

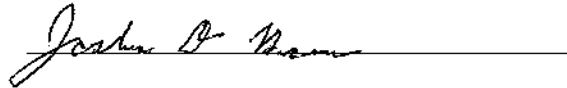
IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<b>RYAN BAGWELL,</b>	:	
<b>Petitioner</b>	:	
	:	
<b>v.</b>	:	<b>No. _____ C.D. 2014</b>
	:	
<b>PENNSYLVANIA DEPARTMENT</b>	:	
<b>OF EDUCATION,</b>	:	
<b>Respondent</b>	:	

**NOTICE TO PARTICIPATE**

TO: The Pennsylvania State University  
c/o Katherine M. Allen, Esquire  
Associate General Counsel  
Office of General Counsel  
The Pennsylvania State University  
227 West Beaver Avenue, Suite 507  
State College, PA 16801

If you intend to participate in this proceeding in the Commonwealth Court, you must serve and file a notice of intervention under Rule 1553 of the Pennsylvania Rules of Appellate Procedure within 30 days.



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Counsel for Ryan Bagwell, Petitioner

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

<b>RYAN BAGWELL,</b>	:	
<b>Petitioner</b>	:	
	:	
<b>v.</b>	:	<b>No. _____ C.D. 2014</b>
	:	
<b>PENNSYLVANIA DEPARTMENT</b>	:	
<b>OF EDUCATION,</b>	:	
<b>Respondent</b>	:	

**PETITION FOR REVIEW**  
(Appellate Jurisdiction)

AND NOW, comes Ryan Bagwell (Bagwell), to petition for review of the Final Determination of the Office of Open Records (OOR) issued on December 20, 2013 in the proceedings docketed below at AP 2013-1753 and the OOR's subsequent denial of Bagwell's Request for Reconsideration, and in support thereof avers as follows:

**I. STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT**

1. This Honorable Court has *de novo* appellate jurisdiction over this appeal from the OOR's Final Determination pursuant to Section 1301(a) of the Right-to-Know Law (RTKL), 65 P.S. § 67.1301(a), and Section 763(a) of the Judicial Code, 42 Pa.C.S.A. § 763(a).

## **II. NAMES OF PARTIES AND OTHER INTERESTED ENTITIES**

2. Ryan Bagwell is an adult individual residing at 5219 Shorecrest Drive, Middleton, WI 53562.

3. The Pennsylvania Department of Education (Department) is a Commonwealth agency as defined by Section 102 of the RTKL, 65 P.S. § 67.102.

4. The OOR is a governmental unit established within the Pennsylvania Department of Community and Economic Development to receive and determine appeals of agency RTKL decisions pursuant to Sections 1102 and 1310 of the RTKL. 65 P.S. §§ 67.1102 and 67.1310.

5. The Pennsylvania State University (Penn State) is a state-related institution as defined by Section 102 of the RTKL, 65 P.S. § 67.102. Penn State asserted an interest under Section 1101(c) of the RTKL, 65 P.S. § 67.1101(c) in the OOR proceedings below.

## **III. ORDER SOUGHT TO BE REVIEWED**

6. The OOR issued its Final Determination on December 20, 2013 in the matter docketed below at AP 2013-1753. A true and correct copy of the Final Determination is attached hereto as Exhibit "A."

## **IV. GENERAL STATEMENT OF OBJECTIONS TO THE ORDER OR OTHER DETERMINATION**

7. The OOR erred by finding that the Department and/or Penn State submitted sufficient evidence to prove certain records are exempt from public disclosure under the attorney work-product privilege because there is no evidence to prove such records were prepared in anticipation of litigation.

8. The OOR erred by finding that Penn State has not waived any attorney-client or work-product privilege and/or exemption from public disclosure by entering waiver agreements with third parties and/or disclosing the records at issue to third parties, including but not limited

to law enforcement agencies, collegiate athletic conference(s), and/or collegiate member organizations.

9. Two days before the issuance of the Final Determination here, the Dauphin County Court of Common Pleas unsealed the grand-jury testimony of former Penn State General Counsel (and former Supreme Court Justice) Cynthia Baldwin, which contained personal statements of record by counsel for the Attorney General's Office and counsel for Penn State and counsel for Cynthia Baldwin that Penn State had waived the attorney-client privilege in regards to all communications pertaining to the same subject matter as the records sought by Mr. Bagwell.

10. Prior to Justice Baldwin's testimony on October 22, 2012, Chief Deputy Attorney General Frank Fina explained that Penn State had broadly waived the attorney-client privilege so that Penn State and Justice Baldwin could cooperate with the Attorney General. Mr. Fina stated,

It was a waiver focused upon the issues of Gerald Sandusky, his relationship with the University, any conduct of his that was known by the University, and it extended to the contacts between the University and this grand jury and investigators, again, looking into Gerald Sandusky, his personal conduct, his – any alleged misconduct **and indeed also the acts of the University in compliance or noncompliance with investigative efforts.** All of those issues were opened to us to discuss with [Justice] Baldwin.

Transcript of Proceedings of Grand Jury taken on October 22, 2013, p. 3-4 (attached hereto as Exhibit "B")(emphasis supplied).

11. Michael Mustkoff, an attorney representing PSU, affirmed Mr. Fina's account of the waiver by saying, "Speaking for the University ... we agree with everything that was stated by Mr. Fina on behalf of the Commonwealth." *Id.*, p. 6.

12. Additionally, Charles DeMonaco, an attorney representing Ms. Baldwin, stated that PSU waived any privilege to communications with Ms. Baldwin involving "Sandusky

related matters.” Id., pp. 8-9. He further stated that the waiver was “memorialized” the week prior to the grand jury testimony. Id.

13. The requester retrieved a copy of the letter believed to be referenced in Justice Baldwin’s testimony, and a subsequent letter between counsel for Penn State and the Attorney General, from the Dauphin County Court of Common Pleas website on January 13, 2013.

14. These letters confirm that Penn State agreed to broadly waive the attorney-client privilege and attorney work-product privilege for “correspondence and communications” of Justice Baldwin, except in two limited circumstances. True and correct copies of these letters are attached hereto as Exhibits “C” and “D.”

15. Penn State did not disclose the existence of the agreements between Penn State and the Office of the Attorney General to the OOR or the Requester prior to the close of the record in the OOR proceedings below.

16. It is believed and therefore averred that Penn State knew or reasonably should have known that it waived the protections afforded by the attorney-client privilege and the attorney work-product doctrine.

17. It is believed and therefore averred that Penn State omitted evidence that it waived the attorney-client privilege and/or the attorney work-product privilege by entering waiver agreements with third parties and/or disclosing the records at issue to third parties, including but not limited to law enforcement agencies, collegiate athletic conferences and collegiate membership organizations.

18. Penn State’s assertions of the attorney-client privilege and the attorney work-product privilege are frivolous and not based on a reasonable interpretation of the law to the

extent Penn State knew or reasonably should have known that the protections afforded by said privileges had been waived.

19. By letter dated December 18, 2013 (the day after Justice Baldwin's grand-jury testimony was unsealed), Mr. Bagwell notified the OOR of the unsealing of Mrs. Baldwin's testimony and requested an evidentiary hearing. A true and correct copy of the letter is attached hereto as Exhibit "E."

20. The OOR concluded with no analysis, that the attorney-client privilege had not been waived, See p. 9 of the Final Determination, and failed to address whether the attorney work-product privilege had been waived.

21. The OOR erred by failing to analyze whether Mr. Bagwell's compelling evidence of waiver, which directly contradicted Penn State's conclusory and incomplete assertions of non-waiver, proved that Penn State waived any attorney-client or work-product privilege and/or exemption from public disclosure

## **V. STATEMENT OF RELIEF SOUGHT**

22. Due to the above cited errors by the OOR, the Court should reverse the Final Determination dated December 20, 2014, and direct the Department to disclose unredacted copies of records that are responsive to Bagwell's initial request.

23. Alternatively, due to the above cited errors of the OOR, the Court should authorize the parties to engage in discovery for a period of 60 days and/or hold an evidentiary hearing to receive and consider additional evidence applicable to the privileges and exemptions asserted and the waiver and/or non-applicability of the same.

WHEREFORE, the Petitioner, Ryan Bagwell, requests the entry of an order REVERSING the Final Determination of the Office of Open Records dated December 16, 2013,

or alternatively, AUTHORIZING the parties to conduct discovery pursuant to the Pennsylvania Rules of Civil Procedure for a period of 60 days and/or SCHEDULING an evidentiary hearing to receive and consider additional evidence applicable to the privileges and exemptions asserted and the waiver and/or non-applicability of the same.

A handwritten signature in cursive script, appearing to read "Craig J. Staudenmaier", is written over a horizontal line.

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Harrisburg, PA 17108-0840

Counsel for Ryan Bagwell, Petitioner

### **Certificate of Service**

I, Karen Farhat, an employee of the law firm of Nauman, Smith, Shissler & Hall, LLP, hereby certify that I am this day, in conformance with Pa.R.A.P. 121, serving the foregoing Notice to Participate and Petition for Review upon the persons listed below as follows:

#### **Via Hand Delivery**

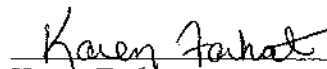
Terry Mutchler, Executive Director  
Office of Open Records  
1<sup>st</sup> Floor Keystone Building  
400 North Street  
Harrisburg, PA 17120-0225

#### **Via First Class Mail**

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Kathrine M. Allen  
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Karen Farhat

Date: January 16, 2013





all letters, memos, reports, contracts and e-mails sent to former secretary of education Ron Tomalis and/or Jane Shoop between Nov. 5, 2011 and July 31, 2013 from any of the following individuals:

1. Louis Freeh ...
2. Omar McNeill ...
3. Kenneth Frazier ...
4. Annette DeRose ...
5. Paula Ammerman ...
6. Karen Peetz
7. Steve Garan

On July 26, 2013, the Department invoked a thirty (30) day extension of time to respond to the Request pursuant to 65 P.S. § 67.902. On August 22, 2013, the Department confirmed the Requester's agreement to an additional extension of time to respond pursuant to 65 P.S. § 67.902(b)(2). On September 9, 2013, the Department partially granted the Request and provided certain responsive records. The Department redacted "personal or cell phone numbers, access codes, and personal email addresses" from certain of the records that were provided. The Department denied the remainder of the Request, citing exemptions for noncriminal investigative records (65 P.S. § 67.708(b)(17)) and records reflecting internal, predecisional deliberations (65 P.S. § 67.708(b)(10)). The Department also stated that withheld records are protected by the attorney-client privilege and the attorney work-product doctrine. The Department also attached an index of the withheld records to its response, which identified 155 withheld records by the date and time range for e-mails; the participants; the subject line of e-mails and the applicable reason for denying access.

On September 19, 2013, the Requester appealed to the OOR, challenging the denial as to the withheld records only and stating grounds for disclosure. The Requester did not challenge the redactions to the records provided. The Requester also asked the OOR to conduct an *in camera* review of the withheld records. The OOR invited both parties to supplement the record

and directed the Department to notify any third parties of their ability to participate in the appeal pursuant to 65 P.S. § 67.1101(c). On September 23, 2013, the OOR issued an order directing the Department to provide the withheld records for an *in camera* review. On September 30, 2013, the Requester submitted a statement arguing, among other matters, that the RTKL exemptions cannot apply to records sent to Secretary Tomalis in his capacity as a member of The Pennsylvania State University Board of Trustees ("Board") because The Pennsylvania State University ("PSU") is not an "agency" as defined by the RTKL. On September 30, 2013, the Department provided an unsworn position statement, which argues that the cited exemptions and privileges should be interpreted as protecting records sent to Secretary Tomalis as a member of PSU's Board of Trustees.

On September 30, 2013, PSU sought to participate in this appeal as a person with a direct interest pursuant to 65 P.S. § 67.1101(c). On October 1, 2013, the OOR granted PSU's request to participate in this appeal and permitted all parties additional time to supplement the record with relevant legal argument and/or evidence. On October 11, 2013, the Department provided the responsive records (consisting of 673 pages) for *in camera* review. On October 11, 2013, PSU provided a position statement stating, among other things, that

the documents at issue ... include communications that were sent, directly or indirectly, to or from counsel to the University[,] to or from one or more members of the Board in their capacities as Board members and/or records that fall within one or more applicable exceptions to the ... RTKL.... During the period at issue, counsel to the University included Cynthia A. Baldwin, Amy McCall, Stephen S. Dunham, Frank T. Guadagnino, Larry J. Davis, Louis Freeh and Omar McNeil, as well as others from the University's in-house legal department, Reed Smith LLP, Lanny Davis and Associates and Freeh Sporkin and Sullivan, LLP.... All were engaged in or their job duties required that they provide professional legal services to the University in the form of investigation of legal matters and/or legal advice. Freeh Sporkin and Sullivan LLP was engaged as counsel to the Board and the Special Investigative Task Force of the Board....

Trustee Tomalis was Secretary of [the Department] and a member of the Board ... at all times in question. Kenneth Frazier and Karen Peetz were members of the Board ... at all times in question. Steven Garban served on the ... Board through July 19, 2012.... At all times in question, Paula Ammerman served as Associate Secretary to the ... Board.....

It is [PSU's] understanding that during some or all of the time in question Annette DeRose was Kenneth Frazier's administrative assistant and that Jane Shoop was Trustee Tomalis' administrative assistant.

In addition to the reasons for denying access asserted by the Department, PSU also stated that certain records contain redactable personal identification information as defined by 65 P.S. § 67.708(b)(6) and "information that is prohibited from ... disclosure pursuant to [Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g] and other federal laws," but did not identify which record(s) contain such information.

PSU also states that pages 15-18, 68-69 and 260-265 of the withheld records are exempt as criminal investigative records under 65 P.S. § 67.708(b)(16). Additionally, PSU asserts that pages 427-57 and 464-484 of the withheld records contain confidential and proprietary information under 65 P.S. § 67.708(b)(11). PSU also alleges that page 527 of the withheld records is exempt under 65 P.S. § 67.708(b)(27) as a "record ... relating to a communication between an agency and its insurance carrier ... or risk management office." Finally, PSU states that it does not believe that pages 378, 424-426 and 458-459 are protected under any exemptions or privileges. PSU also attached an index of the withheld records, which asserts that certain of the identified records are protected by additional reasons for denying access than asserted by the Department. PSU also provided a notarized affidavit from legal counsel Frank Guadagnino explaining that the Secretary of Education serves as an *ex officio* member of the Board and that, as a result, the Secretary has a fiduciary duty to PSU. PSU also provided various other materials in support of its position.

On November 22, 2013, the Requester provided an additional statement arguing that PSU has not invoked the privilege. On December 5, 2013, PSU provided an additional statement, along with another affidavit from Guadagnino that Freeh Sporkin and Sullivan, LLP did not reveal privileged information to any third-parties. PSU also provided additional materials, including a revised index.

On December 9, 2013, the Requester responded to PSU's submission, arguing, among other things, that the attorney-client privilege does not attach to records sent from Freeh Sporkin and Sullivan, LLP because "PSU hired [Freeh Sporkin and Sullivan, LLP] for its fact-finding expertise," rather than for legal advice and that, if a privilege exists, PSU waived such a privilege by permitting Freeh Sporkin and Sullivan, LLP to discuss matters with various third-party organizations. PSU and the Requester made various other submissions after the record closed in this matter. Although these submissions were provided after the record closed, they will be considered as part of the record before the OOR in the interest of developing a full and complete evidentiary record. See 65 P.S. § 67.1102(b)(3) (permitting appeals officers to "rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute").

The OOR obtained the Requester's agreement to extensions of time to conduct an *in camera* review and to issue a final order in this matter pursuant to 65 P.S. § 67.1101(b)(1).

#### LEGAL ANALYSIS

"The objective of the Right to Know Law ... is to empower citizens by affording them access to information concerning the activities of their government." *SWB Yankees L.L.C. v. Wintermantel*, 45 A.3d 1029, 1041 (Pa. 2012). Further, this important open-government law 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.” *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required “to review all information filed relating to the request.” 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here, on December 19, 2013, the Requester sought a hearing, but the OOR hereby denies the request for a hearing because the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

The Department is a Commonwealth agency subject to the RTKL that is required to disclose public records. 65 P.S. § 67.301. Records in possession of a Commonwealth agency are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. Upon receipt of a request, an agency is required to assess whether a record requested is within its possession, custody or control and respond within five business days. 65 P.S. § 67.901. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(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.” 65 P.S. § 67.708(a). Similarly, the burden of proof in claiming a privilege from disclosure is on the party asserting that privilege. *Levy v. Senate of Pa.*, 34 A.3d 243, 249 (Pa.

Commw. Ct. 2011); *DOT v. Drack*, 42 A.3d 355, 364 (Pa. Commw. Ct. 2012) (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved”); *In re: Subpoena No. 22*, 709 A.2d 385 (Pa. Super. Ct. 1998). 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. Scoiforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

**1. Records of PSU in the possession of the Department are “records”**

As an initial matter, the Secretary of Education sits on PSU’s Board as an *ex officio* member. See 24 P.S. § 2536. In *Bagwell v. Department of Education*, the Commonwealth Court held that records sent to the Secretary of Education as a result of his statutory appointment to PSU’s Board are records of the Department under the RTKL. 76 A.3d 81 (Pa. Commw. Ct. 2013). Accordingly, pursuant to *Bagwell*, records received by the Secretary in his capacity as a member of PSU’s Board are records of the Department and are subject to the provisions of the RTKL. *Id.*

**2. Certain records are subject to the attorney-client privilege and/or attorney-work product doctrine**

PSU asserts that the following pages from the withheld records are protected by the attorney-client privilege and/or the attorney-work product doctrine: 1-124, 127-130, 140-217, 228-247, 255-259, 317-377, 379-401, 403-406, 417-423, 573-583, 588-591, 612-613 and 640-657. The RTKL defines “privilege” as “[t]he 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.” 65 P.S. § 67.102. The OOR

gives paramount respect to both the attorney-client privilege and the attorney-work product doctrine and recognizes the importance of guarding both.

In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007). An agency may not rely on a bald assertion that the attorney-client privilege applies; instead, the agency must prove that all four elements are met. *See Clement v. Berks County*, OOR Dkt. AP 2011-0110, 2011 PA O.O.R.D. LEXIS 139 (“Simply invoking the phrase ‘attorney-client privilege’ or ‘legal advice’ does not excuse the agency from the burden it must meet to withhold records”); *see also DOT*, 42 A.3d at 364 (“[T]he RTKL places an evidentiary burden upon agencies seeking to deny access to records even when a privilege is involved”).

The attorney-work product doctrine, on the other hand, prohibits disclosure “of the mental impressions of a party’s attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories.” Pa.R.C.P. 4003.3. The Pennsylvania Supreme Court recently explained that the attorney-work product doctrine “manifests a particular concern with matters arising in anticipation of litigation.” *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 n.16 (Pa. 2011) (citing *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Commw. Ct. 2001) (stating that “[t]he ‘work product rule’ is closely related to the attorney-client privilege but



is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation”)); see also *Heavens v. Pa. Dep't of Env't. Prot.*, 65 A.3d 1069, 1077 (Pa. Commw. Ct. 2013) (“[U]nder the RTKL the work-product doctrine protects a record from the presumption that the record is accessible by the public if an agency sets forth facts demonstrating that the privilege has been properly invoked”).

The OOR has reviewed the arguments and evidence presented by all parties and conducted an *in camera* review of the records alleged to be privileged.<sup>1</sup> Based on the evidence presented, the OOR finds that the privilege has not been waived by PSU. Based on this *in camera* review, the OOR holds that the following pages of records are not subject to public access in their entirety under either attorney-client privilege and/or the attorney-work product doctrine, as they meet all elements of the applicable privileges: 3-18, 38-69, 71-78, 83-111, 113-124, 140-160, 179-180, 317-320, 324-328, 359-361, 369-370, 383-384 and 420-423. Additionally, based on the OOR's *in camera* review, the information specified below is protected by the attorney-work product privilege because it reflects the “mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories” and may be redacted from the following records:

- ☐ March 11, 2012, March 13, 2012 and March 14, 2012 communications from attorney Omar McNeill on pages 19-25 and 31-32;
- ☐ December 14, 2012 communication from attorney McNeill on page 79;
- ☐ June 6, 2012 communication from attorney McNeill on pages 161-162;

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<sup>1</sup> Section IV(D)(11) of the OOR Interim Guidelines provides, among other things, that “[r]eferences to specific records submitted for *in camera* inspection, or the contents of such records, in the final determination will be ... by reference to generic descriptions or characterizations as set forth in the *in camera* inspection index.” As such, the OOR's written analysis is constrained to generic descriptions of the withheld records.

- ☐ April 26, 2012 and April 20, 2012 communications from attorney McNeill on pages 181-182;
- ☐ January 16, 2012 communications from attorneys Louis Freeh and McNeill on 255-256;
- ☐ May 5, 2012 communications from attorneys Louis Freeh and McNeill on pages 351-352;
- ☐ May 5, 2012 communication sent at 9:44 a.m. from attorney McNeill on page 355;
- ☐ April 7, 2012 communications from attorneys Freeh and McNeill on pages 362-364;
- ☐ February 17, 2012 communication from attorney McNeill on pages 371-372;
- ☐ February 17, 2012 communication from attorney McNeill on pages 373-376;
- ☐ February 2, 2012 communication from attorney Freeh on page 377;
- ☐ January 16, 2012 communication sent at 10:40 a.m. from attorney McNeill on page 381;
- ☐ January 16, 2012 communications from attorneys Freeh and McNeill on 385-388;
- ☐ January 16, 2012 communications sent at 5:59 p.m. and 10:40 a.m. from McNeill on pages 389-394;
- ☐ January 16, 2012 communication sent at 10:40 a.m. from attorney McNeill on page 398-400;
- ☐ July 3, 2012 communication from attorney Frank Guadagnino on page 403; and
- ☐ April 26, 2012 and April 20, 2012 communications from attorney McNeill on pages 588-590.

An *in camera* review reveals that the remaining records at issue are not protected by the attorney-client privilege because they were not made “for the purpose of securing either an opinion of law, legal services or assistance in a legal matter.”

With respect to the attorney-work product doctrine, the remaining records are not protected because they either do not reflect “mental impressions ... conclusions, opinions, memoranda, notes or summaries, legal research or legal theories” or because they were not made by “a party’s attorney.” While a significant number of communications were generated by Board member Frazier, who is also an attorney, there is no evidence that attorney Frazier served as PSU’s attorney in any matter – a point underscored by PSU’s submissions to the OOR during this appeal:

During the period at issue, counsel to the University included Cynthia A. Baldwin, Amy McCall, Stephen S. Dunham, Frank T. Guadagnino, Larry J. Davis, Louis Freeh and Omar McNeil, as well as others from the University’s in-house legal department, Reed Smith LLP, Larry Davis and Associates and Freeh Sporkin and Sullivan, LLP....

Kenneth Frazier ... [was a] member[] of the Board ... at all times in question.

Accordingly, communications generated by attorney Frazier are not protected by the attorney-work product doctrine because PSU is not a client of attorney Frazier.

### **3. The certain exemptions do not apply to these records**

The Department and PSU has asserted that exemptions for internal, predecisional deliberations (65 P.S. § 67.708(b)(10)(i)(A)) and noncriminal investigative records (65 P.S. 67.708(b)(17)) protect certain records from public access. In *Bagwell v. Office of the Governor and The Pennsylvania State University*, however, the OOR held that the exemption for internal, predecisional deliberations could not apply to PSU because, as a state-related institution, PSU is not an “agency” as defined by the RTKL. OOR Dkt. AP 2013-1551, 2013 PA O.O.R.D. LEXIS \_\_\_\_; see 65 P.S. § 67.102 (excluding state-related institutions from the definition of “Agency”

and “Commonwealth agency”); *see also* 65 P.S. § 67.708(b)(10)(i)(A) (exempting the “internal, predecisional deliberations of an agency ...”) (emphasis added). Additionally, the OOR’s decision in *Bagwell* held that the exemption for noncriminal investigative records did not apply to records held by the Office of the Governor related to PSU because “Section 708(b)(17) only applies to records relating to investigations conducted by entities that are ‘agencies’ under the RTKL.” *Bagwell, supra* (quoting *Hayes v. Pennsylvania Department of Public Welfare*, OOR Dkt. AP 2012-0415, 2012 PA O.O.R.D. LEXIS 530).

The OOR hereby adopts and incorporates the reasoning of *Bagwell* and holds that the exemptions under 65 P.S. § 67.708(b)(10)(i)(A) and 65 P.S. § 67.708(b)(17) do not apply to any of the records at issue in this appeal. For the same reason, the OOR also finds that the exemption for criminal investigative records (65 P.S. § 67.708(b)(16)) does not apply to these records, as this exemption only applies to records related to criminal investigations conducted by “agencies” subject to the RTKL. Accordingly, the records are not exempt under 65 P.S. § 67.708(b)(10)(i)(A), 65 P.S. § 67.708(b)(17) or 65 P.S. § 67.708(b)(16).

PSU also asserts that page 527 of the withheld records is exempt under 65 P.S. § 67.708(b)(27) as a “record ... relating to a communication between an agency and its insurance carrier ... or risk management office.” Section 708(b)(27) of the RTKL exempts “A record or information relating to a communication between an agency and its insurance carrier, administrative service organization or risk management office.” Because PSU, as a state-related institution, is not an “agency” as defined by the RTKL, this exemption does not apply to this record.

4. **PSU has not established that the records constitute confidential proprietary information**

PSU asserts that pages 427-57 and 464-484 of the withheld records contain confidential and proprietary information under 65 P.S. § 67.708(b)(11). Section 708(b)(11) of the RTKL exempts from disclosure records that reveal “confidential proprietary information.” See 65 P.S. § 67.708(b)(11). “Confidential proprietary information” is defined as “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 [entity] that submitted the information.” 65 P.S. § 67.102. To meet its burden of proof, an agency must establish that both elements of this two-part test are met. See *Scansoni v. Pennsylvania Housing Finance Agency*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; see also *Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011) (involving confidential proprietary information). Unlike the exemptions mentioned above, Section 708(b)(11) is not limited to “agency” confidential proprietary information. See 65 P.S. § 67.708(b)(11).

Based on a review of the legal arguments and evidence presented and an *in camera* review of the records at issue, the OOR finds that pages 427-57 and 464-484 do not constitute confidential proprietary information as defined by the RTKL. While PSU has provided some evidence that the records were intended to be confidential and proprietary, it has not provided any evidence that their “disclosure ... would cause substantial harm to the competitive position of the [entity] that submitted the information.” See 65 P.S. 67.708(b)(11). As a result, PSU has not overcome the presumption that the records are subject to public access. See 65 P.S. § 67.305(a).

5. PSU has not established that FERPA and “other federal laws” apply

In its October 11, 2013, PSU alleges that some of the withheld records contain information protected by FERPA and “other federal laws,” but does not indicate what

information or which records contain information protected by federal law. FERPA protects “personally identifiable information” contained in “education records” from disclosure and financially penalizes entities “which [have] a policy or practice of permitting the release of education records ... of students without the written consent of their parents.” 20 U.S.C. §§ 1232g(b)(1); 1232(g)(a). FERPA defines education records as “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.” 34 C.F.R. § 99.3. Regulations implementing FERPA define “personally identifiable information” to include “(a) the student’s name; and (b) the name of the student’s parent or family member.” *Id.* Here, PSU has not provided any evidence that any of the withheld records constitute “education records” as defined by FERPA and an *in camera* review reveals that none of the withheld records meets this definition. Accordingly, PSU has not established that FERPA or “other federal laws” protect any of the withheld records, in whole or in part, from public access. *See* 65 P.S. § 67.305(a).

**6. Certain personal identification information may be redacted**

PSU states that “[s]everal” of the withheld records contain “personal identification information that is protected from disclosure pursuant to 65 P.S. [§] 67.708(b)(6),” but does not identify which records or what information contains such redactable information. Section 708(b)(6)(i)(A) permits the withholding of “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 email addresses; employee number or other confidential personal identification number.” The RTKL defines “personal financial information” as “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." 65 P.S. 67.102. Upon an *in camera* review of the records, it appears that page 542 facially contains redactable information that falls within the parameters of Section 708(b)(6)(i)(A). Because PSU has not identified any particular information or records that contain withholdable information under Section 708(b)(6)(i)(A), the OOR holds PSU has not established that this exemption applies for any other records.

### CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **denied in part** and the Department is required to provide the Requester with the following records within thirty (30) days as outlined as follows:

- ☐ In their entirety (unredacted):
  - Pages 1-2; 26-30; 33-37; 70; 80-82; 112; 125-139; 163-178; 183-254; 257-316; 321-323; 329-350; 353-354; 356-358; 365-368; 378-380; 382; 395-397; 401-402; 404-419; 424-541; 543-587; and 591-673;
- ☐ With permissible redactions for attorney-work product as described above:
  - Pages 19-25; 31-32; 79; 161-162; 181-182; 255-256; 351-352; 355; 362-364; 371-377; 381; 385-394; 398-400; 403; and 588-590; and
- ☐ With permissible redactions for information exempt under 65 P.S. § 67.708(b)(6)(i)(A):
  - Page 542.

This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal 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. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: December 20, 2013**



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APPEALS OFFICER/ ASSISTANT CHIEF COUNSEL  
J. CHADWICK SCHNEE, ESQ.

Sent to: Ryan Bagwell (via e-mail only);  
Karen Feuchtenberger, Esq. (via e-mail only);  
Michael Bressi (via e-mail only);  
Katherine Allen, Esq. (via e-mail only)



COMMONWEALTH OF PENNSYLVANIA  
THIRTY-THIRD STATEWIDE INVESTIGATING GRAND JURY  
IN RE: NOTICE NO. 1

TRANSCRIPT OF PROCEEDINGS  
OF GRAND JURY

BEFORE: BARRY F. FEUDALE, SUPERVISING JUDGE

DATE: OCTOBER 22, 2012, 8:43 A.M.

PLACE: OFFICE OF THE ATTORNEY GENERAL  
EIGHTH FLOOR  
VERIZON TOWER  
HARRISBURG, PENNSYLVANIA

COUNSEL PRESENT:

OFFICE OF THE ATTORNEY GENERAL  
BY: FRANK FINA, ESQUIRE

PNR - COMMONWEALTH

ALSO PRESENT:

CHARLES A. DEMONACO, ESQUIRE  
MICHAEL M. MUSTOKOFF, ESQUIRE

HILLARY M. HAZLETT, REPORTER  
NOTARY PUBLIC

MR. FINA: Yes, Your Honor. I think that is the information that we have been provided.

MR. DEMONACO: And I believe the starting date was February the 15th.

MR. FINA: 2010?

MR. DEMONACO: 2010 until the end of June of 2012. Then she had an extra month where she was still in her capacity but not serving as general counsel but she was still on the payroll.

JUDGE FEUDALE: Okay. Thank you.

MR. DEMONACO: You're welcome.

JUDGE FEUDALE: Go on, Frank.

MR. FINA: As this Court is aware, a great many of our questions to Justice Baldwin involved her representation of the University and her role and information about the investigative efforts of the grand jury and the compliance with those investigative efforts.

JUDGE FEUDALE: Subpoenas and Orders of Court?

MR. FINA: Yes, Your Honor. And that obviously involved the attorney-client privilege or may well have involved the attorney-client privileges.

In discussions with the University counsel and Attorney Mustokoff was present, there was a waiver of part of that privilege.

(Proceedings in chambers.)

MR. FINA: Your Honor, we are present on Notice No. 1, and we want to just put some matters on the record regarding some events that have occurred over the past couple of weeks and most pointedly last week.

It is okay if I introduce the background?

MR. MUSTOKOFF: Sure.

MR. DEMONACO: Please.

MR. FINA: If there is anything to add, just jump in.

Your Honor, the Office of Attorney General has been conversing with Cynthia Baldwin's counsel and eventually Cynthia Baldwin in the context of a proffer discussion.

And in the course of those discussions, it became necessary because of her status as an attorney and as counsel for Penn State University for several years and I believe it was -- she commenced in early 2010 and continued on until some point in 2012, Your Honor.

JUDGE FEUDALE: Do we know a date certain when she stopped being counsel?

MR. MUSTOKOFF: Yes. As of June the 30th of 2012.

JUDGE FEUDALE: All right. Thank you.

It was a waiver focused upon the issues of Gerald Sandusky, his relationship with the University, any conduct of his that was known by the University, and it extended to the contacts between the University and this grand jury and investigators, again, looking into Gerald Sandusky, his personal conduct, his -- any alleged misconduct and indeed also the acts of the University in compliance or noncompliance with investigative efforts. All of those issues were opened to us to discuss with Miss Baldwin.

However, there was a caveat, Your Honor, and a rather important one; and that is, that Miss Baldwin had entered the grand jury with Mr. Schultz and Mr. Curley as this Court knows and their attorneys, Caroline Roberto on behalf of Tim Curley and Tom Farrell on behalf of Gary Schultz have provided letters to this Court, as well as to the Commonwealth claiming attorney-client privilege for any conversations or information that passed between their clients and Miss Baldwin in preparation for their grand jury appearance or after anything related to their grand jury appearance.

I believe that the letters, Your Honor, which I don't have present are limited even in the claim of privilege to the grand jury appearance.

EXHIBIT

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1 I don't believe they attempt to extend the  
2 privilege to any actions that Baldwin took as University  
3 counsel in fulfilling subpoenas and the contacts that  
4 may have occurred between her and those two gentlemen in  
5 the fulfillment of subpoenas that were issued to the  
6 University.

7 But nonetheless, I won't seek to speak for  
8 those counsel, that is just my interpretation of their  
9 correspondence to the Court and the Commonwealth.

10 Your Honor, we just want to put this issue on  
11 the record. It is anticipated that Miss Baldwin will  
12 testify this week before the grand jury.

13 So we want to have clarity before she testifies  
14 as to the parameters of her allowable testimony and  
15 hopefully having her testify in a way that does not step  
16 on or interfere with any privilege.

17 Your Honor, I'm not -- I want to be clear here.  
18 The Commonwealth is not recognizing any privilege claims  
19 on behalf of Mr. Schultz or Curley in this matter.

20 We are simply recognizing that the claim has  
21 been made. It is the Commonwealth's understanding of  
22 the case law in this matter that the burden of proof in  
23 a claim of privilege in this type of situation lies  
24 solely initially with the Claimants. So it would lie  
25 with Mr. Schultz and Mr. Curley to present proof of that  
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1 privilege.

2 But at this point, Your Honor, we are willing  
3 to put Miss Baldwin in the grand jury without addressing  
4 any of the issues related to the testimony of  
5 Mr. Schultz and Mr. Curley and conversations she had  
6 with them about that testimony and put that -- put those  
7 matters on hold until we get a Court determination  
8 regarding the privilege and we can address that later  
9 on.

10 MR. MUSTOKOFF: Speaking for the University,  
11 Your Honor, this is Michael Mustokoff, we agree with  
12 everything that was stated by Mr. Fina on behalf of the  
13 Commonwealth.

14 Just to put the University's position into a  
15 bit sharper focus, however, the University believes that  
16 with regard to all aspects of Former Justice Baldwin's  
17 representation of the University, that is the  
18 University's privilege.

19 However, issues have legitimately arisen with  
20 regard to the substance and perception of the  
21 representation by Justice Baldwin of Mr. Schultz and  
22 Curley that have us believing that the most prudent  
23 course is for the Court to make an ultimate  
24 determination as to whether that aspect of the privilege  
25 should be waived.

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1 This was something that Mr. Fina and I have  
2 discussed at length and believe that the situation is  
3 sufficiently murky to require the wisdom of this Court,  
4 if not Solomon, to resolve.

5 MR. FINA: Indeed.

6 MR. DeMONACO: And, Your Honor, Charles A.  
7 DeMonaco as counsel for Justice Baldwin. I agree with  
8 the representations of Mr. Fina and Mr. Mustokoff.

9 However, I did receive a letter June the 1st  
10 from Tom Farrell representing Gary Schultz and I  
11 received a letter on June 11th, 2012 from Caroline  
12 Roberto taking the same position as Mr. Farrell.

13 And what their position is, Your Honor, is that  
14 Cynthia Baldwin was the legal counsel to Mr. Schultz  
15 during preparation for the grand jury, for the interview  
16 that took place with the Attorney General's Office and  
17 appearance before the grand jury and until Mr. Farrell  
18 was retained as counsel for Gary Schultz.

19 The request made of Justice Baldwin and of me  
20 was to assert the attorney-client privilege and the  
21 work-product privilege to all questions by the Attorney  
22 General's Office, the United States Attorney's Office,  
23 or anyone else who might ask.

24 I took those letters that I received and I  
25 transmitted them to Mr. Mustokoff as counsel for the  
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1 University, also to Frank Guadagnino, who is counsel to  
2 the Board of Trustees for Penn State University, and  
3 then also to the Freeh Group.

4 And then after I transmitted those letters, I  
5 then sent a letter back to Mr. Farrell and to  
6 Miss Roberto.

7 I advised counsel that Justice Baldwin was  
8 counsel for and represented the interest of Penn State  
9 University and represented the interests of  
10 administrators of Penn State University in capacity as  
11 agents conducting University business so long as their  
12 interests were aligned with the University.

13 But I also put in that letter that Justice  
14 Baldwin considered the -- the communications as  
15 confidential.

16 I also received subpoenas for documents that  
17 would be in the possession of Justice Baldwin from both  
18 counsel for Mr. Schultz and Mr. Curley.

19 I, likewise, transmitted those to Mr. Mustokoff  
20 as counsel for the University and then Mr. Mustokoff  
21 communicated with counsel for Mr. Schultz and Mr. Curley  
22 that the University would respond.

23 And as a result, there was no further  
24 obligation of Justice Baldwin; and then, of course, last  
25 week and, I think, prior to last week but memorialized  
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1 last week, the University waived the privilege, as  
2 Mr. Mustokoff mentioned, for Sandusky-related matters  
3 with this exception, which included the communications  
4 between Mr. Schultz and Mr. Curley.

5 I brought with me today the letters that I  
6 received from Mr. Farrell and Miss Roberto and also my  
7 communication back to both of them, you know, as I just  
8 mentioned.

9 I -- certainly, Justice Baldwin wants to  
10 respect the University, wants to respect the Attorney  
11 General's Office, wants to make sure she is in  
12 compliance with any Orders entered by this Court.

13 And so as a result, when Mr. Fina spoke with  
14 Justice Baldwin last week, you know, it was very clear  
15 that there were parameters to that consistent with what  
16 Mr. Fina just said.

17 And when we appear before the grand jury, we  
18 anticipate they will be the same parameters that there  
19 won't be questions concerning Mr. Schultz and Mr. Curley  
20 as it related to their appearance before the grand jury.

21 I have not communicated with counsel for  
22 Mr. Schultz or Mr. Curley that we were going to be here  
23 today.

24 I don't know if Your Honor anticipates having a  
25 proceeding where they are present to articulate their  
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1 position but we certainly stand ready to go before the  
2 grand jury.

3 We certainly stand ready to honor the waiver of  
4 the attorney-client privilege by the University and just  
5 want to make sure that Justice Baldwin is not in any way  
6 violating the rights of anyone and certainly that she  
7 would be in compliance with any Orders entered by this  
8 Court.

9 JUDGE FEUDALE: Okay. Frank, anything else?

10 MR. FINA: Your Honor, I didn't anticipate  
11 really addressing the merits of the claim of privilege  
12 that has been extended by or asserted by Mr. Schultz and  
13 Mr. Curley.

14 I guess I would just say that, procedurally, I  
15 think there is some tension in terms of the next week  
16 between the secrecy requirements of the grand jury and  
17 certainly the Commonwealth's desire not for it to be  
18 publicly known that Miss Baldwin would be appearing  
19 before the grand jury and addressing this privilege  
20 issue.

21 What I would suggest is that we need not  
22 address the privilege issue this week before her  
23 testimony, that we are not going to ask questions about,  
24 as I stated previously, Mr. Schultz, Mr. Curley, their  
25 testimony before the grand jury, and any preparation for  
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1 or follow-up they had with Counsel Baldwin, University  
2 Counsel Baldwin.

3 I think there will come a point, Your Honor, I  
4 think after Miss Baldwin -- Justice Baldwin testifies  
5 that this issue should be addressed.

6 The Commonwealth, at this point, I think, is  
7 going to take a very clear position as does Miss Baldwin  
8 that she was University Counsel and she was not  
9 individually representing those two gentlemen.

10 But for the purpose of her testimony at least,  
11 the Commonwealth would recommend at this point that her  
12 testimony remain secret and that we address this  
13 privilege matter at a later date.

14 We believe that we are within the confines of  
15 the waiver as it currently exists from the University to  
16 proceed effectively with Miss Baldwin.

17 There may well be claims down the road by  
18 Mr. Farrell, Miss Roberto, and perhaps even counsel for  
19 Graham Spanier; but that is, you know, the risk that the  
20 Commonwealth is ready to bear because we believe that we  
21 are soundly within the waiver.

22 There is no appropriate privilege to the  
23 testimony that will be provided by Miss Baldwin beyond  
24 that held by the University, which has been waived.

25 JUDGE FEUDALE: I'm satisfied based on what you  
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1 placed on the record that she is clearly able to proceed  
2 on testimony with the stipulation that you communicated  
3 that you're not going to get into an inquiry as to her  
4 representation and what that meant with regard to  
5 Mr. Curley, Mr. Schultz, and perhaps, as you said, also  
6 Mr. Spanier.

7 I had prepared and was going to be getting out  
8 this weekend a letter acknowledging the receipt but  
9 indicating that I don't schedule things. I don't deal  
10 with things unless there is motions before the Court.

11 I explained that a grand jury proceeding is  
12 secret. I indicated I was going to be acknowledging  
13 your communication as a courtesy, but there was no  
14 motions filed.

15 I had indicated in the letter that I had  
16 prepared or at least I intended to draft that there was  
17 no response to any of those inquiries nor would I have  
18 expected a response from the Office of Attorney General  
19 given the secrecy of the grand jury proceedings, that if  
20 there was a motion to be filed then I would be  
21 addressing it.

22 I was going to acknowledge the fact that there  
23 was a representation with regard to, you know, concern  
24 about the possible testimony and what impact that might  
25 have but, again, was going to indicate that any  
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1 appropriate motions that you want to file and I'll deal  
2 with it and request an answer and proceed accordingly.  
3 MR. FINA: Yes, Your Honor; and I think that I  
4 probably should put on the record that the issuance of  
5 letters by counsel for Mr. Schultz and Mr. Curley from  
6 the Commonwealth's perspective and our understanding of  
7 the case that in and of itself is not sufficient --  
8 excuse me -- sufficient to assert the privilege.

9 It certainly could be interpreted as one of the  
10 prongs of evidence necessary to prove the privilege but  
11 just the letters themselves do not establish the  
12 privilege.

13 I believe that a motion and some hearing and  
14 evidence must be provided for the privilege to be found  
15 in this case.

16 JUDGE FEUDALE: And that would be subsequent to  
17 the testimony of Attorney Baldwin?

18 MR. FINA: Yes, Your Honor.

19 JUDGE FEUDALE: Based on the stipulation, I'm  
20 satisfied that that testimony can go forward without any  
21 inappropriate inferences to be drawn because I don't  
22 think that the concern that they may have impacts the  
23 investigative role with regard to Sandusky and the  
24 response of the Office of General Counsel to the various  
25 subpoenas and Orders of Court and that is the narrow  
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1 focus of the testimony.

2 MR. FINA: Yes, Your Honor. I mean, I have no  
3 doubt that they will try and run the football in the  
4 middle with it but I don't think they should get  
5 anywhere with it.

6 MR. DeMONACO: Thank you, Your Honor.

7 MR. MUSTOKOFF: Thank you, Your Honor.

8 MR. DeMONACO: And as far as the starting date  
9 of Justice Baldwin, it might have been February 10th  
10 instead of February 15th; but it was within that range.

11 JUDGE FEUDALE: Okay.

12 MR. DeMONACO: Thank you so much, Your Honor.  
13 I'm sure we'll see you later this week.

14 (The proceedings concluded at 9:13 a.m.)  
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1 I hereby certify that the proceedings and  
2 evidence are contained fully and accurately in the notes  
3 taken by me on the within proceedings and that this is a  
4 correct transcript of the same.  
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Hillary M. Hazlett, Reporter  
Notary Public

COMMONWEALTH OF PENNSYLVANIA  
NOTARIAL SEAL  
HILLARY M. HAZLETT, Notary Public  
City of Harrisburg, Dauphin County  
My Commission Expires Sept 29, 2015

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October 2, 2012

Honorable Barry F. Feudale  
Presiding Judge of the 33rd Statewide  
Investigative Grand Jury  
1400 Strawberry Square  
Harrisburg, PA 17120

Re: In re: The Thirty-Third Statewide Investigating Grand Jury,  
217 M.D. Misc. Dkt. 2010 (Pa. Sup. Ct.),  
No. 1325 M.D. 2010 (Dauphin Cty. C.C.P.)

Dear Judge Feudale:

An issue has arisen that requires your attention. The Attorney General's office has requested that the University consider exercising its right to waive its privilege concerning certain communications and correspondence of its former General Counsel, Justice Cynthia Baldwin. Similarly, counsel to Messrs. Gary Schultz and Timothy Curley have subpoenaed these same items. The University is prepared to comply with both the Attorney General's request and defense counsels' subpoena consistent with the scope of the University's waiver.

The University has agreed to waive privilege as to the Office of General Counsel's efforts to comply with the Commonwealth's grand jury investigation related to Gerald Sandusky, specifically excluding privileged communications with or concerning outside counsel, and has further agreed to waive the University's assertion of privilege regarding certain actions taken by the Office of General Counsel subsequent to November 4, 2011, as they relate to that office's efforts to comply with the Attorney General's Grand Jury investigation. The Attorney General's Office and the University have agreed that all communications with or concerning present counsel (including Reed Smith, Duane Morris, and Saul Ewing), are not included in this waiver and subject to review by the Court or the Attorney General's Office, and have agreed that this waiver is made with the clear understanding that the Attorney General's Office will continue to maintain and respect the distinction in the actions taken by the former General Counsel from those that are completely separate and apart from any consultation, direction or advice propounded or shared with, or concerning any outside law firm.

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Honorable Barry F. Feudale

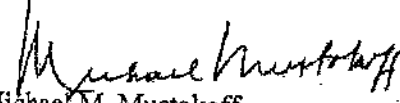
October 2, 2012

Page 2

Duane Morris

Deputy Attorney General Fina has asked that the release of the documents be presided over by Your Honor in your capacity as Supervising Grand Jury Judge. We agree with Mr. Fina's suggestion as the most prudent course.

Respectfully,

  
Michael M. Mustokoff

MMM/ks

cc: Bruce Beemer, Chief of Staff  
Frank Fina, Deputy Attorney General  
Frank T. Guadagnino, Esquire  
Stephen S. Dunham, Esquire  
Caroline M. Roberto, Esquire  
Thomas J. Farrell, Esquire  
Daniel R. Walworth, Esquire

## Duane Morris\*

MICHAEL M. MUSTOKOFF  
DIRECT DIAL: +1 215 979 1810  
PERSONAL FAX: +1 215 689 3607  
E-MAIL: mmustokoff@duanemorris.com

www.duanemorris.com

October 19, 2012

Frank G. Fina  
Chief Deputy Attorney General  
Office of Attorney General  
16th Floor, Strawberry Square  
Harrisburg PA 17120

Re: *In Re: The Thirty-Third Statewide Investigating Grand Jury*, 217 M.D. Misc.  
Dkt. 2010 (Pa. Sup. Ct.), No. 1325 M.D. 2010 (Dauphin Cty. C.C.P.)

Dear Frank:

You have asked for clarification of Pennsylvania State University's (the "University"), position regarding the correspondence and communications of Justice Baldwin, former General Counsel, related to the above-referenced investigation. We have waived the University's privilege as to those documents with two critical exceptions:

(1) any communications between or concerning Justice Baldwin and outside counsel after November 4, 2011. All communications with or concerning present counsel, including Reed Smith, Duane Morris, and Saul Ewing), are not included in this waiver—only those actions taken by the former General Counsel that are completely separate and apart from any consultation, direction or advice propounded or shared with, or concerning any outside law firm are within the scope of the waiver; and

(2) any communications between Justice Baldwin and Messrs. Schultz and Curley. We have previously shared our concerns about the Schultz/Curley communications with you and memorialized them in our October 2, 2012 letter to Judge Feudale.

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Frank G. Fina  
October 19, 2012  
Page 2

Duane Morris

Should there be any additional need for clarification, do not hesitate to contact me.

Sincerely,

  
Michael M. Mustokoff

MMM/ks/

cc: Charles A. DeMonaco, Esquire  
Frank T. Guadagnino, Esquire  
Stephen Dunham, Esquire

5219 Shorecrest Drive  
Middleton, WI 53562

J. Chadwick Schnee  
Appeals Officer  
Office of Open Records  
Commonwealth Keystone Building  
400 North Street, Plaza Level  
Harrisburg, PA 17120-0225

**Re: *Bagwell v. Dept. of Education*, OOR Dkt. No. AP 2013-1753;  
Introduction of new evidence regarding waiver of attorney-client privilege, and  
request for evidentiary hearing.**

December 18, 2013

Dear Mr. Schnee:

I'm writing to introduce new evidence regarding The Pennsylvania State University's ("PSU") waiver of the attorney-client privilege that was made public today. Additionally, for the reasons set forth below, I hereby request that the Office of Open Records ("OOR") hold an evidentiary hearing in this matter.

As the OOR may be aware, a criminal case involving several former Penn State employees is proceeding in the Dauphin County Court of Common Pleas. As a result of a hearing that was held earlier this week, a transcript of an October 22, 2012 meeting held in the chambers of the supervising judge of the statewide grand jury was unsealed (EXHIBIT A). The topic of the meeting concerned whether prosecutors were allowed to subpoena former PSU General Counsel Cynthia Baldwin to testify before the grand jury.

During this meeting, it was revealed to the judge that PSU waived its right to claim the protection afforded by the attorney-client and attorney work-product privileges with respect to the subject matter that many, if not all, of the requested records address. Chief Deputy Attorney General Frank Fina stated PSU's broad waiver encompassed at least the following:

"It was a waiver focused upon the issues of Gerald Sandusky, his relationship with the University, any conduct of his that was known by the University, and it extended to the contacts between the University and this grand jury and investigators, again, looking into Gerald Sandusky, his personal conduct, his - any alleged misconduct and indeed also



the acts of the University in compliance or noncompliance with investigative efforts. All of those issues were opened to us to discuss with Miss Baldwin."

(See "Transcript of Proceedings of Grand Jury" taken on October 22, 2013, p. 3-4)

Michael Mustkoff, and attorney representing PSU, affirmed Mr. Fina's account of the waiver by saying, "Speaking for the University ... we agree with everything that was stated by Mr. Fina on behalf of the Commonwealth."

Additionally, Charles DeMonaco, an attorney representing Ms. Baldwin, stated that PSU waived any privilege to communications with Ms. Baldwin involving "Sandusky-related matters." He further stated that the waiver was "memorialized" the week prior to the hearing, presumably in the form of a letter authored by PSU. To date, PSU has not disclosed the existence of this letter to the OOR or the Requester.

Mr. DeMonaco also stated that PSU specifically rejected requests to assert the attorney-client privilege with respect to communications involving Ms. Baldwin. Those requests were made by defense attorneys involved in the previously mentioned criminal proceeding, and subsequently forwarded to Mr. Mustkoff as well as Frank Guadagnino. PSU has provided unsworn statements by Mr. Guadagnino as evidence of the application of the attorney-client privilege in this matter.

The evidence of PSU's waiver directly contradicts the claim of non-waiver made by Board of Trustees Secretary Janine S. Andrews in her affidavit dated December 5, 2013, which was previously submitted to the OOR. In that attestation, she stated:

"To the best of my knowledge, information and understanding, neither the University nor the Board of Trustees has taken any action to waive the attorney-client privilege or the application of the work product doctrine with respect to any of the documents identified as privileged."

PSU claims that items 68-69 and 79-81 on the index of withheld records deserve the protection of the attorney-client privilege because they constitute communications with Ms. Baldwin. Ms. Andrews's assertion that PSU took no action to waive any privilege that applies to those documents is incorrect as evidenced by the transcript unsealed this week. The accuracy of Ms. Andrews's attestation in its entirety cannot be relied upon.

#### **REQUEST FOR EVIDENTIARY HEARING**

PSU and the Department of Education claim that the attorney-client privilege and the attorney work-product doctrine protect the disclosure of some of the withheld records. These records include communications between Ms. Baldwin and members of The Freeh Group. The evidence PSU has provided in support of its claim that any allegedly held privilege has not been waived has been directly contradicted by the aforementioned transcript and other evidence previously submitted by the requester.

It is expected that PSU will appeal the Final Determination in this matter to the Commonwealth Court. Because a trial court is absent from this process, the OOR serves as the chief fact finder, any court will primarily rely on facts determined by the OOR. A hearing is necessary for the Requester to discover and provide additional evidence that accurately and definitively shows the extent to which PSU waived any claims of privilege.

### **REQUEST FOR EXTENSION OF TIME TO PROVIDE ADDITIONAL EVIDENCE**

The transcript provided to the OOR today along with other previously undisclosed documents have unsealed by the Dauphin County Court of Common Pleas. However, the records have not officially been released by the Court clerk. Members of the news media have reported that the previously unsealed documents will be available on or about Tuesday, December 24, 2013<sup>1</sup>. A copy of PSU's letter describing the extent of its attorney-client privilege waiver is believed to be among the documents that will be released at that time.

A Final Determination in this matter is due by December 20, 2013. Given that the soon-to-be-released court documents are believed to contain valuable clarity about PSU's waiver, I hereby request an additional two week period to obtain and submit this additional evidence if the OOR does not grant the request for a hearing.

### **CONCLUSION**

**WHEREFORE**, the OOR has been provided evidence that contradicts PSU's claim of the application of the attorney-client privilege to the withheld records. Additional evidence is expected to be available in the coming days. For the foregoing reasons, I respectfully request that the OOR grant an evidentiary hearing in this appeal to afford the Requester an opportunity for the discovery of new facts, or, in the alternative, provides an additional two-week period of time for the submission of additional evidence.

---

<sup>1</sup> <http://www.mcall.com/news/breaking/mc-penn-state-spanier-grand-jury-hearing-20131217.0.5897044.story>

Respectfully submitted,

/s/

Ryan Bagwell

# EXHIBIT A



COMMONWEALTH OF PENNSYLVANIA  
THIRTY-THIRD JUDICIAL DISTRICT INVESTIGATING GRAND JURY

IN RE: NOTICE NO. 1

TRANSCRIPT OF PROCEEDINGS  
OF GRAND JURY

BEFORE: HARRY F. FEUDALE, SUPERVISING JUDGE

DATE: OCTOBER 22, 2012, 8:43 A.M.

PLACE: OFFICE OF THE ATTORNEY GENERAL  
EIGHTH FLOOR  
VERIZON TOWER  
HARRISBURG, PENNSYLVANIA

COUNSEL PRESENT:

OFFICE OF THE ATTORNEY GENERAL  
BY: FRANK FINA, ESQUIRE

PROX - COMMONWEALTH

ALSO PRESENT:

CHARLES A. DEMONACO, ESQUIRE  
MICHAEL M. MUSTOKOFF, ESQUIRE

HILLARY M. HAZLETT, REPORTER  
NOTARY PUBLIC

3

1 MR. FINA: Yes, Your Honor. I think that is  
2 the information that we have been provided.

3 MR. DEMONACO: And I believe the starting date  
4 was February the 15th.

5 MR. FINA: 2010?

6 MR. DEMONACO: 2010 until the end of June of  
7 2012. Then she had an extra month where she was still  
8 in her capacity but not serving as general counsel but  
9 she was still on the payroll.

10 JUDGE FEUDALE: Okay. Thank you.

11 MR. DEMONACO: You're welcome.

12 JUDGE FEUDALE: Go on, Frank.

13 MR. FINA: As this Court is aware, a great many  
14 of our questions to Justice Baldwin involved her  
15 representation of the University and her role and  
16 information about the investigative efforts of the grand  
17 jury and the compliance with those investigative  
18 efforts.

19 JUDGE FEUDALE: Subpoenas and Orders of Court?

20 MR. FINA: Yes, Your Honor. And that obviously  
21 involved the attorney-client privilege or may well have  
22 involved the attorney-client privileges.

23 In discussions with the University counsel and  
24 Attorney Mustokoff was present, there was a waiver of  
25 part of that privilege.

2

1 (Proceedings in chambers.)

2 MR. FINA: Your Honor, we are present on Notice  
3 No. 1, and we want to just put some matters on the  
4 record regarding some events that have occurred over the  
5 past couple of weeks and most pointedly last week.

6 It is okay if I introduce the background?

7 MR. MUSTOKOFF: Sure.

8 MR. DEMONACO: Please.

9 MR. FINA: If there is anything to add, just  
10 jump in.

11 Your Honor, the Office of Attorney General has  
12 been conversing with Cynthia Baldwin's counsel and  
13 eventually Cynthia Baldwin in the context of a proffer  
14 discussion.

15 And in the course of those discussions, it  
16 became necessary because of her status as an attorney  
17 and as counsel for Penn State University for several  
18 years and I believe it was -- she commenced in early  
19 2010 and continued on until some point in 2012, Your  
20 Honor.

21 JUDGE FEUDALE: Do we know a date certain when  
22 she stopped being counsel?

23 MR. MUSTOKOFF: Yes. As of June the 30th of  
24, 2012.

25 JUDGE FEUDALE: All right. Thank you.

4

1 It was a waiver focused upon the issues of  
2 Gerald Sandusky, his relationship with the University,  
3 any conduct of his that was known by the University, and  
4 it extended to the contacts between the University and  
5 this grand jury and investigators, again, looking into  
6 Gerald Sandusky, his personal conduct, his -- any  
7 alleged misconduct and indeed also the acts of the  
8 University in compliance or noncompliance with  
9 investigative efforts. All of those issues were opened  
10 to us to discuss with Miss Baldwin.

11 However, there was a caveat, Your Honor, and a  
12 rather important one; and that is, that Miss Baldwin had  
13 entered the grand jury with Mr. Schultz and Mr. Curley  
14 as this Court knows and their attorneys, Caroline  
15 Roberto on behalf of Tim Curley and Tom Farrell on  
16 behalf of Gary Schultz have provided letters to this  
17 Court, as well as to the Commonwealth claiming  
18 attorney-client privilege for any conversations or  
19 information that passed between their clients and  
20 Miss Baldwin in preparation for their grand jury  
21 appearance or after anything related to their grand jury  
22 appearance.

23 I believe that the letters, Your Honor, which I  
24 don't have present are limited even in the claim of  
25 privilege to the grand jury appearance.

1 I don't believe they attempt to extend the  
2 privilege to any actions that Baldwin took as University  
3 counsel in fulfilling subpoenas and the contacts that  
4 may have occurred between her and those two gentlemen in  
5 the fulfillment of subpoenas that were issued to the  
6 University.

7 But nonetheless, I won't seek to speak for  
8 those counsel, that is just my interpretation of their  
9 correspondence to the Court and the Commonwealth.

10 Your Honor, we just want to put this issue on  
11 the record. It is anticipated that Miss Baldwin will  
12 testify this week before the grand jury.

13 So we want to have clarity before she testifies  
14 as to the parameters of her allowable testimony and  
15 hopefully having her testify in a way that does not step  
16 on or interfere with any privilege.

17 Your Honor, I'm not -- I want to be clear here.  
18 The Commonwealth is not recognizing any privilege claims  
19 on behalf of Mr. Schultz or Curley in this matter.

20 We are simply recognizing that the claim has  
21 been made. It is the Commonwealth's understanding of  
22 the case law in this matter that the burden of proof in  
23 a claim of privilege in this type of situation lies  
24 solely initially with the Claimants. So it would lie  
25 with Mr. Schultz and Mr. Curley to present proof of that  
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1 privilege.

2 But at this point, Your Honor, we are willing  
3 to put Miss Baldwin in the grand jury without addressing  
4 any of the issues related to the testimony of  
5 Mr. Schultz and Mr. Curley and conversations she had  
6 with them about that testimony and put that -- put those  
7 matters on hold until we get a Court determination  
8 regarding the privilege and we can address that later  
9 on.

10 MR. MUSTOKOFF: Speaking for the University,  
11 Your Honor, this is Michael Mustokoff, we agree with  
12 everything that was stated by Mr. Fina on behalf of the  
13 Commonwealth.

14 Just to put the University's position into a  
15 bit sharper focus, however, the University believes that  
16 with regard to all aspects of Former Justice Baldwin's  
17 representation of the University, that is the  
18 University's privilege.

19 However, issues have legitimately arisen with  
20 regard to the substance and perception of the  
21 representation by Justice Baldwin of Mr. Schultz and  
22 Curley that have us believing that the most prudent  
23 course is for the Court to make an ultimate  
24 determination as to whether that aspect of the privilege  
25 should be waived.

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1 This was something that Mr. Fina and I have  
2 discussed at length and believe that the situation is  
3 sufficiently murky to require the wisdom of this Court,  
4 if not Solomon, to resolve.

5 MR. FINA: Indeed.

6 MR. DeMONACO: And, Your Honor, Charles A.  
7 DeMonaco as counsel for Justice Baldwin. I agree with  
8 the representations of Mr. Fina and Mr. Mustokoff.

9 However, I did receive a letter June the 1st  
10 from Tom Farrell representing Gary Schultz and I  
11 received a letter on June 11th, 2012 from Caroline  
12 Roberto taking the same position as Mr. Farrell.

13 And what their position is, Your Honor, is that  
14 Cynthia Baldwin was the legal counsel to Mr. Schultz  
15 during preparation for the grand jury, for the interview  
16 that took place with the Attorney General's Office and  
17 appearance before the grand jury and until Mr. Farrell  
18 was retained as counsel for Gary Schultz.

19 The request made of Justice Baldwin and of me  
20 was to assert the attorney-client privilege and the  
21 work-product privilege to all questions by the Attorney  
22 General's Office, the United States Attorney's Office,  
23 or anyone else who might ask.

24 I took those letters that I received and I  
25 transmitted them to Mr. Mustokoff as counsel for the  
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1 University, also to Frank Guadagnino, who is counsel to  
2 the Board of Trustees for Penn State University, and  
3 then also to the Freeh Group.

4 And then after I transmitted those letters, I  
5 then sent a letter back to Mr. Farrell and to  
6 Miss Roberto.

7 I advised counsel that Justice Baldwin was  
8 counsel for and represented the interest of Penn State  
9 University and represented the interests of  
10 administrators of Penn State University in capacity as  
11 agents conducting University business so long as their  
12 interests were aligned with the University.

13 But I also put in that letter that Justice  
14 Baldwin considered the -- the communications as  
15 confidential.

16 I also received subpoenas for documents that  
17 would be in the possession of Justice Baldwin from both  
18 counsel for Mr. Schultz and Mr. Curley.

19 I, likewise, transmitted those to Mr. Mustokoff  
20 as counsel for the University and then Mr. Mustokoff  
21 communicated with counsel for Mr. Schultz and Mr. Curley  
22 that the University would respond.

23 And as a result, there was no further  
24 obligation of Justice Baldwin; and then, of course, last  
25 week and, I think, prior to last week but memorialized

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1 last week, the University waived the privilege, as  
2 Mr. Mustokoff mentioned, for Sandusky-related matters  
3 with this exception, which included the communications  
between Mr. Schultz and Mr. Curley.

I brought with me today the letters that I  
6 received from Mr. Farrell and Miss Roberto and also my  
7 communication back to both of them, you know, as I just  
8 mentioned.

9 I -- certainly, Justice Baldwin wants to  
10 respect the University, wants to respect the Attorney  
11 General's Office, wants to make sure she is in  
12 compliance with any Orders entered by this Court.

13 And so as a result, when Mr. Fina spoke with  
14 Justice Baldwin last week, you know, it was very clear  
15 that there were parameters to that consistent with what  
16 Mr. Fina just said.

17 And when we appear before the grand jury, we  
18 anticipate they will be the same parameters that there  
19 won't be questions concerning Mr. Schultz and Mr. Curley  
20 as it related to their appearance before the grand jury.

21 I have not communicated with counsel for  
22 Mr. Schultz or Mr. Curley that we were going to be here  
23 today.

24 I don't know if Your Honor anticipates having a  
25 proceeding where they are present to articulate their  
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1 or follow-up they had with Counsel Baldwin, University  
2 Counsel Baldwin.

3 I think there will come a point, Your Honor, I  
4 think after Miss Baldwin -- Justice Baldwin testifies  
5 that this issue should be addressed.

6 The Commonwealth, at this point, I think, is  
7 going to take a very clear position as does Miss Baldwin  
8 that she was University Counsel and she was not  
9 individually representing those two gentlemen.

10 But for the purpose of her testimony at least,  
11 the Commonwealth would recommend at this point that her  
12 testimony remain secret and that we address this  
13 privilege matter at a later date.

14 We believe that we are within the confines of  
15 the waiver as it currently exists from the University to  
16 proceed effectively with Miss Baldwin.

17 There may well be claims down the road by  
18 Mr. Farrell, Miss Roberto, and perhaps even counsel for  
19 Graham Spanier; but that is, you know, the risk that the  
20 Commonwealth is ready to bear because we believe that we  
21 are soundly within the waiver.

22 There is no appropriate privilege to the  
23 testimony that will be provided by Miss Baldwin beyond  
24 that held by the University, which has been waived.

25 JUDGE FEUDALE: I'm satisfied based on what you  
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1 position but we certainly stand ready to go before the  
2 grand jury.

3 We certainly stand ready to honor the waiver of  
4 the attorney-client privilege by the University and just  
5 want to make sure that Justice Baldwin is not in any way  
6 violating the rights of anyone and certainly that she  
7 would be in compliance with any Orders entered by this  
8 Court.

9 JUDGE FEUDALE: Okay. Frank, anything else?

10 MR. FINA: Your Honor, I didn't anticipate  
11 really addressing the merits of the claim of privilege  
12 that has been extended by or asserted by Mr. Schultz and  
13 Mr. Curley.

14 I guess I would just say that, procedurally, I  
15 think there is some tension in terms of the next week  
16 between the secrecy requirements of the grand jury and  
17 certainly the Commonwealth's desire not for it to be  
18 publicly known that Miss Baldwin would be appearing  
19 before the grand jury and addressing this privilege  
20 issue.

21 What I would suggest is that we need not  
address the privilege issue this week before her  
testimony, that we are not going to ask questions about,  
24 as I stated previously, Mr. Schultz, Mr. Curley, their  
25 testimony before the grand jury, and any preparation for  
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1 placed on the record that she is clearly able to proceed  
2 on testimony with the stipulation that you communicated  
3 that you're not going to get into an inquiry as to her  
4 representation and what that meant with regard to  
5 Mr. Curley, Mr. Schultz, and perhaps, as you said, also  
6 Mr. Spanier.

7 I had prepared and was going to be getting out  
8 this weekend a letter acknowledging the receipt but  
9 indicating that I don't schedule things. I don't deal  
10 with things unless there is motions before the Court.

11 I explained that a grand jury proceeding is  
12 secret. I indicated I was going to be acknowledging  
13 your communication as a courtesy, but there was no  
14 motions filed.

15 I had indicated in the letter that I had  
16 prepared or at least I intended to draft that there was  
17 no response to any of those inquiries nor would I have  
18 expected a response from the Office of Attorney General  
19 given the secrecy of the grand jury proceedings, that if  
20 there was a motion to be filed then I would be  
21 addressing it.

22 I was going to acknowledge the fact that there  
23 was a representation with regard to, you know, concern  
24 about the possible testimony and what impact that might  
25 have but, again, was going to indicate that any  
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1 appropriate motions that you want to file and I'll deal  
2 with it and request an answer and proceed accordingly.

3 MR. FINA: Yes, Your Honor; and I think that I  
4 probably should put on the record that the issuance of  
5 letters by counsel for Mr. Schultz and Mr. Curley from  
6 the Commonwealth's perspective and our understanding of  
7 the case that in and of itself is not sufficient --  
8 excuse me -- sufficient to assert the privilege.

9 It certainly could be interpreted as one of the  
10 prongs of evidence necessary to prove the privilege but  
11 just the letters themselves do not establish the  
12 privilege.

13 I believe that a motion and some hearing and  
14 evidence must be provided for the privilege to be found  
15 in this case.

16 JUDGE FEUDALE: And that would be subsequent to  
17 the testimony of Attorney Baldwin?

18 MR. FINA: Yes, Your Honor.

19 JUDGE FEUDALE: Based on the stipulation, I'm  
20 satisfied that that testimony can go forward without any  
21 inappropriate inferences to be drawn because I don't  
22 think that the concern that they may have impacts the  
23 investigative role with regard to Sandusky and the  
24 response of the Office of General Counsel to the various  
25 subpoenas and Orders of Court and that is the narrow

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1 focus of the testimony.

2 MR. FINA: Yes, Your Honor. I mean, I have no  
3 doubt that they will try and run the football in the  
4 middle with it but I don't think they should get  
5 anywhere with it.

6 MR. DeMONACO: Thank you, Your Honor.

7 MR. MUSTOKOFF: Thank you, Your Honor.

8 MR. DeMONACO: And as far as the starting date  
9 of Justice Baldwin, it might have been February 10th  
10 instead of February 15th; but it was within that range.

11 JUDGE FEUDALE: Okay.

12 MR. DeMONACO: Thank you so much, Your Honor.  
13 I'm sure we'll see you later this week.

14 (The proceedings concluded at 9:13 a.m.)  
15  
16  
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1 I hereby certify that the proceedings and  
2 evidence are contained fully and accurately in the notes  
3 taken by me on the within proceedings and that this is a  
4 correct transcript of the same.  
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Hillary M. Hazlett, Reporter  
Notary Public

COMMONWEALTH OF PENNSYLVANIA  
NOTARIAL SEAL  
HILLARY M. HAZLETT, Notary Public  
City of Harrisburg, Dauphin County  
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