#### IN THE SUPREME COURT OF PENNSYLVANIA

No

DEPARTMENT OF EDUCATION,

Petitioner

v.

WYATT MASSEY and SPOTLIGHT PA (OFFICE OF OPEN RECORDS)

Respondents.

THE PENNSYLVANIA STATE UNIVERSITY,

Petitioner

V.

DEPARTMENT OF AGRICULTURE, WYATT MASSEY and SPOTLIGHT PA (OFFICE OF OPEN RECORDS)

Respondents.

#### PETITION FOR ALLOWANCE OF APPEAL

On Petition from the Order of the Commonwealth Court, at Consolidated Docket Nos. 1083, 1092 and 1207 C.D. 2023, Dated October 20, 2025, affirming the Final Determinations of the Office of Open Records, Dated September 1, 2023, and October 6, 2023

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## I. REFERENCE TO OPINIONS BELOW

The Commonwealth Court of Pennsylvania issued a precedential, Reported Opinion on October 20, 2025, in the following consolidated appeals filed by the Department of Education ("Education") (Dkt. No. 1083 C.D. 2023) and the Pennsylvania State University ("Penn State") (Dkt. Nos. 1092 C.D. 2023 and 1207 C.D. 2023) affirming the Office of Open Records' September 1, 2023 (No. AP 2023-1492) and October 6, 2023 (AP 2023-1520), Final Determinations. This Opinion and Order are attached hereto as Appendix "A."

The Office of Open Records issued a Final Determination on September 1, 2023, granting in part, and denying in part, Wyatt Massey's ("Massey") appeal (Dkt. No. AP 2023-1492) in connection with a Pennsylvania Right-to-Know Law Request<sup>1</sup> to Education (No. 2023-108). This Final Determination is attached hereto as Appendix "C."

The Office of Open Records issued a Final Determination on October 6, 2023, granting in part, and denying in part, Massey's appeal (Dkt. No. AP 2023-1520) in connection with a PA RTKL Request to the Department of Agriculture ("Agriculture") (No. 230637). This Final Determination is attached hereto as Appendix "D."

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<sup>&</sup>lt;sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104 ("PA RTKL"). Pursuant to Pa. R.A.P. 1115(a)(8), copies of the pertinent statutory provisions are attached at Appendix "B."

# II. TEXT OF THE ORDER IN QUESTION

# ORDER

AND NOW, this 20<sup>th</sup> day of October, 2025, it is hereby ORDERED that the Office of Open Records' September 1, 2023 and October 6, 2023 Final Determinations are AFFIRMED.

LORÍ A. DÚMAS, Judge

Order Exit 10/20/2025

## III. QUESTIONS PRESENTED

A. Whether the Commonwealth Court's Holding that Penn State's Board Materials are "Received" by an Agency, and thus Subject to the PA RTKL, Despite the Fact that Penn State Maintains Unilateral Control Over the Materials that are Hosted on a Secure Cloud-based and Closed Network Platform is an Issue of First Impression.

Suggested Answer in the Affirmative.

B. Whether the Commonwealth Court's Holding that Penn State's Confidential Board Materials are "constructively possessed" by an Agency, Despite the Fact that Penn State Maintains Unilateral Control Over the Board Materials that are Hosted on a Secure Cloud-based and Closed Network Platform Amounts to an Abuse of Discretion.

Suggested Answer in the Affirmative.

C. Whether the Commonwealth Court Violated its Statutory Duty to Develop an Adequate Factual Record When it Failed and Refused to Conduct *in camera* Review of Penn State's Confidential Board Materials.

Suggested Answer in the Affirmative.

### IV. CONCISE STATEMENT OF THE CASE

Under the Amended and Restated Bylaws of Penn State, the Secretaries of Education and Agriculture (the "Secretaries") serve as *ex officio* voting members of the Penn State Board of Trustees (the "Board"). (R. 47a)<sup>2</sup>. In conjunction with their service on the Board, the Secretaries were granted limited access to Diligent Boards ("Diligent"), a secure cloud-based and closed network software platform that Penn State utilizes to host documents for its Board members to view. (R. 38a-39a, 265a-266a). Specifically, Penn State "utilize[s] Diligent to securely share board meeting agendas, meeting materials, and other documents" for the Board's review. (R. 38a, 265a). Diligent is a relatively new technological product that allows Penn State to maintain unilateral control over all aspects of the materials including whether Board members can download, print, forward, or otherwise obtain any Board materials on that platform. (R. 39a, 266a).

## A. Massey's PA RTKL Requests to Education and Agriculture.

On May 18, 2023, Massey filed PA RTKL Requests with Education and with Agriculture (collectively "the Agencies") seeking Penn State Board materials hosted

<sup>&</sup>lt;sup>2</sup> Pursuant to Pa. R.A.P. 1112(d), a copy of the Reproduced Record as filed in the Commonwealth Court below has been lodged with the Prothonotary of this Court and cited herein as (R.\_\_\_).

on Diligent. The Request filed with Education ("Education RTKL Request") 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] role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs Research and Student Life Committee, Outreach, Development and Community Relations Committee, and the full board of trustees.
- 2. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Khalid Mumin's role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life Committee, Outreach, Development and Community Relations Committee, and the full board of trustees.
- 3. An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.
- 4. An electronic copy of all materials hosted on Diligent in relation to the November 16, 2022 meeting of Penn State's Academic Affairs, Research and Student Life Committee, of which Mr. Hagarty was a member.

(R. 18a-19a).

The Request filed with Agriculture ("Agriculture RTKL Request') 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 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.

(R. 226a).

On June 26, 2023, and July 3, 2023, respectively, Education and Agriculture issued final responses to Massey's PA RTKL Requests. (R. 215a, 235a). Both Education and Agriculture stated in their respective responses that it did not have possession, custody, or control of the requested documents. (*Id.*)

## B. Massey's Appeals to the OOR

On July 5, 2023, Massey appealed the Agencies' responses to the OOR (the "OOR Appeals"). (R. 8a-14a). Before the OOR, both Education and Agriculture submitted position statements in support of their respective determinations that they do not have possession, custody, or control of the Board materials. (R. 29a-110a, 259a-407a). Along with their position statements, Education and Agriculture also submitted various affidavits detailing their respective Agencies' thorough search for the requested Board materials. Education submitted the affidavits of Angela Riegel, the Open Records Officer for Education (R. 34a-35a), Kari Worley, the Executive Assistant to the Secretary of Education (R. 36a-37a), and Shannon S. Harvey, Vice President and Secretary of the Office of Penn State Board of Trustees (R. 38a-40a).

Agriculture submitted the affidavits of Susan L. West, the Open Records Officer for Agriculture (R. 269a-271a), and Shannon S. Harvey (R. 265a-267a).

In these affidavits, the Agencies' employees state that after a thorough search of the available records within 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 Agriculture related to the 2022 Board Retreat (the "65-Page Retreat Document"). (R. 34a, 269a-271a). The sworn affidavits from the Education employees include the fact that the two Secretaries of Education named in the RTKL Request did not independently maintain any control over Penn State's Board materials. (R. 34a-37a). Moreover, the sworn affidavits expressly attest that the Secretaries of Education did not "screen capture, save, print, or in any way maintain the documents accessible on Diligent." (R. 35a-37a).

Penn State filed requests to participate as a direct interest participant in both OOR Appeals, along with position papers and the affidavits of Shannon S. Harvey Vice Thorndike, Senior President and Sara F. for Finance and Business/Treasurer/Chief Financial Officer of Penn State. (R. 112a-192a, 408a-489a). In its position statements, inter alia, Penn State highlights the material differences between the facts of the instant matter versus the facts of the primary case law Massey relies upon. (R. 116a, 413a). Penn State distinguishes *Bagwell v*. Pa. Dep't of Educ., 76 A.3d 81 (Pa. Cmwlth. 2013) from the instant matter where

the Board materials in *Bagwell* consisted of emails and other documents that were "received" and physically possessed by the Secretary of Education. (*Id.*) In this matter, the requested Board materials were never received nor physically possessed by the Secretaries. Instead, the Board materials were hosted on the secure cloudbased and closed network Diligent platform and Penn State controlled all aspects of access to the materials. (*Id.*).

#### C. The OOR Issues its Final Determinations.

On September 1, 2023, the OOR issued its Final Determination in Massey's appeal of the final response of Education. (Appendix C). Therein, the OOR granted in part and denied in part Massey's appeal. (*Id.*). As to Items 1 and 2 of the Education RTKL Request, the OOR concluded that Education 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 for disclosure. (*Id.* at pp. 10-11).

With respect to Items 3 and 4 of the Education RTKL Request, the OOR concluded that Education has possession, custody, and control of the requested documents by virtue of the Education Secretaries' access to those documents hosted on the Diligent platform. (*Id.* at p. 9). To do so, the OOR claimed that "the documents hosted on Diligent are no different than the records at issue in *Bagwell*" and "*Bagwell* controls in this matter[.]" (*Id.*). As a result, the OOR ordered Education to provide the documents responsive to Items 3 and 4 of the Request within thirty (30)

days. (*Id.* at p. 11). Both Education and Penn State requested reconsideration of the September 1, 2023, Final Determination, which the OOR subsequently denied. (R. 204a-222a).

On October 6, 2023, the OOR issued its Final Determination in Massey's appeal of the final response of Agriculture. (Appendix D). Therein, the OOR granted in part, denied in part, and dismissed as moot in part Massey's appeal. (*Id.* at pp. 20-21). Like in the Education appeal, the OOR dismissed Item 1 of the Agriculture RTKL Request on the basis that Agriculture 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 p. 11). With respect to Item 2 of the Agriculture RTKL Request, the OOR concluded, as it did in the Education appeal, that Agriculture has possession, custody, and control of the requested documents by virtue of the Secretary of Agriculture's access to those Board materials hosted on Diligent. (Id. at p. 12). To do so, the OOR relied on Bagwell to conclude that "[r]ecords 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." (Id.) The OOR ordered Agriculture to provide the documents responsive to Item 2 of the Request within thirty (30) days. (Id. at p. 20-21). The OOR also ordered Agriculture to provide an unredacted copy of the 65-Page Retreat Document produced during the appeal on the basis that neither Agriculture nor Penn State proved the redacted information fell within any PA RTKL exemption including, but not limited to, whether the redacted information constituted confidential proprietary information exempt from disclosure pursuant Section 708(b)(11) of the PA RTKL. (*Id.*)

#### D. Appeals of the Final Determinations to the Commonwealth Court.

On September 27, 2023, Education filed a Petition for Review in the Commonwealth Court appealing the OOR's September 1, 2023, Final Determination (Dkt. No. 1083 C.D. 2023). On September 28, 2023, the next day, Penn State also filed a Petition for Review in the Commonwealth Court appealing the OOR's September 1, 2023, Final Determination (Dkt. No. 1092 C.D. 2023). On October 25, 2023, Penn State also filed a Petition for Review in the Commonwealth Court appealing the OOR's October 6, 2023, Final Determination (Dkt. No. 1207 C.D. 2023). On December 28, 2023, the Commonwealth Court granted Penn State's Unopposed Application and consolidated all the three (3) appeals.

#### E. The Commonwealth Court Affirms the Final Determinations.

On October 20, 2025, in an Opinion by the Honorable Lori A. Dumas, the Commonwealth Court affirmed the OOR's Final Determinations in both the Education and Agriculture appeals filed by Massey. (*See* Appendix A). In affirming the OOR's Final Determinations, the Commonwealth Court first determined that the requested Penn State Board materials were "records" subject to the PA RTKL. (*Id.*)

at pp. 7-8). The Commonwealth Court noted that in order to be "records" subject to the PA RTKL, that the Board materials had to be "created, received, or retained" by the Agencies. (Id. at p.7). According to the Commonwealth Court, it was undisputed that the Board materials were not "created" or "retained" by the Agencies. Thus, the only question considered was whether the Board materials were "received" by the Agencies. (See id.). The Commonwealth Court noted that the PA RTKL does not define the word "receive" as used in the definition of "record," and thus, proceeded to quote selected definitions from Black's Law and Merriam-Webster Dictionaries. (*Id.*). In doing so, the Commonwealth Court noticeably skipped over both Black's Law and Merriam-Webster's primary definition of "receive" (i.e., "to come into possession of") and relied upon the secondary definitions of "receive" which included "to perceive mentally" or "to assimilate through the mind or senses." (Id. at pp. 7-8). (finding that the Secretaries did not have physical possession, but nonetheless "received" the Board materials because they were able to "perceive and assimilate the information" hosted on the Diligent platform). Notably, in determining that the Board materials were "received" and, thus, "records" subject to the PA RTKL, the Commonwealth Court did not adopt the OOR's wholesale reliance on *Bagwell*. More importantly, the Opinion fails to cite to any other case

<sup>&</sup>lt;sup>3</sup> The Opinion does cite to *Bagwell*, but only tangentially at the end of its succinct analysis and only apparently to bridge the gap from the Commonwealth Court's strained finding (as

law involving non-agency documents hosted on a secure cloud-based and closed network platform such as Diligent in support of its decision to hold that the Agencies had "received" the requested Board materials. (*Id.*)

Next, and in response to both Education and Penn State's arguments that neither Education nor Agriculture had "possession, custody, or control" of the Board materials as required by Section 901 of the PA RTKL, the Commonwealth Court held that the Agencies have "constructive possession of the requested materials, despite their read-only nature." (*Id.* at p. 9). This conclusion was based on the Commonwealth Court's reaching claim that the Secretaries have "unfettered" ability to access the Board materials hosted on Diligent. (*Id.*). In support of its position, the Commonwealth Court, however, relies on case law dealing with an agency's social media posts and emails sent and received by government officials regarding their official duties. (*Id.* at pp. 9-10).

Next, the Commonwealth Court rejected Penn State's position on appeal that the redacted material from the 65-Page Retreat Document was exempt from disclosure pursuant to Sections 708(b)(10) and (11) of the PA RTKL. (*Id.* at pp. 10-

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challenged above) that the Secretaries had "received" the Board materials which, according to *Bagwell*, means that the Agencies had then received the Board materials. (Appendix A, at p. 8). In other words, the Commonwealth Court does not rely on *Bagwell*, like the OOR did, to support that the Secretaries had "received" the Board materials. The Commonwealth Court instead relied on the secondary definitions of the word "receive" from Black's Law and Merriam-Webster to come to that conclusion. (*Id.* at pp. 7-9).

15). In addressing Penn State's argument that the redacted information contained confidential proprietary information, the Commonwealth Court determined that Penn State did meet the first element that the information was "privileged or confidential." (Id. at p. 14). The Commonwealth Court, however, concluded that Penn State did not meet the second element "competitive harm" and determined that the statements made in the sworn affidavit of Penn State's Treasurer and Chief Financial Officer constituted "vague jargon and conclusory statements." (Id. at pp. 14-15). While repeatedly asserting that it was the ultimate factfinder in this matter, the Commonwealth Court refused to conduct a hearing or perform in camera review in connection with Penn State's position that the Board materials were exempt from disclosure under Section 708(b)(11)—despite affirmatively determining that the information redacted from the 65-Page Retreat Document was confidential. (Id. at nn. 5, 13, & 15).

The Commonwealth Court similarly rejected all of Education's arguments on appeal.

## V. CONCISE STATEMENT OF REASONS TO ALLOW APPEAL

A. The Commonwealth Court's Holding that Penn State's Board Materials are "Received" by an Agency, and thus Subject to the PA RTKL, Despite the Fact that Penn State Maintains Unilateral Control Over the Materials that are Hosted on a Secure Cloudbased and Closed Network Platform is an Issue of First Impression.<sup>4</sup>

The Supreme Court of Pennsylvania may grant allowance of appeal where the question presented is an issue of first impression. *See* Pa. R.A.P. 1114(b)(3). In support that this is an issue of first impression, Penn State's research has not disclosed any decision of this Court interpreting the word "received" as used in the definition of "record" in the PA RTKL where the requester sought third-party board documents hosted on a secure cloud-based and closed network platform that were only viewed by a Commonwealth agency Secretary serving as an *ex-officio* member of the board and where the third-party maintained unilateral control of the documents, including whether the board member could download, print, forward, or otherwise obtain the document. Next, and as discussed in further detail below, the Commonwealth Court noted that the word "received" as included within the

<sup>&</sup>lt;sup>4</sup> Issues of first impression may arise when modern technology intersects with the existing PA RTKL. *See Penncrest Sch. Dist. v. Cagle*, --- A.3d ---, 2025 WL 2400297 (Pa. Aug. 19, 2025) (granting allowance of appeal "due to the ever-evolving nature of technology and related new methods of communication, courts in this Commonwealth have been repeatedly tasked with discerning whether certain information is considered a record subject to disclosure" under the PA RTKL). Here, the Diligent platform (and those like it) offer a unique cloud-based service to third-party Boards (that is only growing in popularity) that the current PA RTKL and the cases interpreting it have not yet established any precedent for this technology.

definition of "record" in Section 102 is not defined anywhere in the PA RTKL. (*See* Appendix A, at p. 7). Moreover, the Commonwealth Court did not adopt the OOR's wholesale reliance on *Bagwell* and, not surprisingly, cited no case law whatsoever interpreting the word "received" as used in the definition of record in the PA RTKL.

Contrary to some misconceptions, Penn State is not "an agency of the Commonwealth" and, as a non-agency, its third-party records are not publicly available through Section 301(a) of the PA RTKL. See 65 P.S. § 67.301(a); Roy v. Pa. State Univ., 568 A.2d 751, 752 (Pa. Cmwlth. 1990). Penn State's affairs are managed by its Board whose members stand in a fiduciary relationship with Penn State. As noted briefly above, Penn State utilizes relatively new technology that includes a secure cloud-based and closed network platform known as Diligent to facilitate review of Board materials such as meeting agendas, meeting materials, and other relevant documents by members of the Board, including the Secretaries. (R. 120a-122a). The Diligent platform allows Penn State to maintain unilateral control of all Board materials. (See id.) As it is for all Board members, Penn State completely

<sup>&</sup>lt;sup>5</sup> However, because Penn State receives limited funding from the Commonwealth, Penn State is included in the PA RTKL's definition of "State-related institution." As a State-related institution, Penn State's only obligation to disclose records is limited to the specific reporting requirements imposed in Chapter 15 of the PA RTKL. *See* 65 P.S. §§ 67.1501-1504. The Board materials at issue in this case are not subject to Chapter 15 of the PA RTKL.

controls the Secretaries' ability to download, print, forward, or otherwise obtain any Board materials hosted on the Diligent platform. Consistent with Penn State's unilateral control, the Secretaries do not have the ability to post or delete any Board materials hosted on the Diligent platform. (R. 38a-40a). Diligent is the electronic equivalent of a Penn State official holding a physical document in their hand and inviting the Secretaries to look at the document. Importantly, in this analogy, the Penn State official never lets go of the document and the Secretaries never possess the document.

In order to be a "record" subject to the PA RTKL, the Board materials sought by Massey had to be "created, received, or retained" by either Education or Agriculture. See 65 P.S. § 67.102 (defining "Record." Information, regardless of physical form or characteristics, that documents a transaction of activity of an agency and that is created, received, or retained pursuant to law or in connection with a transaction, business, or activity of any agency[.]) (emphasis added). Notably, the Opinion admits that neither Agency "created" or "retained" the requested Penn State Board materials. (See Appendix A, at p. 7). Thus, in order for the Board materials to be considered "records" subject to the PA RTKL, the Commonwealth Court had to find that the Agencies "received" the Board materials.

The Opinion goes on to state that the word "received" as included within the definition of "record" in Section 102 is not defined anywhere within the PA RTKL

and, as a result, the Commonwealth Court proceeded to reference both Black's Law and Merriam-Webster Dictionary definitions. (*Id*.). According the Commonwealth Court, the "first" or primary definition of the word "receive" in both Black's Law and Merriam-Webster is essentially the same: ("to come into possession of"). (Id.). Based on this primary definition of the word "received" from Black's Law and Merriam-Webster that requires "possession," the Commonwealth Court should have granted Penn State's and Education's appeals and overturned the OOR's Final Determinations. Especially here, where the Opinion confirms that neither the Secretaries nor the Agencies ever took actual "physical possession" of the Board materials requested, save the 65-Page Retreat Document. (*Id.* at pp. 7-8) (emphasis in original). It is also true that neither the Secretaries nor the Agencies are able to print or provide electronic copies of the requested Board materials that are hosted on the Diligent platform, because they simply are not in possession of the Board materials that would allow them to do so. (R. 39a, 266a).

But instead of ending the analysis there, the Opinion enlists a "second" definition for the word "receive" that is more amorphous: Black's Law ("[to] perceive mentally; to understand") and Merriam-Webster ("to assimilate through the mind of senses[,]") (Appendix A, at p. 7). Ignoring the first and common definition of the word "receive" found in the dictionary resources (*i.e.*, "to come into possession of") it references, the Commonwealth Court jumped a chasm and,

instead, adopted the "second" definitions and held that the Secretaries "received" the Board materials merely because they were able to "perceive and assimilate the information." (*Id.* at pp. 7-8).

By adopting this secondary definition of "receive," it is clear that the Commonwealth Court has assuredly, but maybe unwittingly, created unworkable and untenable precedent. Now, apparently, any document, material, or information that a Commonwealth agency employee "perceives and assimilates" is now subject to a request and disclosure as a "record" under the PA RTKL. This interpretation simply creates a ridiculous result. <sup>6</sup> The only practical and workable definition of the word "receive" as used in the definition of "record" in the PA RTKL is the first definition from both Black's Law and Merriam-Webster, which is "to come into possession of."

As part of the same analysis, and further support that this amounts to an issue of first impression, is that the Commonwealth Court cited no case law whatsoever

<sup>&</sup>lt;sup>6</sup> The ridiculousness of the result is further highlighted by the Commonwealth Court's undisputed acknowledgment of facts of record in this case regarding the Secretaries of Education respective temporal access to Diligent or lack thereof. Namely, that Secretary Mumin never accessed Diligent prior to the date of Education's receipt of Massey's May 18, 2023, RTKL Request and that Secretary Hagarty left Commonwealth service five (5) months *before* Massey's RTKL Request to Education. (*See* Appendix A, at pp. 15-16, R. 36a). Thus, it was impossible for either Secretary to have "received" the Board materials, using the Opinion's definition, as of the date of Massey's RTKL Request, because they simply could not have "perceived or assimilated" the requested Board materials as of May 18, 2023.

interpreting the word "received" as used in the definition of "record" in the PA RTKL. And while the OOR relied exclusively on the Commonwealth Court's prior decision in Bagwell, the Opinion avoids the same reliance on Bagwell as the OOR, most likely because the Commonwealth Court knew that Bagwell is easily distinguished here due to the obvious factual differences, including where the documents at issue in *Bagwell* were actually received and possessed by the Secretary of Education in that case, which is simply not the case here. Compare Bagwell, 76 A.3d at 83 (RTKL request sought "copies of letters, emails, reports, and memoranda received by [the Secretary] of Education...") with Massey RTKL Requests (R. 18a-19a, 226a) (Massey seeks a "[a]n electronic copy of all materials hosted on **Diligent...**") (emphasis added). More importantly, the Bagwell Court did not interpret what it means for a Commonwealth agency to "receive" a document as that term is used in the definition of "record" in the PA RTKL. See generally Bagwell, 76 A.3d 81 (Pa. Cmwlth. 2013). It is certainly telling and supports that this is an issue of first impression, that the Commonwealth Court abandoned the OOR's reliance on Bagwell.8

<sup>&</sup>lt;sup>7</sup> Similarly, this Court recently granted a petition for allowance of appeal that, *inter alia*, reviewed the Commonwealth Court's interpretation of just one word (*i.e.*, "premises") in a HUD Lease. *See Housing Auth. of the City of Pittsburgh v. Nash*, 16 WAP 2024 (Pa. September 25, 2025).

<sup>&</sup>lt;sup>8</sup> See supra n.3

Therefore, Penn State raises an issue of first impression for this Court that must be decided in order to provide reasoned guidance to not only Penn State and the similarly situated State-related institutions under the PA RTKL, but third-parties, Commonwealth agencies, and requesters alike as to whether third-party board materials hosted on secure cloud-based and closed network platforms like Diligent that are controlled and maintained by the third-parties like Penn State and not the agency are "received" for purposes of being a "record" subject to the PA RTKL. Moreover, if left to stand, this reported, precedential decision issued by the Commonwealth Court now significantly impairs the Secretaries (and other Commonwealth Agency secretaries similarly situated) as ex officio voting members from honoring their fiduciary obligations to Penn State's Board and maintaining the information to which the Secretaries are exposed to in that role as confidential, nonpublic information. (R. 39a-40a). For these, and the other reasons noted herein, this Court must not let this reported decision by the Commonwealth Court stand without a deeper review.

B. The Commonwealth Court's Holding that Penn State's Confidential Board Materials are "constructively possessed" by an Agency, Despite the Fact that Penn State Maintains Unilateral Control Over the Board Materials that are Hosted on a Secure Cloud-based and Closed Network Platform Amounts to an Abuse of Discretion.

Next, the Supreme Court of Pennsylvania may grant allowance of appeal when the Commonwealth Court has so far departed from accepted judicial practices

or so abused its discretion as to call for the exercise of this Court's supervising authority. See Pa. R.A.P. 1114(b)(6).

Penn State argued below that the requested Board materials were not in the "possession, custody, or control" of either Education or Agriculture. Under Section 901 of the PA 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. See 65 P.S. § 67.901 (emphasis added). Accordingly, a public record is subject to disclosure under the PA RTKL only if it is in possession, custody, or control of an agency. Even if an agency does not have possession or custody, a record still may be subject to the PA RTKL if an agency exhibits the necessary level of "control." The Commonwealth Court has referred to this as "constructive possession." UnitedHealthcare of Pennsylvania, Inc. v. Baron, 171 A.3d 943, 958 (Pa. Cmwtlh. 2017). The inquiry under Section 901 of the PA RTKL for determining whether an agency is in constructive 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). As defined in another holding by the

<sup>&</sup>lt;sup>9</sup> Similar to the prior issue, this Court could also grant allowance of appeal based on the fact that this second reason constitutes an issue of first impression satisfying Pa. R.A.P. 1114(b)(3) given that no PA RTKL legal opinions have concluded that an agency has "constructive possession" under the factual circumstances presented by this case where a third-party maintains unilateral control over its board materials that are hosted on a secure cloud-based and closed network platform.

records of an agency that are outside an agency's possession, but are within its legal custody or control." *United Healthcare of Pa.*, 171 A.3d at 958 (emphasis added in the quoted language to highlight that for constructive possession to apply, the records must first be determined to be "records" of an agency).

Ignoring its own case law and ignoring the affidavits of record attesting to the clear absence of any material level of control by the Agencies or the Secretaries over Board materials hosted on the Diligent platform, the Commonwealth Court unbelievably asserts that Education and Agriculture have "constructive possession" of the Board materials because the Secretaries have what the Opinion erroneously refers to as "unfettered access" through Diligent. To begin with, "access" alone does not equate to "control" and the Commonwealth Court's suggestion that it does directly contradicts its own established precedent. See UnitedHealthcare of Pa., 171 A.3d at 959 ("[T]his Court does not infer constructive possession from the mere availability of the records to an agency upon request.") (emphasis added). Thus, an agency's legal right to review or access third party materials does not alone satisfy the "possession, custody, or control" requirement of Section 901 of the PA RTKL.

<sup>&</sup>lt;sup>10</sup> It is also undisputed that neither Penn State nor its Board materials are under the control of Education or Agriculture. *See, e.g., 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.").

See id. Moreover, even if access did equate to control, which it does not, the Opinion's use of the adjective "unfettered" to describe the Secretaries' access to the requested Board materials on Diligent constitutes an abuse of discretion where it plainly misrepresents the facts of record in this case, including the fact that Penn State maintains unilateral control over the Board materials—to the contrary—the record actually demonstrates that the Secretaries access is completely "fettered."

In further abuse of its discretion, the Commonwealth Court relies on case law that does not support its holding that Education and Agriculture have constructive possession of Penn State's confidential Board materials hosted on a secure cloudbased and closed network platform. (See Appendix A, at pp. 9-10) (relying on Penncrest Sch. Dist. V. Cagle, 293 A.3d 783 (Pa. Cmwlth. 2023), aff'd, --- A.3d ---, 2025 WLL 2400297 (Pa. 2025) (materials subject to PA RTKL request were agency's social media posts); Barkeyville Borough v. Stearns, 35 A.3d 91, 96 (Pa. Cmwlth. 2012) (materials subject to PA RTKL request were *emails created by* agency members). Notably, the cases cited in the Opinion involved records "created" by the agencies—not allegedly "received" by the agencies—as is the issue in this matter. Remarkably, the Opinion failed to even address (let alone rebut) the on-point and dispositive opinion cited by Penn State that forms part of the legal backbone of the Commonwealth Court's own test to determine whether the Agencies had "possession, custody, or control" of the Board materials requested. See Office of the Budget v. Office of Open Records, 11 A.3d 618 (Pa. Cmwlth. 2011) (reversing OOR's holding that third-party records were under the control of the Office of Budget simply by virtue of that agency's legal right to audit the third-party records).

To make the Opinion even more confusing, the Commonwealth Court cites to dicta from a footnote that discusses Section 506(d)(1) of the PA RTKL to support its "constructive possession" determination. (See Appendix A, at p. 10) (citing In re Silberstein, 11 A.3d 629, 634 n.12 (Pa. Cmwlth. 2011) (suggesting, contrary to binding precedent and common sense, that documents solely in the possession of a third-party without a contract with the Commonwealth could still be construed as public records subject to disclosure under Section 506(d)(1) of the PA RTKL). Constructive possession of records by an agency under Section 901 of the PA RTKL and third-party records subject to disclosure under Section 506(d)(1) of the PA RTKL are simply not interchangeable analyses and, despite well-stated opinions from its own bench, the Commonwealth Court's Opinion in this regard is certainly confused. See S. Alleghenies Plan. & Dev. Comm'n v. Latker, 322 A.3d 297 (Pa. Cmwlth. 2024) ("We have made clear that constructive possession and third-party records under Section 506(d)(1) are distinct pathways, and we have observed that, in the past, OOR has 'conflat[ed] the two.""). Here, the Commonwealth Court has similarly conflated the two Sections. Of course, if the Commonwealth Court is relying on Section 506(d)(1) of the PA RTKL, as its citation to *In re Silberstein* in

its Opinion suggests, for its determination that the Agencies have constructive possession, such position is easily reversible because the requested Board materials are not subject to a contract with the Commonwealth. As this Court has held, reliance on Section 506(d)(1) "contemplates an actual contract with a third party in possession of salient records." *See Dental Benefit Providers, Inc. v. Eiseman*, 124 A.3d 1214, 1223 (Pa. 2015).

Therefore, where the Commonwealth Court has so far departed from its own holdings and as it conflated the concept of "constructive possession" as established under Section 901 with third-party records under Section 506(d)(1), it is necessary for this Court to intervene and exercise its supervising authority to provide guidance and clarity to avoid muddling previously clear authority on constructive possession.

C. The Commonwealth Court Violated its Statutory Duty and Abused its Discretion by Failing to Develop an Adequate Factual Record, When it Failed and Refused to Conduct *in camera* Review of Penn State's Confidential Board Materials.

Finally, as noted above, the Supreme Court of Pennsylvania may grant allowance of appeal where this Court has so abused its discretion as to call for the exercise of the Pennsylvania Supreme Court's supervising authority. *See* Pa. R.A.P. 1114(b)(6).

In connection with the "full *de novo*" standard of review and "plenary" scope of review applicable to PA RTKL appeals from the OOR to the Commonwealth Court, Penn State requested that the Commonwealth Court conduct its own *in* 

camera review (or order remand to the OOR to conduct *in camera* review) so that this Court could fulfill its statutory obligation as the ultimate factfinder in this matter. (See Appendix A, at p. 11, n.13); 65 P.S. § 67.1301(a); see also Bowling v. Off. of Open Recs., 75 A.3d 453, 474 (Pa. 2013). The PA RTKL expressly requires that the Commonwealth Court issue findings of fact and conclusions of law under Section 1301. ("The decision of [the Commonwealth Court] shall contain findings of fact and conclusions of law based upon the evidence as a whole.") See 65 P.S. § 67.1301(a) (emphasis added). Yet, the Opinion is completely devoid of any stated findings of fact or conclusions of law. (See generally Appendix A). Here, and despite publicizing multiple times in the Opinion that it was the "ultimate finder of fact" under the PA RTKL, the Commonwealth Court completely failed to fulfill its statutory obligation. (See Appendix A, nn. 5, 13, & 15).

Even absent the statutory duty, Instead, the Commonwealth Court affirmed the OOR's Final Determinations that the Agencies must disclose Penn State's confidential Board materials that Penn State expressly argued below were exempt from disclosure pursuant to Rule 708(b)(11) of the PA RTKL, *inter alia*, without any additional fact-finding. As the Commonwealth Court itself has held, when dealing with a third-party's confidential proprietary information and/or trade secrets under a Section 708(b)(11) exemption of the PA RTKL, "all necessary precautions," including conducting a hearing or performing *in camera* review, must

be taken before providing access. *See Office of Governor v. Bari*, 20 A.3d 634, 648 (Pa. Cmwlth. 2011). Remarkably, the Commonwealth Court even cites to case law in the Opinion that confirms it is "required to conduct our own *in camera* review of requested materials where necessary and cannot rely upon the OOR's handling of such items." (*See* Appendix A, at 11, n.13) (citing *Am. C.L. Union of Pa. v. Pa. State Police*, 232 A.3d 654, 668-71 (Pa. 2020).

By way of specific example of the blatant abuse of discretion by the Commonwealth Court in not conducting in camera review, Penn State plainly argued that the redactions to the 65-Page Retreat Document that was produced by Agriculture constituted confidential proprietary information exempt from disclosure. (R. 498a, 502a). In support of the Section 708(b)(11) exemption for confidential proprietary information, Penn State relied on two sworn, testimonial affidavits that supported the exemption, one from Agriculture's Open Records Officer that, inter alia, supported the confidential nature of the document and another from Penn State's Senior Vice-President for Finance and Business, Treasurer, and CFO that supported the confidential nature of the document as well as the likelihood of harm to Penn State's competitive position. (R. 265a-267a, 504a-509a). In particular, the redactions were to a particular Section of the 65-Page Retreat Document entitled "The Student Success Imperative: Cost" slide deck. (R. 369a-386a).

Penn State's Senior Vice-President for Finance and Business, Treasurer, and CFO expressly noted that the redactions to the "The Student Success Imperative: Cost" slide deck included: (a) confidential and proprietary financial information relating to identification and lists of specific non-core Penn State assets being evaluated for strategic alternatives and possible reprioritization; (b) confidential and proprietary financial information of Penn State relating to subsidies and expenses paid by Penn State to provide certain services being evaluated for business needs; and (c) a confidential and proprietary financial analysis of Penn State's building construction costs and benchmarking analysis of its average construction costs. (R. 504a-509a). Penn State's Senior Vice-President for Finance and Business, Treasurer, and CFO also noted in her affidavit that the disclosure of the information in this particular Section of "The Student Success Imperative: Cost" slide deck would cause substantial harm to Penn State's competitive position because disclosure of the identity of the assets and/or the financial reasons to consider prioritization of the assets would: (a) damage current operations of the assets; (b) harm employee morale and retention; (c) reduce the market value of any non-core assets; and (d) disadvantage Penn State if it elected to re-prioritize the assets by having its confidential, internal analysis publicly available. (*Id.*).

The Commonwealth Court concluded, again without even availing itself of its mandate to review these redactions *in camera* that: "[t]here is nothing in 'The

Student Success Imperative: Cost" slide deck *that facially shows* how its disclosure would substantially harm Penn State's ability to compete in the higher education marketplace." (*See* Appendix A, at p. 14) (emphasis added). The Commonwealth Court's conclusion is pure speculation as it had zero actual knowledge of what the redactions to "*The Student Success Imperative: Cost*" slide deck "facially show" where it failed to conduct *in camera* review of the document—because the Commonwealth Court only had access to the redacted version in the Reproduced Record. As this Court (and the Commonwealth Court) should be well aware, it is extremely difficult to demonstrate competitive harm without revealing the nature of the confidential property information that Penn State is seeking to protect under Section 708(b)(11), which is exactly why *in camera* review is necessary.

If these redactions to the 65-Page Retreat Document as well as the other Board materials that Penn State argues are exempt from disclosure pursuant to Section 708(b)(11) are disclosed without either the OOR or the Commonwealth Court

Documents "facially shows," the Commonwealth Court should have still concluded that Penn State met the two-part test to establish the Section 708(b)(11) outright, or at minimum, conducted its own *in camera* review given what the Commonwealth Court could actually see. Indeed, at least one set of redactions in the "*The Student Success Imperative: Cost*" slide deck was under the heading: "Leading in a resource-constrained environment." (R. 381a). It only stands to follow that the confidential information (which the Commonwealth Court concluded that it was) set forth under that heading, if disclosed, could potentially harm Penn State's ability to compete. It is certainly difficult to fathom why the OOR and the Commonwealth Court failed to review this redacted information *in camera*, especially after determining that redacted information was confidential or privileged. (Appendix A, at p. 14).

conducting *in camera* review, it is a clear violation of Section 1301(a) as well as an abuse of the Commonwealth Court's discretion. Further, any conclusion by the Commonwealth Court left to stand that permits disclosure of confidential information without either OOR or other judicial review establishes worrisome precedent that also contradicts existing case law.

Another important point that goes hand-in-hand with the Commonwealth Court's failure to fulfill its statutory duty to develop the record or remand to the OOR to do so, is that Penn State expressly requested that a determination be made as to the threshold question of whether the requested Board materials were actually "records" subject to the PA RTKL in the first place. By way of example of just one of the issues that are created by not conducting in camera review, where here the Commonwealth Court plainly ascribes the burden set forth in 65 P.S. § 67.708(a)-(b) of claiming exemptions under the PA RTKL to Penn State by stating that "the burden [is] upon the agency to establish by a preponderance of the evidence that a requested item should be deemed exempt under one or more of those specific exemptions." (See Appendix A, at p. 10) (emphasis added). Penn State, however, is not an agency subject to the PA RTKL and it defies logic and reason that stated PA RTKL exemptions on such materials are supposed to be asserted before the Commonwealth agency even had the opportunity to review the documents and assert applicable exemptions. To find otherwise requires non-agency third parties, who do

not have Agency Open Records Officers or a separate PA RTKL infrastructure, to develop itemized exemptions to every document any requestor believes is a public record, with no opportunity for the agency to review or contribute, just in case the document is later found to be a public record.

## VI. CONCLUSION

For the foregoing reasons, The Pennsylvania State University respectfully requests that this Honorable Court **GRANT** this **PETITION FOR ALLOWANCE OF APPEAL**.

/s/ Jan L. Budman II

**BUCHANAN INGERSOLL & ROONEY, PC** 

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## **COMBINED CERTIFICATES OF COMPLIANCE**

- 1. I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than on confidential information and documents.
- 2. I further certify that according to the word count feature of the word processing program used to prepare it, this brief contains 6375 words, excluding those supplementary matters that are exempted. This document was prepared using Microsoft Word and Times New Roman font in 14 point.

/s/ Jan L. Budman II

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# **APPENDIX A**

Commonwealth Court Opinion and Order, Dated October 20, 2025, and Entered in Consolidated Docket Nos. 1083, 1092, and 1207 C.D. 2023

## IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Education, :

Petitioner

Nos. 1083 & 1092 C.D. 2023

V. :

.

Wyatt Massey and Spotlight PA

(Office of Open Records),

Respondents :

Pennsylvania State University,

Petitioner

No. 1207 C.D. 2023

v. :

: Argued: September 9, 2025

**FILED: October 20, 2025** 

Pennsylvania Department of

Agriculture, Wyatt Massey, and

Spotlight PA

(Office of Open Records), :

Respondents :

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge

HONORABLE LORI A. DUMAS, Judge

HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION BY JUDGE DUMAS

In these consolidated appeals, Petitioners Department of Education and Pennsylvania State University (individually, DOE and Penn State) petition for review of two Final Determinations issued by the Pennsylvania Office of Open Records (OOR). Through those Final Determinations, OOR partially granted

Respondent Wyatt Massey's (Massey) Right-to-Know Law (RTKL)<sup>1</sup> requests he had filed with the DOE and the Pennsylvania Department of Agriculture (DOA), through which Massey sought copies of certain electronic documents that had been created by Penn State. Those documents could be accessed by the Secretaries of the DOA and DOE (collectively, Departments) via Diligent, an electronic database maintained by Penn State, due to the Secretaries' status as *ex officio* members of Penn State's Board of Trustees. After thorough review, we affirm.

## I. BACKGROUND<sup>2</sup>

On May 18, 2023, Massey, a reporter with Spotlight PA, submitted an RTKL request to the DOE, through which he sought the following items:

- 1. An electronic screenshot of all folders and files hosted on Diligent, the filesharing 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 filesharing 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

<sup>&</sup>lt;sup>1</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

<sup>&</sup>lt;sup>2</sup> We draw the substance of this section from the OOR's two decisions that disposed of Massey's RTKL request appeals. *See generally* OOR Final Determination, 9/1/23; OOR Final Determination, 10/6/23.

State's Academic Affairs, Research and Student Life committee, of which Mr. Hagarty was a member.

OOR Final Determination, 9/1/23, at 1-2.<sup>3</sup> The DOE denied Massey's request on June 26, 2023, on the basis that these documents were not in its possession, custody, or control.

On June 29, 2023, Massey submitted an RTKL request to the DOA, through which he requested the following items:

- 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.

OOR Final Determination, 10/6/23, at 1-2.<sup>4</sup> The DOA denied Massey's request on July 5, 2023, on the basis that these documents were not in its possession, custody, or control.

Massey then appealed these denials to the OOR on, respectively, July 6, 2023, and July 5, 2023. The OOR subsequently granted Penn State's requests to participate in both appeals. Thereafter, the OOR issued two Final Determinations that disposed of these appeals, on September 1, 2023, and October 6, 2023. In the September 1, 2023 Final Determination, the OOR denied Massey's appeal as to Items 1 and 2 (on the basis that the DOE neither possessed nor was required to create the sought-after screenshots), but granted the appeal as to Items 3 and 4 (on the basis

<sup>&</sup>lt;sup>3</sup> Hagarty was the Acting DOE Secretary between April 2022 and January 2023, while Mumin was the Acting DOE Secretary from January 2023 through June 2023, when he was confirmed by the Senate of Pennsylvania and formally assumed the role of DOE Secretary.

<sup>&</sup>lt;sup>4</sup> Redding was the DOA's Secretary during the time periods covered by this request.

that responsive records had been received, and were accessible, by the DOE through Diligent). In the October 6, 2023 Final Determination, the OOR denied the appeal as to Item 1 and granted the appeal as to Item 2. Additionally, the OOR dismissed Massey's appeal as moot in part; the OOR noted that the DOA had already provided Massey with a 65-page, partially redacted document from a 2022 Penn State trustee retreat (Retreat Document) that was in the DOA's physical possession and dismissed Massey's appeal as moot to the extent that disclosure satisfied Massey's RTKL request, but also ordered the DOA to give an unredacted version to Massey. The OOR applied the same logic to Massey's DOA appeal that it had used in Massey's DOE appeal, *i.e.*, that the DOA did not possess and was not required to create the requested screenshots, but had possession of and access to responsive documents.

These Final Determinations produced three separate appeals to our Court. Specifically, the DOE appealed the September 1, 2023 Final Determination, while Penn State appealed both Final Determinations. We subsequently consolidated all three appeals. The parties have fully briefed their positions, and we have held oral argument thereon. Accordingly, these consolidated appeals are ready for our disposition.

### II. DISCUSSION<sup>5</sup>

We address Penn State's and DOE's respective arguments in turn.

<sup>&</sup>lt;sup>5</sup> With regard to RTKL requests submitted to Commonwealth agencies, the RTKL mandates that our Court constitutes the ultimate finder of fact and that we must consequently conduct a *de novo*, plenary review of OOR final determinations regarding such requests. *See Bowling v. Off. of Open Recs.*, 75 A.3d 453, 474 (Pa. 2013).

## A. Penn State

Penn State challenges both of the OOR's Final Determinations on the following bases. First, Penn State asserts that the documents requested by Massey do not constitute public records for purposes of the RTKL for four reasons: they were not created, received, or retained by the Departments; their disclosure would contravene the statutory limits placed upon Penn State's RTKL obligations; they are not in the possession, custody, or control of the Departments; and they are exempt from disclosure pursuant to Section 708(b) of the RTKL.<sup>6</sup> Penn State's Br. at 14-29. Second, Penn State argues that the Retreat Document is partially exempt from disclosure under the RTKL, because it contains Penn State's confidential proprietary information and predecisional deliberation information. *Id.* at 29-39.

We begin with a brief review of how the RTKL shapes an agency's obligation to disclose responsive materials.<sup>7</sup> Generally speaking, "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." *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Cmwlth. 2014). Accordingly, items are presumed to be disclosable in response to an RTKL request as long as they qualify as a public record. *Id.*<sup>8</sup> "Record" is expressly defined in relevant part through the RTKL 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

<sup>&</sup>lt;sup>6</sup> 65 P.S. § 67.708(b).

<sup>&</sup>lt;sup>7</sup> Per Section 301(a), "[a] Commonwealth agency shall provide public records in accordance with [the RTKL]." 65 P.S. § 67.301(a). "The burden of proving that a requested piece of information is a 'public record' lies with the requester." *Off. of Governor v. Bari*, 20 A.3d 634, 640 (Pa. Cmwlth. 2011).

<sup>&</sup>lt;sup>8</sup> As we have explained in the past, "[w]hether sought after information constitutes a 'public record' is a preliminary, threshold issue[.]" *Bari*, 20 A.3d at 640.

with a transaction, business or activity of the agency." 65 P.S. § 67.102.9 A Commonwealth agency's record is considered a "public record" under the RTKL as long as it "(1) is not exempt [from being disclosed] under [S]ection 708 [of the RTKL]; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; [and] (3) is not protected by a privilege." *Id.*; *see Pa. Dep't of Educ. v. Bagwell*, 114 A.3d 1113, 1122 (Pa. Cmwlth. 2015) ("Under the RTKL, records in possession of a Commonwealth agency are presumed to be public unless they [fall within any of those three exemption categories].").

The RTKL also mandates that "[u]pon receipt of a written request for access to a record, an agency shall make a good faith effort to determine . . . whether the agency has possession, custody[,] or control of the identified record[.]" 65 P.S. § 67.901. Thus, an agency need not *actually* possess a record in order for the RTKL's obligations to attach; rather, constructive possession is enough to trigger an agency's disclosure obligation. *UnitedHealthcare of Pa., Inc. v. Baron*, 171 A.3d 943, 958 (Pa. Cmwlth. 2017). This is because "[t]he true inquiry is whether the [requested] document is subject to the control of the agency." *Barkeyville Borough v. Stearns*, 35 A.3d 91, 96 (Pa. Cmwlth. 2012) (citing *Tribune-Review Publ'g Co. v. Westmoreland Cnty. Housing Auth.*, 833 A.2d 112, 118 (Pa. 2003)). In other words, the "character of the record, not location, determines access" for purposes of the RTKL. *Id.* (citing *Mollick v. Twp. of Worcester*, 32 A.3d 859 (Pa. Cmwlth. 2011)); *accord Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc.*, 13 A.3d 1025, 1037 (Pa. Cmwlth. 2011) (emphasis in original) ("The location of a 'public record' is not at all a relevant consideration in terms of the public's right to *access.*").

<sup>&</sup>lt;sup>9</sup> "[A record for purposes of the RTKL] includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image-processed document." 65 P.S. § 67.102.

Turning to Penn State's main argument, we disagree with its assertion that the materials requested by Massey do not qualify as public records. With regard to the issue of creation, reception, and retention, Massey does not dispute that those materials were neither created nor retained by the Departments. *See* Massey's Br. at 14-21. We therefore need only determine whether the materials were received by those Departments.

The RTKL does not expressly define "received," so we must construe that term in accordance with its "common and approved usage." *P.R. v. Pa. Dep't of Pub. Welfare*, 759 A.2d 434, 437 (Pa. Cmwlth. 2000) (cleaned up). "In ascertaining the common and approved usage or meaning, a court may resort to the dictionary definitions of the terms left undefined by the legislature." *Mountz v. Columbia Borough*, 260 A.3d 1046, 1050 n.4 (Pa. Cmwlth. 2021) (quoting *Leventakos v. Workers' Comp. Appeal Bd. (Spyros Painting)*, 82 A.3d 481, 484 n.4 (Pa. Cmwlth. 2013)). Black's Law Dictionary defines "receive," in two relevant ways: first, "[t]o take (something offered, given, sent, etc.); to come into possession of or get from some outside source" and, second, "[t]o gain knowledge of from some communication; to perceive mentally; to understand[.]" Similarly, Merriam-Webster defines this term in two relevant ways: first, "to come into possession of" and, second, "to assimilate through the mind or senses[.]"

We conclude then that, in general, the information requested by Massey was "received" by the Departments. As noted above, the Departments' Secretaries accessed the requested materials through Diligent; though they did not consequently take *physical* possession, it remains that those materials were sent to them by an

<sup>&</sup>lt;sup>10</sup> Receive, Black's Law Dictionary (12th ed. 2024).

<sup>&</sup>lt;sup>11</sup> *Receive*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/receive (last updated Oct. 11, 2025).

outside source, as well as that this access allowed them to then perceive and assimilate the information contained therein. The Secretaries therefore received the requested materials, akin to how a person can be commonly understood to have received an email, despite the fact that it may only exist as data housed on a third-party server or cloud-based system that the person cannot physically access. *See Mollick*, 32 A.3d at 873-76 (emails can constitute public records even if they are only stored in government officials' personal email accounts). It follows that the information was also received by both Agencies; this is because the Secretaries received the requested information by virtue of their respective roles as *ex officio* members of Penn State's Board of Trustees, as well as because they only have those roles because they represent "the Commonwealth's education interests" and their Departments. *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81, 90-91 (Pa. Cmwlth. 2013).

We are similarly unpersuaded by Penn State's assertion that fulfilling Massey's request will contravene the RTKL's limits on Penn State's disclosure obligations. It is true that Penn State is a state-related institution, not a Commonwealth agency, and therefore has limited *direct* disclosure obligations under the RTKL. *See* 65 P.S. §§ 67.102, 67.1501-67.1505; *cf. Roy v. Pa. State Univ.*, 568 A.2d 751, 752-54 (Pa. Cmwlth. 1990) (Penn State was considered a state-related institution under the RTKL's predecessor, the Right-to-Know Act, rather than a state agency). However, that fact is not dispositive in this situation, as the RTKL does not contain any provisions that expressly prevent *Commonwealth agencies* from providing information to requesters that originated with or was created by a state-related institution. *See Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co.*, 788 A.2d 955, 962 (Pa. 2001) (cleaned up) (though a court must "listen attentively to what a statute says[,] [we] must also listen attentively to what it does not say"). Indeed, as

we have explained in the past, the fact that Penn State and its Board are not Commonwealth agencies is immaterial, "because both parties to correspondence do not have to be agencies. Rather, only one party needs to be an agency to lead to RTKL disclosure." *Bagwell*, 76 A.3d at 88. Thus, as long as such information pertains to a Commonwealth agency's involvement with or interest in a state-related institution, the agency is not barred from disclosing it in response to an RTKL request. *See id.* at 87-91.

Moving on, we conclude that Penn State's assertion that the requested materials are not in the Departments' possession, custody, or control is without merit. It is undisputed that Penn State has granted the Departments' Secretaries the ability to access to the requested documents through Diligent, as well as that this access is largely unfettered in either scope or duration, outside of being read-only.<sup>12</sup> See, e.g., Massey's Br. at 26-36; Penn State's Br. at 12, 17, 19, 22-27; Penn State's Reply Br. at 1, 11, 18-25. Therefore, the Departments have constructive possession of the requested materials, despite their read-only nature; this is by virtue of the fact that those materials have been specifically made available to the Secretaries in accordance with their positions as ex officio board members. Cf. Penncrest Sch. Dist. v. Cagle, 293 A.3d 783, 799 (Pa. Cmwlth. 2023), aff'd, --- A.3d ---, 2025 WL 2400297 (Pa. 2025) (an agency's social media posts pertaining to official business are presumptively deemed public records under the RTKL); Barkeyville Borough, 35 A.3d at 95-97 (emails sent and received by government officials regarding their official duties are constructively possessed by their agencies, and presumptively constitute public records, even if those emails are actually possessed only by the

<sup>&</sup>lt;sup>12</sup> This is not to suggest that the scope or duration of such access is dispositive regarding whether an agency possesses an item; rather, we simply note the nature of the access rights that Penn State has afforded to the Secretaries.

officials themselves or by a third party); *In re Silberstein*, 11 A.3d 629, 634 n.12 (Pa. Cmwlth. 2011) (it is not reasonable to construe the RTKL "to mean that the only time that an agency is required to provide a record that is not in its physical possession is when the agency contracts for a governmental function[, which is expressly required under Section 506(d)(1) of the RTKL]"). Holding otherwise would perversely incentivize Commonwealth agencies, local agencies, and affected third parties like Penn State to utilize remote servers and/or cloud-based services, in order to ensure that they would no longer need to disclose what would otherwise constitute public records. Such an outcome would run contrary to the RTKL's remedial purpose and the General Assembly's intent that the RTKL be used as a vehicle for increasing and ensuring government transparency. *See Off. of the Dist. Att'y of Phila. v. Bagwell*, 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017).

Next, we find that Penn State has waived its argument that the requested materials are exempt from disclosure under Section 708(b) of the RTKL. That RTKL provision lists 30 discrete categories of information that are exempt from disclosure, while its companion provision places the burden upon the agency to establish by a preponderance of the evidence that a requested item should be deemed exempt under one or more of those specific exceptions. *See* 65 P.S. § 67.708(a)-(b). Despite this, Penn State does not identify which of those exemptions allegedly apply to the materials sought through Massey's request or even which items are allegedly exempt from disclosure. *See* Penn State's Br. at 27-29. We therefore conclude that Penn State has waived this argument, due to its failure to properly develop that argument in its brief. *Wirth v. Com.*, 95 A.3d 822, 837 (Pa. 2014) (quoting *Com. v. Johnson*, 985 A.2d 915, 924 (Pa. 2009)) (cleaned up) ("Where an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails

to develop the issue in any other meaningful fashion capable of review, that claim is waived. It is not the obligation of an appellate court to formulate an appellant's arguments for him.").<sup>13</sup>

Finally, we address Penn State's assertion that the unredacted version of the Retreat Document is exempt from disclosure. This document consists of four parts: an agenda for the retreat; a slide deck entitled "Board of Trustees July Retreat Summary Long Range Priorities"; another slide deck entitled "The Student Success Imperative: Cost" that was presented during the retreat; and a fictional essay that was "written" by Niccolo Machiavelli in his role as "Former Assistant to Presidents, University of the Medici" and addressed to "Presidents, Senior Administrators, and Faculty Leaders Who Would Seek Change." *See* Retreat Doc. at 1-65. Penn State argues that the redacted portions of this document, which are only in the second slide deck, constitute predecisional deliberation information and confidential proprietary information and, thus, are exempt pursuant to Section 708(b)(10) and (11) of the RTKL.<sup>14</sup> Penn State's Br. at 29-39.<sup>15</sup>

<sup>&</sup>lt;sup>13</sup> Penn State's broad exemption argument is also complicated by its assertion that the OOR erred by failing to perform an *in camera* review of the requested documents, as well as its request that we remand this matter to the OOR with instructions that it conduct such a review. Penn State's Br. at 27-29. This Court is the ultimate factfinder in appeals that, like this one, emanate from RTKL requests made to Commonwealth agencies. *See Bowling*, 75 A.3d at 474. Accordingly, we are required to conduct our own *in camera* review of requested materials where necessary and cannot rely upon the OOR's handling of such items. *Am. C.L. Union of Pa. v. Pa. State Police*, 232 A.3d 654, 668-71 (Pa. 2020). In the absence of waiver, Penn State's assertion that the OOR erred would therefore be moot, and its request for remand would be legally erroneous.

<sup>&</sup>lt;sup>14</sup> 65 P.S. § 67.708(10)-(11).

<sup>&</sup>lt;sup>15</sup> Penn State also asserts that we should remand this matter to the OOR, with instructions that the OOR conduct an *in camera* review of the Retreat Document to determine whether which portions should be deemed exempt under the confidential proprietary information exemption. *See* Penn State's Br. at 35-36. Again, such a request is not proper, as this Court is the ultimate factfinder in this instance. *See Bowling*, 75 A.3d at 474.

We disagree. Penn State offers two arguments in support of its assertion that the predecisional deliberation information exemption applies in this instance. In its main brief, Penn State does not challenge the OOR's determination that Penn State is not considered an agency under the RTKL; instead, it states that "[i]f 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 [the DOA] because it is used by its Secretary, in his official capacity, as a member of the Penn State Board of Trustees." See Penn State's Br. at 36-39. Penn State then takes a different tack in its reply brief, where it also maintains that the OOR erred on this point because Penn State is an "agency" under Section 703 of the Sunshine Act, 16 which therefore also makes Penn State an agency for purposes of this specific exemption, pursuant to Section 708(b)(10)(A)(ii) of the RTKL. Penn State's Reply Br. at 28-29. However, Penn State failed to raise either of these arguments when this matter was before the OOR, in either its initial position statement or its subsequent supplemental information filing, and has accordingly waived them.<sup>17</sup> See Allegheny Cnty. Dep't of Admin. Servs. v. Parsons, 61 A.3d 336, 348 (Pa. Cmwlth. 2013) ("Any grounds for denial or defenses not raised at the asserting party's first opportunity are waived."); E. Stroudsburg Univ. Found. v. Off. of Open Recs., 995 A.2d 496, 501 n.8 (Pa. Cmwlth. 2010) (a party waives any issue for purposes of appeal to our Court that it did not raise before the OOR).

<sup>&</sup>lt;sup>16</sup> 65 Pa.C.S. § 703.

<sup>&</sup>lt;sup>17</sup> We also note that Penn State used its reply brief to improperly expand upon the argument it presented in its main brief, in that Penn State did not present its Sunshine Act-based argument in its main brief. As our Supreme Court has explained, "a reply brief cannot be a vehicle to argue issues raised but inadequately developed in appellant's original brief." *Com. v. Fahy*, 737 A.2d 214, 219 (Pa. 1999).

Penn State fares no better regarding the confidential proprietary information exemption. The RTKL defines "confidential proprietary information" as "[c]ommercial 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." Id., § 67.102. "To qualify as "confidential proprietary information," the information must meet both components of the two-part test." Dep't of Pub. Welfare v. Eiseman, 85 A.3d 1117, 1128 (Pa. Cmwlth. 2014), rev'd on other grounds, 125 A.3d 19 (Pa. 2015). In order to determine whether the first prong is satisfied, the factfinder must "consider the efforts the parties undertook to maintain their secrecy." *Id.* The second prong can be satisfied only where it is shown via a preponderance of the evidence that there is "(1) actual competition in the relevant market; and[] (2) a likelihood [that the individual or entity that submitted the information will suffer] substantial competitive injury if the information were released." *Id.* Additionally, "competitive 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. Cmwlth. 2015) (quoting *Eiseman*, 85 A.3d at 1128) (cleaned up).

This test is only partially satisfied in this instance. The record contains two relevant affidavits, <sup>18</sup> one from Susan L. West, the DOA's Open Records Office, and the other from Sara F. Thorndike, Penn State's Senior Vice President for Finance

<sup>&</sup>lt;sup>18</sup> "Testimonial affidavits found to be relevant and credible may provide sufficient evidence in support of a claimed exemption." *Heavens v. Dep't of Env't Prot.*, 65 A.3d 1069, 1073 (Pa. Cmwlth. 2013). Those "affidavits must be detailed, nonconclusory, and submitted in good faith." *Off. of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Cmwlth. 2013) (quoting *Manchester v. Drug Enforcement Admin., U.S. Dep't of Justice*, 823 F. Supp. 1259, 1265 (E.D. Pa. 1993)). "In other words, a generic determination or conclusory statements are not sufficient to justify the exemption of public records." *Id.* 

and Business, Treasurer, and Chief Financial Officer, as well as the Retreat Document itself. The Retreat Document is marked "CONFIDENTIAL" in bright red text at the top of its first page. Retreat Doc. at 1. Ms. West's affidavit mentions this notation and explains that it caused her to both contact Penn State's legal counsel and to provide counsel with "a copy of the confidential, third-party proprietary information for review." West Aff., ¶12. In addition, Ms. Thorndike attests in her affidavit that the Retreat Document was only made physically available to select individuals at Penn State on a "need to know" basis, as well as to others via Diligent (which Ms. Thorndike describes as "a secure communications portal with restrictive access permissions"). Thorndike Aff., ¶¶10-12. We therefore conclude that the first prong of the confidential proprietary information test has been met here.

However, we cannot come to the same conclusion regarding the test's second prong. There is nothing in "The Student Success Imperative: Cost" slide deck that facially shows how its disclosure would substantially harm Penn State's ability to compete in the higher education marketplace. As for Ms. Thorndike, she maintains in her affidavit that some of the redactions constitute "confidential and proprietary financial information relating to specific non-core [Penn State] assets being evaluated for strategic alternatives and possible reprioritization," while other parts of the redactions pertain to Penn State's unspecified "fiscal challenges." *Id.* In addition, Ms. Thorndike broadly asserts that disclosure of the redacted information would "create distrust and confusion as these are mere considerations, rather than items for decision"; "damage current operations of the assets"; "harm" or "damage employee morale and retention"; "reduce the market value of any noncore assets"; "disadvantage [Penn State] if it elected to re-prioritize the assets" or "to pursue any of the options under consideration[.]" *Id.* Such vague jargon and

conclusory statements fall woefully short of satisfying the second prong's requirements, in that they do not establish by a preponderance that Penn State is likely to suffer substantial competitive injury if Massey is provided with an unredacted version of the Retreat Document. We therefore conclude that the record evidence does not support Penn State's attempt to invoke the confidential proprietary information exemption regarding the Retreat Document.

## B. DOE

As for the DOE, its challenge to the OOR's September 1, 2023 Final Determination can be distilled into two arguments. First, the DOE asserts that it does not have actual or constructive possession, custody, or control of the requested documents, because those documents are located on Diligent and can only be accessed by the DOE's Secretary in read-only form. DOE's Br. at 10-15. Second, the DOE claims that it will have to create screenshots of the requested documents in order to comply with the OOR's Final Determination, because the DOE does not have the ability to secure and produce the original documents; this, according to the DOE, contradicts the OOR's ruling that the DOE has no obligation to create such screenshots, as well as the RTKL's language stating that Agencies do not need to create documents in response to a request. *Id.* at 17-19.

We have already largely disposed of the DOE's first argument, through our handling of Penn State's substantially similar contention. As we explained, *supra*, the Agencies have constructive possession of the requested materials, due to their Secretaries' Diligent access rights. We also note that the DOE has provided an affidavit from Kari Worley, who is identified therein "as the primary executive staff assistant to the [DOE] Secretary and Executive Deputy Secretary[.]" Worley Aff., ¶2. In that affidavit, Ms. Worley states that Secretary Mumin had not accessed

Diligent as of May 18, 2023, *i.e.*, the date of Massey's RTKL request. *Id.*, ¶12. This assertion is ultimately of no help to the DOE, as Secretary Mumin's failure to avail himself of his access rights does not negate the fact that he possessed those rights prior to when Massey filed his request. <sup>19</sup>

Finally, we are unpersuaded by the DOE's second argument. It is true that the DOE is not required to provide Massey with the screenshots he sought through his RTKL request.<sup>20</sup> We note, however, that Ms. Harvey has attested that Penn State's Office of the Board of Trustees "controls the Secretary's ability to print or download any document from the Diligent platform." Harvey Aff., ¶8. Thus, it appears that the DOE could directly obtain responsive documents through Diligent if those restrictions were lifted. The DOE does not address this point and fails to explain why it cannot simply ask Penn State to facilitate the fulfilment of Massey's request by expanding the Secretary's Diligent usage rights on at least a temporary basis.

<sup>&</sup>lt;sup>19</sup> Penn State has provided an affidavit from Shannon S. Harvey, who is identified therein as the Office of the Board of Trustees' Assistant Vice President and Secretary. In that affidavit, Ms. Harvey states that the Office "controls the Secretary's ability to print or download any document from the Diligent platform." Harvey Aff., ¶8. In addition, Ms. Harvey avers that Secretary Mumin "became an *ex officio* member of the Board of Trustees in January of 2023 when he was appointed to serve as the [DOE's] Acting Secretary[,]" and "was granted Diligent access on May 3, 2023." *Id.*, ¶¶6-7. We find these averments to be credible.

<sup>&</sup>lt;sup>20</sup> Massey did not appeal the OOR's Final Determinations, so neither the propriety of the OOR's denials of his screenshot requests, nor the soundness of the logic underpinning those denials, is before us in this matter.

# III. CONCLUSION

In accordance with the foregoing analysis, we affirm the OOR's September 1, 2023 and October 6, 2023 Final Determinations in their entirety.

LORI A. DUMAS, Judge

## IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Department of Education, :

Petitioner

Nos. 1083 & 1092 C.D. 2023

v. :

.

Wyatt Massey and Spotlight PA

(Office of Open Records),

Respondents :

Pennsylvania State University,

Petitioner

No. 1207 C.D. 2023

v. :

.

Pennsylvania Department of

Agriculture, Wyatt Massey, and

Spotlight PA

:

(Office of Open Records),

Respondents :

# ORDER

AND NOW, this 20<sup>th</sup> day of October, 2025, it is hereby ORDERED that the Office of Open Records' September 1, 2023 and October 6, 2023 Final Determinations are AFFIRMED.

LORI A. DUMAS, Judge

# APPENDIX B

Relevant Sections of the Pennsylvania Right-to-Know Law, 65 P.S. §§ 67.101-67.3104

Purdon's Pennsylvania Statutes and Consolidated Statutes Title 65 P.S. Public Officers (Refs & Annos) Chapter 3A. Right-to-Know Law (Refs & Annos) Chapter 1. Preliminary Provisions

65 P.S. § 67.102

§ 67.102. Definitions

#### Currentness

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

- "Administrative proceeding." A proceeding by an agency the outcome of which is required to be based on a record or documentation prescribed by law or in which a statute or regulation is particularized in application to individuals. The term includes an appeal.
- "Agency." A Commonwealth agency, a local agency, a judicial agency or a legislative agency.
- "Aggregated data." A tabulation of data which relate to broad classes, groups or categories so that it is not possible to distinguish the properties of individuals within those classes, groups or categories.
- "Appeals officer." As follows:
  - (1) For a Commonwealth agency or a local agency, the appeals officer designated under section 503(a). <sup>1</sup>
  - (2) For a judicial agency, the individual designated under section 503(b).
  - (3) For a legislative agency, the individual designated under section 503(c).
  - (4) For the Attorney General, State Treasurer, Auditor General and local agencies in possession of criminal investigative records, the individual designated under section 503(d).

### "Commonwealth agency." Any of the following:

- (1) Any office, department, authority, board, multistate agency or commission of the executive branch, an independent agency and a State-affiliated entity. The term includes:
  - (i) The Governor's Office.
  - (ii) The Office of Attorney General, the Department of the Auditor General and the Treasury Department.
  - (iii) An organization established by the Constitution of Pennsylvania, a statute or an executive order which performs or is intended to perform an essential governmental function.
- (2) The term does not include a judicial or legislative agency.

"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.

"Financial record." Any of the following:

- (1) Any account, voucher or contract dealing with:
  - (i) the receipt or disbursement of funds by an agency; or
  - (ii) an agency's acquisition, use or disposal of services, supplies, materials, equipment or property.
- (2) The salary or other payments or expenses paid to an officer or employee of an agency, including the name and title of the officer or employee.
- (3) A financial audit report. The term does not include work papers underlying an audit.

"Homeland security." Governmental actions designed to prevent, detect, respond to and recover from acts of terrorism, major disasters and other emergencies, whether natural or manmade. The term includes activities relating to the following:

- (1) emergency preparedness and response, including preparedness and response activities by volunteer medical, police, emergency management, hazardous materials and fire personnel;
- (2) intelligence activities;
- (3) critical infrastructure protection;
- (4) border security;
- (5) ground, aviation and maritime transportation security;
- (6) biodefense;
- (7) detection of nuclear and radiological materials; and
- (8) research on next-generation securities technologies.

"Independent agency." Any board, commission or other agency or officer of the Commonwealth, that is not subject to the policy supervision and control of the Governor. The term does not include a legislative or judicial agency.

"Judicial agency." A court of the Commonwealth or any other entity or office of the unified judicial system.

"Legislative agency." Any of the following:

(1) The Senate.

(2) The House of Representatives.

(3) The Capitol Preservation Committee.
(4) The Center for Rural Pennsylvania.
(5) The Joint Legislative Air and Water Pollution Control and Conservation Committee.
(6) The Joint State Government Commission.
(7) The Legislative Budget and Finance Committee.
(8) The Legislative Data Processing Committee.
(9) The Independent Regulatory Review Commission.
(10) The Legislative Reference Bureau.
(11) The Local Government Commission.
(12) The Pennsylvania Commission on Sentencing.
(13) The Legislative Reapportionment Commission.
(14) The Legislative Office for Research Liaison.
(15) The Legislative Audit Advisory Commission.
<b>Legislative record.</b> " Any of the following relating to a legislative agency or a standing committee, subcommittee or conference ommittee of a legislative agency:
(1) A financial record.
(2) A bill or resolution that has been introduced and amendments offered thereto in committee or in legislative session, including resolutions to adopt or amend the rules of a chamber.
(3) Fiscal notes.
(4) A cosponsorship memorandum.
(5) The journal of a chamber.
(6) The minutes of, record of attendance of members at a public hearing or a public committee meeting and all recorded votes taken in a public committee meeting.
(7) The transcript of a public hearing when available.

(8) Executive nomination calendars.

- (9) The rules of a chamber.
- (10) A record of all recorded votes taken in a legislative session.
- (11) Any administrative staff manuals or written policies.
- (12) An audit report prepared pursuant to the act of June 30, 1970 (P.L. 442, No. 151)<sup>2</sup> entitled, "An act implementing the provisions of Article VIII, section 10 of the Constitution of Pennsylvania, by designating the Commonwealth officers who shall be charged with the function of auditing the financial transactions after the occurrence thereof of the Legislative and Judicial branches of the government of the Commonwealth, establishing a Legislative Audit Advisory Commission, and imposing certain powers and duties on such commission."
- (13) Final or annual reports required by law to be submitted to the General Assembly.
- (14) Legislative Budget and Finance Committee reports.
- (15) Daily legislative session calendars and marked calendars.
- (16) A record communicating to an agency the official appointment of a legislative appointee.
- (17) A record communicating to the appointing authority the resignation of a legislative appointee.
- (18) Proposed regulations, final-form regulations and final-omitted regulations submitted to a legislative agency.
- (19) The results of public opinion surveys, polls, focus groups, marketing research or similar efforts designed to measure public opinion funded by a legislative agency.

### "Local agency." Any of the following:

- (1) Any political subdivision, intermediate unit, charter school, cyber charter school or public trade or vocational school.
- (2) Any local, intergovernmental, regional or municipal agency, authority, council, board, commission or similar governmental entity.
- "Office of Open Records." The Office of Open Records established in section 1310.<sup>3</sup>
- "Personal financial information." An individual's personal credit, charge or debit card information; bank account information; bank, credit or financial statements; account or PIN numbers and other information relating to an individual's personal finances.
- "Privilege." The attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.
- "Public record." A record, including a financial record, of a Commonwealth or local agency that:
  - (1) is not exempt under section 708; <sup>4</sup>
  - (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 a privilege.

"Record." 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 recording, information stored or maintained electronically and a data-processed or image-processed document.

"Requester." A person that is a legal resident of the United States and requests a record pursuant to this act. The term includes an agency.

"Response." Access to a record or an agency's written notice to a requester granting, denying or partially granting and partially denying access to a record.

"Social services." Cash assistance and other welfare benefits, medical, mental and other health care services, drug and alcohol treatment, adoption services, vocational services and training, occupational training, education services, counseling services, workers' compensation services and unemployment compensation services, foster care services, services for the elderly, services for individuals with disabilities and services for victims of crimes and domestic violence.

"State-affiliated entity." A Commonwealth authority or Commonwealth entity. The term includes the Pennsylvania Higher Education Assistance Agency and any entity established thereby, the Pennsylvania Gaming Control Board, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, the Pennsylvania Housing Finance Agency, the Pennsylvania Municipal Retirement Board, the State System of Higher Education, a community college, the Pennsylvania Turnpike Commission, the Pennsylvania Public Utility Commission, the Pennsylvania Infrastructure Investment Authority, the State Public School Building Authority, the Pennsylvania Interscholastic Athletic Association and the Pennsylvania Higher Educational Facilities Authority. The term does not include a State-related institution.

### "State-related institution." Includes:

- (1) Temple University.
- (2) The University of Pittsburgh.
- (3) The Pennsylvania State University.
- (4) Lincoln University.

"Terrorist act." A violent or life-threatening act that violates the criminal laws of the United States or any state and appears to be intended to:

- (1) intimidate or coerce a civilian population;
- (2) influence the policy of a government; or
- (3) affect the conduct of a government by mass destruction, assassination or kidnapping.

"Trade secret." Information, including a formula, drawing, pattern, compilation, including a customer list, program, device, method, technique or process that:

- (1) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The term includes data processing software obtained by an agency under a licensing agreement prohibiting disclosure.

### **Credits**

2008, Feb. 14, P.L. 6, No. 3, § 102, imd. effective.

Notes of Decisions (888)

### **Footnotes**

- 1 65 P.S. § 67.503.
- 2 71 P.S. §§ 1189.1, 1189.2.
- 3 65 P.S. § 67.1310.
- 4 65 P.S. § 67.708.

65 P.S. § 67.102, PA ST 65 P.S. § 67.102

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

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Purdon's Pennsylvania Statutes and Consolidated Statutes

Title 65 P.S. Public Officers (Refs & Annos)

Chapter 3A. Right-to-Know Law (Refs & Annos)

Chapter 3. Requirements and Prohibitions

65 P.S. § 67.301

## § 67.301. Commonwealth agencies

Currentness

- (a) Requirement.—A Commonwealth agency shall provide public records in accordance with this act.
- **(b) Prohibition.--**A Commonwealth agency may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.

### Credits

2008, Feb. 14, P.L. 6, No. 3, § 301, effective Jan. 1, 2009.

Notes of Decisions (43)

65 P.S. § 67.301, PA ST 65 P.S. § 67.301

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

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Purdon's Pennsylvania Statutes and Consolidated Statutes

Title 65 P.S. Public Officers (Refs & Annos)

Chapter 3A. Right-to-Know Law (Refs & Annos)

Chapter 5. Access

65 P.S. § 67.506

§ 67.506. Requests

Currentness
(a) Disruptive requests
(1) An agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.
(2) A denial under this subsection shall not restrict the ability to request a different record.
(b) Disaster or potential damage
(1) An agency may deny a requester access:
(i) when timely access is not possible due to fire, flood or other disaster; or
(ii) to historical, ancient or rare documents, records, archives and manuscripts when access may, in the professional judgment of the curator or custodian of records, cause physical damage or irreparable harm to the record.
(2) To the extent possible, the contents of a record under this subsection shall be made accessible to a requester even when the record is physically unavailable.

(c) Agency discretion .-- An agency may exercise its discretion to make any otherwise exempt record accessible for

inspection and copying under this chapter, if all of the following apply:

(1) Disclosure of the record is not prohibited under any of the following:
(i) Federal or State law or regulation.
(ii) Judicial order or decree.
(2) The record is not protected by a privilege.
(3) The agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.
(d) Agency possession
(1) A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.
(2) Nothing in this act shall be construed to require access to any other record of the party in possession of the public record.
(3) A request for a public record in possession of a party other than the agency shall be submitted to the open record officer of the agency. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee established under section 1307(b) <sup>1</sup> and upon collection shall remit the fee to the party in possession of the record if the party duplicated the record.
Credits
2008, Feb. 14, P.L. 6, No. 3, § 506, effective Jan. 1, 2009.
Notes of Decisions (89)
Footnotes

65 P.S. § 67.1307.

65 P.S. § 67.506, PA ST 65 P.S. § 67.506

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

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Purdon's Pennsylvania Statutes and Consolidated Statutes

Title 65 P.S. Public Officers (Refs & Annos)

Chapter 3A. Right-to-Know Law (Refs & Annos)

Chapter 7. Procedure

65 P.S. § 67.708

# § 67.708. Exceptions for public records

Currentness

4	(a)	Burden	of n	roof
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- (1) The 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.
- (2) The burden of proving that a legislative record is exempt from public access shall be on the legislative agency receiving a request by a preponderance of the evidence.
- (3) The burden of proving that a financial record of a judicial agency is exempt from public access shall be on the judicial agency receiving a request by a preponderance of the evidence.
- **(b) Exceptions.--**Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:
  - (1) A record, the disclosure of which:
    - (i) would result in the loss of Federal or State funds by an agency or the Commonwealth; or
    - (ii) would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual.

- (2) A record maintained by an agency in connection with the military, homeland security, national defense, law enforcement or other public safety activity that, if disclosed, would be reasonably likely to jeopardize or threaten public safety or preparedness or public protection activity or a record that is designated classified by an appropriate Federal or State military authority.
- (3) A record, the disclosure of which creates a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, which may include:
  - (i) documents or data relating to computer hardware, source files, software and system networks that could jeopardize computer security by exposing a vulnerability in preventing, protecting against, mitigating or responding to a terrorist act;
  - (ii) lists of infrastructure, resources and significant special events, including those defined by the Federal Government in the National Infrastructure Protections, which are deemed critical due to their nature and which result from risk analysis; threat assessments; consequences assessments; antiterrorism protective measures and plans; counterterrorism measures and plans; and security and response needs assessments; and
  - (iii) building plans or infrastructure records that expose or create vulnerability through disclosure of the location, configuration or security of critical systems, including public utility systems, structural elements, technology, communication, electrical, fire suppression, ventilation, water, wastewater, sewage and gas systems.
- (4) A record regarding computer hardware, software and networks, including administrative or technical records, which, if disclosed, would be reasonably likely to jeopardize computer security.
- (5) A record of an individual's medical, psychiatric or psychological history or disability status, including an evaluation, consultation, prescription, diagnosis or treatment; results of tests, including drug tests; enrollment in a health care program or program designed for participation by persons with disabilities, including vocation rehabilitation, workers' compensation and unemployment compensation; or related information that would disclose individually identifiable health information.
  - (6)(i) The following personal identification information:
    - (A) A record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.
    - (B) A spouse's name, marital status or beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.
(ii) Nothing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee.
(iii) An agency may redact the name or other identifying information relating to an individual performing an undercover or covert law enforcement activity from a record.
(7) The following records relating to an agency employee:
(i) A letter of reference or recommendation pertaining to the character or qualifications of an identifiable individual, unless it was prepared in relation to the appointment of an individual to fill a vacancy in an elected office or an appointed office requiring Senate confirmation.
(ii) A performance rating or review.
(iii) The result of a civil service or similar test administered by a Commonwealth agency, legislative agency or judicial agency. The result of a civil service or similar test administered by a local agency shall not be disclosed if restricted by a collective bargaining agreement. Only test scores of individuals who obtained a passing score on a test administered by a local agency may be disclosed.
(iv) The employment application of an individual who is not hired by the agency.
(v) Workplace support services program information.
(vi) Written criticisms of an employee.
(vii) Grievance material, including documents related to discrimination or sexual harassment.
(viii) Information regarding discipline, demotion or discharge contained in a personnel file. This subparagraph shall not

apply to the final action of an agency that results in demotion or discharge.	
(ix) An academic transcript.	
(8)(i) A record pertaining to strategy or negotiations relating to labor relations or collective bargaining and arbitration proceedings. This subparagraph shall not apply to a final or executed contract or agreement betwee parties in a collective bargaining procedure.	
(ii) In the case of the arbitration of a dispute or grievance under a collective bargaining agreement, an exhibit e into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion. This subparagraph shapply to the final award or order of the arbitrator in a dispute or grievance procedure.	
(9) The draft of a bill, resolution, regulation, statement of policy, management directive, ordinance or amendment to prepared by or for an agency.	hereto
(10)(i) A record that reflects:	
(A) The internal, predecisional deliberations of an agency, its members, employees or officials or predecideliberations between agency members, employees or officials and members, employees or officials of a agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative proposal, legislative proposal, legislative proposed policy or course of action or any research, memos or other documents of the predecisional deliberations.	nother slative
(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proporegulation.	sal or
(ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a n consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act and wh presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record.	
(iii) This paragraph shall not apply to a written or Internet application or other document that has been submirrequest Commonwealth funds.	tted to
(iv) This paragraph shall not apply to the results of public opinion surveys, polls, focus groups, marketing resea	arch or

similar effort designed to measure public opinion.
(11) A record that constitutes or reveals a trade secret or confidential proprietary information.
(12) Notes and working papers prepared by or for a public official or agency employee used solely for that official's or employee's own personal use, including telephone message slips, routing slips and other materials that do not have an official purpose.
Records that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official of employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.
(14) Unpublished lecture notes, unpublished manuscripts, unpublished articles, creative works in progress, research-related naterial and scholarly correspondence of a community college or an institution of the State System of Higher Education of a faculty member, staff employee, guest speaker or student thereof.
(15)(i) Academic transcripts.
(ii) Examinations, examination questions, scoring keys or answers to examinations. This subparagraph shall include licensing and other examinations relating to the qualifications of an individual and to examinations given in primary and secondary schools and institutions of higher education.
(16) A record of an agency relating to or resulting in a criminal investigation, including:
(i) Complaints of potential criminal conduct other than a private criminal complaint.
(ii) Investigative materials, notes, correspondence, videos and reports.
(iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.
(iv) A record that includes information made confidential by law or court order.

(v) Victim information, including any information that would jeopardize the safety of the victim.
(vi) A record that, if disclosed, would do any of the following:
(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.
(B) Deprive a person of the right to a fair trial or an impartial adjudication.
(C) Impair the ability to locate a defendant or codefendant.
(D) Hinder an agency's ability to secure an arrest, prosecution or conviction.
(E) Endanger the life or physical safety of an individual.
This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b) (relating to accident prevention investigations).
(17) A record of an agency relating to a noncriminal investigation, including:
(i) Complaints submitted to an agency.
(ii) Investigative materials, notes, correspondence and reports.
(iii) A record that includes the identity of a confidential source, including individuals subject to the act of December 12 1986 (P.L. 1559, No. 169), known as the Whistleblower Law.
(iv) A record that includes information made confidential by law

(v) Work papers underlying an audit.
(vi) A record that, if disclosed, would do any of the following:
(A) Reveal the institution, progress or result of an agency investigation, except the imposition of a fine or cive penalty, the suspension, modification or revocation of a license, permit, registration, certification or simil authorization issued by an agency or an executed settlement agreement unless the agreement is determined to be confidential by a court.
(B) Deprive a person of the right to an impartial adjudication.
(C) Constitute an unwarranted invasion of privacy.
(D) Hinder an agency's ability to secure an administrative or civil sanction.
(E) Endanger the life or physical safety of an individual.
(18)(i) Records or parts of records, except time response logs, pertaining to audio recordings, telephone or rad transmissions received by emergency dispatch personnel, including 911 recordings.
(ii) This paragraph shall not apply to a 911 recording, or a transcript of a 911 recording, if the agency or a coudetermines that the public interest in disclosure outweighs the interest in nondisclosure.
(19) DNA and RNA records.
(20) An autopsy record of a coroner or medical examiner and any audiotape of a postmortem examination or autopsy, or copy, reproduction or facsimile of an autopsy report, a photograph, negative or print, including a photograph or videotap of the body or any portion of the body of a deceased person at the scene of death or in the course of a postmorte examination or autopsy taken or made by or caused to be taken or made by the coroner or medical examiner. The exception shall not limit the reporting of the name of the deceased individual and the cause and manner of death.

(21)(i) Draft minutes of any meeting of an agency until the next regularly scheduled meeting of the agency.
(ii) Minutes of an executive session and any record of discussions held in executive session.
(22)(i) The contents of real estate appraisals, engineering or feasibility estimates, environmental reviews, audits or evaluations made for or by an agency relative to the following:
(A) The leasing, acquiring or disposing of real property or an interest in real property.
(B) The purchase of public supplies or equipment included in the real estate transaction.
(C) Construction projects.
(ii) This paragraph shall not apply once the decision is made to proceed with the lease, acquisition or disposal of real property or an interest in real property or the purchase of public supply or construction project.
(23) Library and archive circulation and order records of an identifiable individual or groups of individuals.
(24) Library archived and museum materials, or valuable or rare book collections or documents contributed by gift, grant, bequest or devise, to the extent of any limitations imposed by the donor as a condition of the contribution.
(25) A record identifying the location of an archeological site or an endangered or threatened plant or animal species if not already known to the general public.
(26) A proposal pertaining to agency procurement or disposal of supplies, services or construction prior to the award of the contract or prior to the opening and rejection of all bids; financial information of a bidder or offeror requested in an invitation for bid or request for proposals to demonstrate the bidder's or offeror's economic capability; or the identity of members, notes and other records of agency proposal evaluation committees established under 62 Pa.C.S. § 513 (relating to competitive sealed proposals).
(27) A record or information relating to a communication between an agency and its insurance carrier, administrative

service organization or risk management office. This paragraph shall not apply to a contract with an insurance carrier, administrative service organization or risk management office or to financial records relating to the provision of insurance.

(28) A record or information:
(i) identifying an individual who applies for or receives social services; or
(ii) relating to the following:
(A) the type of social services received by an individual;
(B) an individual's application to receive social services, including a record or information related to an agency decision to grant, deny, reduce or restrict benefits, including a quasi-judicial decision of the agency and the identity of a caregiver or others who provide services to the individual; or
(C) eligibility to receive social services, including the individual's income, assets, physical or mental health, age disability, family circumstances or record of abuse.
(29) Correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services. This paragraph shall no apply to correspondence between a member of the General Assembly and a principal or lobbyist under 65 Pa.C.S. Ch. 13A (relating to lobbying disclosure).
(30) A record identifying the name, home address or date of birth of a child 17 years of age or younger.
(c) Financial records.—The exceptions set forth in subsection (b) shall not apply to financial records, except that an agency may redact that portion of a financial record protected under subsection (b)(1), (2), (3), (4), (5), (6), (16) or (17). An agency shall not disclose the identity of an individual performing an undercover or covert law enforcement activity.
(d) Aggregated dataThe exceptions set forth in subsection (b) shall not apply to aggregated data maintained or received by an agency, except for data protected under subsection (b)(1), (2), (3), (4) or (5).
(e) ConstructionIn determining whether a record is exempt from access under this section, an agency shall consider and apply each exemption separately.

# Credits

2008, Feb. 14, P.L. 6, No. 3, § 708, effective Jan. 1, 2009.

Notes of Decisions (638)

# Footnotes

1 43 P.S. § 1421 et seq.

65 P.S. § 67.708, PA ST 65 P.S. § 67.708

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

Purdon's Pennsylvania Statutes and Consolidated Statutes Title 65 P.S. Public Officers (Refs & Annos) Chapter 3A. Right-to-Know Law (Refs & Annos) Chapter 9. Agency Response

65 P.S. § 67.901

§ 67.901. General rule

#### Currentness

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record, legislative record or financial record and whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request. All applicable fees shall be paid in order to receive access to the record requested. The time for response shall not exceed five business days from the date the written request is received by the open-records officer for an agency. If the agency fails to send the response within five business days of receipt of the written request for access, the written request for access shall be deemed denied.

# **Credits**

2008, Feb. 14, P.L. 6, No. 3, § 901, effective Jan. 1, 2009.

# Notes of Decisions (72)

65 P.S. § 67.901, PA ST 65 P.S. § 67.901

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

Purdon's Pennsylvania Statutes and Consolidated Statutes

Title 65 P.S. Public Officers (Refs & Annos)

Chapter 3A. Right-to-Know Law (Refs & Annos)

Chapter 13. Judicial Review (Refs & Annos)

65 P.S. § 67.1301

§ 67.1301. Commonwealth agencies, legislative agencies and judicial agencies

Currentness

- (a) General rule.--Within 30 days of the mailing date of the final determination of the appeals officer relating to a decision of a Commonwealth agency, a legislative agency or a judicial agency issued under section 1101(b)<sup>1</sup> or the date a request for access is deemed denied, a requester or the agency may file a petition for review or other document as might be required by rule of court with the Commonwealth Court. The decision of the court shall contain findings of fact and conclusions of law based upon the evidence as a whole. The decision shall clearly and concisely explain the rationale for the decision.
- (b) Stay.—A petition for review under this section shall stay the release of documents until a decision under subsection (a) is issued.

#### **Credits**

2008, Feb. 14, P.L. 6, No. 3, § 1301, effective Jan. 1, 2009.

Notes of Decisions (143)

Footnotes

65 P.S. § 67.1101.

65 P.S. § 67.1301, PA ST 65 P.S. § 67.1301

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

Purdon's Pennsylvania Statutes and Consolidated Statutes Title 65 P.S. Public Officers (Refs & Annos)

Chapter 3A. Right-to-Know Law (Refs & Annos)

Chapter 15. State-Related Institutions (Refs & Annos)

65 P.S. § 67.1501

§ 67.1501. Definition

Currentness

As used in this chapter, "S	State-related institution"	means an	y of the	following:
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- (1) Temple University.
- (2) The University of Pittsburgh.
- (3) The Pennsylvania State University.
- (4) Lincoln University.

# Credits

2008, Feb. 14, P.L. 6, No. 3, § 1501, effective July 1, 2008.

65 P.S. § 67.1501, PA ST 65 P.S. § 67.1501

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

Purdon's Pennsylvania Statutes and Consolidated Statutes Title 65 P.S. Public Officers (Refs & Annos)

Chapter 3A. Right-to-Know Law (Refs & Annos)

Chapter 15. State-Related Institutions (Refs & Annos)

65 P.S. § 67.1502

§ 67.1502. Filing

# Currentness

No later than May 30 of each year, unless otherwise provided under this chapter, a State-related institution shall file the information set forth in section 1503 <sup>1</sup> as required under section 1504. <sup>2</sup>

# **Credits**

2008, Feb. 14, P.L. 6, No. 3, § 1502, effective July 1, 2008. Amended 2023, Nov. 16, P.L. 173, No. 29, § 1, effective July 1, 2024.

# **Footnotes**

- 1 65 P.S. § 67.1503.
- 2 65 P.S. § 67.1504.

65 P.S. § 67.1502, PA ST 65 P.S. § 67.1502

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 65 P.S. Public Officers (Refs & Annos)
Chapter 3A. Right-to-Know Law (Refs & Annos)
Chapter 15. State-Related Institutions (Refs & Annos)

65 P.S. § 67.1503

§ 67.1503. Contents of filing

#### Currentness

- (a) Information included.—The filing required under section 1502 <sup>1</sup> shall include the following:
  - (1) Except as provided in paragraph (4), all 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.
  - (3) The highest 25 salaries paid to employees of the institution that are not included under paragraph (2) and, for a State-related institution with 2,500 employees or more, the next highest 175 salaries paid to employees of the institution that are not included under paragraph (2). Faculty members' salaries shall be presented in salary ranges.
  - (4) The filing shall not include information relating to individual donors.
  - (5) Revenue and expenditure budgets of the State-related institution's academic and administrative support units for the current fiscal year.
  - (6) The actual revenue and expenditures for the prior year.
  - (7) For any defined project or program which is the subject of a specific line item appropriation from the General Fund, the State-related institution shall disclose the following:
    - (i) Revenue and expenditure budgets of the defined program or project for the current fiscal year.
    - (ii) The actual revenue and expenditures of the defined program or project for the prior year.
  - (8) The revenue and expenditures of any auxiliary enterprise which is directly funded in whole or in part by tuition or a State appropriation for the current fiscal year.

(9) The most recent audited financial statement for the State-related institution.
(10) The following information for the prior fiscal year for each academic or administrative support unit, for each define project or program and for an auxiliary enterprise:
(i) The number of employees by academic rank.
(ii) The number of administrators, staff, clerical and technical service employees, by classification.
(iii) Median and mean salary by academic rank.
(iv) Median and mean salaries of administrators, staff, clerical and technical service employees, by classification.
(v) Nonsalary compensation as a percentage of salary. Nonsalary compensation shall include:
(A) Medical benefits.
(B) Life insurance benefits.
(C) Pension benefits.
(D) Leave benefits.
(E) Employer Social Security payments.
(F) Workers' compensation benefits.
(vi) A statement of the State-related institution's retirement policies.
(vii) A policy statement relating to a reduction of tuition for employees' family members.
(viii) A list by academic or administrative support unit in the aggregate of the expenses of travel, subsistence and lodgin whether provided or reimbursed.
<b>(b) Providing information</b> -Each State-related institution shall provide full, complete and accurate information as may be required by the Department of Education or the chairperson or minority chairperson of the Appropriations Committee of the

Senate or the chairperson or minority chairperson of the Appropriations Committee of the House of Representatives.

- **(c) Financial statements.-**-Each State-related institution shall present and report its financial statements required under the provisions of this act in accordance with:
  - (1) The generally accepted accounting principles as prescribed by the National Association of College and University Business Officers, the American Institute of Certified Public Accountants or by another recognized authoritative body.
  - (2) The Commonwealth of Pennsylvania Budget Instructions for the State System of Higher Education, State-Related Universities and Non-State-Related Colleges and Universities.
  - (3) The financial reporting policies and standards promulgated by the Commonwealth of Pennsylvania and by the Federal Government that apply to the State-related institutions.

# (d) Appropriations .--

- (1) In a year a State-related institution receives an appropriation, a report shall be submitted prior to September 1 and shall cover the 12-month period beginning with the summer term of the preceding year. The report shall include:
  - (i) The following counts and distributions for each term during the period:
    - (A) The definition and number of:
      - (I) Faculty members employed full time.
      - (II) Faculty members employed part time.
      - (III) Full-time students enrolled in a graduate course.
      - (IV) Full-time students enrolled in an undergraduate course.
      - (V) Part-time students enrolled in a graduate course.
      - (VI) Part-time students enrolled in an undergraduate course.
    - (B) The total number of:
      - (I) Undergraduate student credit hours, divided into lower division and upper division course levels.

(II) Graduate student credit hours, divided into three course levels: master's, first professional and doctoral.
(C) The number of different courses scheduled by level of instruction and the number of sections of individual instruction scheduled by level of instruction, each further subdivided by two-digit Classification of Instructional Program (CIP categories of instructional programs of higher education as defined by the National Center for Education Statistics United States Department of Education.
(D) The number of terms scheduled and the dates of the terms.
(ii) For the summer term and the following academic year in total and for each two-digit CIP program category:
(A) A classification of faculty members or other professional employees by title, including:
(I) Professor.
(II) Associate professor.
(III) Assistant professor.
(IV) Instructor.
(V) Lecturer.
(VI) Research associate.
(VII) Librarian and academic administrator.
(B) Faculty members or other professional employees under each title to be subdivided into teaching and nonteaching
(C) Each set of faculty members or other professional employees to be further subdivided by full-time or part-tim employment.
(D) The following aggregates for each subdivided classification:
(I) The number of faculty and other professional employees and the full-time equivalence in instructional annoninstructional functions.

- (II) The sum of credits assigned to undergraduate classroom courses and the sum of credits assigned to graduate classroom courses taught divided into lower division, upper division, master's, first professional and doctoral course
- (III) The sum of credits assigned to undergraduate individual instruction courses and the sum of credits assigned to graduate individual instruction courses taught divided into lower division, upper division, master's, first professional and doctoral course levels.
- (IV) The sum of undergraduate classroom student credit hours and the sum of graduate classroom student credit hours generated, divided into lower division, upper division, master's, first professional and doctoral course levels.
- (V) The sum of undergraduate individual instruction student credit hours and the sum of graduate individual instruction student credit hours generated, divided into lower division, upper division, master's, first professional and doctoral course levels.
- (VI) The total salary paid for instructional functions and for noninstructional functions and the amount of salary paid for each of these functions from State-related institution funds, Federal funds and other funds.
- (iii) For each term of the period covered for each faculty member employed full-time identified by two-digit CIP program category and title, the report shall contain an analysis of the average hours per week spent:
  - (A) In State-related-institution-related activities, stating specifically hours spent in undergraduate classroom contact and graduate classroom contact hours spent in preparation.
  - (B) In research.
  - (C) In public service.
- (2) The report covering the 12-month period shall include for each program of the State-related institution:
  - (i) Minimum number of credits required for a baccalaureate and a master's degree.
  - (ii) Number of bachelor's, master's, first professional and doctoral degrees awarded for the previous five years and those estimates for that year.
- (e) Minutes.--Each State-related institution shall make a copy of the minutes of each public meeting of the institution's board of trustees available for public inspection in the institution's library in print format and online on the institution's publicly accessible Internet website. The minutes shall be maintained in print and online for no fewer than 20 years.

**(f) Data systems report.-**Each State-related institution shall make a copy of the institution's integrated postsecondary education data systems report available for public inspection in the institution's library in print format and online on the institution's publicly accessible Internet website.

#### **Credits**

2008, Feb. 14, P.L. 6, No. 3, § 1503, effective July 1, 2008. Amended 2023, Nov. 16, P.L. 173, No. 29, § 1, effective July 1, 2024.

### **Footnotes**

# 1 65 P.S. § 67.1502.

65 P.S. § 67.1503, PA ST 65 P.S. § 67.1503

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

Purdon's Pennsylvania Statutes and Consolidated Statutes Title 65 P.S. Public Officers (Refs & Annos) Chapter 3A. Right-to-Know Law (Refs & Annos)

Chapter 15. State-Related Institutions (Refs & Annos)

65 P.S. § 67.1504

§ 67.1504. Requirements for information in filings

#### Currentness

A State-related institution shall make the information required under section 1502 <sup>1</sup> accessible to the public in accordance with the following:

- (1) The information shall be posted online on the institution's publicly accessible Internet website in a searchable, sortable and downloadable database format that is freely accessible by the public. To the extent possible, a State-related institution shall post the information online in a similar manner in order to facilitate easy public review. The information of prior years shall be maintained for no fewer than 10 years.
- (2) The information shall be maintained in print format in the institution's library for no fewer than 10 years.
- (3) The information shall be provided in electronic format to the Department of Education and the Joint State Government Commission.
- (4) The information shall be provided in print format to the General Assembly and to each of the State regional library resource centers.

#### **Credits**

2008, Feb. 14, P.L. 6, No. 3, § 1504, effective July 1, 2008. Amended 2023, Nov. 16, P.L. 173, No. 29, § 1, effective July 1, 2024.

# **Footnotes**

1 65 P.S. § 67.1502.

65 P.S. § 67.1504, PA ST 65 P.S. § 67.1504

Current through Act 44 of the 2025 Regular Session. Some statute sections may be more current, see credits for details.

**End of Document** 

# APPENDIX C

Office of Open Records Final Determination (Education), Dated September 1, 2023, in Docket No. AP 2023-1492



# **FINAL DETERMINATION**

IN THE MATTER OF :

WYATT MASSEY AND SPOTLIGHT PA,

Requester

v. : Docket No.: AP 2023-1492

PENNSYLVANIA DEPARTMENT OF

EDUCATION, Respondent

1

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

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

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

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

# LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Commonwealth is required to demonstrate, "by a preponderance of the evidence," that records are exempt from public access. 65 P.S. § 67.708(a)(1). Preponderance of the evidence has been defined as "such proof as leads the 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)).

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

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

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

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

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

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

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

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

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

<sup>&</sup>lt;sup>2</sup> Under the RTKL, an attestation may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, "the averments in [the attestations] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. 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 I(d)(x) (Expectations of Membership) (See Exhibit PSU #2)

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

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

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

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

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

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

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

929, 936 (holding that, when there is evidence that a record does not exist, "[i]t is questionable to

what degree additional detail and explanation are necessary...."); Campbell v. Pa. Interscholastic

Athletic Ass'n, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the

nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and

is tantamount to a "more likely than not" inquiry); Moore, 992 A.2d at 909.

**CONCLUSION** 

For the foregoing reasons, the appeal is granted in part and denied in part, and the

Department is required to provide all records responsive to Items 3 and 4 of the Request within

thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing

date of this Final Determination, any party may appeal or petition for review to the Commonwealth

Court. 65 P.S. § 67.1301(a). All parties must be served with notice of the appeal. The OOR also

shall be served notice and have an opportunity to respond according to court rules as per Section

1303 of the RTKL. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this

matter, the OOR is not a proper party to any appeal and should not be named as a party.<sup>4</sup> This

Final Determination shall be placed on the website at: <a href="http://openrecords.pa.gov">http://openrecords.pa.gov</a>.

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.

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

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# APPENDIX D

Office of Open Records Final Determination (Agriculture), Dated October 6, 2023, in Docket No. AP 2023-1520



IN THE MATTER OF :

WYATT MASSEY AND SPOTLIGHT PA, Requester

v. : Docket No: AP 2023-1520

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PENNSYLVANIA DEPARTMENT OF AGRICULTURE,

Respondent :

and :

:

THE PENNSYLVANIA STATE : UNIVERSITY, :

Direct Interest Participant :

# FACTUAL BACKGROUND

On June 29, 2023,<sup>1</sup> 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

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

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

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<sup>&</sup>lt;sup>2</sup> 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,<sup>3</sup> 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.

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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.

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

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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.

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- 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 I(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."<sup>4</sup>

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<sup>&</sup>lt;sup>4</sup> 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.<sup>5</sup>

The Department further maintains that it is not required to create a record that does not exist. Specifically, the Department argues that "[a]sking [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

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

<sup>&</sup>lt;sup>5</sup> 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

<sup>&</sup>lt;sup>6</sup> 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.<sup>7</sup>

<sup>&</sup>lt;sup>7</sup> 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 reprioritization.
    - 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 reprioritization.
    - 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

- 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 Envtl. 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 predcisional 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.<sup>8</sup> 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.;

Marija Kuren, Esq.; Susan West, AORO;

Natalie Voris Grosse, Esq.

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

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# **PROOF OF SERVICE**

I hereby certify that on this 19<sup>th</sup> day of November, 2025 a true and correct copy of the foregoing document was electronically filed using the PACFile system, which will send notification of such filing to all counsel of record, which service satisfies the requirements of Pa. R.A.P. 121.

/s/ Jan L. Budman II

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