documents are accessible to the Secretaries of PDE and PDA.

STATEMENT OF JURISDICTION

This Court has jurisdiction over these consolidated appeals pursuant to Section 1301(a) of the RTKL, 65 P.S. § 67.1301(a), and Section 763(a) of the Judicial Code, 42 Pa.C.S. § 763(a).

DETERMINATIONS IN QUESTION

These consolidated appeals arise from the Final Determinations of the OOR entered at docket numbers AP 2023-1492 and AP 2023-1520.

The Final Determination of the OOR entered at docket number AP 2023-1492 on September 1, 2023, which is attached hereto as Exhibit A, concluded as follows:

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and [PDE] 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 with notice and have an opportunity to respond according to court rules 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

MAGDALENE C. ZEPPOS-BROWN, ESQ.
DEPUTY CHIEF COUNSEL

(R. at 203a, Final Determination (PDE) at 11 (footnote omitted) (emphasis in original)).

The Final Determination of the OOR entered at docket number AP 2023-1520 on October 6, 2023, which is attached hereto as Exhibit B, concluded as follows:

For the foregoing reasons, the appeal is **granted in part, denied in part and dismissed as moot in part**, and [PDA] is required to provide all records responsive to Item Two of the Request within thirty days. In addition, [PDA] is also required to provide the Requester with an unredacted copy of the 65-page document produced during the pendency of this appeal. 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, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party. All documents or communications following the issuance of this Final Determination

shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 6, 2023

APPEALS OFFICER
ANGELA EDRIS, ESQ.

(R. at 529a-30a, Final Determination (PDA) at 20-21 (footnote omitted) (emphasis in original)).

STATEMENT OF SCOPE AND STANDARD OF REVIEW

“On appeal from the OOR in a [RTKL] case, this Court’s standard of review is *de novo*, and [its] scope of review is plenary.” *Saunders v. Dep’t of Corr.*, 172 A.3d 110, 112 n.2 (Pa. Cmwlth. 2017). Thus, “[i]n reviewing a final determination of the OOR, this Court ‘independently reviews the OOR’s orders and may substitute its own findings of fact for [those] of the agency.’” *Off. of Governor v. Scolforo*, 65 A.3d 1095, 1099 n.6 (Pa. 2013) (quoting *Bowling v. Off. of Open Recs.*, 990 A.2d 813, 818 (Pa. Cmwlth. 2010)).

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the OOR err in ordering the disclosure of all documents responsive to Items 3 and 4 of Requesters’ RTKL Request filed with PDE and Item 2 of Requesters’ RTKL Request filed with PDA given that documents belonging to Penn State and hosted on Diligent or in any like software, platform, or manner, are not

“public records” as that term is defined in Section 102 of the RTKL, 65 P.S. § 67.102?

Suggested Answer: Yes

2. Did the OOR err in ordering the disclosure of all documents responsive to Items 3 and 4 of Requesters’ RTKL Request filed with PDE and Item 2 of Requesters’ RTKL Request filed with PDA given that documents belonging to Penn State and hosted on the platform Diligent or in any like software, platform, or manner, are not in the possession, custody, or control of PDE or PDA?

Suggested Answer: Yes

3. To the extent the documents at issue are public records in the possession, custody, or control of PDE or PDA, did the OOR err in concluding that the records are not exempt from disclosure by Section 708(b) of the RTKL, 65 P.S. § 67.708(b)?

Suggested Answer: Yes

4. Did the OOR err in ordering the disclosure of an unredacted copy of a 65-page document produced during the OOR proceedings at Docket Number AP 2023-1520 given the document contains information exempt from disclosure by Section 708(b) of the RTKL?

Suggested Answer: Yes

STATEMENT OF THE CASE

As stated above, under the Amended and Restated Bylaws of Penn State, the Secretaries of PDE and PDA serve as *ex officio* members of the Penn State Board of Trustees. (R. at 47a). In conjunction with their service on the Board, the Secretaries of PDE and PDA, at all times relevant hereto, were granted access to Diligent, a cloud-based software Penn State utilizes to host documents for its Board. (*Id.* at 38a-39a, 265a-66a). Specifically, Penn State “utilize[s] Diligent to securely share board meeting agendas, meeting materials, and other documents” for the Board’s review. (*Id.* at 38a, 265a). Penn State “maintains all aspects of the Diligent site, including with respect to access controls, posting of documents, deleting documents and posting other information” as well as the “ability to print or download any document from the Diligent platform.” (*Id.* at 39a, 266a).

On May 18, 2023, Requester filed RTKL Requests with PDE and PDA seeking Penn State documents hosted on Diligent. The Request filed with PDE seeks the following:

1. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Eric Hagarty’s^[2] 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 Eric Hagarty served as the Acting Secretary of PDE from April 2022 until January 2023.

2. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Khalid Mumin's^[3] 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.

(*Id.* at 18a-19a). The Request filed with PDA similarly seeks the following:

1. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Russell Redding's^[4] role on the Penn State Board of Trustees, including but not limited to his role as a member of the Governance and Planning Committee, Legal and Compliance Committee, and the full board of trustees.
2. An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.

(*Id.* at 226a).

PDE and PDA issued final responses to Requester's RTKL Requests on June 26, 2023 and July 3, 2023, respectively. Each agency stated in their respective responses that it did not have possession, custody, or control of the requested

³ Khalid Mumin has served as the Secretary of PDE since January 2023.

⁴ Russell Redding has served as Secretary of PDA since January 2015.

documents.⁵ (*Id.* at 215a, 235a). Requester appealed the agency responses to the OOR on July 5, 2023. (*Id.* at 8a).

Before the OOR, PDE and PDA each submitted position statements in support of their determinations that they do not have possession, custody, or control of the requested documents. With their position statements, PDE and PDA submitted various affidavits detailing the agencies' search for the requested documents. PDE submitted the affidavits of Angela Riegel, the Open Records Officer for PDE,⁶ Kari Worley, the Executive Assistant to the Secretary of PDE,⁷ and Shannon S. Harvey, Vice President and Secretary of the Office of Penn State Board of Trustees.⁸ PDA submitted the affidavits of Susan L. West, the Open Records Officer for PDA,⁹ and Shannon S. Harvey.¹⁰ (*Id.* at 265a-71a).

⁵ “It is not a denial of access when an agency does not possess records [and] there is [no] legal obligation to obtain them[.]” *Jenkins v. Pa. Dep’t of State*, Final Determination at 2 (OOR, Dkt. No. AP. 2009-0065, filed March 7, 2014).

⁶ The affidavit of Angela Riegel submitted by PDE to the OOR is located at pages 34a-35a of the Reproduced Record.

⁷ The affidavit of Kari Worley submitted by PDE to the OOR is located at pages 36a-37a of the Reproduced Record.

⁸ The affidavit of Shannon S. Harvey submitted by PDE to the OOR is located at pages 38a-40a of the Reproduced Record.

⁹ The affidavit of Susan L. West submitted by PDA to the OOR is located at pages 269a-71a of the Reproduced Record.

¹⁰ The affidavit of Shannon S. Harvey submitted by PDA to the OOR is located at pages 265a-67a of the Reproduced Record.

In their affidavits, the agency employees state that after a search of the records in the agencies' possession, custody, and control, no responsive documents were discovered other than a physical copy of a 65-page document in the possession of PDA. (*Id.* at 34a, 269a-71a). The affidavits from the PDE employees make clear that the Secretaries of PDE named in the RTKL Request did not independently maintain the requested documents. In this regard, the affidavits state that the Secretaries of PDE did not “screen capture[], save[], print[], or in any way maintain[] the documents accessible on Diligent.” (*Id.* at 35a, 37a).

Penn State filed requests to participate in both OOR appeals, along with position papers and the affidavits of Shannon S. Harvey¹¹ and Sara F. Thorndike, Senior Vice President for Finance and Business/Treasurer/Chief Financial Officer of Penn State.¹²

The OOR issued its Final Determination in the appeal of the final response of PDE on September 1, 2023. Therein, the OOR granted in part and denied in part the appeal of Requester. As to Items 1 and 2 of the Request, the OOR concluded that PDE established that it was not in possession of screenshots of folders and files hosted on Diligent and, therefore, was not required to create the requested documents

¹¹ The affidavits of Shannon S. Harvey submitted by Penn State to the OOR are located at pages 120a-22a and 417a-19a of the Reproduced Record.

¹² The affidavit of Sara F. Thorndike submitted by Penn State to the OOR is located at pages 504-09a of the Reproduced Record.

for disclosure. (*Id.* at 202a-03a, Final Determination (PDE) at 10-11). With respect to Items 3 and 4 of the Request, the OOR concluded that PDE has possession, custody, and control of the requested documents by virtue of its Secretaries' access to those documents through Diligent. (*Id.* at 201a, Final Determination (PDE) at 9). The OOR ordered PDE to provide the documents responsive to Items 3 and 4 of the Request within 30 days. (*Id.* at 203a, Final Determination (PDE) at 11). PDE and Penn State requested reconsideration of the Final Determination, which the OOR subsequently denied.

The OOR issued its Final Determination in the appeal of the final response of PDA on October 6, 2023. Therein, the OOR granted in part, denied in part, and dismissed as moot in part the appeal of Requester. Like in the PDE appeal, the OOR dismissed Item 1 of the Request on the basis that PDA established it was not in possession of screenshots of folders and files hosted on Diligent and, therefore, was not required to create the requested documents for disclosure. (*Id.* at 520a, Final Determination (PDA) at 11). With respect to Item 2 of the Request, the OOR concluded, as it did in the PDE appeal, that PDA has possession, custody, and control of the requested documents by virtue of its Secretary's access to those documents through Diligent. (*Id.* at 519a, Final Determination (PDA) at 10). The OOR ordered PDA to provide the documents responsive to Item 2 of the Request within 30 days. (*Id.* at 529a, Final Determination (PDA) at 20). The OOR also ordered PDA to

provide an unredacted copy of the 65-page document produced during the appeal on the basis that neither PDA nor Penn State proved the redacted information fell within an exemption to the RTKL's disclosure requirement. (*Id.* at 526a-27a, 529a, Final Determination (PDA) at 17-18, 20).

PDE filed a Petition for Review of the OOR's September 1, 2023 Final Determination on September 27, 2023. PDE's Petition for Review was docketed at 1083 C.D. 2023. The next day, Penn State also filed a Petition for Review of the OOR's September 1, 2023 Final Determination.¹³ Penn State's Petition for Review was docketed at 1092 C.D. 2023. Thereafter, Penn State filed a Petition for Review of the OOR's October 6, 2023 Final Determination on October 25, 2022. That Petition for Review was docketed at 1207 C.D. 2023.¹⁴

This Court, *sua sponte*, consolidated the matters at 1083 C.D. 2023 and 1092 C.D. 2023 on November 8, 2023. On the same day, Penn State filed an Unopposed Application to Consolidate the matters at 1083 C.D. 2023 and 1092 C.D. 2023 with the matter at 1207 C.D. 2023. By Order dated December 28, 2023, the Court granted the Unopposed Application to Consolidate and consolidated the three matters as captioned above.

¹³ This Court has recognized that direct interest participants may petition for review of a final determination of the OOR. *Baron v. Dep't of Hum. Servs.*, 169 A.3d 1268, 1275 (Pa. Cmwlth. 2017).

¹⁴ By letter dated November 2, 2023, PDA provided notice of non-participation in the appeal.

SUMMARY OF ARGUMENT

Through his RTKL Requests, Requester seeks documents of Penn State that are merely accessible to the Secretaries of PDE and PDA solely by virtue of their membership on the Penn State Board of Trustees. The requested documents, aside from the 65-page document produced during the PDA appeal, were not independently maintained by PDE or PDA. Rather, the requested documents were accessible to the Secretaries of those agencies through Diligent only.

The OOR ordered the disclosure of the requested documents on the basis that the documents were accessible to the Secretaries of PDE and PDA through Diligent. This was in error. For a document to be subject to disclosure under the RTKL, it must have been created, received, or retained in connection with a transaction, business, or activity of an agency. Here, neither PDE nor PDA created, received, or retained the requested documents. As stated above, the requested documents were merely accessible to the Secretaries by virtue of their membership on the Penn State Board of Trustees.

Requiring the disclosure of Penn State documents that are merely accessible to the Secretaries of PDE and PDA would negate the limited scope of Penn State information that is subject to disclosure under the RTKL by making all Penn State documents accessible to the Secretaries of PDE and PDA subject to disclosure. This result cannot have been intended by the General Assembly since it limited the

information Penn State is required to disclose. Further, such a result conflicts with the well-established precedent that an agency is not in the possession, custody, or control of the documents of a private entity – that is not a government contractor – merely because those documents are accessible to the agency.

To the extent this Court concludes the requested documents are subject to disclosure, this matter should be remanded for the OOR to conduct an *in camera* review to ensure that no information exempted from disclosure is made available through the production of the requested documents.

As to the 65-page document produced during the PDA appeal, Penn State does not contest that it is a record subject to disclosure through the RTKL, namely because it is actually in the possession of PDA. However, the OOR erred in ordering an unredacted copy of the document be provided to Requester. The redacted information is exempted from disclosure by the RTKL and, therefore, the redactions were properly made.

ARGUMENT

The central issue in these consolidated appeals is whether the requested documents¹⁵ are subject to disclosure under the RTKL. The OOR determined that

¹⁵ The OOR denied Requester’s RTKL Request to PDE with respect to Items 1 and 2 and Requester’s RTKL Request to PDA with respect to Item 2. Requester did not file cross petitions for review or its own petition for review to challenge the foregoing. Therefore, Penn State uses the term “requested documents” to refer to documents sought through Items 3 and 4 in the Request to PDE and Item 2 in the Request to PDA.

the documents are subject to disclosure because of their accessibility by the Secretaries of PDE and PDA through Diligent. However, for the reasons that follow, that determination was in error.

A. The Requested Documents Are Not Public Records.

For the reasons that follow, the requested documents are not public records, as that term is defined in the RTKL, and, therefore, are not subject to disclosure.

i. PDE and PDA Did Not Create, Receive, or Retain any of the Requested Documents.

Pursuant to Section 301(a) of the RTKL, “[a] Commonwealth agency,^[16]” such as PDE and PDA, “shall provide public records in accordance with this act.” 65 P.S. § 67.301(a). Thus, the first step in determining whether the documents requested by Requester are subject to disclosure is examining whether the documents are “public records.” *Hunsicker v. Pa. State Police*, 93 A.3d 911, 913 (Pa. Cmwlth. 2014) (“Under the RTKL, whether [a] document is accessible is based only on whether [the] document is a public record[.]”).

Section 102 of the RTKL defines the term “Record” as follows:

Information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency. The term includes a document, paper, letter, map, book, tape, photograph, film or sound record,

¹⁶ Section 102 of the RTKL defines the term “Commonwealth agency” to include “[a]ny office, department, authority, board, multistage agency or commission of the executive branch[.]” 65 P.S. § 67.102.

information stored or maintained electronically and a data-processed or image-processed document.

65 P.S. § 67.102. In turn, the term “Public record,” is defined as “[a] record, including a financial record of a Commonwealth or local agency that: (1) is not exempt under [S]ection 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by privilege.” *Id.* Thus, a document is a public record if it: (1) “document[s] a transaction or activity of the agency” and (2) was “‘created, received, or retained’ in connection with the activity of the agency.” *Barkeyville Borough v. Stearns*, 35 A.3d 91, 94-95 (Pa. Cmwlth. 2012).

Here, the requested documents were not created, received, or retained in connection with a transaction, business, or activity of PDE or PDA and, therefore, the requested documents are not public records as that term is defined in the RTKL.

Initially, it is clear from the record that the requested documents were not “created” in connection with a transaction, business, or activity of PDE or PDA. The requested documents include “meeting agendas, meeting materials, and other documents” that were created or curated by Penn State and made available by Penn State to its Board of Trustees. (R. at 38a, 265a). The documents were not specifically created or curated as a result of the membership of the Secretaries of PDE and PDA on the Penn State Board of Trustees. Rather, the requested documents were created or curated by Penn State for all members of the Board. As such, it

cannot be said that the requested documents were created in connection with a transaction, business, or activity of PDE or PDA. *Off. of Governor v. Bari*, 20 A.3d 634, 642 (Pa. Cmwlth. 2011) (setting forth that the meeting minutes of the board of directors of a non-profit corporation to which the Governor appointed a representative were not records under the RTKL because the minutes would have been created, received, or retained by the organization regardless of whether the Governor had appointed a member to its board).

Similarly, the requested documents were not “retained” in connection with a transaction, business, or activity of PDE or PDA. The requested documents were created or curated by Penn State for all members of its Board. As such, it follows that the documents were retained by Penn State irrespective of the membership of the Secretaries of PDE and PDA on the Penn State Board of Trustees. Other than the 65-page document discussed above, there is no question that neither PDE nor PDA separately retained the requested documents in electronic or physical form. (R. at 34a-35a, 37a, 270a-71a).

Therefore, the requested documents are records for purposes of the RTKL only if they were “received” by the Secretaries of PDE and PDA in connection with a transaction, business, or activity of PDE or PDA. The word “received” is not defined in the RTKL. Pursuant to Section 1903(a) of the Statutory Construction Act of 1972, undefined words in a statute are to be “construed according . . . to their

common and approved usage.” 1 Pa.C.S. § 1903(a). It is well-established that the common and approved usage of a word may be gleaned from “dictionary definitions.” *Vetri Navy Yard, LLC v. Dep’t of Cmty. & Econ. Dev. of Cmwlt. of Pa.*, 189 A.3d 1137, 1146 (Pa. Cmwlt. 2018).

The word “receive” is defined as follows: “to come into possession of.” “Receive,” Merriam-Webster, <https://www.merriam-webster.com/dictionary/receive> (last visited February 7, 2024). The word “possession” is defined as “the act of having or taking into control.” “Possession,” Merriam-Webster, <https://www.merriam-webster.com/dictionary/possession> (last visited February 7, 2024). Thus, an agency has “received” a document when it takes control of that document.

Here, neither PDE nor PDA ever took control of the requested documents. The record reflects that the requested documents are maintained by Penn State on Diligent and that Penn State controls the ability of the members of its Board of Trustees to view the documents and “to print or download any document from the Diligent platform.” (R. at 39a, 266a). While the Secretaries of PDE and PDA had the ability to view the requested documents on Diligent, they cannot be said to have “received” the documents through Diligent. Diligent is the modern equivalent of an official from Penn State showing a physical document to the Secretaries for review and then taking that physical document back.

The requested documents, except as otherwise noted above, were not independently maintained by PDE or PDA in electronic or physical form. (R. at 34a-35a, 37a, 270a-71a). Absent independent maintenance of the requested documents, it cannot be said that PDE or PDA ever exercised any control over the documents. As such, even if the documents relate to a transaction, business, or activity of PDE or PDA, it cannot be said that PDE or PDA ever “received” the documents.

Nonetheless, the OOR ordered the disclosure of the requested documents based upon the fact that they are accessible to PDE and PDA. (R. at 201a-02a, Final Determination (PDE) at 9-10, 519a, Final Determination (PDA) at 10). As support, the OOR cites this Court’s decision in *Bagwell v. Pennsylvania Department of Education*, 76 A.3d 81 (Pa. Cmwlth. 2013). (R. at 201-02a, Final Determination (PDA) at 9-10 (“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.”), 519a, Final Determination (PDA) at 10 (“Notably, these documents were/are accessible to Secretary Redding for the sole purpose of allowing him to carry out his respective role as an *ex officio* Voting member of the Board. . . . Accordingly, *Bagwell* controls in this matter, and records responsive to Item

Two of the Request that are hosted on Diligent are public information and accessible.”)).

In *Bagwell*, the requester sought physical records from PDE that, unquestionably, were in PDE’s possession by virtue of the Secretary of PDE’s “capacity as an *ex officio* member of the [Penn State] Board of Trustees[.]” 76 A.3d at 83. This Court considered whether those documents were “received” in connection with a transaction, business, or activity of PDE and ultimately concluded that they were. *Id.* at 90-91. The Court reasoned that “[t]he Secretary only has a place on [Penn State’s] Board because he represents” PDE and, therefore, the records found in his *physical* possession relate to a transaction, business, or activity of PDE because they “enable him to perform his *ex officio* duties . . . [in] representing the Commonwealth’s education interests on the Board.” *Id.* at 91 (emphasis added).

According to the OOR, “the documents hosted on Diligent are no different than the records at issue in *Bagwell*.” (R. at 201a, Final Determination (PDE) at 9, 519a, Final Determination (PDA) at 10). However, the documents at issue in *Bagwell* were found to be in the *physical* possession of PDE and thus within the agency’s control. Here, there is no dispute that the requested documents – other than the redacted 65-page document produced during the OOR appeal – are not in the physical possession of PDE and PDA. Rather, the documents were merely accessible to the Secretaries of PDE and PDA through Diligent. Therefore, it cannot

be said the documents in dispute are similar to those in *Bagwell*. Further, *Bagwell* does not support the argument that agencies are in receipt of documents merely because the documents are accessible to them.

The term “received” should not be construed so broadly as to include mere accessibility. Requiring the disclosure of Penn State documents that are merely accessible to the Secretaries of PDE and PDA would negate the limited scope of Penn State information that is subject to disclosure under the RTKL by making all Penn State documents accessible to the Secretaries of PDE and PDA subject to disclosure, subverting the clear intent of the General Assembly and the plain meaning of the RTKL, as set forth in more detail below.

ii. The OOR’s Final Determinations Subvert the Intent of the General Assembly, which Purposefully Limited the Scope of Penn State’s Required Disclosures.

Penn State is not “an agency of the Commonwealth” and, therefore, its records are not generally accessible through Section 301(a) of the RTKL. *Roy v. Pa. State Univ.*, 568 A.2d 751, 752 (Pa. Cmwlth. 1990). This is because Penn State is private entity subject to the Nonprofit Corporation Law of 1988 (“Nonprofit Corporation Law”). (R. at 46a (“On August 28, 1878, after the enactment of Pennsylvania’s first corporation law, and pursuant to the provisions thereof, the institution elected to be subject to such corporation law and thereafter, has been existing under such law, as such law has been amended, supplemented and modified from time to time.”)).

However, given that Penn State receives funding from the Commonwealth, it is defined in the RTKL, as well as several other statutory schemes,¹⁷ as a “State-related institution.”^[18] 65 P.S. § 67.1501. As a “State-related institution” the information that Penn State must publicly disclose is much more limited than a Commonwealth agency that, unlike Penn State, is fully funded and controlled by the Commonwealth.¹⁹

Section 1502 of the RTKL, 65 P.S. § 67.1502, requires state-related institutions, including Penn State, to file a report once a year containing the following information set forth in Section 1503 of the RTKL:

- (1) [A]ll information required by Form 990 or an equivalent form of the United States Department of the Treasury, Internal Revenue Service, entitled the Return of Organization Exempt From Income Tax, regardless of whether the State-related institution is required to file the form by the Federal Government.
- (2) The salaries of all officers and directors of the State-related institution.

¹⁷ Penn State is defined as a “State-related institution” in several other statutory schemes aside from the RTKL including The Institutional Assistance Grants Act, Act of July 18, 1974, P.L. 483, 24 P.S. § 5183, the Uniform Crime Reporting Act, Section 302 of the Act of November 29, 2004, P.L. 1383, 18 P.S. § 20.302, The College and University Student Vaccination Act, Section 2 of Act of June 28, 2002, P.L. 492, 35 P.S. § 633.2, and the Public School Code of 1949, Section 2001-D of the Act of March 10, 1949, *as amended*, 24 P.S. § 20-2001-D.

¹⁸ The term “State-related institution” is also defined to include Temple University, The University of Pittsburgh, and Lincoln University. 65 P.S. § 67.1501.

¹⁹ Proportionality, “State-related institutions” are afforded less protections than Commonwealth agencies, which are shielded by Pennsylvania’s Sovereign Immunity Act. 1 Pa.C.S. § 2310.

- (3) The highest 25 salaries paid to employees of the institution that are not included under paragraph (2).

65 P.S. § 67.1503. State-related institutions are also required to report an “annual list of contracts in excess of \$5,000 for the purchase of all goods and third-party services” pursuant to Section 1505(a) of the RTKL. 65 P.S. § 67.1505(a).

Requiring the disclosure of Penn State documents merely accessible to the Secretaries of PDE and PDA would render the foregoing limited disclosure requirements surplusage because Penn State documents accessible to the Secretaries pursuant to Section 5508 of the Nonprofit Corporation Law, 15 Pa.C.S. § 5508(b),²⁰ or through Diligent or any like software or manner, could simply be obtained by filing a RTKL request with PDE or PDA. Had the General Assembly intended for Penn State documents to be generally accessible through the RTKL, it would not have narrowed the scope of disclosures that Penn State and the other State-related institutions must make.

²⁰ Section 5508(b) of the Nonprofit Corporation Law provides that:

[o]n demand, in compliance with the requirements in subsection (b.1), a member [of a nonprofit’s board of directors] has a right to examine, in person or by agent or attorney, during the usual hours for business for any proper purpose, the membership register, books and records of account, and minutes of, and consents in lieu of meetings by, the incorporators, members, directors and any other body, and to make copies or extracts therefrom.

15 Pa.C.S. § 5508(b).

Pursuant to Section 1922(2) of the Statutory Construction Act of 1972 it is presumed that “the General Assembly intends the entire statute to be effective.” 1 Pa.C.S. § 1922(2). As such, “courts must interpret statutes to give meaning to all of their words and phrases so that none are rendered mere surplusage.” *Concerned Citizens for Better Sch. v. Brownville Area Sch. Dist.*, 660 A.2d 668, 671 (Pa. Cmwlth. 1995). In order to avoid making the foregoing provisions regarding the limited information a State-related institution must disclose surplusage, not all Penn State documents accessible to the Secretaries of PDE and PDA can be construed as public records. In other words, there must be some mechanism for making documents accessible to the Secretaries for review that does not trigger the disclosure requirement. That mechanism is sharing documents in such a way that Penn State, rather than PDE or PDA, maintains control of the documents. That is exactly what occurred here through the use of Diligent. Thus, for these reasons, the requested documents are not public records subject to disclosure through the RTKL.

B. The Requested Documents Are Not in the Possession, Custody, or Control of PDE or PDA.

To the extent the requested documents can be construed as public records, the documents are not in the possession, custody, or control of PDE or PDA and, therefore, are not subject to disclosure.

Again, pursuant to Section 301(a) of the RTKL, “[a] Commonwealth agency,” such as PDE and PDA, “shall provide public records in accordance with this act.”

65 P.S. § 67.301(a). The requirement that agencies disclose their public records is not limited only to those records physically possessed by an agency. *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1037 (Pa. Cmwlth. 2011). Under Section 901 of the RTKL an agency is required to “make a good faith effort to determine . . . whether the agency has possession, custody, or control of the identified record” requested. 65 P.S. § 67.901. Thus, a public record is subject to disclosure under the RTKL if it is in the possession, custody, *or control* of an agency. This Court has referred to this as “constructive possession.”

As defined by this Court, “[c]onstructive possession is the concept of accessing records ‘of’ an agency that are outside an agency’s possession, but are within its legal custody or control.” *UnitedHealthcare of Pa., Inc. v. Baron*, 171 A.3d 943, 958 (Pa. Cmwlth. 2017). This concept was developed so that “agencies cannot frustrate the purpose of the RTKL by placing their records in the hands of third parties to avoid disclosure.” *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938 (Pa. Cmwlth. 2015). Thus, the “true inquiry” under Section 901 of the RTKL for determining whether an agency is in possession of a document “is whether the document is subject to the control of the agency.” *Barkeyville Borough v. Stearns*, 35 A.3d 91, 96 (Pa. Cmwlth. 2012).

Here, in contrast to those cases in which the Court has ordered the disclosure of records in the custody of third-party government contractors through Section

506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1),²¹ there is no question that neither Penn State nor its documents are under the control of PDE and PDA. *Pa. State Univ. v. Derry Twp. Sch. Dist.*, 731 A.2d 1272, 1275 (Pa. 1999) (“Given the composition of the board of trustees of [Penn State], it is clear that the authority to control” Penn State “is not within the purview of the Commonwealth.”). While the Secretaries of those agencies are members of the Penn State Board of Trustees, the Board is comprised of only 3 voting government officials²² out of 36 voting members and, thus, the Board “of [Penn State] is not governmental in nature.” *Id.*

As set forth above, the OOR ordered the disclosure of the requested documents based upon the fact that they are accessible to PDE and PDA. (R. at 201a-02a, Final Determination (PDE) at 9-10, 519a, Final Determination (PDA) at 10). This conflicts with the well-established precedent from this Court that “precludes access to a private company’s records based solely on an agency’s legal right to review those records.” *UnitedHealthcare of Pa., Inc.*, 171 A.3d at 959; *Eiseman*, 86 A.2d at 938 (“[T]his Court does not infer constructive possession from

²¹ Section 506(d)(1) of the RTKL provides that “[a] 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 action, shall be considered a public record of the agency for the purposes of this act.” 65 P.S. § 67.506(d)(1).

²² In addition to the Secretaries of PDE and PDA, the Secretary of the Pennsylvania Department of Conservation and Natural Resources serves as an *ex officio* member of the Penn State Board of Trustees. (R. at 47a). The Governor of the Commonwealth serves as a non-voting *ex officio* member of the Board. (*Id.*).

the mere availability of the records to an agency upon request.”). In this regard, this Court’s decision in *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Cmwlth. 2011) is instructive.

In *Office of the Budget*, the OOR granted access to payroll records in the possession of a third-party subcontractor for a school project in the City of York, which received funding for the project from the Pennsylvania Office of the Budget. *Id.* at 619. The OOR recognized that the subcontractor’s work “did not relate to the performance of a government function and,” therefore, is not subject to disclosure under Section 506(d) of the RTKL. *Id.* Nonetheless, the OOR determined that the payroll records were subject to disclosure because they “were under the ‘control’ of” the Office of the Budget by virtue of that agency’s right to audit those records pursuant to the Pennsylvania Prevailing Wage Act.²³ *Id.* Upon review, this Court reversed the decision of the OOR explaining that “[t]o adopt the OOR’s reasoning would mean that records of a private company, not in the possession of a government agency and not related to a contract to perform a governmental function, are disclosable to the public if any government agency has a legal right to review those records” and that “[s]uch interpretation would greatly broaden the scope of the RTKL beyond its explicit language.” *Id.* at 623.

²³ Act of August 15, 1961, P.L. 987, *as amended*, 43 P.S. §§ 165-1 – 165-17.

Here, like in *Office of the Budget*, the OOR has ordered the disclosure of a private company's records not in the possession of a government agency and not related to a contract to perform a governmental function simply because the records are accessible to PDE and PDA. This determination is inconsistent with the RTKL which requires disclosure only if they are in the possession, custody, or control of an agency. The record makes clear that the requested documents are not in the possession, custody, or control of PDE or PDA and, therefore, the requested documents are not subject to disclosure under the RTKL. (R. at 34a-35a, 37a, 270a-71a). Again, to conclude otherwise, would negate the limited scope of Penn State information that is subject to disclosure under the RTKL by making all Penn State documents accessible to the Secretaries of PDE and PDA subject to disclosure. Thus, like in *Office of the Budget*, the OOR must be reversed here.

C. The Requested Documents Are Exempt From Disclosure Under Section 708(b) of the RTKL.

Should this Court conclude that the requested documents are records in the possession, custody, or control of PDE and PDA, the requested documents are exempt from disclosure under Section 708(b) of the RTKL. That section sets forth a number of exemptions to the RTKL's disclosure requirement. Penn State submitted below that the requested documents contain information exempt from disclosure. (R. at 117a, 414a-15a). However, the OOR ordered the responsive documents be produced without conducting an *in camera review* to ensure the

requested documents do not contain information exempt from disclosure. (*Id.* at 203a, Final Determination (PDE) at 11, 529a-30a, Final Determination (PDA) at 20-21).

The Supreme Court has recognized that “[a]lthough the RTKL grants [OOR] appeals officers wide discretion with respect to [the] procedure” for deciding appeals “there appears to be little ‘discretion’ concerning whether a document may or may not be related to a requester. Either the document falls under one of the specific exemptions, or it is a document that must be released.” *Bowling v. Off. of Open Recs.*, 75 A.3d 453, 467 (Pa. 2013). “[T]he foundational question of whether a record or document is exempt from disclosure is a factual one,” *Id.* at 476, “that should be made in the first instance by an appeals officer,” *Off. of Open Recs. v. Center Township*, 95 A.3d 354, 369 (Pa. Cmwlth. 2014). This Court has held that the “OOR should take all necessary precautions, such as conducting a hearing or performing *in camera* review, before providing access to information which is claimed to reveal” information exempted from disclosure under Section 708(b). *Id.* at 368 (quoting *Off. of the Governor*, 20 A.3d at 648).

Here, the OOR did not conduct an *in camera* review before ordering the disclosure of documents that Penn State stated contained information exempt from disclosure by Section 708(b) of the RTKL. As such, the OOR did not take all steps necessary to ensure that information exempt from disclosure is not released through

production of the requested documents. Therefore, should this Court determine the requested documents are records in the possession, control, or custody of PDE or PDA, Penn State requests these matters be remanded for the OOR to conduct an *in camera* review and issue findings as to what information, if any, it considered to be exempted from disclosure in order to ensure no information exempt from disclosure is released.

D. The 65-page Document Produced During the OOR Appeal Contains Information Exempt from Disclosure.

Penn State does not contest that under *Bagwell*, the 65-page document found in the possession of PDA is subject to disclosure through the RTKL. However, the document contains information that is exempt from disclosure by Section 708(b). Specifically, the document contains confidential proprietary information and predecisional deliberation information.

i. The 65-page Document Contains Confidential Proprietary Information.

Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). The term “Confidential proprietary information” is defined in Section 102 of the RTKL as follows:

Commercial or financial information received by an agency:

- (1) which is privileged or confidential; and

- (2) the disclosure of which would create substantial harm to the competitive position of the person that submitted the information.

65 P.S. § 67.102. In determining whether information is confidential, “the efforts the parties undertook to maintain [its] secrecy” must be considered. *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Cmwlth. 2014). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the [entity] from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.” *Id.*

Regarding confidentiality of the document, Susan L. West, the Open Records Officer for PDA, states the following in her affidavit:²⁴

12. Records from a one-day attendance at the August 2022 . . . Board of Trustees retreat were produced. The applicable record was marked “Confidential” and in conjunction with [S]ection

²⁴ “Relevant and credible testimonial affidavits may provide sufficient evidence in support of a claimed exemption.” *Office of the Dist. Atty. of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017).

[§707(b) [of the RTKL, 65 P.S. § 67.707²⁵], legal counsel at [Penn State] were contacted and provided a copy of the confidential, third-party proprietary information for review.

13. The August 2022 retreat record, consisting of 65 pages, has been returned with recommended redactions to pages 1, 2, 28, 29, 30, 31, 39, 43, and 44. Therefore, [PDE] willingly produces this public record to the [R]equester with the assertion of the following exemption:

- a. A record that constitutes or reveals a trade secret or confidential proprietary information is exempt from disclosure pursuant to [S]ection [§708(b)(11) of the [RTKL].

(R. at 271a).

Sara F. Thorndike, Senior Vice President for Finance and Business/Treasurer/Chief Financial Officer of Penn State, states the following in her affidavit regarding the document:

6. In August of 2022, I presented a slide deck entitled “The Student Success Imperative: Cost” at the University’s Board of Trustees Retreat. The presentation provided a strategic review and analysis of the following topics (i) the alignment of the

²⁵ Pursuant to Section 707(b) of the RTKL:

An agency shall notify a third party of a request for a record if the third party provided the record and included a written statement signed by a representative of the third party that the record contains a trade secret or confidential proprietary information. Notification shall be provided within five business days of receipt of the request for the record. The third party shall have five business days from receipt of notification from the agency to provide input on the release of the record. The agency shall deny the request for the record or release the record within ten business days of the provision of notice to the third party and shall notify the third party of the decision.

65 P.S. § 67.707(b).

University's budget with its priorities and values, (ii) the University's ability to lead in a resource-constrained environment, and (iii) the relationship between transforming the budgets of the University and transforming its culture.

7. The presentation was part of a two-day conference session with University leadership and Trustees to discuss some of the strategic goals and operational challenges impacting Penn State.
8. I understand that a hardcopy of this presentation was located in the possession of Pennsylvania's Secretary of Agriculture and that a redacted version has been provided to the Requester in this matter . . . pursuant to the [RTKL] and case law interpreting it. I further understand that [Requester] and the [OOR] have requested additional support for the redactions made to certain pages.
9. I have reviewed the redactions and the underlying information.

(R. at 504a-05a). Regarding the confidentiality of the redacted information, Sara F.

Thorndike states:

The University has taken steps to maintain the confidentiality of this information, namely (1) the Agenda for the Retreat, on the first page of the 65-page document produced to Requester, is marked "Confidential" to remind Trustees of the confidential nature of the information and their fiduciary responsibilities to maintain that confidentiality, (2) my presentation was made available for viewing by the Board of Trustees via Diligent, a secure communication portal with restrictive access permissions, and (3) within the University, the information has been closely held to individuals who need to know. The issues related to the redacted content in my presentation materials are in various stages of discussion, with some being in the very early stages, and the University is still gathering information to determine the possible options. Having any of the redacted data in the public domain would put us at a competitive disadvantage and would

breach the confidentiality that is necessary and expected at this stage in business operations.

(R. at 506a-07a).

Regarding the competitive harm that would result from the release of the redacted information, Sara F. Thorndike states the following in her affidavit:

10. The information that has been redacted on PDF pages 28, 29, 30, 31, and 39 is confidential proprietary information as defined in the RTKL. Namely,
 - a. The information is privileged or confidential because the slides provide confidential and proprietary financial information relating to specific non-core University assets being evaluated for strategic alternatives and possible re-prioritization, more specifically:
 - i. Page 28 of the PDF redacts a list of University non-core assets under evaluation by the University for business needs, along with certain expenses and services of the University being considered for strategic alternatives and possible re-prioritization.
 - ii. Page 29 of the PDF redacts information utilized in identifying and analyzing a particular asset, as well as confidential and proprietary financial information of the University relating to a University non-core asset being evaluated for strategic alternatives and possible re-prioritization.
 - iii. Page 30 and 31 of the PDF redacts confidential and proprietary financial information of the University relating to subsidies and expenses paid by the University to provide certain services being evaluated for business needs of the University.

- iv. Page 39 of the PDF redacts a confidential and proprietary financial analysis of the University's building construction costs and benchmarking analysis of average construction costs.
 - b. The disclosure of the information would cause substantial harm to the University's competitive position because disclosure of the identity of the assets and/or the financial reasons to consider prioritization of the assets would (1) damage current operations of the assets, (2) harm employee morale and retention, (3) reduce the market value of any non-core assets, and (4) disadvantage the University if it elected to re-prioritize the assets by having its confidential, internal analysis publicly available
- 11. The information that has been redacted on PDF pages 43 and 44 is confidential proprietary information as defined in the RTKL. Namely,
 - a. The information is privileged or confidential because it discloses a set of options University leaders are considering to address the University's fiscal challenges,
 - b. The disclosure of this information would cause substantial harm to the University's competitive position because disclosure of information would (1) create distrust and confusion as these are mere considerations, rather than items for decision, (2) damage employee morale and retention, and (3) disadvantage the University in the future if it decided to pursue any of the options under consideration

(R. at 505a-06a).

As the OOR correctly concluded, the foregoing “establishes that the redacted information at issue is ‘confidential’ in that [Penn State] took actions to ensure that redacted information in the slide deck presentation was maintained in secrecy.” (R. at 526a, Final Determination (PDA) at 17). The OOR, however, erred in concluding that the foregoing does not establish that disclosure of the redacted information would cause substantial harm to the competitive position of Penn State. Sara F. Thorndike makes clear in her affidavit that release of the redacted information would cause Penn State competitive harm. Specifically, she states that release of the redacted information could harm Penn State by “(1) create[ing] distrust and confusion as these are mere considerations, rather than items for decision, (2) damage[ing] employee morale and retention, and (3) disadvantage[ing] the University in the future if it decided to pursue any of the options under consideration.” (R. at 505a-06a). The redacted information could be used by competitors to adjust their own allocation of assets to align with that of Penn State in order to compete with the University, to lure employees away from Penn State, and generally to sow discord regarding the consideration of reallocation of assets. Therefore, the redacted information would harm Penn State’s competitive position if released.

To the extent the affidavits do not sufficiently establish that release of the redacted information would harm Penn State’s competitive position, Penn State

requests a remand to the OOR to conduct an *in camera* review of this document to ensure information exempted from disclosure is not made available through subsequent production.

ii. The 65-page Document Contains Predecisional Deliberation Information.

Section 708(b)(10)(i)(A) of the RTKL exempts from disclosure a record reflecting:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). To prove this exemption, the following must be shown: “(1) the information is internal to the agency; (2) the information is deliberative in character; and, (3) the information is prior to a related decision, and thus ‘predecisional.’” *Glunk v. Dep’t of State*, 102 A.3d 605, 613 (Pa. Cmwlth. 2014) (quoting *Carey v. Dep’t of Corr.*, 61 A.3d 367, 379 (Pa. Cmwlth. 2013)). Information falls within “the ‘internal’ element when [it is] maintained internal to one agency or among governmental agencies.” *W. Chester Univ. of Pa. v. Schackner*, 124 A.3d 382, 398 (Pa. Cmwlth. 2015). “Only information that constitutes ‘confidential deliberations of law or policymaking, reflecting opinions,

recommendations or advice’ is protected as ‘deliberative.’” *Id.* at 397-98 (quoting *Carey*, 61 A.3d at 378).

Regarding the internal predecisional nature of the document, Sara F. Thorndike states in her affidavit:

12. The information that has been redacted on PDF pages 28, 29, 30, 31, 39, 43 and 44 is internal, predecisional information as defined in the RTKL. Namely,
 - a. These slides disclose University leadership’s internal, predecisional data points relating to a contemplated course of action and the research used in the University’s predecisional analysis. Namely, as described in more detail above, pages 28-31 and 39 detail non-core assets University leadership is considering for strategic alternatives and possible re-prioritization. Pages 43 and 44 posit a variety of possible strategic directions the University has considered that it could pursue to address the financial challenges it is facing,
 - b. The information is prior to a related decision. The information was preliminary, and no decisions were made or intended to be made at the Board Retreat relating to these possible re-prioritizations of business assets or courses of action

(R. at 508a).

Sara F. Thorndike makes clear in her affidavit that the redacted information is internal information related to the possible reallocation of non-core assets. Thus, her affidavit establishes that the redacted information is internal predecisional information.

In concluding otherwise, the OOR wrote that “[t]he evidence provided by [Penn State] asserts that the information redacted reflects internal deliberations of [Penn State’s] Board of Trustees. However, the University nor its Board are considered an ‘agency’ as that term is defined in Section 102 of the RTKL.” (R. at 529a, Final Determination (PDA) at 20). If this Court determines that the document is that of a Commonwealth agency subject to disclosure under the RTKL, then it must follow that the predecisional content in the document is predecisional deliberation information of PDA because it is used by its Secretary, in his official capacity, as a member of the Penn State Board of Trustees. *Bagwell*, 76 A.3d 91 (“[t]he Secretary only has a place on [Penn State’s] Board because he represents” PDE and, therefore, the records found in his physical possession relate to a transaction, business, or activity of PDE because they “enable him to perform his *ex officio* duties . . . [in] representing the Commonwealth’s education interests on the Board.”).

Notably, this Court considered whether this exemption applied in *Pennsylvania Department of Education v. Bagwell*, 131 A.3d 638, 659 (Pa. Cmwlth. 2015), and concluded that PDE did not establish the exemption in that matter. However, the Court did not determine, as the OOR did, that the exemption did not apply to Penn State documents, rather the Court determined the affidavit submitted did not demonstrate the exemption applied. *Id.* at 659.

Regardless, Penn State should not be excluded from invoking the “agency” exemptions in Section 708(b) of the RTKL, including exemptions for documents related to employment, criminal investigations, noncriminal investigations, procurement, and insurance carriers. 65 P.S. § 67.708(b)(7), (16)-(17), (26)-(27). To conclude otherwise would produce an absurd result as Commonwealth agencies could disclose highly sensitive and confidential information of Penn State that is likely protected from disclosure by the federal and state law that they themselves are not required to disclose with respect to their own internal documents.

CONCLUSION

For the reasons set forth above, the requested documents, other than the redacted 65-page document produced during the OOR appeal, are not public records as that term is defined in the RTKL. Even if the documents could be construed as public records, they are not in the possession, custody, or control of PDE or PDA. Accordingly, the requested documents are not subject to disclosure. Should the Court conclude otherwise, Penn State requests these matters be remanded to the OOR to conduct an *in camera* review to ensure that no information exempted from disclosure is made available through the production of the requested documents.

Penn State also requests the OOR's *in camera* review include a review of the 65-page document produced below to the extent the Court concludes the evidence is not sufficient to support the redactions made in that document.

McNEES WALLACE & NURICK LLC

By: 
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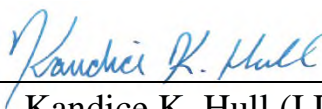
Date: February 8, 2024

*Counsel for Petitioner The Pennsylvania
State University*

CERTIFICATION PURSUANT TO PA.R.A.P 2135

Undersigned counsel hereby certifies pursuant to Pennsylvania Rule of Appellate Procedure 2135(d), Pa.R.A.P. 2135(d), that the foregoing document contains 9,641 words (exclusive of the caption, the table of contents, the table of authorities, signature block, and the certifications herein) according to the word count of the undersigned counsel's computer.

McNEES WALLACE & NURICK LLC

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Date: February 8, 2024

*Counsel for Petitioner The Pennsylvania
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CERTIFICATE OF COMPLIANCE

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

McNEES WALLACE & NURICK LLC

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Date: February 8, 2024

*Counsel for Petitioner The Pennsylvania
State University*

EXHIBIT A



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF :

WYATT MASSEY AND SPOTLIGHT PA, :
Requester :

v. : **Docket No.: AP 2023-1492**

PENNSYLVANIA DEPARTMENT OF :
EDUCATION, :
Respondent :

And :

THE PENNSYLVANIA STATE :
UNIVERSITY, :
Direct Interest Participant :

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.¹ 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).

¹ 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 Attestation² 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:

² 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.³

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

³ 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.⁴ 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.

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

EXHIBIT B



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
WYATT MASSEY AND SPOTLIGHT PA,	:	
Requester	:	
	:	
v.	:	Docket No: AP 2023-1520
	:	
PENNSYLVANIA DEPARTMENT OF	:	
AGRICULTURE,	:	
Respondent	:	
	:	
and	:	
	:	
THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	
Direct Interest Participant	:	

FACTUAL BACKGROUND

On June 29, 2023,¹ Wyatt Massey, a reporter for Spotlight PA (collectively the “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Agriculture (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[Item One:] An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Russell Redding’s role on the Penn State Board of Trustees, including but not limited to his role as a member of

¹ According to the Requester, the Request was initially emailed to the Department on May 18, 2023. However, upon the Requester’s follow-up, the Department informed the Requester that it had no record of the Request having been filed. As such, the Department, upon receiving another copy of the Request, indicated on June 29, 2023 that it would process and expedite the Request for a response. Thus, for purposes of this appeal, the submission date of the Request to the Department is considered to be June 29, 2023 when the Department actually received and began to process the Request.

the Governance and Planning Committee, Legal and Compliance Committee, and the full board of trustees.

[Item Two:] An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.

On July 5, 2023, the Department denied the Request, asserting that it did not have any responsive records in its possession, custody or control.

On that same date, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.² 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).

On July 18, 2023, the Department submitted a position statement reiterating that it does not have any records responsive to Item One of the Request. With regard to Item Two of the Request, the Department indicates that, after receiving this appeal, it conducted “further due diligence” and discovered a responsive document of which it was previously unaware. The responsive document, which consisted of 65 pages, was attached to the Department’s appeal submission. Certain pages of the 65-page record were redacted. The Department argues that the information redacted is exempt under Section 708(b)(11) of the RTKL, which protects confidential

² The Requester granted the OOR additional time to issue a final determination. See 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

proprietary information from disclosure. 65 P.S. § 67.708(b)(11). In support of its position, the Department submitted the attestations of Shannon Harvey, Assistant Vice President and Secretary, Office of the Board of Trustees/Secretary of the Pennsylvania State University, and Susan West, the Department's Open Records Officer. Also attached to the Department's submission were "Amended and Restated Bylaws" and "Standing Orders of the Board of Trustees" for the Pennsylvania State University.

On July 24, 2023, the Pennsylvania State University ("University") submitted a Request to Participate in the appeal pursuant to 65 P.S. § 67.1101(c). On the same day, the OOR granted the Request to Participate. As part of its Request to Participate, the University submitted a position statement, arguing that any records residing on Diligent are not public records under the RTKL and are not within the possession, custody or control of the Department. As for any documents printed or downloaded from Diligent and in the possession of the Department's Secretary, the University acknowledges that those records would be considered "public" and in the Department's possession for purposes of the RTKL. Like the Department, the University maintains that the information redacted consists of confidential proprietary information under Section 708(b)(11) of the RTKL; the University also cites to Section 708(b)(10), relating to internal, predecisional deliberations, as a basis for the redactions made. 65 P.S. §§ 67.708(b)(10) and (11). In support of its position, the University provides a copy of the same Harvey attestation submitted by the Department, and copies of the University's bylaws and standing orders.

After securing an additional extension of time from the Requester in which to issue its decision, the OOR, on September 18, 2023, requested that the University and Department submit evidence in support of their position that the redacted information is confidential proprietary information. On September 25, 2023, the University filed a supplemental submission, which

included a sworn affidavit from its Senior Vice President for Finance and Business/Treasurer/Chief Financial Officer, Sara Thorndike. The Department did not submit any additional information in response to the OOR's inquiry.

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 Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). This burden also applies to third parties arguing an exemption. *See Highmark, Inc. v. Voltz*, 163 A.3d 485, 490 (Pa. Commw. Ct. 2017) (“The party asserting an exemption bears the burden of proving the exemption applies”). Preponderance of the evidence has been defined as “such proof as leads the fact-finder . . . 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)).

1. The appeal is moot as to the records produced.

During the course of this appeal, the Department provided the Requester with a 65-page document which contained certain redacted information. Insofar as the Request sought the unredacted portions of that record, the appeal is dismissed as moot. *See Phila. Pub. Sch. Notebook v. Sch. Dist. of Phila.*, 49 A.3d 445 (Pa. Commw. Ct. 2012) (an appeal is moot if there is no actual case or controversy).

2. While the Department has proven that the screenshots sought in Item One of the Request do not exist, the records sought in Item Two of the Request are in the constructive possession of the Department and therefore subject to access under the RTKL.

The Department asserts that, except for the redacted document produced on appeal, the records sought by the Request do not exist in its possession, custody or control. By way of background, the Department explains that the Secretary of the Department, Russell Redding, became an *ex officio* member of the University's Board of Trustees in January of 2015 when he was appointed to serve as the Department's Secretary. The Department, indicates that "Secretary Redding was granted Diligent access on July 16, 2020."

With respect to Diligent, the Department explains that Diligent "is board management software used by the [University's] Board as a platform for sharing documents and other information with the Trustees." According to the Department, the University's 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 Secretary Redding "does not have the ability to post or delete anything in Diligent."

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, Ms. West, the Department's Open Records Officer, attests,³ in relevant part, as follows:

4. I conducted a thorough examination of files in the possession, custody and control of [the Department] for records responsive to this request. This search entailed coordinating with staff within [the Department's] Executive Office.

5. As a courtesy following receipt of [the Request], contact was made with the [University's] Board of Trustees' legal counsel to let them know [the Request] was received. Past [RTKL] requests received which were related to [University] Board of Trustee records resulted in the identification of confidential, third[-]party proprietary information. This required contact with [University] legal counsel based on section 67.707(b) and section 67.708(b)(11) of the [RTKL,] 65 P.S. §§ 67.101, *et seq.*

6. As a result of contacting [the University's] legal counsel regarding this [R]equest, this agency was informed that the Diligent platform is the property of [the University]. Trustees are able to view documents contained therein without the ability to print or download information hosted on the Diligent platform. Other than Secretary Russell Redding, we were informed that no other individuals within the [Department] have been given access to the Diligent platform.

8. Regarding records related to the August 2022 [University] Board of Trustees retreat, when initially checking with the Executive Office, it was confirmed such records were not in [the Department's] possession.

³ 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)).

9. Based upon the search of [the Department's] files and inquiries with relevant [Department] personnel prior issuing the letter of response, I made the determination that: (a) [the Department] does not have records related to this [R]equest in its possession, custody or control; (b) [the Department] does not own or maintain the Diligent database where the requested records reside; and (c) in conjunction with the appointment to the [University's] Board of Trustees, the Secretary of Agriculture, Russell Redding, does have access to the Diligent platform; however, such access is restricted to a read-only status which precludes documents being downloaded or otherwise in [the Department's] possession.

10. Following the receipt of the appeal by [the Requester] regarding [the Department's] response to [the Request], additional due diligence ensued related to the preparation of [the Department's] position statement in this matter.

11. The staff person within the Executive Office was again contacted regarding records. Additional information surfaced; not all duties were consistently handled by only one individual since the Diligent Platform became the data source for the [University's] Board of Trustees. This could be due to changes following a new administration or other reasons. Additional clarification with the staff person resulted in learning that one record which applies to this [R]equest is in [the Department's] possession, custody and control.

15. Therefore, following additional due diligence on the part of [the Department] related to [the Request], and in response to the statements provided by this [R]equester in his initial filing before the OOR in this matter, [the Department] is providing one responsive record, with redactions, related to the August 2022 [University] Board of Trustee Retreat while maintaining all other requested records are not in the possession, custody or control of [the Department].

Both the Department and University submitted an attestation from Shannon Harvey, which states, in part, the following:

2. I am the Assistant Vice President and Secretary, Office of the Board of Trustees at [the 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. Secretary Russell Redding became an ex officio member of the Board of Trustees in January of 2015 when he was appointed to serve as Secretary of [the Department.]
7. Secretary Redding was granted Diligent access on July 16, 2020.
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 Agriculture 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 the “controlling law on this issue makes clear that the records are public.” The Requester relies, in part, 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 of Education 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 appears to argue that the requested documents, unlike those in *Bagwell*, are not in the physical possession of the Secretary, and therefore not in the possession of the Department. 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.”⁴

⁴ The definition of “record” under the RTKL does not 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

Contrary to the arguments raised, the documents hosted on Diligent are no different than the records at issue in *Bagwell*. Item Two of the Request seeks materials hosted on Diligent related to the August 2022 Board retreat. Notably, these documents were/are accessible to Secretary Redding for the sole purpose of allowing him to carry out his respective role as an *ex officio* Voting Member of the Board. Although the documents on Diligent are “read-only” and are unable to be printed or downloaded by the Secretary, such does not alter our conclusion. The documents, regardless of how they were provided, enable the Secretary to fulfill his *ex officio* duties and represent the Department on the University’s Board. Accordingly, *Bagwell* controls in this matter, and records responsive to Item Two of the Request that are hosted on Diligent are public information and accessible.⁵

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

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

clear that the records are retained on Diligent in connection with a Department Secretary’s duties. Thus, they remain records of the Department.

⁵ Other than the exceptions cited to for the redactions made to the 65-page document produced during the pendency of this appeal, the Department did not raise any RTKL exemptions or other legal authority for denying access to records responsive to Item Two of the Request. The University argues “[t]o the extent that nonprinted documents on the Diligent platform are determined to be within the possession, custody, control of the [Department], 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 do not have the force and effect of law.

cannot be made to create a record that does not exist). Here, Item One of the Request seeks an “electronic screenshot of all folders and files hosted on Diligent” relative to Secretary Redding’s role on the [University’s] Board and related committees. Ms. West’s attestation states that Secretary Redding “has no business reason to take electronic screenshots of all folders and files hosted on Diligent” and that as a result of the search performed, “no records were found related to screenshots of the Diligent platform.” West Att. at ¶¶ 7 and 14. Therefore, based on the evidence provided, the Department has met its burden of proof that it does not possess the screenshots responsive to Item One 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 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 909.⁶

While the Department’s appeal submission only appears to address Section 705 in the context of the requested screenshots requested in Item One of the Request, to the extent that it is also arguing that it would need to create a record in order to provide the records requested in Item Two of the Request, we disagree. Unlike the records sought in Item Two of the Request, a “screenshot” of the folders and files requested would require the Department to, in essence, take

⁶ *In Massey and Spotlight PA v. Dep’t of Educ.*, OOR Dkt. No. AP 2023-1492, 2023 PA O.O.R.D. LEXIS 1976, the OOR reached the same conclusion as has been reached in the instant matter with regard to the accessibility of records contained in the Diligent software. The primary difference in *Massey v. Dep’t of Educ.* was that the records sought related to the Secretary of Education and his role on the University’s Board of Trustees.

an electronic photograph so as to provide an exact duplicate of the computer screen showing the folders and files within the software. Depending on the number of files and folders, a “screenshot” could also potentially require manipulation of the information in order to provide what is requested. In order for the Department to provide a screenshot, the evidence substantiates that such a record would need to be created in order to respond to the Request. A request under the RTKL can only seek records that exist at the time it is filed; any record created during the Department’s effort to respond to the Request cannot be responsive to the Request. *See Rice v. East Rockill Twp.*, OOR Dkt. AP 2018-0346, 2018 PA O.O.R.D. LEXIS 541; *Grabuloff v. Borough of Middletown*, OOR Dkt. AP 2016-0608, 2016 PA O.O.R.D. LEXIS 716.

Conversely, providing an electronic copy of the responsive records that are stored on Diligent does not require the Department to create a record. Diligent, according to the evidence, is a file management and sharing software. Presumably, the documents that were uploaded and stored in Diligent for Board Trustees to access were created prior to their placement in the software for sharing purposes. The fact that the University would necessarily need to allow the Secretary to retrieve the responsive documents in Diligent or otherwise provide the documents/information in electronic form to the Department for provision to the Requester does not amount to the *creation of a new record* under Section 705 of the RTKL. Records transmitted to the Secretary due to his role on the Board are records of the Department under *Bagwell*, and thus, are subject to public access under the RTKL; the designation of those documents as “read-only” cannot circumvent that fact.⁷

⁷ Agencies or other parties that 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. *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”).

3. The Department and the University did not prove that the redacted information in the record produced is confidential proprietary information.

The Department and University contend that the redacted information in the record produced during the appeal is exempt from access because it constitutes confidential proprietary information under Section 708(b)(11) of the RTKL. Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). Confidential proprietary information is defined in Section 102 of the RTKL as follows:

“Confidential proprietary information.” Commercial or financial information received by an agency:

- (1) which is privileged or confidential; and
- (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

65 P.S. § 67.102.

An agency must establish that both elements of this definition are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part*, *Pa. Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.” *Id.* Additionally, “[c]ompetitive harm analysis ‘is limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive

harm should not be taken to mean simply any injury to competitive position.” *Dep’t of Corr. v. Maulsby*, 121 A.3d 585, 590 (Pa. Commw. Ct. 2015).

In support of the position that the redacted information constitutes confidential proprietary information, Ms. West attests that:

12. Records from a one-day attendance at the August 2022 ...Board of Trustees retreat were produced. The applicable record was marked “Confidential” and in conjunction with section 67.707(b), legal counsel at [University] was contacted and provided a copy of the confidential, third-party proprietary information for review.

13. The August 2022 retreat record, consisting of 65 pages, has been returned with recommended redactions to pages 1, 2, 28, 29, 30, 31, 39, 43, and 44. Therefore, [the Department] willingly produces this public record to the [R]equester with the assertion of the following exemption:

a) A record that constitutes or reveals a trade secret or confidential proprietary information is exempt from disclosure pursuant to section 67.708(b)(11) of the [RTKL].

In addition to the foregoing, Ms. Thorndike, the University’s Senior Vice President for Finance & Business/Treasurer/Chief Financial Officer attests as follows:

4. Among other roles at the University, I am responsible for the strategic planning and management of the Finance & Business unit at Penn State. The mission of the Finance & Business unit is to support the Penn State community through stewardship of the University’s human, financial, physical, and environmental resources.

5. In my role, I oversee [the University’s] financial performance and operating budget, which is \$9.5 billion for the 2023-24 fiscal year.

6. In August of 2022, I presented a slide deck entitled “The Student Success Imperative: Cost” at the University’s Board of Trustee Retreat. The presentation provided a strategic review and analysis of the following topics (i) the alignment of the University’s budget with its priorities and values, (ii) the University’s ability to lead in a resource-constrained environment, and (iii) the relationship between transforming the budgets of the University and transforming its culture.

7. The presentation was part of a two-day conference session with University leadership and Trustees to discuss some of the strategic goals and operational challenges impacting Penn State.

8. I understand that a hardcopy of this presentation was located in the possession of Pennsylvania's Secretary of Agriculture and that a redacted version has been provided to the Requester in this matter...pursuant to the Right-to-Know Law ("RTKL") and case law interpreting it. I further understand that [the Requester] and the Office of Open Records have requested additional support for the redactions made to certain pages.

9. I have reviewed the redactions and the underlying information.

10. The information that has been redacted on PDF pages 28, 29, 30, 31, and 39 is confidential proprietary information as defined in the RTKL. Namely,

a. The information is privileged or confidential because the slides provide confidential and proprietary financial information relating to specific non-core University assets being evaluated for strategic alternatives and possible re-prioritization, more specifically:

i. Page 28 of the PDF redacts a list of University non-core assets under evaluation by the University for business needs, along with certain expenses and services of the University being considered for strategic alternatives and possible re-prioritization.

ii. Page 29 of the PDF redacts information utilized in identifying and analyzing a particular asset, as well as confidential and proprietary financial information of the University relating to a University non-core asset being evaluated for strategic alternatives and possible re-prioritization.

iii. Pages 30 and 31 of the PDF redacts confidential and proprietary financial information of the University relating to subsidies and expenses paid by the University to provide certain services being evaluated for business needs of the University.

iv. Page 39 of the PDF redacts a confidential and proprietary financial analysis of the University's building construction costs and benchmarking analysis of average construction costs,

b. The disclosure of the information would cause substantial harm to the University's competitive position because disclosure of the identity of the assets and/or the financial reasons to consider prioritization of the assets would (1) damage current operations of the assets, (2) harm employee morale and retention, (3) reduce the

market value of any non-core assets, and (4) disadvantage the University if it elected to re-prioritize the assets by having its confidential, internal analysis publicly available, and

c. The University has taken steps to maintain the confidentiality of this information, namely (1) the Agenda for the Retreat, on the first page of the 65-page document produced to Requester, is marked “Confidential” to remind Trustees of the confidential nature of the information and their fiduciary responsibilities to maintain that confidentiality, (2) my presentation was made available for viewing by the Board of Trustees via Diligent, a secure communication portal with restrictive access permissions, and (3) within the University, the information has been closely held to individuals who need to know. The issues related to the redacted content in my presentation materials are in various stages of discussion, with some being in the very early stages, and the University is still gathering information to determine the possible options. Having any of the redacted data in the public domain would put us at a competitive disadvantage and would breach the confidentiality that is necessary and expected at this stage in business operations.

11. The information that has been redacted on PDF pages 43 and 44 is confidential proprietary information as defined in the RTKL. Namely,

a. The information is privileged or confidential because it discloses a set of options University leaders are considering to address the University’s fiscal challenges,

b. The disclosure of this information would cause substantial harm to the University’s competitive position because disclosure of information would (1) create distrust and confusion as these are mere considerations, rather than items for decision, (2) damage employee morale and retention, and (3) disadvantage the University in the future if it decided to pursue any of the options under consideration, and

c. The University has taken steps to maintain the confidentiality of this information, namely (1) the Agenda for the Retreat, on the first page of the 65-page document produced to Requester, is marked “Confidential” to remind Trustees of the confidential nature of the information and their fiduciary responsibilities to maintain that confidentiality, (2) my presentation was made available for viewing by the Board of Trustees via Diligent, a secure communication portal with restrictive access permissions, and (3) within the University, the information has been closely held to individuals

who need to know. As noted above, the redacted content in my presentation materials is at various stages of discussion, with some being in the very early stages, and the University is still gathering information to determine the best way to proceed. Having the redacted data in the public domain at this time would put us at a competitive disadvantage and would breach the confidentiality that is necessary and expected at this stage in business operations.

A review of the redacted slide deck presentation itself shows that the redactions are contained on pages with various titles, including “Strategic Questions,” “Leading in a resource-constrained environment,” and “Aligning the Budget with our priorities and values.”

The evidence submitted by the University establishes that the redacted information at issue is “confidential” in that the University took actions to ensure that redacted information in the slide deck presentation was maintained in secrecy. The evidence details that the record containing the information was identified as “confidential,” that access to the redacted information was limited and that it was closely held by individuals within the University on a need-to-know basis. Furthermore, we note that according to the Board of Trustee’s Standing Orders, Trustees are expected to “maintain the confidentiality of confidential information.” Thus, the efforts undertaken by the University show that it made various attempts to maintain the confidentiality of the redacted information and as such, it has met the “confidential” element required as part of the test for confidential proprietary information under Section 708(b)(11) of the RTKL.

Conversely, however, we are unable to conclude that the second element of the “confidential proprietary” test under Section 708(b)(11) has been proven. The second element of the test requires that the University and Department demonstrate, by a preponderance of the evidence, that the disclosure of the redacted information would cause substantial harm to the competitive position of the University. The University’s evidence provides a very generalized description of the information at issue and the harm that may result from disclosure of that

information. With regard to certain statements in the evidence, it is unclear as to what exactly the University is referring. For example, while the University indicates it does not wish to disclose the “non-core assets” at issue, additional description of the types of assets referred to would be helpful to understanding the University’s position and why the redacted content of the slide deck should be considered confidential proprietary. In addition, none of the evidence provided discusses the actual competitive nature of the relevant market from which we could better understand the effects of disclosure and the harm alleged. Lastly, the evidence provided does not demonstrate how the redacted information, should it be released by the University, could be used by its competitors to result in the harm alleged. As noted above, competitive harm does not mean any injury to competitive position; rather the harm must flow from a competitor’s affirmative use of the information at issue. *Maulsby, supra*. While the evidence generally shows that the University could suffer injury from the release of the redacted information should it be disclosed, such is not enough to meet the requirements of Section 708(b)(11). Absent further specifics and more detailed facts, the broad statements in the affidavit provided cannot carry even this low burden.

“Consistent with the RTKL’s goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed.” *Bagwell*, 114 A.3d at 1122. As such, we are constrained to find that the Department and University failed to meet their burden and that the redactions are improper as they are unsupported by the evidence.

4. Section 708(b)(10)(i)(A) of the RTKL does not apply.

The University also argues that Section 708(b)(10) of the RTKL, which relates to internal, predecisional deliberations, serves as a basis for the redactions made to the slide deck. *See* 65 P.S.

§ 67.708(b)(10)(i)(A). Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure a record that reflects:

[t]he internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, ... or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). In order for this exemption to apply, three elements must be satisfied: 1) “[t]he records must ... be ‘internal’ to a governmental agency”; 2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and 3) the contents must be deliberative in character, *i.e.*, pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014).

In support of is position that the redacted information on PDF page nos. 28, 29, 30, 31, 39, 43 and 44 of the slide deck presentation is exempt as reflecting internal predecisional deliberations, Ms. Thorndike attests that:

- a. These slides disclose University leadership’s internal, predecisional data points relating to a contemplated course of action and the research used in the University’s predecisional analysis. Namely, as described in more detail above, pages 28-31 and 39 detail non-core assets University leadership is considering for strategic alternatives and possible re-prioritization. Pages 43 and 44 posit a variety of possible strategic directions the University has considered that it could pursue to address the financial challenges it is facing.
- b. The information is prior to a related decision. The information was preliminary, and no decisions were made or intended to be made at the Board Retreat relating to these possible re-prioritizations of business assets or courses of action, and
- c. These strategic possibilities are internal to the University and confidential. The University took steps to keep the information internal to the University and maintain the confidentiality of this information, namely (1) the Agenda for the

Retreat, on the first page of the 65-page document produced to Requester, is marked “Confidential” to remind Trustees of the confidential nature of the information and their fiduciary responsibilities to maintain that confidentiality, (2) my presentation was made available for viewing by the Board of Trustees via Diligent, a secure communication portal with restrictive access permissions, and

(3) within the University, the information was closely held to individuals who needed to know. Again, the redacted content in my presentation materials is at various states of discussion and the University is still gathering information to enable fully informed decisions. Having the redacted data in the public domain at this time would put us at a competitive disadvantage and would breach the confidentiality that is necessary and expected at this stage in business operations.

Thorndike Affidavit at ¶12.

Records satisfy the “internal” element of Section 708(b)(10)(i)(A) when they are maintained internal to one agency or among governmental agencies. *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 658 (Pa. Commw. Ct. 2016). The evidence provided by the University asserts that the information redacted reflects internal deliberations of the University’s Board of Trustees. However, the University nor its Board are considered an “agency” as that term is defined in Section 102 of the RTKL. *Bagwell*, 76 A.3d 81, 88; 65 P.S. § 67.102. In addition, the Department has presented no evidence to show how the document could fall under this particular exemption. Thus, the redacted information at issue is not “internal” to an agency or among governmental agencies, and as such we find that the Section 708(b)(10)(i)(A) of the RTKL cannot apply to the redactions in the slide deck. 65 P.S. § 67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part and dismissed as moot in part**, and the Department is required to provide all records responsive to Item Two of the Request within thirty days. In addition, the Department is also required to provide the Requester with an unredacted copy of the 65-page document produced during the pendency of this appeal. 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, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁸ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 6, 2023

/s/ Angela Edris

APPEALS OFFICER
ANGELA EDRIS, ESQ.

Sent via the OOR Portal to: Marija Kuren, Esq.;
Susan West, AORO;
Natalie Voris Grosse, Esq.

⁸ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

PROOF OF SERVICE

I certify that I have caused a true and correct copy of the foregoing document to be served on this 8th day of February 2024 upon the persons below via PACFile, in accordance with Pennsylvania Rule of Appellate Procedure 121, Pa.R.A.P. 121:


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