



March 3, 2014

**VIA ELECTRONIC MAIL
AND REGULAR MAIL**

Appeals Officer Kyle Applegate, Esquire
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, Plaza Level
Harrisburg, PA 17120-0225
(kyapplegat@pa.gov)

**Re: Position of The Pennsylvania State University; Bagwell v. Pennsylvania
Department of Education, Docket # AP 2014-0205**

Dear Appeals Officer Applegate:

On February 24, 2014, you granted the request of The Pennsylvania State University ("Penn State") to participate in the above-referenced appeal as an interested party pursuant to Section 1101(c) of the Pennsylvania Right-to-Know Law ("RTKL"), 65 P.S. § 67.1101(c). Accordingly, Penn State provides the following submission in support of the denial by the Pennsylvania Department of Education ("PDE") of the request by Ryan Bagwell that is the subject of this appeal.

Background and Facts

On December 24, 2013, Mr. Bagwell made a request for public records under the RTKL to the PDE, as follows:

1. all subpoenas for testimony and/or tangible items issued to the Department or its employees between October 1, 2011, and December 31, 2012;
2. all records provided to The Freeh Group as part of Penn State's investigation into reported allegations of sexual abuse;
3. all requests for records and interviews with Department employees from The Freeh Group;

4. all notes, transcripts, audio recordings and video recordings of interviews given to The Freeh Group by Department employees;
5. the Conflict of Interest disclosure forms filed by Ron Tomalis, William Harner and Carolyn Dumaresq with the Secretary of the Penn State Board of Trustees in 2013.

In its final response to Mr. Bagwell dated February 4, 2014, the PDE stated that the request was initially denied, with respect to items numbered 1-4, as insufficiently specific. However, in a good faith effort to respond, the PDE interpreted the insufficiently specific requests and stated that it did not have records requested in items 1, 2 and 4 in its possession or under its custody or control. The PDE identified two emails in its possession as responsive to its interpretation of item 3 and produced one redacted email to Mr. Bagwell. The PDE denied access to the second email on the grounds that the Office of Open Records ("OOR") previously determined in a separate appeal that this same document (bates stamp numbered 369-370) is protected by the attorney-client privilege and/or the attorney work product doctrine held by Penn State. *See Final Determination in Bagwell v. Pennsylvania Department of Education*, OOR Dkt. AP #2013-1753, December 20, 2013, p. 9. With respect to item 5, the PDE provided attestations indicating that the requested records are not in its possession, or under its control or custody.

On February 10, 2014, the OOR received Mr. Bagwell's appeal in this case. In his appeal and additional argument filed on February 21, 2014, Mr. Bagwell does not challenge the PDE's position that the withheld email (bates stamp numbered 369-370 in AP#2013-1753) is protected by the attorney-client and/or attorney work product privilege. Instead, Mr. Bagwell argues only that items 1-4 of his request were sufficiently specific and should not have been interpreted by the PDE and that the PDE has control over documents requested in item 5.

ARGUMENT

The PDE Responded Appropriately to Items 1-4

Penn State supports the PDE's position that items 1-4 of Mr. Bagwell's request were insufficiently specific and sees no reason to restate the PDE's argument. To the extent that the OOR determines that any further response is required and the PDE identifies any other responsive document, Penn State reserves the right to submit additional evidence and argument to protect any document from disclosure that falls within the attorney-client privilege, the attorney work product doctrine or any other applicable exception under the RTKL.

The PDE is Not Required to Retrieve Documents Responsive to Item 5

In item 5 of his request, Mr. Bagwell seeks conflict of interest forms filed with the Penn State Board of Trustees in 2013 by former Secretary Tomalis, former Acting Secretary Harner and Acting Secretary Dumarseq. The PDE provided attestations indicating that, after a

reasonable search, the PDE does not have responsive documents in its possession or under its custody or control.

Under the RTKL, “records *not* in the possession of an agency would not be presumed to be public records.” *Office of the Budget v. Office of Open Records*, 11 A.3d 618, 621 (Pa. Cmwlth. Ct. 2011)(emphasis in original). In view of the PDE’s position that it does not have possession of the records requested in item 5, Mr. Bagwell must show that such records are public records under the RTKL. Mr. Bagwell fails to offer any evidence or argument on this point.

Instead, Mr. Bagwell argues on appeal that to the extent that the PDE provided the requested records to Penn State, but no longer possesses the records itself, the PDE continues to maintain control over the records. Mr. Bagwell contends that if the PDE “no longer has possession of the conflict of interest forms, the [PDE] should retrieve them from [Penn State] because it continue[sic] to control them.” Mr. Bagwell cites nothing in the RTKL to support this contention. To the contrary, the Commonwealth Court has made clear that even when an agency may have the ability to request or retrieve documents from a third party, the RTKL does not require the agency to do so in order to respond to a request. In *Office of the Budget, supra*, the requester sought from the Budget office the payroll records of a subcontractor. Even though the Budget office had the right to audit these payroll records, the court rejected the OOR decision that the Budget office had an obligation to obtain and then disclose the records. The court held that “[t]o adopt the OOR’s reasoning would mean that records of a private company, not in the possession of a government agency and not related to a contract to perform a governmental function, are disclosable to the public if any government agency has a legal right to review those records. Such interpretation would greatly broaden the scope of the RTKL beyond its explicit language.” *Id.* at 623. Similarly, in the context of a request to a local agency, the Commonwealth Court held that even if it had sought records from former officials in the past, a township had no obligation under the RTKL to seek requested documents from former employees or officials. *Breslin v. Dickinson Township*, 68 A.3d 49, 55 (Cmwlth Ct. 2013).

Mr. Bagwell’s reliance on the Pennsylvania Nonprofit Corporation Law is irrelevant where he fails to show that under the circumstances of this appeal, the RTKL requires the PDE to “retrieve” from Penn State any conflict of interest form that may have been provided to Penn State’s Board of Trustees in 2013. Absent such a showing, the PDE’s denial of Mr. Bagwell’s item 5 request must be upheld.¹

¹ Information disclosed in the conflict of interest forms provided by current members of the Penn State Board of Trustees is publically available on the University’s website at <http://www.psu.edu/trustees/pdf/COI%20Web%20posting%2012.18.13.pdf>. In the near future, Penn State intends to make the conflict of interest disclosure forms for current members of the Penn State Board of Trustees available for inspection upon request.

CONCLUSION

For the foregoing reasons, Penn State respectfully requests that the OOR deny Mr. Bagwell's appeal in this matter.

Respectfully submitted,



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