



October 11, 2013

**VIA ELECTRONIC MAIL  
AND REGULAR MAIL**

Appeals Officer J. Chadwick Schnee, Esquire  
Commonwealth of Pennsylvania  
Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4th Floor  
Harrisburg, PA 17120-0225  
jschnee@pa.gov

**Re: Bagwell v. Pennsylvania Department of Education, Docket #AP 2013-1753; Position of The Pennsylvania State University**

Dear Appeals Officer Schnee:

Pursuant to Section 1101(c) of the Pennsylvania Right-to-Know Law ("RTKL"), 65 P.S. § 67.1101(c), The Pennsylvania State University ("Penn State" or "University"), hereby files the following evidence and arguments in the above-captioned appeal as a party with a direct interest. Penn State maintains that most of the records subject to this appeal must be withheld in their entirety pursuant to statutory exceptions, including 65 P.S. §§ 67.102, 67.708(b)(10)(i) and 67.708(b)(17).

## **BACKGROUND AND FACTS**

### **Procedural Background**

On July 19, 2013, by letter sent via email, Mr. Bagwell made a request to the Pennsylvania Department of Education ("PDE") for public records pursuant to the RTKL, 65 P.S. § 67.101, *et seq.*, as follows:

*[C]opies of 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, 2012 from any and all of the following individuals:*

1. Louis Freeh ([freeh@freehgroup.com](mailto:freeh@freehgroup.com))
2. Omar McNeill ([mcneill@freehgroup.com](mailto:mcneill@freehgroup.com))
3. Kenneth Frazier ([ken\\_frazier@merck.com](mailto:ken_frazier@merck.com))
4. Annette DeRose ([annette\\_derose@merck.com](mailto:annette_derose@merck.com))
5. Paula Ammerman ([pra4@psu.edu](mailto:pra4@psu.edu))
6. Karen Peetz
7. Steve Garban

On August 26 and September 9, 2013, the PDE provided Mr. Bagwell with copies of records responsive to his request, but denied his request with respect to information protected by privilege or by specific exceptions of the RTKL. Also on September 9, 2013, the PDE provided Mr. Bagwell with a table listing the documents protected from disclosure pursuant to the RTKL.

On September 17, 2013, Mr. Bagwell filed an appeal from the PDE's partial denial of his request. On September 30, 2013, both the PDE and Mr. Bagwell provided additional submissions to you.

Via email, Mr. Bagwell notified Penn State of the above-docketed appeal on September 19, 2013. On September 30, 2013, Penn State requested to participate in this appeal as a party with a direct interest pursuant to Section 1101(c) of the RTKL, 65 P.S. § 67.1101(c). You granted this request and allowed the record to remain open for all parties to provide additional evidence and/or legal argument prior to 5 p.m. on October 11, 2013. The PDE is required to submit the withheld records for an *in camera* review by October 14, 2013.

### **Background Facts**

Penn State was granted a corporate charter – the equivalent of articles of incorporation at the time – by an “Act to Incorporate the Farmers’ High School of Pennsylvania” adopted by the General Assembly in 1855. Affidavit of Frank T. Guadagnino (“Guadagnino Affidavit”) at ¶ 4, Exhibit 1. Subsequently, in 1874, the General Assembly enacted the first general Corporation Act, which applied to all categories of corporations, including non-profit educational corporations like Penn State. Guadagnino Affidavit at ¶ 5. Currently and since that time, for governance purposes the University has been and is governed by and subject to the Corporation Act, as amended.<sup>1</sup> Penn State is also a public university which is an instrumentality of the Commonwealth, a state-related university, and Pennsylvania’s land grant university, and is

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<sup>1</sup> The current governing statute is the Pennsylvania Nonprofit Corporation Law of 1988. 15 P. S. §§ 5101, *et seq.* In May 2013, the Board adopted resolutions approving a number of amendments to the Charter, Bylaws and Standing Orders of the Board, including among other things an amendment that changed the Governor’s and the President of the University’s status from being an *ex officio* voting member to an *ex officio* non-voting member. Guadagnino Affidavit, ¶ 6. The amendments to the Charter were filed with the Secretary of State of the Commonwealth in accordance with the requirements set forth in 15 P. S. § 5915. A copy of the Articles of Amendment, as filed with the Commonwealth on May 9, 2013, is attached to Guadagnino Affidavit as Exhibit 2.

therefore, along with the other state-related universities, appropriately subjected to certain provisions of the RTKL.

As set forth in the Charter, as amended, the Board of Trustees (the “Board”), comprises 32 members. Guadagnino Affidavit ¶ 7, Exhibit 1. Five members of the Board are *ex officio* members who serve as trustees by virtue of their position. *Id.* Those members are the Governor of the Commonwealth, the President of the University, the Secretary of the PDE, the Secretary of the Pennsylvania Department of Agriculture (“PDA”) and the Secretary of the Pennsylvania Department of Conservation and Natural Resources (“PDCNR”). *Id.* The Governor and the President of the University are *ex officio* non-voting members of the Board. *Id.* In the language of the original charter, and as amended, all board members, including *ex officio* members, are “trustees,” a legal term which imposes a fiduciary duty to the entity on whose board they sit.

Pursuant to the University’s Bylaws, all members of the Board stand in a fiduciary relationship to the University. Guadagnino Affidavit at ¶ 8. Specifically, the Bylaws provide that “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.” See Bylaws, Section 8.07, attached as Exhibit 3 to Guadagnino Affidavit. This statement of fiduciary duty is consistent with the standard set forth in the Pennsylvania Nonprofit Corporation Law to which the University is subject. Section 5712(a) of the Pennsylvania Nonprofit Corporation Law provides that “a director of a nonprofit corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interests of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances.” 15 P.S. § 5712.

For the Board’s purposes, the designation “*ex officio*” refers only to the method by which a trustee becomes and remains a member of the Board. Guadagnino Affidavit at ¶ 10. As background, six members of the Board are appointed by the Governor, nine are directly elected by the alumni, six are elected by registered agricultural societies, six are elected by the Board to represent business and industry interests, and five serve as *ex officio* trustees by virtue of their status as the incumbent in another position - i.e., President, Governor, Secretary of PDE, Secretary of PDA and Secretary of PDCNR. *Id.* at ¶ 7. There is no distinction made, either in the University’s Charter, Bylaws or Standing Orders of the Board, or in Pennsylvania law, between *ex officio* trustees and trustees elected, appointed or selected in some other manner. *Id.* at ¶ 10. All have the same fiduciary duties to the University. *Id.*

In furtherance of their fiduciary duties to the University, trustees are entitled to, and as a practical matter must, rely on others (officers, accountants, attorneys and other advisors). See 15 P. S. § 5712(b). Thus, it is axiomatic that in the course of fulfillment of a trustee’s fiduciary duty, he or she will from time to time communicate with counsel to the University. Guadagnino Affidavit at ¶ 12. Such communications are and are intended to be protected and subject to the attorney-client privilege and the related work product doctrine as communications

between an attorney and members of the Board, as the governing body of the University, as authorized representatives of the client. *Id.* at ¶¶ 12-13.

The University's attorney-client privilege belongs to the University, not to any individual member of the Board or to any officer, employee or other representative of the University's interests. Only the University may properly consent to a waiver of the attorney-client privilege. It would be a great cause for concern for any individual member of the Board to disclose privileged information without proper authorization from the University. Guadagnino Affidavit at ¶ 13.

Based on a review of the documents at issue, they 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 document production requirements of the RTKL. Guadagnino Affidavit at ¶ 20. During the period at issue, counsel to the University included Cynthia A. Baldwin, Amy McCall, Stephen S. Dunham, Frank T. Guadagnino, Lanny 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 (the "Freeh Group"). Guadagnino Affidavit at ¶¶ 15-16. 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 & Sullivan LLP was engaged as counsel to the Board and the Special Investigative Task Force of the Board. *Id.* at ¶¶ 16-18, Exhibit 4 (Engagement letter between the Board, acting on behalf of the University, and the Freeh Group). Similarly, Lanny Davis and Associates was engaged as counsel to the University and the parties intended that communications to and from members of that firm to members of the Board and administrators would be covered by the attorney client privilege. *Id.* at ¶¶ 12-15.

Although Judge Freeh, Freeh Sporkin & Sullivan, Lanny Davis and Lanny Davis and Associates have completed the work for which they were engaged, the protections of the attorney-client privilege and work product doctrine continue to be fully applicable.

Trustee Tomalis was the Secretary of PDE and a member of the Board of Trustees at all times in question. Kenneth Frazier and Karen Peetz were members of the Board of Trustees at all times in question. Steve Garban served on the Penn State Board through July 19, 2012. Guadagnino Affidavit at ¶ 21. At all times in question, Paula Ammerman served as Associate Secretary to the Penn State Board. *Id.*

It is Penn State'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.

## ARGUMENT

Contrary to Mr. Bagwell's position on appeal, Penn State contends that some or all of the documents at issue on appeal are not "public records" and that to the extent that any

document provided by Penn State to Trustee Tomalis, directly or through his administrative assistant, Shoop, in his role as a member of the Penn State Board is considered to be a record of an agency under the RTKL, the statutory exceptions are available to Penn State. Any other result leads to an absurd construction of the RTKL.

### **Bagwell v. Pennsylvania Department of Education**

By way of background, it is critical to understand the limited relevance of the recent decision by the Commonwealth Court in *Bagwell v. Pennsylvania Department of Education*, \_\_\_A.3d \_\_\_, 2013 WL 3778927 (Pa. Cmwlth. 2013) (“*Bagwell*”) to this appeal. The case concerned a request by Mr. Bagwell for records from the PDE, specifically PDE Secretary Tomalis in his capacity as *ex officio* member of the Penn State Board during the timeframe of April, May, June and July 2012.

With Judge Leadbetter dissenting, the Commonwealth Court decided *Bagwell* on July 19, 2013. The Court recognized that Penn State, as a state-related institution, is not an “agency” under the RTKL, but is subject to other reporting requirements as a state-related institution pursuant to Chapter 15 of the RTKL. *Bagwell* at \*4-\*5.<sup>2</sup>

Based on the allegations and record before it, the Commonwealth Court held that documents received by and in the possession of the PDE Secretary as a Penn State Board member qualify as “records” for purposes of the RTKL because they enable the PDE “to perform its statutory governmental function.” *Bagwell* at \*9.

Importantly, the Court declined to independently review the factual record, “[g]iven the limited record developed below.” *Bagwell* at \*9. The Court noted that the existing record did not identify or describe the responsive records. *Id.* Acknowledging the necessity of protecting the rights of third parties, such as Penn State, the Court remanded and specifically left “to the thoughtful discretion” of the Office of Open Records (“OOR”) to determine the scope of the evidence, the appropriate parties and the proper defenses to disclosure. *Id.* The Court noted that no party before it alleged that the Secretary served in his individual capacity on the Penn State Board. *Bagwell* at \*7. Penn State was not a party in *Bagwell* and did not argue before the Commonwealth Court.<sup>3</sup>

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<sup>2</sup> Penn State submits that in *Bagwell*, the Court erroneously cited to a PDE regulation as the basis for the appointment of the PDE Secretary and the Governor as *ex officio* Penn State Board members. *Bagwell* at \*4. To the contrary, the Secretaries of the PDE, PDA and PDCNR and the Governor sit on the Penn State Board by virtue of the Penn State charter and subsequent charter amendments. Guadagnino Affidavit at ¶¶ 4-7.

<sup>3</sup> Penn State’s arguments here are based on the statutory exceptions in the RTKL, not on distinguishing or limiting the decision of the Commonwealth Court in *Bagwell*. Assuming the decision applies to the documents covered by Mr. Bagwell’s current request, nevertheless the requests which are the subject of this appeal are covered by specific statutory exceptions and the documents should not be produced. For the reasons stated here (including the factual record and the application of the RTKL exceptions to the documents at issue), and in the attached Affidavit, the University believes the *Bagwell* holding does not determine the outcome of this proceeding and reserves all of its rights to raise these issues in the *Bagwell* remand, in this appeal, and in other RTKL proceedings. See Guadagnino Affidavit ¶¶ 4-14.

### **Attorney-Client Privilege and Attorney-Work Product Privilege**

Under the RTKL, a record in the possession of a Commonwealth agency is presumed to be a public record unless: (1) the record is exempt under section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305. The RTKL defines “privilege” to include, “[t]he attorney-work product doctrine, the attorney-client privilege . . . or other privilege recognized by a court interpreting the laws of this Commonwealth.” 65 P.S. § 67.102. Neither section of the RTKL requires that the holder of a recognized privilege be an agency. 65 P.S. §§67.102, 67.305.

In Pennsylvania, the attorney-client privilege operates to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice. *Gillard v. AIG Insurance Co.*, 15 A.3d 44, 59 (Pa. 2011). The attorney-work product privilege is closely related to the attorney-client privilege, but is broader and protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation, as well as the mental impressions, conclusions, opinions, memoranda, notes, summaries, legal research or legal theories of a party’s attorney. *Id.*, n. 16, citing Pa.R.Civ.P. 4003.3 and *Nat’l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa. Cmwlth. 2001).

“Where a privilege does apply, an agency does not have discretion to release for public access information protected by privilege.” *Heavens v. Pennsylvania Department of Environmental Protection*, 65 A.3d 1069, 1074 (Cmwlth Ct. 2013). Records that contain communications made to and by counsel for the purpose of providing professional legal advice concerning legal issues that are confidential are not considered public records under the RTKL. *Id.* at 1076-77.

Penn State has provided evidence that the University through its Board hired the Freeh Group to provide professional legal services in the form of an internal investigation and advice regarding allegations of child sexual abuse by Gerald Sandusky and related matters. Guadagnino Affidavit at ¶¶ 16-19, Exhibit 4. Confidential communications to and from Board members, officers, employees and other representatives of Penn State and Judge Freeh, Omar McNeil and other members of the Freeh Group, confidential communications to and from counsel to the University and Judge Freeh, Omar McNeil and other members of the Freeh Group and confidential communications to and from lawyers for the University and Board members officers, employees and other representatives of Penn State were intended by the parties to such communications to be subject to the attorney-client privilege and work product doctrine. *Id.* at ¶ 17.

Mr. Bagwell’s request includes documents in the possession of Trustee Tomalis which involve communications with two members of the Freeh Group and/or other attorneys representing the University. Attached as Appendix 1 hereto is an updated list of the 155 documents, as numbered by Mr. Bagwell and as described by the PDE, which are the subject of

this appeal. Penn State has indicated on this list which documents it contends are protected by the attorney-client and/or attorney-work product privilege. Such documents include all communications between counsel to Penn State and members of the Board for the purpose of obtaining or providing legal advice as well as documents that reflect the mental impressions and work product of counsel for Penn State. Penn State contends that the documents identified as being privileged on Appendix 1 are covered by either the attorney-client and/or the attorney-work product privilege, and are not public records under the RTKL and the PDE is not authorized to and cannot waive that attorney-client privilege by producing them to Mr. Bagwell. Those documents are as follows: 1-28, 30, 33-42, 45-46, 49-50, 69-84, 86-89, 91-92, 95-97, 116-118, 122, 131 and 141-146. *See* Appendix 1.

### **Noncriminal Investigation Exception**

Section 708(b)(17) of the RTKL exempts from public access a “record of an agency relating to a noncriminal investigation.” 65 P.S. § 67.708(b)(17). This includes the following:

- (i) Complaints submitted to an agency.
- (ii) Investigative materials, notes, correspondence and reports.
- (iii) A record that includes the identity of a confidential source . . .
- (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 civil penalty, the suspension, modification or revocation of a license, permit, registration, certification or similar 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.

The investigation conducted by the Freeh Group for Penn State was a noncriminal investigation which involved investigative materials, notes, correspondence and reports, as well as confidential interviews of witnesses. Guadagnino Affidavit at ¶¶ 16-19. The RTKL does not define “noncriminal” or “investigation.” *Heavens, supra* at 1074. It may apply when records reflect “a systematic or searching inquiry, detailed examination, or an official probe” that is not criminal in nature. *Id.* The Freeh Group’s investigation for Penn State was searching, detailed and noncriminal and falls within this exception. Guadagnino Affidavit at ¶¶ 16-19. Thus, the noncriminal investigation exception applies to all documents related to the investigation by the Freeh Group.

In addition to the Freeh investigation, some of the records being requested relate to other noncriminal investigations that were conducted or proposed to be conducted during the time period in question. Guadagnino Affidavit at ¶ 22. Those records similarly fall within the noncriminal investigation exception. Penn State contends that the following documents fall within the noncriminal investigation exception: 3-4,6-7,9, 14,16-17,19-30, 33-42, 54-55, 57-70, 73, 75-76, 79-82, 86-97, 109-111, 121- 123, 126-133, 136-139 and 141-148. *See* Appendix 1.

The University notes that several documents come within more than one exception. The clearest example of this is that on the facts here, the attorney-client privilege overlaps substantially with the noncriminal investigation exception. Put another way, Judge Freeh and his law firm acted both as attorneys for the University providing legal counsel and they conducted a noncriminal investigation, so their communications to and from the University and its Board about the investigation are covered by both exceptions.

Mr. Bagwell contends that because Penn State is not an “agency” under the RTKL and had no obligation to conduct the Freeh investigation, any records related to that investigation do not fall within the noncriminal investigation exception of 65 P.S. § 67.708(b)(17). His position has no merit.

In construing the RTKL, the best indication of legislative intent is the statute’s plain language. *Bowling v. Office of Open Records*, \_\_A.3d \_\_, 2013 WL 4436219, \*11 (Pa. S.Ct. 2013). Nothing in the plain language of the noncriminal investigation exception requires that the investigation be conducted by a Commonwealth agency. Indeed, “agency” modifies “investigation” only in subsection 65 P.S. § 67.708(b)(17)(vi)(A). Thus, the plain language of the statutory exception applies to records related to the noncriminal investigation by the Freeh Group and to many of the documents that are the subject of this appeal.

In addition, “the plain language of each section of a statute must be read in conjunction with one another, construed with reference to the entire statute.” *Bowling*, at \*11. The presumption is that the legislature did not intend “a result that is absurd, impossible of execution, or unreasonable.” *Id.* There are four distinct sections of the RTKL which provide for public access to information from four distinct institutions:

1. The Commonwealth and its Agencies (including local governments);
2. The Legislature;
3. The Judiciary; and
4. The State-Related Universities.

The law treats each of these four types of institutions differently with regards to what types of records are public and how those records may be accessed by the public. These distinctions were established in recognition of the legal and practical differences between these types of institutions. The clear legislative intent is to treat state-related universities differently than the Commonwealth and its agencies, the legislature and the judiciary and to make information required to be provided by state-related institutions more limited than that



provided by Commonwealth agencies, the legislature and the judiciary. To agree with Mr. Bagwell's position that Penn State's documents shared with its *ex officio* Board members who are agency Secretaries are public records, but that the exemptions in section 67.708 do not apply because Penn State is not an "agency," would allow an individual requester like Mr. Bagwell to make an end run around the statutory limitations on unrestricted access to institutional records. Put another way, Mr. Bagwell argues that the documents at issue are covered by the RTKL as agency records, but that the exceptions in the law do not apply because Penn State is not an agency. Such a reading of the RTKL leads to an absurd, and therefore impermissible, result.

Finally, Mr. Bagwell argues that the noncriminal investigation exemption does not apply because the Freeh Group investigation was not conducted by a Commonwealth agency as part of its "official duties." As co-chair of the University's Special Investigative Task Force established by the Board, Trustee Tomalis participated in the investigation conducted by the Freeh Group. If Trustee Tomalis was, as the Commonwealth Court suggested in *Bagwell*, also acting in an official Commonwealth capacity, then his participation in that investigation was necessarily pursuant to the PDE's official duties and the exemption contained in section 67.708(b)(17) must apply. Mr. Bagwell cannot have it both ways.

#### **Predecisional and Deliberative Process Exception**

Section 708(b)(10)(i) exempts from public access 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." 65 P.S. § 67.708(b)(10)(i). Many of the documents listed on the PDE's list also fall within this exception. While serving on the Penn State Board, Trustee Tomalis sent and received communications (including email communications), memoranda, research and other documents for purposes of or in connection with his contemplation of decisions with respect to proposed policy or action by the Board. Guadagnino Affidavit ¶ 25. Clearly any records reflecting the predecisional deliberations of Trustee Tomalis or of any other employee of a Commonwealth agency, including the other Departmental Secretaries who serve on the Penn State Board, squarely fall within this exception. Similarly, any record subject to this appeal which was used by Trustee Tomalis in his predecisional deliberations regarding policies or proposed action by the Penn State Board are exempt under the RTKL. Penn State contends that the following documents are protected from disclosure by the predecisional deliberations exception: 6-8, 9-10, 12-14, 19-22, 25-27, 30-68, 79, 87, 90, 99-100, 102-107, 110-120, 122-138, 140-155. See Appendix 1.

Mr. Bagwell argues that such documents cannot fall within the RTKL exception because they do not reflect predecisional deliberations that are internal to the PDE. He cites to no authority for this position and it is belied by the plain language of the exception. In addition, Mr. Bagwell's position again undermines the logic and the spirit of the RTKL. He cannot claim that Trustee Tomalis' possession of documents by virtue of his service on the Penn State Board transforms such documents into documents "of an agency" and then claim that no exceptions apply because such documents are not internal to the agency. Mr.

Bagwell's position eviscerates any rights of Penn State to communicate in a confidential manner with all members of its Board on predecisional matters for which they have a fiduciary duty, and it eviscerates the rights of Trustee Tomalis to the exceptions provided in the RTKL.

### **Other Exceptions**

Several of the documents included within the set of 155 potentially responsive documents include personal identification information that is protected from disclosure pursuant to 65 P.S. §§ 67.708(b)(6). In addition, a number of documents include information that is prohibited from public disclosure pursuant to the Family Educational Rights and Privacy Act and other federal laws. If any documents from this set are required to be produced, Penn State requests that they be reviewed and appropriately redacted prior to production to Mr. Bagwell.

In addition, Penn State contends that other exceptions under the RTKL apply to some of the documents at issue. A record of an agency "relating to or resulting in a criminal investigation" is protected from disclosure pursuant to the exception in 65 P.S. §§ 67.708(b)(16). Penn State contends that the following documents are protected from disclosure by the criminal investigation exception: 5, 15 and 51-52. *See* Appendix 1; Guadagnino Affidavit at ¶ 23.

A record "that constitutes or reveals a trade secret or confidential proprietary information" is protected from disclosure by 65 P.S. §§ 67.708(b)(11). Document 102 is marked confidential and proprietary and relates to information provided to the Penn State Board by a third party consultant that was intended to be confidential and proprietary information. Guadagnino Affidavit at ¶ 24. Similarly, Documents 99 and 100 were intended to be confidential and proprietary information shared with the Board. *Id.*

Finally, Penn State contends that Document 108 falls within the RTKL exception for a "record or information relating to a communication between an agency and its insurance carrier, . . . or risk management office." 65 P.S. §§ 67.708(b)(27). Document 108 relates to a communication from Penn State's Risk Management Officer to the Penn State Board, including Trustee Tomalis. To the extent that this document is a record "of an agency" by being in the possession of Trustee Tomalis, it is entitled to this exception. As argued above, the document is either an agency record subject to the exceptions of the RTKL or not. Any other reading of the statute is absurd and unreasonable.

After review, Penn State does not believe that Documents 85, 98 or 101 fall within any of the RTKL exceptions. *See* Appendix 1.

## CONCLUSION

Based on the evidence provided and the argument above, Penn State respectfully requests that Mr. Bagwell's appeal be denied. To the extent that you determine that any document at issue should be disclosed, Penn State requests that such documents be appropriately redacted to eliminate any personally identifiable information or other information protected by privilege or any applicable RTKL exception.

Respectfully submitted,



Katherine M. Allen  
Associate General Counsel

cc: Karen S. Feuchtenberger, Pennsylvania Department of Education  
(kfeuchtenb@pa.gov)  
Ryan Bagwell (ryan@ryanbagwell.com)

# APPENDIX 1

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## THE PENNSYLVANIA STATE UNIVERSITY REVIEW OF DOCUMENTS PROTECTED FROM DISCLOSURE BY THE DEPARTMENT OF EDUCATION PURSUANT TO REQUEST DATED JULY 19, 2013 BY RYAN BAGWELL

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
1.	07/25/12 12:33 – 12:43 PM	Ammerman, P Members of the Board of Trustees Guadagnino, F Dunham, S	Privileged and Confidential	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X				
2.	05/17/12 5:18 PM	Ammerman, P Members of the Board of Trustees	FW: New Civil Filing	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X				
3.	04/09/12 12:39 – 1:24 PM	McNeill, O Tomalis, R Frazier, K Freeh, L	Re: Judge severely restricts what lawyers can say in ex-Penn State coach Sandusky's sex abuse case	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X		X		
4.	04/07/12 7:40 AM – 2:29 PM	McNeill, O Tomalis, R Frazier, K Freeh, L	RE: Please set up a call for all trustees on Monday night, April 9 <sup>th</sup> at 5:30 pm	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X		X		
5.	03/17/12 10:20 AM – 03/18/12 6:56 PM	McNeill, O Tomalis, R Frazier, K Freeh, L	Re: Legal Conference Call	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X				X
6.	03/10/2012 10:53 AM – 03/15/12 5:14 PM	McNeill, O Frazier, K Tomalis, R	Re: Report on Freech Recommendations	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X	X		
7.	03/10/2012 10:53 AM - 03/13/12	McNeill, O Frazier, K Tomalis, R	RE: Report on Freech Recommendations	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RIKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
	2:24 PM								
8.	02/17/12 6:02 PM	Ammerman, P Members of the Board of Trustees	FW: Attorney – Client Privileged – (1) Narrative re Nov 9 decision; (2) possible op-ed for Centre Daily Times or to be posted; (3) memo re: Paterno re- naming	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X			
9.	02/17/12 8:28 AM	Ammerman, P Members of the Board of Trustees	Attorney – Client Privileged – (1) Narrative re Nov 9 decision; (2) possible op-ed for Centre Daily Times or to be posted; (3) memo re: Paterno re-naming	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X	X		
10.	02/11/12 6:29-6:46 PM	Frazier, K McNeill, O Tomalis, R Freeh, L	RE: Investigation	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X			
11.	02/11/12 6:29 – 6:43 PM	Frazier, K McNeill, O Tomalis, R Freeh, L	RE: Investigation	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X				
12.	01/20/12 8:33 PM – 01/21/12 5:52 PM	Frazier, K McNeill, O Tomalis, R Freeh, L	RE: follow-up about Senate meeting	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X			
13.	01/20/12 8:33 PM – 01/21/12 5:50 PM	Frazier, K McNeill, O Tomalis, R Freeh, L	RE: follow-up about Senate meeting	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X			

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
14.	01/16/12 10:40 AM	Frazier, K McNeill, O Tomalis, R Freeh, L	PSU – Special Investigations Task Force/Board of Trustees Meetings	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X	X		
15.	12/19/11 5:46 PM – 12/20/11 9:00 AM	Tomalis, R Erickson, R Guadagnino, F Baldwin, C Garban, S Summa, J Frazier, K	RE: RE: Grand Jury Subpoena Compliance	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X				X
16.	12/19/11 6:57 PM	McNeill, O Frazier, K Tomalis, R	PSU	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X		X		
17.	12/10/11 10:39 AM – 12/14/11 9:47 PM	Frazier, K Ammerman, P Tomalis, R Garban, S Summa, J Erickson, R Baldwin, C	RE: Big 10 Letter	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X		X		
18.	12/06/2011 11:39 AM	Ammerman, P Members of the Board of Trustees	Communication from Frank Guadagnino	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X				
19.	11/28/11 1:51 PM – 12/02/11 5:11 PM	Ammerman, P Frazier, K Hagan, D Bluford, G Peetz, K Eckel, K Dambly, M Hughes, R	FW: NCAA/Big Ten	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
		Tomalis, R							
20.	11/28/11 1:51 PM – 12/02/2011 11:10 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	RE: NCAA/Big Ten	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X	X		
21.	11/28/11 1:51 PM – 12/02/11 9:59 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	RE: NCAA/Big Ten	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X	X		
22.	11/28/11 1:51 PM – 12/02/11 9:59 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	RE: NCAA/Big Ten	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X	X	X		
23.	11/30/11 4:21 – 9:51 PM	Ammerman, P Frazier, K Tomalis, R Dambly, M Peetz, K Guadagnino, F	BOT Communication	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X		X		
24.	11/30/11 3:29 PM	Ammerman, P Members of the Board of Trustees	Communication from Counsel Guadagnino regarding Trustee interview and document production protocol	42 Pa.C.S. § 5928 Pa.R.C.P. 4003.3	X		X		
25.	07/06/12 3:24-4:01 PM	Frazier, K McNeill, O Tomalis, R	RE: Briefing for new board members	65 P.S. sec. 67.708(b)(17)	X	X	X		
26.	06/25/12 7:27 – 7:46 PM	Frazier, K McNeill, O Tomalis, R	Re: Update	65 P.S. sec. 67.708(b)(17)	X	X	X		



	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
		Freeh, L							
27.	06/10/12 9:33 PM – 06/11/12 7:17 AM	Frazier, K. Tomalis, R	Fwd: Leak	65 P.S. sec. 67.708(b)(17)	X	X	X		
28.	06/11/12 6:30 – 6:42 AM	Frazier, K Thompson, J	Re: Possible Leaks	65 P.S. sec. 67.708(b)(17)	X		X		
29.	11/11/11 8:14 PM – 11/14/11 6:37 AM	Frazier, K Tomalis, R	Re: Gov	65 P.S. sec. 67.708(b)(17)			X		
30.	07/31/12 7:55 – 11:55 AM	Frazier, K Tomalis, R	RE: PSARS DEMANDS FREEH CONTRACTS AND DETAILS BE MADE PUBLIC	65 P.S. 67.708(b)(10)(i)	X	X	X		
31.	07/29/12 7:26 AM	Ammerman, P Members of the Board of Trustees	Agenda for Briefing Clai Sunday, July 29; 5 PM Eastern	65 P.S. 67.708(b)(10)(i)		X			
32.	07/27/12 10:37 AM	Ammerman, P Members of the Board of Trustees	Briefing Call Planned for Sunday, July 29, 5 pm EASTERN; Paula Cell	65 P.S. 67.708(b)(10)(i)		X			
33.	06/07/12 3:37 PM – 06/08/12 6:34 PM	Frazier, K Tomalis, R McNeill, O Freeh, L	Re: Checking in	65 P.S. 67.708(b)(10)(i)	X	X	X		
34.	06/07/12 3:37-8:31 PM	Frazier, K Tomalis, R McNeill, O Freeh, L	Re: Checking in	65 P.S. 67.708(b)(10)(i)	X	X	X		
35.	06/06/12 8:21 Am – 12:35 PM	Frazier, K Tomalis, R McNeill, O	RE: Core Team Call Questions	65 P.S. 67.708(b)(10)(i)	X	X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
		Freeh, L							
36.	06/06/12 8:21-10:52 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	FW: Core Team Call Questions	65 P.S. 67.708(b)(10)(i)	X	X	X		
37.	06/06/12 8:21 – 8:55 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	RE: Core Team Call Questions	65 P.S. 67.708(b)(10)(i)	X	X	X		
38.	06/06/12 8:21 – 8:49 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	RE: Core Team Call Questions	65 P.S. 67.708(b)(10)(i)	X	X	X		
39.	05/03/12 10:26 PM – 05/08/12 11:44 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	Fwd: Thanks	65 P.S. 67.708(b)(10)(i)	X	X	X		
40.	05/05/12 7:23 PM – 05/06/12 10:31 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	Re: New Trustees	65 P.S. 67.708(b)(10)(i)	X	X	X		
41.	05/05/12 7:23 PM – 05/06/12 7:48 AM	Frazier, K Tomalis, R McNeill, O Freeh, L	FW: New Trustees	65 P.S. 67.708(b)(10)(i)	X	X	X		
42.	04/20/12 8:45 AM – 04/26/12 11:01 AM	Frazier, K Tomalis, R	FW: Committee on Audit, Risk, Legal and Compliance	65 P.S. 67.708(b)(10)(i)	X	X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
43.	02/26/12 11:16 PM – 02/27/12 8:02 AM	Frazier, K Tomalis, R	RE: CONFIDENTIAL Revised Statements	65 P.S. 67.708(b)(10)(i)		X			
44.	02/26/12 11:16 PM	Ammerman, P Members of the Board of Trustees	CONFIDENTIAL Revised Statements	65 P.S. 67.708(b)(10)(i)		X			
45.	02/25/12 5:44 PM – 02/26/12 9:05 AM	Ammerman, P Members of the Board of Trustees	CONFIDENTIAL Feb 25 Final Version – Report of the Board of Trustees on November 9 Decisions and Op Ed on Coach Paterno	65 P.S. 67.708(b)(10)(i)	X	X			
46.	02/20/12 7:58 PM – 02/22/12 10:26 AM	Ammerman, P Members of the Board of Trustees	FW: Attorney-Client Privilege; PRA Cell	65 P.S. 67.708(b)(10)(i)	X	X			
47.	02/01/12 5:01 AM	Ammerman, P Members of the Board of Trustees	Briefing Call Planned for February 4; 12 noon	65 P.S. 67.708(b)(10)(i)		X			
48.	01/25/12 6:46 PM	Ammerman, P Board Members	JVP statement/attorney-client privilege	65 P.S. 67.708(b)(10)(i)		X			
49.	01/16/12 10:40 AM – 1:42 PM	Frazier, K Tomalis, R McNeil, O Freeh, L	Re: PSU – Special Investigations Task Force/Board of Trustees Meetings	65 P.S. 67.708(b)(10)(i)	X	X			
50.	12/21/11 3:05 PM – 12/22/11 6:55 AM	Frazier, K Tomalis, R	FW: Call	65 P.S. 67.708(b)(10)(i)	X	X			
51.	12/19/11 7:24 – 8:31 PM	Garban, S Frazier, K Surna, J Tomalis, R	RE: The call will be held at 7:45 pm	65 P.S. 67.708(b)(10)(i)		X			X
52.	12/19/11 7:19-7:31 PM	Garban, S Frazier, K	Re: The call will be held at 7:45	65 P.S. 67.708(b)(10)(i)		X			X

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
		Surma, J Tomalis, R	pm						
53.	12/10/11 10:39 AM – 12/14/11 2:30 PM	Ammerman, P Frazier, K Tomalis, R Garban, S Surma, J Erickson, R	RE: Big 10 Letter	65 P.S. 67.708(b)(10)(i)		X			
54.	11/18/11 1:21-5:56 PM	Frazier, K Tomalis, R	RE: Monday Press Briefing Memo	65 P.S. 67.708(b)(10)(i)		X	X		
55.	11/18/11 12:59 – 4:25 PM	Garban, S Frazier, K Surma, J Tomalis, R	RE: Monday Press Briefing Memo	65 P.S. 67.708(b)(10)(i)		X	X		
56.	11/18/11 12:59 – 1:21 PM	Garban, S Frazier, K Surma, J Tomalis, R	FW: Monday Press Briefing Memo	65 P.S. 67.708(b)(10)(i)		X			
57.	11/17/11 11:47 AM – 11/18/11 12:46 PM	Frazier, K Tomalis, R	RE: Investigation Counsel	65 P.S. 67.708(b)(10)(i)		X	X		
58.	11/17/11 8:51 – 10:12 PM	Frazier, K Tomalis, R	RE: Guion Bluford	65 P.S. 67.708(b)(10)(i)		X	X		
59.	1/17/11 3:21 – 8:58 PM	Frazier, K Tomalis, R	Fwd: Special Committee	65 P.S. 67.708(b)(10)(i)		X	X		
60.	11/17/11 3:21 – 8:57 PM	Frazier, K Tomalis, R	Fwd: Special Committee	65 P.S. 67.708(b)(10)(i)		X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
61.	11/17/11 3:21 – 4:00 PM	Ammerman, P Members of the Special Investigations Committee	Special Committee	65 P.S. 67.708(b)(10)(i)		X	X		
62.	11/17/11 11:48 AM – 1:59 PM	Frazier, K Tomalis, R	Re: Investigation Counsel	65 P.S. 67.708(b)(10)(i)		X	X		
63.	11/17/11 11:48 AM – 1:57 PM	Frazier, K Tomalis, R	Re: Investigation Counsel	65 P.S. 67.708(b)(10)(i)		X	X		
64.	11/17/11 11:47 AM – 12:31 PM	Garban, S Baldwin, C Frazier, K Surma, J Tomalis, R	Re: Investigation Counsel	65 P.S. 67.708(b)(10)(i)		X	X		
65.	11/17/11 11:56 AM	Baldwin, C Guadagnino, F Garban, S Surma, J Frazier, K Tomalis, R Ammerman, P	Guy Bluford	65 P.S. 67.708(b)(10)(i)		X	X		
66.	11/15/11 2:14 PM – 11/16/11 8:44 AM	Ammerman, P Surma, J Garban, S Frazier, K Tomalis, R	Re: Alumni Representation	65 P.S. 67.708(b)(10)(i)		X	X		
67.	11/15/11 11:47 AM – 1:00 PM	Ammerman, P Surma, J Garban, S Frazier, K Tomalis, R	Alumni Representation	65 P.S. 67.708(b)(10)(i)		X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
68.	11/14/11 5:41 PM	Ammerman, P Surma, J Garban, S Frazier, K Tomalis, R	Distinguished Alumni	65 P.S. 67.708(b)(10)(i)		X	X		
69.	07/08/12 10:38 PM – 07/09/12 8:04 AM	Frazier, K McNeill, O Freeh, L Tomalis, R Paw, G Disney, K Sheehan, J	Re: Penn State investigator is ex-exec at firm with PSU ties	42 Pa. C.S. § 5928	X		X		
70.	07/06/12 8:12 PM – 8:34 PM	Freeh, L Frazier, K McNeill, O Tomalis, R	Re: ESPN Report to shed light on PSU scandal	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		
71.	07/06/12 4:36-4:40 PM	Frazier, K Tomalis, R Guadagnino, F	RE: Re:	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X				
72.	06/07/12 6:44 PM	Ammerman, P Guadagnino, F Members of the Board of Trustees	RW: Note to trustees	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X				
73.	05/25/12 3:55 PM – 05/29/12 12:00 PM	Frazier, K Freeh, L McNeill, O Tomalis, R Paw, G Disney, K Sheehan, J	RE: PRIVILEGED AND CONFIDENTIAL	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
74.	05/25/12 3:55 PM – 5/29/12 8:01 AM	Frazier, K Freeh, L McNeill, O Tomalis, R	RE: PRIVILEGED AND CONFIDENTIAL	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X				
75.	05/05/12 6:45 AM – 05/05/12 10:30 AM	Frazier, K Freeh, L McNeill, O Tomalis, R	Re: Meeting with Dan McGinn	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		
76.	05/05/12 6:49 AM – 05/05/12 9:54 AM	McNeill, O Frazier, K Freeh, L Tomalis, R	Re: Meeting with Dan McGinn	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		
77.	04/09/12 3:45 PM	Frazier, K Guadagnino, F Tomalis, R Freeh McNeill	Re: Tonight's Call	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X				
78.	04/09/12 12:39 PM – 04/09/12 3:42 PM	Frazier, K Tomalis, R McNeill Freeh	Re: Judge severely restricts what lawyers can say in ex-Penn State coach Sandusky's sex abuse case	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X				
79.	04/06/12 7:40 AM – 04/07/12 6:48 PM	Frazier, K Freeh, L Tomalis, R McNeill, O	Re: Please set up a call for all trustees on Monday night, April 9 <sup>th</sup> at 5:30 pm	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X	X	X		
80.	03/19/12 1:40 PM – 03/20/12 6:35 AM	McNeill, O Frazier, K Freeh, L Tomalis, R	RE: French Group statement	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
81.	02/25/12 5:59 PM	Ammerman, P Guadagnino, F Members of the Board of Trustees	Freeh Group Request – PRIVILEGED AND CONFIDENTIAL	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		
82.	02/17/12 10:43 AM – 7:06 PM	Ammerman, P Members of the Board of Trustees	CONFIDENTIAL/ATTORNEY- CLIENT PRIVILEGED COMMUNICATION / ATTORNEY WORK PRODUCT	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		
83.	02/17/12 11:43 AM – 12:48 PM	Frazier, K Tomalis, R McNeill, O	Re: PSU	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X				
84.	02/02/12 10:34 AM – 11:13 AM	Frazier, K Freeh, L Tomalis, R McNeill, O	RE: Baldwin	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X				
85.	01/26/12 4:03 AM	Ammerman, P Members of the Board of Trustees	JVP statement/attorney-client privilege	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3					
86.	01/16/12 11:34 AM – 4:26 PM	McNeill, O Frazier, K Freeh, L Tomalis, R	RE: PSU – Special Investigations Task Force/Board of Trustees Meetings	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		
87.	01/16/12 10:40 AM – 2:03 PM	McNeill, O Frazier, K Freeh, L Tomalis, R	RE: PSU – Special Investigations Task Force/Board of Trustees Meetings	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X	X	X		
88.	01/16/12 10:40 AM – 7:53 PM	Frazier, K McNeill, O Tomalis, R	RE: PSU – Special Investigations Task Force/Board of Trustees Meetings	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		



	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
		Freeh, L							
89.	01/16/12 4:26 PM – 4:40 PM	Frazier, K McNeill, O Tomalis, R Freeh, L	RE: PSU – Special Investigations Task Force/Board of Trustees Meetings	42 Pa. C.S. § 5928 Pa. R.C.P. 4003.3	X		X		
90.	04/20/12 9:37 AM – 9:39 AM	Ammernan, P Tomalis, R Shoop, J	Re: Request for A Meeting	65 P.S. § 67.708(b)(17)		X	X		
91.	07/03/12 10:26 AM – 10:48 AM	Frazier, K Tomalis, R	FW: Briefing the newest board members	65 P.S. § 67.708(b)(17)	X		X		
92.	05/18/12 11:53 AM – 05/21/12 6:23 AM	Frazier, K Freeh, L McNeill, O Tomalis, R	FW: Questions	65 P.S. § 67.708(b)(17)	X		X		
93.	05/04/12 5:48 PM – 05/05/12 3:31 PM	Frazier, K Freeh, L McNeill, O Tomalis, R	FW: An Introduction to Dr. David Roselle	65 P.S. § 67.708(b)(17)			X		
94.	05/04/12 1:07 PM 05/05/12 10:41 AM	Frazier, K McNeill, O Tomalis, R	RE: An Introduction to Dr. David Roselle	65 P.S. § 67.708(b)(17)			X		
95.	06/25/12 7:28 PM – 06/26/12 12:04 PM	Freeh, L Tomalis, R Frazier, K McNeill, O	Re: Update	65 P.S. § 67.708(b)(17)	X		X		
96.	12/19/11 8:10 PM – 9:44 PM	Freeh, L Frazier, K McNeill, O	Re: Document Production	65 P.S. § 67.708(b)(17)	X		X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
		Tomalis, R Surma							
97.	03/22/12 3:58 pm – 4:14 pm	McNeill, O Frazier, K Tomalis, R Freeh, L	RW: Chronicle Conversation	65 P.S. § 67.708(b)(17)	X		X		
98.	07/23/12 10:03 AM	Ammerman, P Members of the Board of Trustees	Statement from President Erickson	65 P.S. § 67.708(b)(10)(i)					
99.	06/02/12 12:21 PM	Ammerman, P Voting Members Attending Retreat on Sunday, June 3	Retreat, Sunday June 3	65 P.S. § 67.708(b)(10)(i)		X		X	
100.	05/19/12 2:10 PM	Ammerman, P Voting Member of the Board of Trustees	Briefing Call for Sunday, May 20; Paula Cell	65 P.S. § 67.708(b)(10)(i)		X		X	
101.	05/17/12 10:44 AM	Ammerman, P Members, Board of Trustees	1 <sup>st</sup> Qtr. Endowment Investment Summary	65 P.S. § 67.708(b)(10)(i)					
102.	05/04/12 10:50 AM – 05/07/12 9:46 AM	Ammerman, P Members of the Board of Trustees	RE: Edelman Presentation and Contact	65 P.S. § 67.708(b)(10)(i)		X		X	
103.	05/04/12 10:50 AM – 11:28 AM	Ammerman, P Members of the Board of Trustees	Edelman Presentation and Contact	65 P.S. § 67.708(b)(10)(i)		X			
104.	05/03/12 7:24 AM – 7:26 AM	Ammerman, P Members of the Board of Trustees	RE: CONFIDENTIAL Trustee Discussion Items	65 P.S. § 67.708(b)(10)(i)		X			
105.	05/02/12 9:37 AM	Ammerman, P Members of the Board of Trustees	Recommendation from Selection Group on Business & Industry	65 P.S. § 67.708(b)(10)(i)		X			

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
106.	02/28/12 3:06 PM	Ammernan, P Members of the Board of Trustees	Briefing Call Scheduled for TODAY, Tuesday, February 28	65 P.S. § 67.708(b)(10)(i)		X			
107.	02/26/12 9:01 AM	Ammernan, P Members of the Board of Trustees	Information for Today's Call	65 P.S. § 67.708(b)(10)(i)		X			
108.	02/01/12 11:50 AM	Ammernan, P Members of the Board of Trustees	Communication re Insurance	65 P.S. § 67.708(b)(27)					
109.	12/09/11 9:50 AM – 10:00 AM	Ammernan, P Members of the Board of Trustees	RE: Communication from President Erickson	65 P.S. § 67.708(b)(10)(i)			X		
110.	12/04/11 3:38 PM – 5:46 PM	Ammernan, P Tomalis, R	RE: Info for Call at 5	65 P.S. § 67.708(b)(10)(i)		X	X		
111.	11/22/11 5:34 PM	Ammernan, P Members of the Board of Trustees	Update 4 from President Erickson	65 P.S. § 67.708(b)(10)(i)		X	X		
112.	11/21/11 6:59 PM	Ammernan, P Tomalis, R Surma, J Garban Baldwin, C Guadagnino, F Frazier, K Erickson, R	Statements	65 P.S. § 67.708(b)(10)(i)		X			
113.	11/21/11 5:33 PM	Ammernan, P Members of the Board of Trustees	Communication from Chair Garban and Vice Chair Surma	65 P.S. § 67.708(b)(10)(i)		X			
114.	11/20/11 6:59 PM	Ammernan, P Members of the Board of Trustees	Media Inquiries	65 P.S. § 67.708(b)(10)(i)		X			
115.	11/18/11 8:20 PM	Ammernan, P Members of the Board of Trustees	Update 3	65 P.S. § 67.708(b)(10)(i)		X			

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RIKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
116.	11/18/11 4:29 PM	Ammerman, P Select Members of the Board of Trustees	Confidentiality Agreement	65 P.S. § 67.708(b)(10)(i)	X	X			
117.	11/17/11 4:51 PM	Ammerman, P Members of the Board of Trustees	Confidentiality Agreement	65 P.S. § 67.708(b)(10)(i)	X	X			
118.	11/16/11 10:27 PM – 11/17/11 9:40AM	Ammerman, P Frazier, K Tomalis, R Garban Surma, J Guadagnino, F Baldwin, C	FW: Trustee Speaks Out	65 P.S. § 67.708(b)(10)(i)	X	X			
119.	11/15/11 12:46 PM	Ammerman, P Members of the Board of Trustees	Communication from Chair and Vice Chair of the Board of Trustees	65 P.S. § 67.708(b)(10)(i)		X			
120.	11/17/11 2:41 PM	Ammerman, P Members of the Board of Trustees	IMPORTANT Message Re Transmitted Email	65 P.S. § 67.708(b)(10)(i)		X			
121.	6/3/12 9:11 AM – 10:20 AM	Frazier, K Tomalis, R	Re: Today	65 P.S. § 67.708(b)(10)(i)			X		
122.	04/20/12 8:45 AM – 04/27/12 11:48 AM	Frazier, K Tomalis, R McNeil, O	RE: Committee on Audit, Risk, Legal and Compliance	65 P.S. § 67.708(b)(10)(i)	X	X	X		
123.	02/26/12 5:51 PM – 6:52 PM	Frazier, K Tomalis, R	Re: are you on the call?	65 P.S. § 67.708(b)(10)(i)		X	X		
124.	02/24/12 6:04 PM – 6:10 PM	Frazier, K Tomalis, R	Re: Pitt trustees decry proposed state cuts in higher ed funding	65 P.S. § 67.708(b)(10)(i)		X			

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
125.	11/22/11 11:55 AM – 12:05 PM	Frazier, K Tomalis, R	Fw: Process and Timeline for Announcing Candidates for Officers	65 P.S. §67.708(b)(10)(i)		X			
126.	11/18/11 12:14 PM – 12:35 PM	Frazier, K Tomalis, R. Baldwin, C Ammerman, P	RE: penn state	65 P.S. §67.708(b)(10)(i)		X	X		
127.	11/17/11 11:56 AM – 12:00	Frazier, K Ammerman, P Garban Surma, J Tomalis, R Baldwin, C Guadagnino, F	RE: Guy Bluford	65 P.S. §67.708(b)(10)(i)		X	X		
128.	11/15/11 2:14 PM – 2:38 PM	Frazier, K Surma, J Ammerman, P Tomalis, R Garban	RE: Alumni Representation	65 P.S. §67.708(b)(10)(i)		X	X		
129.	11/14/11 10:33 AM – 10:56 AM	Frazier, K Garban, S Surma, J Tomalis, R	RE:	65 P.S. §67.708(b)(10)(i)		X	X		
130.	11/11/11 4:38 PM – 10:03 PM	Frazier, K Tomalis, R	Re: Pat Meehan	65 P.S. §67.708(b)(10)(i)		X	X		
131.	01/05/12 8:59 AM – 4:20 PM	McNeill, O Tomalis, R	Re: follow-up on next week's Senate Council meeting	65 P.S. §67.708(b)(10)(i)	X	X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
132.	12/10/11 10:39 AM – 7:06 PM	Garban, S Frazier, K Ammerman, P Tomalis, R Surma, J Erickson, R	RE: Big 10 Letter	65 P.S. §67.708(b)(10)(i)		X	X		
133.	11/11/11 4:38 PM – 7:39 PM	Garban, S Frazier, K Tomalis, R Surma, J	FW: Pat Meehan	65 P.S. §67.708(b)(10)(i)		X	X		
134.	07/24/12 11:05 AM – 5:26 PM	Ammerman, P Tomalis, R Members of the Board of Trustees	RE: Special Briefing Session Announcement	65 P.S. §67.708(b)(10)(i)		X			
135.	07/06/12 11:10 AM	Ammerman, P Trustees Cotner, Frazier, Lubrano, McCombie, Taliafero, and Tomalis	Confirming Briefing Date	65 P.S. §67.708(b)(10)(i)		X			
136.	7/03/12 10:26	Ammerman, P Tomalis, R Frazier, K	RE: Briefing the newest board members	65 P.S. §67.708(b)(17)		X	X		
137.	06/29/12 3:21 PM	DeRose, A Frazier, K Freeth, L McNeill, O Hagan, D Bluford, G Peetz, K Eckel, K Dambly, M Hughes, R Tomalis, R Ammerman, P	RE: Special Investigative Task Force Briefing Call	65 P.S. §67.708(b)(17)		X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
		Crouse, M Shoop, J							
138.	04/24/12 4:29 PM	DeRose, A Frazier, K McNeill, O Freeh Group Hagan, D Bluford, G Peetz, K Eckel, K Dambly, M Hughes, R Tornalis, R Ammerman, P Shoop, J	Special Investigative Task Force Briefing Call, May 2, 2012	65 P.S. §67.708(b)(17)		X	X		
139.	04/-2/12 1:39 PM	DeRose, A Frazier, K McNeill, O Hagan, D Bluford, G Peetz, K Eckel, K Dambly, M Hughes, R Tornalis, R Ammerman, P Shoop, J	Special Investigative Task Force Briefing Call, April 4, 2012	65 P.S. §67.708(b)(17)			X		
140.	02/11/12 1:46	Ammerman, P Members of the Board of Trustees	Alert-CHANGE IN PLANS; Briefing Update is Scheduled for Tonight	65 P.S. §67.708(b)(10)(i)		X			
141.	02/09/12 3:02 PM – 7:47 PM	McNeill, O Frazier, K Freeh Group	Re: Briefing	65 P.S. §67.708(b)(17)	X	X	X		

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
		Tomalis, R DeRose, A							
142.	01/09/12 3:35 PM – 01/16/12 1:40PM	Ammerman, P Frazier, K Freeh, L McNeill, O Hagan, D Bluford, G Peetz, K Eckel, K Darnbly, M Hughes, R Tomalis, R Shoop, J	RE: Special Investigative Task Force Briefing Call-January 16	65 P.S. §67.708(b)(17)	X	X	X		
143.	12/29/11 10:25 AM – 1:02 PM	Frazier, K Tomalis, R	Fw: January Board Meeting	65 P.S. §67.708(b)(10)(i)	X	X	X		
144.	12/19/11 4:52 PM – 6:28 PM	Frazier, K Tomalis, R	RE: Urgent Call	65 P.S. §67.708(b)(10)(i)	X	X	X		
145.	12/19/11 4:42 PM – 5:21 PM	Frazier, K Garban, S Surma, J Ammerman, P Tomalis, R Freeh, L McNeill, O	RE: Urgent Call	65 P.S. §67.708(b)(10)(i)	X	X	X		
145.	12/19/11 3:51 PM – 4:01 PM	McNeill, O Frazier, K Tomalis, R	RE: Special Investigation Task Force Call	65 P.S. §67.708(b)(17)	X	X	X		
146.	12/09/11 12:40 PM – 12/10/11	Frazier, K McNeill, O	RE: Update	65 P.S. §67.708(b)(10)(i)	X	X	X		



	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
	12:35 PM	Tomalis, R. DeRose, A Freeh Group							
147.	11/23/11 1:16 PM -- 11/27/11 4:30 PM	Ammerman, P Tomalis, R	RE: Briefing Call on Sunday, November 27	65 P.S. §67.708(b)(10)(i)		X	X		
148.	11/19/11 1:43 PM	Ammerman, P Members of the Board of Trustees	Briefing Call on Sunday, November 20	65 P.S. §67.708(b)(10)(i)		X	X		
149.	11/8/11 11:59 AM	Ammerman, P Members of the Board of Trustees	CONFIDENTIAL -- Briefing Scheduled for Today, November 8	65 P.S. §67.708(b)(10)(i)		X			
150.	11/05/11 7:58 PM -- 11/06/11 5:10PM	Ammerman, P Tomalis, R	RE: CONFIDENTIAL Board of Trustees Executive Session Notification	65 P.S. §67.708(b)(10)(i)		X			
151.	11/05/11 7:59	Ammerman, P Members of the Board of Trustees	RE: CONFIDENTIAL Board of Trustees Executive Session Notification	65 P.S. §67.708(b)(10)(i)		X			
152.	11/05/11 3:11	Ammerman, P Members of the Board of Trustees	CONFIDENTIAL -- Conference call Invitation for Today, November 5	65 P.S. §67.708(b)(10)(i)		X			
153.	06/09/11 11:17 AM -- 1:12 PM	Frazier, K Peetz, K Tomalis, R	FW: Please review my proposed agenda	65 P.S. §67.708(b)(10)(i)		X			
154.	04/08/12 8:01 PM-04/09/12 10:13 AM	Ammerman, P Tomalis, R	RE: Please set up a call for all trustees on Monday night, April 9 <sup>th</sup> at 5:30 pm	65 P.S. §67.708(b)(10)(i)		X			

	DATE/TIME	PARTICIPANT(S)	SUBJECT	RTKL EXEMPTION CITED BY PDE	AC	PD	NCI	CP	CI
155.	04/06/12 3:54 PM	Ammerman, P Members of the Board of Trustees	Privileged and Confidential- Briefing Call Scheduled for Monday, April 9	65 P.S. §67.708(b)(10)(i)		X			

See notes below.

Counsel for the The Pennsylvania State University reviewed the documents withheld by PDE and believes that, except as set forth below, such documents are exempt from disclosure for the reasons indicated in this chart. The five columns on the right of each page indicate the exception that Penn State believes to be applicable.

AC means document subject to the attorney client privilege and not a public record pursuant to 65 P.S. §67.702.

PD means record falls within the predecisional deliberation exception set forth in 65 P.S. §67.708(b)(10)(i).

NCI means record falls within the noncriminal investigation exception set forth in 65 P.S. §67.708(b)(17).

CP means record falls within the trade secret or confidential proprietary information exception set forth in 65 P.S. §67.708(b)(11).

CI means record falls within the criminal investigation exception set forth in 65 P.S. §67.708(b)(16).

**Additional notes:**

Document Number 108 falls within the exception for records between an agency and its risk management office.

The University does not believe that documents numbered 85, 98 and 101 fall within any of the exceptions set forth in the RTKL.