

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DEPARTMENT OF EDUCATION,

Petitioner

V.

WYATT MASSEY and SPOTLIGHT PA

(Office of Open Records),

Respondents

PENNSYLVANIA STATE UNIVERSITY,

Petitioner,

V.

PENNSYLVANIA DEPARTMENT OF
AGRICULTURE, WYATT MASSEY, and
SPOTLIGHT PA

(Office of Open Records),

Respondents

CASES CONSOLIDATED

No. 1083 C.D. 2023

No. 1092 C.D. 2023

No. 1207 C.D. 2023

BRIEF FOR RESPONDENTS WYATT MASSEY AND SPOTLIGHT PA

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INTRODUCTION

This action involves two state entities appealing the Office of Open Records' ("OOR") well-reasoned determination that records sent by the Pennsylvania State University Board of Trustees ("PSU Board") to the Secretaries of the Pennsylvania Department of Education ("PDE") and Pennsylvania Department of Agriculture ("PDA") must be produced to journalist Wyatt Massey and news outlet Spotlight PA under the Pennsylvania Right-to-Know Law ("RTKL"). The Secretaries serve on the PSU Board as *ex officio* voting members pursuant to state statute, and the requested documents were sent to the Secretaries so they can fulfill those statutory duties. The continued withholding of these records thwarts the RTKL's purpose of "promot[ing] access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *Bowling v. Off. of Open Recs.*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). To that end, the RTKL requires the disclosure of these public records in the possession of Commonwealth agencies.

This case is nearly factually identical to a case decided by this Court more than a decade ago, *Bagwell v. Pennsylvania Department of Education*, 76 A.3d 81 (Pa. Commw. Ct. 2013). Here, as in *Bagwell*, a requester seeks documents from Commonwealth executive departments that were sent to the departments' secretaries by the PSU Board. Here, as in *Bagwell*, the documents are public records in the

possession of the Commonwealth executive departments. Therefore, here, as in *Bagwell*, the documents must be disclosed, as they are public records in the possession of Commonwealth agencies. This case can easily be decided under established precedent.

Rather than disclosing the documents, though, PDE, with the support of PSU (collectively, “Petitioners”), argues that *Bagwell* is distinguishable from the instant case because the requested documents were sent to the Secretaries via Diligent, an online document storage and sharing platform, instead of being shared physically. The two agencies’ argument fails because the RTKL does not distinguish between physical and digital receipt.

Additionally, the Petitioners’ arguments, if adopted, would contravene the RTKL’s intent by creating a loophole through which agencies could withhold a wide swath of documents that otherwise would be subject to disclosure under the RTKL. This loophole would allow agencies to share documents exclusively via Diligent or another online file-sharing platform and thereby avoid ever having to disclose the records under the RTKL. Because this case is nothing more than *Bagwell 2.0*, updated for the digital age, this Court should affirm the OOR’s decision requiring the documents to be released under the RTKL.

SUMMARY OF THE ARGUMENT

Under the RTKL, records in the possession of a Commonwealth agency must be disclosed to the public upon request, unless an agency carries its burden to show, by a preponderance of the evidence, that an exemption applies. 65 P.S. §§ 67.301, 67.708. In this case, Massey and news outlet Spotlight PA seek records in the possession of Commonwealth agencies, PDA and PDE, which have failed to demonstrate that an exemption applies. Therefore, PDE and PDA must disclose the records sought.

The RTKL defines a “record” as “[i]nformation, 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.” 65 P.S. § 67.102. This Court held more than a decade ago that documents received by the Secretary of Education from the PSU Board pursuant to the Secretary’s service on the PSU Board are records within the meaning of the RTKL. *Bagwell*, 76 A.3d at 81. As in *Bagwell*, the documents sought here are records within the meaning of the RTKL because the PDE and PDA Secretaries received the records in connection with their statutorily required service on the PSU Board.

Possession of a record under the RTKL can be actual or constructive. *See* 65 P.S. § 67.901 When an agency receives a record, it comes into actual possession of

the record, even when received digitally. *See Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1122 (Pa. Commw. Ct. 2015). PDE and PDA have actual possession of the requested records because the Secretaries received the records via Diligent.

Constructive possession exists when an agency has some modicum of control over a record. Here, the agencies have constructive possession of the documents because they have control of the records through their access to the documents via Diligent.

PDE erroneously argues that it is nonetheless exempted from producing documents stored on Diligent because that would purportedly require the agency to take screenshots, which PDE equates to “creat[ing] a record which does not currently exist.” PDE Br. at 18–19 (citing 65 P.S. § 67.705). This argument ignores that taking screenshots in this context creates no new record and instead merely duplicates a record that already exists. And, even if the Court were to find that PDE is not required to take screenshots of the records itself, PDE has not explained how its read-only access would hinder it from allowing inspection of the documents under the RTKL by Spotlight PA. Nor has PDE explained, as it must, why it is unable to request access to print or download Board documents from PSU, given that the PDE Secretary is a member of the PSU Board with fiduciary duties that require full access to Board documents.

PSU additionally makes the extraordinary argument that the Court should relieve the agencies of the statutory burden of proof for asserting exemptions and instead shift the burden onto the Court and the OOR through an *in camera* review process, which would severely undercut the RTKL's remedial nature and its transparency goals. While PSU acknowledges that no exemptions to disclosure were cited for the withheld documents in the proceedings below, as required, it nonetheless requests that the Court remand this matter to the OOR to conduct a wide-ranging *in camera* review that is unsupported by the RTKL and case law interpreting it. Because neither PSU, PDE or PDA asserted any exemptions below to withhold these documents, the RTKL requires that any belated reliance on exemptions be waived. And, for the 65-page document already released below, this Court should find that an unredacted version must be released because PSU failed to demonstrate its asserted exemptions by a preponderance of the evidence.

In sum, this Court should affirm the OOR's decision.

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Did the OOR correctly determine that the requested documents are records in the possession of a Commonwealth agency within the meaning of the RTKL and thus subject to disclosure?

Suggested answer: Yes.

2. Were any exemptions to disclosure of the withheld documents waived because they were not asserted below?

Suggested answer: Yes.

3. Is any remand to the OOR to determine what exemptions may apply to the withheld documents improper because it improperly shifts the burden of proof for justifying exemptions?

Suggested Answer: Yes.

4. Did the OOR correctly determine that PDE must produce documents that it has access to through Diligent under the RTKL, and that any such production does not result in the creation of new records?

Suggested answer: Yes.

COUNTERSTATEMENT OF THE CASE

I. Requests and agency denials

Wyatt Massey is a reporter at the State College bureau of Spotlight PA, a Pennsylvania nonprofit newsroom dedicated to independent, nonpartisan journalism about the Pennsylvania state government and urgent statewide issues. Spotlight PA's journalism has regularly prompted meaningful reform and has been recognized by its peers at the state and national level as among the best local investigative journalism in the country. In addition to its reporting, Spotlight PA's State College bureau journalists regularly engage with community members through listening sessions and local events. They also host workshops for the Penn State student outlet *The Daily Collegian* and participate in other opportunities to mentor student journalists.

Since opening its State College bureau in Centre County, Spotlight PA has reported on Penn State's operations and the university's impact on communities both

locally and statewide. *See, e.g., Wyatt Massey, Regular Private Meetings Among Top Penn State Trustees May Be Violating Pa. 's Transparency Law, Spotlight PA* (Sept. 15, 2022), <https://perma.cc/VQ5T-7DFE>.

On May 18, 2023, Mr. Massey submitted an RTKL request (the “Request”) to PDE 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.

PSU R.11a.¹

The same day, Mr. Massey submitted a similar request to PDA seeking:

¹ Two reproduced records have been filed in this consolidated action, one by PSU and one by PDE. All citations to the record in this brief are to the reproduced record filed by PSU, and that record is cited throughout as “PSU R. __” for clarity.

1. 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 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.

PSU R.12a.

On June 26, 2023, PDE denied the Request, arguing that PDE did “not have possession, custody, or control of the requested records” and that “[i]t is not a denial of access when an agency does not possess records and [there is no] legal obligation to obtain them.” PSU R.15a. On July 3, 2023, PDA likewise denied the Request, arguing that the “records are not in PDA’s possession, under its custody or its control” and that “an agency is not required ‘to create a record which does not currently exist’” PSU R.235a (quoting 65 P.S. § 67.705).

II. OOR proceedings

On July 5, 2023, Mr. Massey and Spotlight PA (“Requesters”) appealed both PDE’s and PDA’s denials to the OOR pursuant to 65 P.S. § 67.101. PSU R.8a–14a, 21a. PSU requested to participate in each of the appeals as an interested party. PSU R.111a, 409a. All parties filed position statements. PSU R.29a, 113a, 259a, 409a. Additionally, PDA disclosed to Requesters a redacted 65-page document in its physical possession. PSU R.260a.

A. Appeal of request for records from PDE

In the PDE appeal, the OOR denied the portion of the Request seeking screenshots because it determined that PDE was not required to create screenshots after it provided evidence that neither Secretary had previously created screenshots. *See* PSU R.202a.

The OOR granted the Request with respect to Board documents stored on Diligent, as the OOR determined that any documents stored on Diligent were records within the meaning of RTKL in the possession of PDE. *See* PSU R.201a–202a. The OOR based its decision on the near identical nature of the facts in this case to this Court’s previous *Bagwell* case. *See id.* (citing *Bagwell*, 76 A.3d at 90, 92). In *Bagwell*, the PDE Secretary received the requested records from the PSU Board pursuant to the Secretary’s *ex officio* service on the PSU Board. PSU R.201a. The Commonwealth Court held that “[b]ecause the records are received by a Commonwealth agency to enable it to perform its statutory governmental function, they qualify as ‘records’ under the RTKL” and had to be disclosed. *Id.* (quoting *Bagwell*, 76 A.3d at 92).

Applying *Bagwell*, the OOR held that in this case, “the documents hosted on Diligent are no different than the records at issue in *Bagwell*,” because they were “accessible” to the Secretary “for the sole purpose of allowing them to carry out their respective role as an Ex Officio Voting Member of the PSU Board.” PSU R.201a–

202a. Therefore, the documents must be disclosed. PSU R.201a. Following the OOR's decision, PDE and PSU filed petitions for reconsideration, primarily arguing that the storage of the records on Diligent distinguishes the Request from the request at issue in *Bagwell*. PSU R.204a, 216a. The OOR denied the petitions and reaffirmed its decision, stating that storage of the records on the Diligent platform made no difference under the RTKL. PSU R.221a–222a. The OOR stated that agencies possessing public records cannot “store records . . . as ‘read-only’ and then argue the records are incapable of duplication” because this “would lead to an absurd result wherein the public would be unable to obtain public records” and would also “encourage agencies . . . to use file sharing platforms and software to avoid releasing . . . records.” PSU R.221a.

The OOR also rejected the arguments of PDE and PSU that transmitting the records via Diligent means the Secretaries never received or possessed the records. *See* PSU R. 221a. “When Department secretaries are granted access to Diligent,” the OOR determined that “they clearly receive the documents and information necessary to enable them to perform their duties.” *Id.* The OOR declined to sanction an arrangement where a “Department Secretary is able to view documents containing public information but is then permitted to avoid public disclosure of those documents simply by proclaiming they have never actually *received* them.” *Id.* Overall, the OOR reaffirmed that PDE must disclose the requested records

available to the Secretaries stored on Diligent. PSU R.222a. PDE and PSU then petitioned this Court to review the OOR's decision pursuant to 65 P.S. § 67.1301.

B. Appeal of request for records from PDA

In the PDA appeal, the OOR denied the portion of the Request seeking screenshots on the same basis as in the PDE appeal: the Secretary had never created screenshots and the OOR cannot order an agency to create a record. *See* PSU R.520a–521a. The OOR likewise granted the Request as to the documents stored in Diligent. *See* PSU R.519a–520a. With respect to the Diligent records, the OOR again held that “the documents hosted on Diligent are no different than the records at issue in *Bagwell*.” PSU R.519a–520a.

The OOR also made several determinations related to the disclosed 65-page document. First, the OOR held that “[i]nsofar as the Request sought the unredacted portions of that record,” the appeal was moot because the document had been produced. PSU R.513a. As to the redacted sections of the 65-page document, the OOR held that PDA and PSU had not met their burden to show any exemptions to the RTKL applied. *See id.*

PDA and PSU argued that the redacted sections of the 65-page document were exempt from disclosure because they contained confidential proprietary information. PSU R.522a. To shield confidential information under the RTKL, agencies must show that the information is (1) privileged or confidential and (2) that the disclosure

would “substantial[ly] harm . . . the competitive position of the person that submitted the information.” 65 P.S. § 67.102. The OOR held that although PDA and PSU met their burden to show the redacted information was privileged or confidential, they did not meet their burden to show that the disclosure of the information would cause substantial harm to the competitive position of PSU. R.526a. Therefore, “the redactions [we]re improper as they are unsupported by the evidence.” *Id.* at R.527a.

The OOR also rejected PSU’s argument that the redactions in the 65-page document were proper under the predecisional deliberation exemption. The RTKL exempts from disclosure a record that reflects “internal, predecisional deliberations of an agency.” PSU R.528a (quoting 65 P.S. § 67.708(b)(10)(i)(A)). The OOR held this exemption did not apply to the redacted information in the 65-page document because PSU and its Board are not agencies under the RTKL and because PDE presented no evidence as to how the exemption would apply. PSU R.529a. Therefore, the OOR determined that the 65-page document must be released without redactions. *Id.* PSU petitioned this Court to consider the OOR’s decision pursuant to 65 P.S. § 67.1301, requesting *in camera* review to determine the applicable exemptions, without asserting any exemptions themselves. PSU Br. at 27–29. The appeals of the RTKL requests to PDE and to PDA were then consolidated by this Court pursuant to an unopposed application by PSU on November 21, 2023.

ARGUMENT

Under the RTKL, “[a] record in the possession of a Commonwealth agency . . . shall be presumed to be a public record[.]” 65 P.S. § 67.305(a), and agencies “shall provide public records” upon request. 65 P.S. § 67.301(a). Any entity asserting an exemption from disclosure under the RTKL bears the burden of showing by a preponderance of the evidence that the exemption applies. *See* 65 P.S. § 67.708(a)(1). The RTKL “must be construed to maximize access to public records that are in an agency’s possession” and “exemptions from disclosure must be strictly construed.” *McKelvey v. Pa. Dep’t of Health*, 255 A.3d 385, 400 (Pa. 2021) (citing *ACLU of Pa. v. Pa. State Police*, 232 A.3d 654, 656 (Pa. 2020)). This Court “in its appellate jurisdiction, independently reviews” decisions of the OOR. *Bowling*, 990 A.2d at 818.

I. THE DOCUMENTS SOUGHT ARE RECORDS WITHIN THE MEANING OF THE RTKL BECAUSE THEY DOCUMENT AGENCY ACTIVITIES AND WERE RECEIVED BY PDE AND PDA IN CONNECTION WITH AGENCY ACTIVITIES.

The RTKL defines a “record” as “[i]nformation, 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.” 65 P.S. § 67.102. The law’s definition of record, therefore, is two-fold: it requires that the information (1) was “created, received, or retained . . . in connection with the activity of the agency” and (2) “documents a

transaction or activity of an agency.” *Barkeyville Borough v. Stearns*, 35 A.3d 91, 95 (Pa. Commw. Ct. 2012) (citing *Allegheny Cnty. Dep’t of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1034–35 (Pa. Commw. Ct. 2011)).

a. The Requested Records Were Received by PDE and PDA in Connection with an Activity of the Agencies.

The first element of the RTKL’s definition of a record has two parts: first, that the information was “created, received, or retained,” and second, that the creation, receipt, or retention of the information was “in connection with . . . [the] activity of the agency.” *See Bagwell*, 76 A.3d at 88–90 (analyzing whether a document received by the Department of Education was a document “of” the agency).

i. The Requested Records Were Received by the Secretaries When PSU Sent the Records to the Secretaries Through Diligent.

For a record to be public under the RTKL, it must have been created, received, or retained by a Commonwealth agency. 65 P.S. § 67.102. This Court held more than ten years ago that documents sent by PSU to Commonwealth Secretaries who serve on the PSU Board are “received by an agency” within the definition of a record under the RTKL. *Bagwell*, 76 A.3d at 90. In *Bagwell*, a requester sought “letters, emails, reports and memorand[a] received by [the] Secretary of Education” related to his service as an *ex officio* member of the PSU Board. *Id.* at 83. This Court held that “receipt” of “information from PSU” by the Education Secretary “on the

Department's behalf . . . through his service as an *ex officio* [PSU] Board member qualifies the information as 'received' by an agency" under the RTKL. *Id.* at 90. Similarly, the requested documents in this case were shared by PSU with the Pennsylvania Secretaries of Education and Agriculture related to their service as *ex officio* Board members. This is virtually identical to the facts of *Bagwell*, and therefore, as the OOR recognized, the documents sought by the Request were "clearly receive[d]" by the Secretaries according to the definitions set out in the RTKL. PSU R.221a.

PSU attempts to distinguish this case from *Bagwell* because the requested records here were transmitted via Diligent, an online document-sharing software, whereas in *Bagwell*, the documents were received physically by the Education Secretary. PSU Br. at 19. However, as the OOR explained in its decision below, "the definition of 'record' under the RTKL does not necessarily require physical receipt." PSU R.221a. *See also, e.g., Mollick v. Township of Worcester*, 32 A.3d 859, 872 (Pa. Commw. Ct. 2011) (holding that emails, which cannot be received physically, were records under RTKL). Because the RTKL does not distinguish between physical and digital receipt, the Secretaries here "received" the documents from PSU, just as they did in *Bagwell*.

Courts in other jurisdictions have likewise held that viewing a digitally shared document constitutes receipt in the public records context. For example, the District

Court of Appeal of Florida rejected a nearly identical argument to PSU's that Florida State University ("FSU") raised in claiming that sharing a document via a website does not constitute receipt. *See NCAA v. Associated Press*, 18 So.3d 1201, 1207 (Fla. Dist. Ct. App. 2009). Florida law, much like the RTKL, grants "[e]very person . . . the right to inspect or copy any public record made *or received* in connection with the official business of any public body." *Id.* at 1206 (quoting Fla. Const. art. I § 24(a)) (emphasis added). Under that provision, requesters sought disclosure of records that the NCAA had shared with FSU via a secure Internet website, which FSU officials could access using a password. *Id.* at 1205. The NCAA, like PSU, was not directly subject to the state's public records disclosure requirements, but FSU, like PDA and PDE, carries out state business and is thus subject to disclosure requirements. *Id.* at 1204.

The NCAA argued the records at issue were not subject to disclosure because FSU had never "received" the documents "within the meaning of the public records law" but rather argued that FSU had merely "viewed" the records. *Id.* at 1208. The Florida court rejected the NCAA's argument and held that the term "'received' . . . refers not only to a situation in which a public agent takes physical delivery of a document, but also to one in which a public agent examines a document residing on a remote computer." *Id.* at 1207.

PSU's arguments are nearly identical to the NCAA's in the Florida case. PSU argues that the requested records are not subject to disclosure because they were never received by the Secretaries and instead were merely "accessible" to them, emphasizing that the Secretaries had only the "ability to view the requested documents on Diligent." PSU Br. at 17, 19. However, just as the Florida court found that FSU received the documents when the NCAA shared them via the secure website, this Court should likewise find that PDA and PDE received the documents here when PSU shared the documents via Diligent with the Secretaries.

In another recent analogous case, a North Carolina court held that sharing links to a document hosted online "does not remove[] the document from the universe of public records." *Gray Media Grp., Inc. v. City of Charlotte*, 892 S.E.2d 629, 638 (N.C. Ct. App. 2023). In *Gray Media*, requesters sought a survey of city councilors, as well as their responses. *Id.* at 634. The state's public records law, much like the RTKL, provides access to "all documents . . . regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business." *Id.* at 638 (quoting N.C. Gen. Stat. § 132-1(a)). A contracted private entity had shared the survey with city council members via a hyperlink, and the city contended that this method of transmission rendered the survey beyond public access. *Id.* The court rejected that argument in holding that, whether received by email or via a hyperlink, the survey was a public record subject

to disclosure. *Id.* Here, the same principle applies. Sharing the documents via Diligent was merely an alternative to emailing the records or physically handing them off to the Secretaries, and just as in the North Carolina case, a digital method of transmission does not render the records beyond public access.

Just like in *Gray Media* and *NCAA*, the RTKL does not contemplate a distinction between “receipt” and “viewing access.” The intention and functional result of receiving and accessing a document are the same. Whether a document is handed off physically, emailed, or shared within Diligent, the intention is to send the document and the information therein; the functional result is receipt, which allows the recipient to read the document and the information therein. The OOR recognized the absurdity of trying to distinguish between receipt and access, stating that “it is difficult to sanction an arrangement wherein a Department Secretary is able to view documents containing public information but is then permitted to avoid public disclosure of those documents simply by proclaiming they have never actually received them.” PSU R.221a. Sharing via Diligent is simply an alternative to a physical hand off or using email that ensures the Secretaries receive the documents and information they need to carry out their statutory duties as *ex officio* members of the Board. *See Bagwell*, 76 A.3d at 88–89 (“[T]he Secretary is statutorily required to serve on the PSU Board [T]he purpose of the Secretary’s *ex officio*

membership on the Board is to build support for the institution and to increase state influence”).

PSU also relies on the fact that Penn State “maintains” the Diligent platform and “controls the ability of the members of its Board of Trustees to view the documents and ‘to print or download . . . from the Diligent platform’” to argue that PDA and PDE did not receive the documents. PSU Br. at 17. But an agency does not need to be the owner or administrator of a digital account for documents within the account to be considered records under the RTKL. For example, this Court held in *Mollick* that emails maintained on personal computers and email accounts were still public records because the “Township Supervisors exchanged emails that document a transaction or activity of the Township and that were created, received, or retained in connection with a transaction, business, or activity of the Township.” 32 A.3d at 872–73. In other words, it did not matter that the owners of the computers and accounts were not the township, but rather its supervisors in their individual capacities, because under the RTKL, who owns an account housing documents is not determinative of whether the records are public. *See id.* (“any emails that meet the definition of ‘record’ under the RTKL, even if they are stored on the Supervisors’ personal computers or in their personal email accounts, would be records of the Township.”) Just as in *Mollick*, it does not matter that PSU, not PDE or PDA, owns and controls the Diligent account; what matters is whether the documents requested

meet the definition of a “record” under the RTKL, a definition that is squarely based on a record’s content and use, not its physical form. 65 P.S. § 67.102.

Finally, it would contravene the purpose of the RTKL to hold that viewing a shared document within Diligent is not receipt. The RTKL is “remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.” *Commw. Off. of Open Recs. v. Center Township*, 95 A.3d 354, 358 (Pa. Commw. Ct. 2014). If PSU’s argument were adopted, then documents shared within Diligent would not be capable of being “received” within the meaning of the RTKL, and agencies could easily flout disclosure by channeling communications through Diligent or another online document management service, such as Google Drive or Dropbox.

The OOR foresaw and sought to avoid this outcome, stating that adopting PSU’s and PDE’s view “would encourage agencies in similar situations to use file sharing platforms and software to avoid releasing [public] records.” PSU R.221a. Such a loophole would undermine the purpose of the RTKL to promote open government and allow public scrutiny of officials. *See, e.g., Center Township*, 95 A.3d at 358. The Court of Appeals of North Carolina likewise recognized that finding that hyperlinked access to a document was not receipt “would defeat the purpose of the [the state’s public record law], creating a clear path to hide huge

swaths of governmental work from public scrutiny.” *Gray Media Grp., Inc.*, 892 S.E.2d at 638–39.

PDA and PDE received the requested records when PSU shared them with the Secretaries within the Diligent platform, and there is no substantive difference between “receipt” under the RTKL and “access to view” within Diligent. Holding otherwise would create a loophole in the RTKL that would allow agencies to keep documents that should be public out of reach under the RTKL.

ii. PDE and PDA Received the Requested Documents in Connection with Agency Activities Because the Secretaries Represent Agency and Commonwealth Interests on the PSU Board.

The definition of “record” requires that receipt of records must occur “in connection with the activity of the agency.” 65 P.S. § 67.102. In *Bagwell*, this Court held that documents the Education Secretary received from PSU related to his *ex officio* role on the PSU Board were received “in connection” with Department business because “[t]he Secretary is statutorily required to serve on the PSU Board[.]” 76 A.3d at 88; 24 P.S. § 2536. “When performing statutorily imposed duties, the Secretary must act at all times as the Secretary of the Department, and thus is acting in a governmental capacity.” *Bagwell*, 76 A.3d at 88. The purpose of the Secretary’s membership on the PSU Board, this Court held, is to “build support for the institution and to increase state influence” and “to protect students and citizens of the Commonwealth.” *Id.* at 89.

Just as in *Bagwell*, the documents responsive to the Request were received by the Secretaries pursuant to their statutory duties. The Secretaries, just as in *Bagwell*, act as representatives of their Departments and the Commonwealth on the PSU Board. Therefore, the records at issue in this case were received by the Secretaries in connection with activities of their respective agencies in service of Pennsylvanians.

b. The Requested Records Document an Activity of PDE and PDA Because the Records Evidence Activities of the Secretaries and Their Departments.

The RTKL’s definition of “record” requires that the information sought by the requester “documents a transaction or activity of the agency.” *Barkeyville Borough*, 35 A.3d at 95. “Document” in this context means “proves, supports, or evidences.” *Id.* (internal brackets omitted). Therefore, to be a record, the requested information must evidence an activity of the agency from whom the information is being requested.

In *Bagwell*, this Court held that documents related to PSU Board activities sent to the Education Secretary “evidence the Department’s governmental function of representing the Commonwealth’s education interests on the Board.” 76 A.3d at 91. “The Secretary only has a place on PSU’s Board because he represents the Department. The records he receives to enable him to perform his *ex officio* duties.” *Id.* Therefore, the Court held, the information the Secretary received related to the

PSU Board documented an agency activity. *Id.* at 92. By contrast, information sought under the RTKL pertaining only to personal matters does not evidence agency activity and is not a record under the RTKL. *Compare Pa. Off. of Att’y Gen. v. Phila. Inquirer*, 127 A.3d 57, 63 (Pa. Commw. Ct. 2015) (holding that “emails only related to personal activity of individuals” are not records under the RTKL) *with Easton Area Sch. Dist. v. Baxter*, 35 A.3d 1259, 1264 (Pa. Commw. Ct. 2012) (holding that emails of school board members were records under the RTKL so long as the emails discussed official and not personal business).

Here, the facts are, again, virtually identical to *Bagwell*. The documents sought by the Request contain information related to the PSU Board that the Secretaries received pursuant to their statutory duties. PSU R.38a–39a. These documents therefore evidence activities of PDA and PDE because the Secretaries “represent[] the Department,” *Bagwell*, 76 A.3d at 91, and the Commonwealth’s interests by their participation on the Board. Additionally, the information in the requested documents is not of a personal nature outside the ambit of the RTKL because this Court recognized in *Bagwell* that the Education Secretary does not serve on the PSU Board in an individual or personal capacity but rather serves “on behalf of the Commonwealth.” 76 A.3d at 90. Because the Education Secretary and Agriculture Secretary serve on the PSU Board to represent their respective

Departments, the requested records document activities of Commonwealth agencies, PDA and PDE.

Petitioners do not directly dispute that the records sought by Spotlight PA document activities of Commonwealth agencies. Instead, PSU argues that the PSU Board is not subject to the RKTL and claims that granting Requesters access to the responsive records would render the more limited disclosure requirements that apply to Penn State directly “surplusage.” PSU Br. at 20–23. However, this argument ignores the well-established principle that the “non-agency status of the creator or sender of records does not preclude the [records’] public status.” *Bagwell*, 76 A.3d at 90 (citing *Dep’t of Env’tl. Prot. v. Cole*, 52 A.3d 541 (Pa. Commw. Ct. 2012); *Baxter*, 35 A.3d 1259. “Private persons and entities may create correspondence and send it to an agency, thereby potentially making it a record of the agency.” *Bagwell*, 76 A.3d at 90; *see also W. Chester Univ. of Pa. v. Schackner*, 124 A.3d 382, 395 (Pa. Commw. Ct. 2015) (holding that university foundation documents were subject to disclosure because they were received by university officials on the board). Therefore, it is irrelevant whether PSU itself is subject to the RTKL.

PSU also argues that “there must be some mechanism for making documents accessible to the Secretaries for review that does not trigger the disclosure requirement.” PSU Br. at 23. However, to allow the university to share documents with the secretaries without the documents becoming subject to the RKTL would

overturn *Bagwell* and the broader principle that only one party to correspondence needs to be a state agency for the communication to be subject to the RTKL. Such a decision would also require this Court to ignore the plain language of the RTKL on which *Bagwell* and related cases are based.

The statute is clear that “[a] record in the possession of a Commonwealth agency . . . shall be presumed to be a public record,” 65 P.S. § 67.305, and that agencies “shall provide public records” upon request. 65 P.S. § 67.301. There is no carveout or exception for records in the possession of an agency but not created by that agency. Rather, the exact opposite is true: the General Assembly crafted the definition of record to include records “received” by an agency. 65 P.S. § 67.102. For an agency to receive a record, the record must necessarily originate somewhere outside the agency or else the agency would have no need to receive it. The plain language of the statute therefore clearly covers records which an agency possesses but which originated with another entity. To grant PSU’s request and allow documents to be shared with the Secretaries without triggering the RTKL duties would directly contradict the statute and overturn a swath of precedent applying the law’s plain language.

PSU’s argument that the RTKL supports a carveout for any documents shared via Diligent to avoid rendering PSU’s more limited general disclosure requirements mere “surplusage,” PSU Br. at 23, also fails because these disclosure requirements

pre-date PSU's deployment three years ago of Diligent by well over a decade. PSU R.120a; 65 P.S. § 67.1503 (effective Jul. 1, 2008). PSU has demonstrated no legislative intent for such a carveout that would allow it to easily circumvent the RTKL because there was none.

In sum, the requested records document an activity of the Departments because the records contain information related to the Secretaries' service on the PSU Board on behalf of their Departments. The requested records were also, as discussed *supra* at Section I(a)(ii), "received" by PDE and PDA "in connection with" an activity of the agencies: the Department Secretaries' statutorily required participation on the PSU Board to promote Commonwealth and agency interests. *See* 24 P.S. § 2536. The requested records, therefore, meet the two-part definition of a "record" under the RTKL.

II. THE PENNSYLVANIA DEPARTMENTS OF EDUCATION AND AGRICULTURE POSSESS THE REQUESTED RECORDS.

The RTKL requires that records of Commonwealth agencies in their "possession, custody or control" be disclosed. 65 P.S. § 67.901. Both actual possession and constructive possession of documents are "possession" under the RTKL. *See Barkeyville Borough*, 35 A.3d at 96 ("constructive possession qualifies as possession under the RTKL").

a. The Department of Education Has Actual Possession of the Requested Records Because the Secretary Has Access to Open and Review the Documents in Diligent.

An agency has actual possession of the records it receives, regardless of whether receipt is physical or electronic. *See Dep't of Conservation & Nat. Res. v. Off. of Open Recs.*, 1 A.3d 929, 936 (Pa. Commw. Ct. 2010) (certified payroll records of a third-party submitted to a Commonwealth agency were records in the possession of an agency); *Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1122 (Pa. Commw. Ct. 2015) (emails received by the Education Secretary were in the possession of the Education Department). As explained *supra* in Section I(a)(i), the Department received the requested records when the documents were shared via Diligent with the Secretaries. PSU R.38a–39a. Therefore, the Departments had actual possession of the records by virtue of the Secretaries' receipt of the documents through Diligent.

PSU calls Diligent “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.” PSU Br. at 17. But no facts in the record suggest that the Secretaries have lost the ability to review the requested documents in Diligent after they viewed them, as PSU's metaphor suggests. Instead, it appears that the Secretaries can open Diligent to review the requested documents at any time. This is the same as the Secretaries opening an email they received in the past or pulling

physical records they received in the past out of a filing cabinet. In either of those circumstances, there would be no question that the Secretaries, and thus the Departments, actually possessed the requested records; neither should there be a question of actual possession here simply because the storage medium is different.

The implication of PSU’s metaphor—that some members of the Board, or the Board’s office staff, have the authority to revoke any Board member’s access to Board documents—raises concerns about whether PSU may be impeding the Secretaries’ ability to fulfill their fiduciary duties through the use of Diligent. The Secretaries are statutorily required to serve on the PSU Board, an arrangement from which both “PSU and the Commonwealth benefit.” *Bagwell*, 76 A.3d at 88–89. All Board members, pursuant to the Standing Orders of the Board of Trustees, must “[p]repare diligently, attend faithfully, and participate constructively in all Board of Trustees meetings and related activities by reading the agenda and supporting materials.” PSU R.186a. Revocation of documents would seriously impede the Secretaries’ ability to fulfill these obligations.

Board members’ obligations also include, under Pennsylvania Nonprofit Corporations law, that they “stand in a fiduciary relation to the corporation,” and act “in good faith,” according to “the best interests of the corporation and with such care, including the skill and diligence that a person of ordinary prudence would use under similar circumstances.” 15 P.S. § 5712. A fiduciary relationship is “the highest

standard of duty implied by law.” *Commw. by Kane v. New Founds., Inc.*, 182 A.3d 1059, 1067 (Pa. Commw. Ct. 2018) (quoting *Miller v. Keystone Ins. Co.*, 636 A.2d 1109 (1994)). This relationship requires “reasonable inquiry” into, 15 P.S. § 5712(a), and being “appropriately informed” of, *Lustig v. Seffer*, No. 110 EDA 2013, 2013 WL 11250861, at *5 (Pa. Super. Ct. Nov. 6, 2013), matters relevant to the corporation.

If PSU or Board office staff revoke Board documents from Board members, including the Secretaries, this implicates serious concerns that they are impeding the Board members’ ability to execute their fiduciary duties. A Board member must be able to “make inquiries” into, 15 P.S. § 5712(a), and stay “appropriately informed” of, *Lustig*, 2013 WL 11250861, at *5, corporate matters. Those obligations are difficult, if not impossible, to fulfill if the Secretaries lose access to key Board materials.

In sum, the Secretaries, and thus the Departments, obtained actual possession of the requested documents when the documents were posted to and shared within the Diligent platform. That the documents reside in Diligent matters not, as the Secretaries presumably have a continuing ability to review the documents at will; if they do not have that ability, it implicates concerns about PSU and Board administrators interfering with the Secretaries’ ability to fully execute their obligations.

b. Even if the Departments of Education and Agriculture Do Not Have Actual Possession of the Requested Records, They Have Constructive Possession of the Documents.

Constructive possession “qualifies as possession under the RTKL,” *Barkeyville Borough*, 35 A.3d at 96, and the inquiry into whether an agency has constructive possession of a record is “focuse[d] on an agency’s *access* to [the] record,” *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938 (Pa. Commw. Ct. 2014), *aff’d*, 124 A.3d 1214 (Pa. 2015) (emphasis added). “The analysis emphasizes the statutory language . . . of the RTKL that mandates an agency ‘determine whether [it] has possession, custody *or control* of the identified record.’” *Id.* (quoting 65 P.S. § 67.901) (emphasis added). “A record is in the control or constructive possession of an agency when it is in the possession of one of the agency’s officials.” *Breslin v. Dickinson Township*, 68 A.3d 49, 54 (Pa. Commw. Ct. 2013) (citing *Barkeyville Borough*, 35 A.3d at 96 (holding that emails from individual Council members’ personal accounts are subject to the Borough’s control and therefore in the Borough’s constructive possession) and *Mollick*, 32 A.3d at 874–75 (holding that emails in the possession of township supervisors are in the constructive possession of the township)).

Here, the Secretaries have access to the requested records and therefore constructive possession. Again, constructive possession focuses on “an agency’s *access*” to a record, *Dental Benefit Providers, Inc.*, 86 A.3d at 938 (emphasis added),

and by PSU's own admission, the documents are "*accessible* to the Secretaries of PDE and PDA through Diligent," PSU Br. at 19 (emphasis added). Therefore, even if the Secretaries do not actually possess the records, the records are accessible to the Secretaries and, by extension, to the Departments, constituting constructive possession.

Constructive possession also exists where records are no longer in the agency's possession but remain in the possession of a third party from which the agency can obtain the record at will. For example, in *Edinboro University of Pennsylvania v. Ford*, a requester sought the payroll records of a third-party contractor from a state university subject to the RTKL. 18 A.3d 1278, 1280 (Pa. Commw. Ct. 2011). At the time of the request, the university no longer had possession of the payroll records, but it had received and reviewed them in the past. *Id.* The Court held that "where the record is . . . received by the Commonwealth agency, there is no requirement that it then be retained by the agency," *id.*, and "[t]hus, under the RTKL, the received certified payroll forms are public records . . . simply by virtue of the fact that they were received by Edinboro," *id.* at 1281. The Court ordered that "the certified payroll forms received by Edinboro should be again obtained by Edinboro, and provided to Requester." *Id.* Thus, although the records were not in the actual possession of *Edinboro*, past receipt of the forms combined

with an ability to request the forms again at-will constituted constructive possession under the statute.

The Departments have constructive possession under *Edinboro*. Just as the university in *Edinboro* had once received the documents, so, too, here did the Departments receive the documents. *See supra* at Section I(a)(i). Also, just as the university in *Edinboro* could request to review the documents at-will, so, too, here should the Secretaries be able to review the documents at-will pursuant to their Standing Orders and fiduciary duties. *See supra* at Section II(a).

PSU argues the documents are not under the Secretaries' control because the *ex officio* members of the PSU Board constitute a minority of the Board. PSU Br. at 25. However, this fact is irrelevant—PSU improperly conflates control of Penn State's general governance with control of the documents at issue in this request. Of course, the Secretaries alone do not constitute a majority of the Board and therefore do not “control” the Board itself or PSU at large, but that is not relevant here, where the issue is whether the Secretaries have actual or constructive possession, of the specific requested documents.

PSU also argues the Secretaries lack control of the documents because PSU “controls the ability of the members of its Board of Trustees to view the documents and to print or download . . . from the Diligent platform.” PSU Br. at 17 (internal punctuation omitted). As an initial matter, this Court held in *Commonwealth*

Department of Environmental Protection v. Legere that “an agency’s failure to maintain [requested] files in a way necessary to meet its obligations under the RTKL should not be held against the request[e]r.” 50 A.3d 260, 265 (Pa. Commw. Ct. 2012). Indeed, because a “request[e]r cannot control how an agency catalogues or organizes [its] files,” it is incumbent on the agency to make those files available, no matter if administrative difficulties of so doing are heightened by the agency’s own recordkeeping practices. *Id.* With respect to the case at bar, PSU has chosen to make records available to the Secretaries via Diligent; any limited permissions or inability to print or download documents ought not to bear on the right of the requester to the information they seek. If the Secretaries’ documents are kept on a platform that raises challenges to access for the Secretaries, that “should not be held against the request[e]r.” *Id.*

Additionally, the fact that the PSU Board has overall control of the Diligent account does not mean that the PSU Board has complete control over the specific requested records themselves. And, even if the Secretaries are currently unable to print or download the requested records, that does not constitute a lack of control within the meaning of the RTKL. Control depends on the ability to access, such as where a document is in the possession of an agent of the agency, as in *Mollick*, 32 A.3d at 874–75, or where the agency previously received the document, no longer has it, but can request it once again, as in *Edinboro*, 18 A.3d at 1280. It is therefore

irrelevant to the question of control what specific permissions the Secretaries have within the Diligent platform.

To the extent that the inability to print or download a document can be construed as lack of control of the document, the Secretaries' inability here is caused by the specific choices of PSU. PSU R.39a ("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"). PSU provides no reason in the record as to why the Secretaries should not have these capabilities, and PSU should not be permitted to specifically deny the Secretaries certain permissions that they indisputably should have as Board members and then cite its own refusal to give the Secretaries these permissions to demonstrate a lack of control, thereby preventing disclosure under the RTKL.

PSU relies on language from *UnitedHealthcare of Pennsylvania, Inc. v. Baron* to argue that "access to a private company's records" cannot be "based solely on an agency's legal right to review those records," PSU Br. at 25 (quoting *UnitedHealthcare of Pa., Inc. v. Baron* 171 A.3d 943, 959 (Pa. Commw. Ct. 2017)). However, this case is inapposite. In *UnitedHealthcare*, this Court held the Department of Human Services did not have constructive possession of the requested records because the records had never been received by the agency before the RTKL request and had remained in the sole possession of the third party.

UnitedHealthcare of Pa., 171 A.3d at 958 (the agency “does not receive . . . obtain . . . control . . . or review” the requested records). Here, the requested documents were received by the Secretaries of PDE and PDA years ago. The agency in that case also had a right to review some of the third party’s records but no obligation to do so. *See id.* at 959 (“[f]rom our review of the cited regulations, they do not require submission of the [requested records] to DHS”). Here, however, due to the Board’s Standing Orders and the Board members’ fiduciary duties, discussed *supra* at Section II(a), PSU is obligated to send certain documents to Board members, and the Secretaries are obligated to review them.

PSU also relies on *Office of Budget v. Office of Open Records* to argue that PDE and PDA lack constructive possession, PSU Br. at 26, but this case, too, is inapposite. In *Office of Budget*, the Court denied access to payroll records of a third-party contractor sought through an RTKL request to the Office of Budget. *Off. of Budget v. Off. of Open Recs.*, 11 A.3d 618, 619 (Pa. Commw. Ct. 2011). The records had never been in the Office’s possession, so the only way to access them was under Section 506(d)(1) of the RTKL. *Off. of Budget*, 11 A.3d at 621. That section classifies records “not in the possession of an agency but . . . in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency” as public records subject to disclosure. *Id.* (quoting 65 P.S. § 67.506(d)(1)). In *Office of Budget*, the Court held that the records sought were not

subject to disclosure because, first, the records were never in the possession of the Office, and second, there was no argument the records related to the governmental function of the Office. *Id.*

Office of Budget does not apply to this case because the requested records came into PDA and PDE's possession when they were sent via Diligent and no third-party relationship exists here between the parties. But if there were such a relationship, PSU cannot dispute that the records concern a core governmental function, since they directly relate to the Secretaries' work as appointed Board members representing the Commonwealth.

PDE and PDA have constructive possession of the records because the Secretaries have access to the documents via Diligent. And, even if for some reason the Departments no longer have access to the documents, under *Edinboro*, 18 A.3d at 1278, 1280, the documents are still in the constructive possession of the Departments by virtue of their past receipt and the Secretaries' ability to request the documents from PSU on-demand.

III. FAILURE TO RECOGNIZE THE REQUESTED DOCUMENTS ARE RECORDS SUBJECT TO DISCLOSURE UNDER THE RTKL WOULD CONTRAVENE THE INTENT OF THE RTKL AND ITS REMEDIAL PURPOSE.

The RTKL is designed "to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions." *Center. Twp.*, 95 A.3d at 358. Because of

the law’s remedial nature, “the law must be construed to maximize access to public records that are in an agency’s possession.” *McKelvey*, 255 A.3d at 400. It would contravene the remedial nature of the RTKL and the legislative policy to maximize access to public records if this Court failed to recognize that documents sent to public agencies via Diligent are records in the possession of the agency within the meaning of the RTKL. Agencies could easily place a variety of documents that should be public records out of reach of the public by simply never emailing or physically handing off documents, but instead always sharing the records via Diligent or a similar online platform.

Such an interpretation would also have grave consequences not just for accessing materials sent by PSU to the Secretaries of Agriculture and Education but also for accessing public records across the Commonwealth. That is because, “[f]or companies, and even governments, the data that comprise their business is increasingly saved on the cloud.” Danielle D’Onfro, *The New Bailments*, 97 Wash. L. Rev. 97, 119 (2022). Diligent is or has been used by numerous other Commonwealth and local agencies,² and there are countless other digital storage

² Local entities and agencies which have contracted with Diligent include, for example, Montgomery County Community College, *Pennsylvania Treasury* (last visited March 13, 2024), https://www.patreasury.gov/transparency/e-library//ContractFiles/299279_P0073275_Diligent%20Board.pdf; Public School Employees Retirement System, *Pennsylvania Treasury* (last visited March 13, 2024), https://www.patreasury.gov/transparency/e-library//ContractFiles/335438_PO4300430958%20change%203.pdf; Pennsylvania Higher Education Assistance Agency, *Pennsylvania Treasury* (last visited March 13, 2024), https://www.patreasury.gov/transparency/e-library//ContractFiles/534363_16C-022-001.pdf;

platforms³ that may be used by other Commonwealth entities now or in the future. Finding that documents shared via Diligent are beyond the reach of the RTKL could render the documents of many other agencies inaccessible.

This Court has been vigilant in guarding against the use of new technology to thwart the intent of the RTKL. This Court rejected an argument that emails related to agency business sent on officials’ personal emails accounts were beyond the reach of the RTKL because, if the Court ruled otherwise, “the law would serve no function and would result in all public officials conducting public business via personal email.” *Barkeyville Borough*, 35 A.3d at 97. This Court also found over a decade ago that “pulling information from a database is not the creation of a record” because “to hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases.” *Commw. Dep’t of Env’tl. Prot. v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012). And, just last summer, this Court held that social media posts made by public officials could qualify as a record under the RTKL. *See Penncrest Sch. Dist. v. Cagle*, 293 A.3d 783, 800–01 (Pa. Commw. Ct. 2023), *appeal granted*, No. 103 WAL 2023, 2023 WL 8366057 (Pa. Dec. 4, 2023).

Philadelphia Parking Authority, *Pennsylvania Treasury* (last visited March 13, 2024), [https://www.patreasury.gov/transparency/e-library//ContractFiles/735610_231114.Exec%";](https://www.patreasury.gov/transparency/e-library//ContractFiles/735610_231114.Exec%) and Community College of Philadelphia, *Pennsylvania Treasury* (last visited March 13, 2024), https://www.patreasury.gov/transparency/e-library//ContractFiles/588756_CCP.

³ See D’Onfro, 97 Wash. L. Rev. at 119 (discussing Microsoft’s OneDrive, Apple’s iCloud, Evernote, and Dropbox as examples of other online storage platforms).

This Court should continue to guard against agencies' efforts to use new technology to evade the RTKL by holding that the use of document-sharing software to send records to public officials does not suddenly remove the documents from the ambit of the RTKL. Diligent is only nominally different from email, representing merely the next evolution in digital communication. This Court should continue to interpret the RTKL to maximize access to public records, even in the face of new technology.

IV. PETITIONERS HAVE WAIVED THEIR EXEMPTION CLAIMS IN IMPROPERLY SHIFTING THE BURDEN TO THE REVIEWING COURT AND THE OOR TO DETERMINE THE APPLICABLE EXEMPTIONS.

To assert any of the § 708(b) disclosure exemptions, the RTKL requires an agency to demonstrate their applicability by a preponderance of the evidence. 65 P.S. §§ 67.708(a)(1), (b). In the OOR proceedings below, PSU and PDE did not assert any exemptions to withhold the remaining documents, instead denying the requests wholesale and arguing that they did not have possession, custody, or control over the asserted records. PSU R511a-12a. On appeal, PSU asserted §708(b) generally, requesting that this Court remand the case to the OOR to conduct an *in camera* review to determine the applicable exemptions. PSU Br. at 27–29. PSU not only waived its right to assert these exemptions by failing to raise them before the OOR, but also improperly sought to shift the burden of justifying exemptions to this Court and the OOR. *See, e.g.*, PSU Br. at 28 (quoting *Bowling v. Off. of Open Recs.*,

75 A.3d 453, 467 (Pa. Commw. Ct. 2013)) (“Either the document falls under one of the specific exemptions, or it is a document that must be released”). As PSU’s own brief demonstrates, the documents must be released, given PSU’s failure to establish that any exemption applies and PSU’s improper attempt to shift this burden to this Court and the OOR.

a. Petitioners Have Cited No Exemptions to the Presumption that Records in the Possession of a Commonwealth Agency Are Public and Therefore Subject to Disclosure Under the RTKL.

In asserting that an exemption to disclosure of records under the RTKL applies, “[t]he burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). It is well-established that an agency waives exemptions to disclosure that it does not assert before the OOR. *See Dep’t of Transp. v. Drack*, 42 A.3d 355, 364–65 (Pa. Commw. Ct., 2012)) (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved.”).

PSU has waited far too long to raise any additional arguments it may have against disclosure of the documents here. The Supreme Court of Pennsylvania recently rejected an agency’s similar attempt to submit supplemental argument it did not raise at the OOR. *See McKelvey*, 255 A.3d at 404. There, the Supreme Court affirmed the unanimous, *en banc* Commonwealth Court opinion barring the

Department of Health from submitting supplemental arguments and evidence that it had not offered at the OOR level. *Id.* As the Court explained, “allowing the submission of additional evidence at the judicial review stage would undermine the presumption of openness attendant to the RTKL, as doing so would permit agencies to withhold records, without legal ground to do so, until reaching a court.” *Id.* at 393. So, too, here.

Because PSU asserted no exemptions to disclosure of the remaining withheld documents at the OOR level, the court must find that PSU has thus waived any and all exemptions.

b. PSU Has Improperly Shifted the Burden to this Court and the OOR by Requesting *In Camera* Review of the Requested Records.

When justifying exemptions, an agency may not “delegate its . . . burden of proof to third parties.” *McKelvey*, 255 A.3d at 401. Instead, “[t]he burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1).

PSU makes an extraordinary request in its brief that this Court, upon determining that any remaining documents are subject to disclosure, remand the case “for the OOR to conduct an *in camera* review and issue findings as to what information, if any, it considered to be excepted from disclosure in order to ensure no information exempt from disclosure is released.” PSU Br. at 29. PSU relies on

no case law that supports this request, which would effectively flip the RTKL on its head by shifting the burden of proof of establishing an exemption applies onto this Court and the OOR.

PSU asserts that its request is not out of line with this Court's *in camera* review precedent, pointing to language stating 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)." PSU Br. at 28 (citing *Center Township*, 95 A.3d at 368). But PSU mischaracterizes the scope of this quote by omitting key language clarifying that, in a case involving claimed confidential proprietary information, "all necessary precautions" should be taken "before providing access to information which is claimed to reveal 'confidential proprietary information' under [s]ection 708(b)(11) of the RTKL." *Center Township*, 95 A.3d at 368 (quoting *Off. of the Governor v. Bari*, 20 A.3d 634, 648 (Pa. Cmwlth. Ct. 2011)) (emphasis added). Taking all necessary precautions in cases where an agency has asserted records contain confidential proprietary information comports with the RTKL, which places the burden on the agency, and not the Court or the OOR to justify records fall outside the ambit of the RTKL.

This Court has recognized sound policy objectives in deploying *in camera* review, including where it "provides an essential check against the possibility that a

privilege may be abused,” *id.* at 367, and where it avoids “serious due process implications” that could arise if a private entity’s confidential information is disclosed “solely” due to “an agency’s failure to adequately defend a RTKL request.” *Bari*, 20 A.3d at 648. Neither of these objectives is met here, where no exemptions were asserted to the disclosure of the remaining records either at the OOR level or before this Court. Ordering *in camera* review in this context would only serve to undermine the transparency goals underpinning the RTKL by impermissibly shifting the agency’s burden of proof onto the Court and the OOR. PSU’s *in camera* review request should thus be rejected.

c. An Unredacted Version of the 65-Page Document Should Be Released Because Petitioners Failed to Meet Their Burden to Demonstrate That Any Exemptions Apply.

This Court should affirm the OOR’s determination that an unredacted copy of the 65-page slide deck must be released because neither PSU nor PDA demonstrated that the slide deck contained confidential proprietary information or internal, predecisional deliberations under the RTKL that justify any of the redactions made. *See* PSU R.526a–529a.

i. The Confidential Proprietary Information Exemption Does Not Apply.

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: “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. In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commw. Dep’t of Pub. Welfare v. Eisman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part*, 125 A.3d 19 (Pa. 2015). In determining whether disclosure “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 injury if the information were released.” *Dep’t of Corr. V. Maulsby*, 121 A.3d 585, 590 (Pa. Commw. Ct. 2015) (quoting *Eisman*, 85 A.3d at 1128).

While the OOR found that the confidential prong of this exemption had been met, it conversely found that PDA and PSU had not demonstrated, as required, that disclosure would cause substantial harm to PSU’s competitive position. *See* PSU R.526–527a. PSU’s evidence failed to meet this burden, according to the OOR, because it only “provide[d] a very generalized description of the information at issue and the harm that may result from disclosure of that information[,]” “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 no evidence

“demonstrate[s] how the redacted information . . . could be used by its competitors to result in the harm alleged.” *Id.*

PSU relies extensively on the affidavit of Senior Vice President for Finance and Business, Sara F. Thorndike, in arguing that disclosure of “non-core University assets being evaluated for strategic alternatives and possible re-prioritization” would cause “substantial harm” 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.” PSU Br. at 35. (quoting PSU R.505a–506a). PSU additionally argues, with no basis in the record, that competitors could use unspecified redacted information “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.” *Id.* PSU’s brief and supporting evidence utterly fail to demonstrate that the information identified, if released, would result in a qualifying substantial injury, which is narrowly “limited to harm flowing from the affirmative use of proprietary information by competitors” and cannot “be taken to mean simply any injury to competitive position.” *Keystone Nursing & Rehab of Reading, LLC v. Simmons-Ritchie*, No. 1631 C.D. 2018, 2020 WL 40042, at *7 (Pa. Commw. Ct. Jan. 3, 2020).

As the OOR recognized, the generalized description of “non-core University assets” at issue here is so vague that it is impossible to determine, without more, why the information on the slide deck qualifies as confidential proprietary information that would result in a substantial competitive injury if released. PSU R.528a. This Court has rejected similarly general descriptions of the information to be withheld where, like here, the type of information is not, by itself, “facially proprietary[.]”. *Keystone Nursing & Rehab of Reading, LLC*, 2020 WL 40042, at *12.

And, likewise, while harms such as distrust and confusion, damaged employee morale and retention, and an unspecified disadvantage to PSU if it pursues options under consideration may all result from release of the redacted information, PSU made no effort to demonstrate how these harms would stem from competitors’ use of the redacted information as opposed to from merely making the information public at all. PSU provides no support for its remaining arguments in its brief regarding competitors allegedly adjusting their own allocation of assets to compete, luring employees away or sowing discord. *See* PSU Br. at 35. “[C]onclusory affidavits,” or statements in a brief, “standing alone, will not satisfy the burden of proof.” *Off. of Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Commw. Ct. 2017).

For these and all the reasons identified by the OOR, PSU and PDA failed to demonstrate that the confidential proprietary exemption applies to the redacted

information. An unredacted version should thus be released. While PSU argues in the alternative that the Court should remand to the OOR for *in camera* review if the Court determines it failed to demonstrate the exemption applies, the Court should reject PSU's attempt at a third bite at the apple here.

ii. The Predecisional Deliberation Exemption Does Not Apply.

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 . . . including predecisional deliberations relating to a budget recommendation . . . 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, an agency must show: “(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. Commw. Ct. 2014) (quoting *Carey v. Dep’t of Corr.*, 61 A.3d 367, 379 (Pa. Commw. Ct. 2013)). Information falls within “the ‘internal’ element when [it is] maintained internal to one agency or among governmental agencies.” *Schackner*, 124 A.3d at 398. “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).

The OOR correctly determined that "his exemption does not apply to PSU's internal deliberations, *see* PSU R.529a, as it only applies to records "maintained internal to one agency or among governmental agencies." *Dep't of Educ. v. Bagwell*, 131 A.3d 638, 658 (Pa. Commw. Ct. 2016). PSU does not quibble with its non-agency status, but instead advances a new argument not raised at the OOR that "the predecisional content in the document is" nonetheless "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." PSU Br. at 38. Because this argument was not raised at the OOR, PSU has unequivocally waived it. *See supra* at Section IV(a).

Even if this Court finds that PSU's argument was not waived, PSU relies on no caselaw to support its novel argument that information that was not in fact maintained internally amongst or between agencies, but instead pertained to PSU's internal deliberations, somehow satisfies the internal element of this exemption. This interpretation, if adopted, threatens to shield from disclosure wide swaths of information that plainly do not fall within the predecisional exemption. PSU also demonstrates that, if its interpretation were adopted by this Court, it would seek to invoke other agency exemptions to withhold its documents going forward, including those "related to employment, criminal investigations, noncriminal investigations, procurement, and insurance carriers." PSU Br. at 39. The Court should reject PSU's

wholly unsupported interpretation of the RTKL here and affirm the OOR's determination that an unredacted version of the slide deck must be released.

V. PDE AND PDA WILL NOT HAVE TO CREATE A RECORD TO DISCLOSE THE REQUESTED RECORDS.

The OOR correctly determined that requiring the agencies to provide electronic copies of the requested records does not constitute the creation of a record under Section 705 of the RTKL, even when the documents are stored on Diligent in a "read-only" format. PSU R.521a.

PDE argues that it cannot produce records responsive to the Request "without being required to create a record," which the RTKL states it "shall not be required to" do. PDE Br. at 18 (citing 65 P.S. §67.705). While the RTKL does state that "an agency shall not be required to create a record which does not currently exist[.]" the OOR correctly determined that the documents stored on Diligent "were created prior to their placement in the software[.]" PSU R.521a. The mere "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 . . . does not amount to the *creation* of a new record under Section 705 of the RTKL." *Id.* Moreover, this Court does not consider the act of "pulling information from a database" to count as creating a record for purposes of the RTKL either. *Cole*, 52 A.3d at 549. Just as in *Cole*, finding here that the mere act of storing documents digitally in Diligent cloaks them from disclosure

“encourage[s] an agency to avoid disclosing public records by putting information into” Diligent. *Id.*

PDE maintains that its only means of complying with the Request is to “create screenshots of the materials,” which the OOR determined PDE was not required to do with respect to requests no longer at issue. PDE Br. at 19. Even if that were the case (and the OOR correctly determined that it is not), taking screenshots of the “read-only” documents is akin to making paper copies, a type of “duplication” long permitted under the RTKL, and which indisputably does not result in the creation of a new record. *See* 65 P.S. § 67.701 (allowing for physical “duplication” of requested documents). A federal court recently examined this same issue under the Freedom of Information Act and likewise determined that an agency was required to make reasonable efforts to create screenshots of a database where, as here, the screenshots merely readily reproduced the records in a different format and did not result in the creation of a new record. *See Stevens v. U.S. Dep’t of Health & Hum. Servs.*, No. 22 C 5072, 2023 WL 6392407, at *6 (N.D. Ill. Oct. 2, 2023).

The mechanics of PSU’s cloud storage software, Diligent, further support the interpretation that retrieving documents via Diligent, or creating screenshots if necessary, does not result in the creation of new records and instead only shares existing ones. As the OOR correctly noted, Diligent is a “file management and sharing software” that PSU uses to upload and share pertinent records for the Board’s

use. PSU R.521a. Construing such file sharing as the creation of a new record directly contradicts PSU's own affidavit from Shannon Harvey of the Office of the Board of Trustees, which states that Diligent is deployed "to securely share board meeting agendas, meeting materials, and other documents." PSU R.265a.

Given the widespread use of cloud storage in government, *see supra* at Section III, the policy implications of allowing PSU to shield public records behind Diligent's "read-only" mode are immense. PSU's interpretation of the RTKL, if adopted, would severely undercut the statute's purposes, allowing "an agency to avoid disclosing public records by putting information into" this next-generation "electronic database[]." *Cole*, 52 A.3d. at 549. This Court should thus affirm the OOR's determination that requiring agencies to provide electronic copies of the requested records does not constitute the creation of a record under Section 705 of the RTKL. And, even if this Court accepts PDE's argument that its only means of complying with the OOR's decision is to take screenshots, this Court should find in the Diligent file-sharing context that this, too, does not result in the creation of a new record.

In the alternative, if the Court accepts PDE's argument that it must create screenshots and finds that PDE is not required to do so, the Court should instead order PDE to allow inspection of the documents under the RTKL. *See* 65 P.S. § 67.701 ("[A] public record . . . shall be accessible for inspection and duplication[.]").

PDE is required to make its records “accessible for inspection[,]” which would further the RTKL’s goal of “maximiz[ing] access to public records[.]” *McKelvey*, 255 A.3d at 400.

CONCLUSION

For all the foregoing reasons, the decisions of the OOR that the requested documents on Diligent should be released and that the 65-page document should be released without redactions should be affirmed.

Dated: April 8, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the word count limit set forth in Pennsylvania Rule of Appellate Procedure 2135(a)(1). Based on the word-count function of Microsoft Word, the filing contains 12,487 words.

Dated: April 8, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April 2024, a true and correct copy of the foregoing brief was filed with the Clerk of Court for the Commonwealth Court of Pennsylvania by using the PACfile electronic filing system. Notice was provided to the following via PACfile:

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

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

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