

**COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF OPEN RECORDS**

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**RYAN BAGWELL**  
**Complainant,**

**v.**

**PHILADELPHIA DISTRICT  
ATTORNEY'S OFFICE,**  
**Respondent.**

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**DOCKET # AP 2013-1586**

**THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE'S  
OPPOSITION TO THE RTKL APPEAL OF RYAN BAGWELL**

The Philadelphia District Attorney's Office ("DA's Office"), by and through undersigned counsel, hereby submits this memorandum of law in opposition to the Right to Know Law ("RTKL") appeal filed by Ryan Bagwell, challenging the denial of his request by the Open Records Officer of the DA's Office.

**FACTS AND PROCEDURAL HISTORY**

In 2010 and 2011, the Pennsylvania Office of Attorney General ("OAG") conducted a grand jury investigation into allegations that former Pennsylvania State University ("Penn State") football coach Jerry Sandusky sexually assaulted numerous children. Frank G. Fina, formerly the Chief Deputy Attorney General of the OAG's Criminal Prosecutions Section, led the investigation. The grand jury investigation resulted in Sandusky's arrest on November 5, 2011. Subsequently, on November 21, 2011, Penn State announced that it had retained former Federal Bureau of Investigation Director Louis Freeh and the Freeh Group to investigate the abuse allegations. Ultimately, on June 22, 2012, a jury convicted Sandusky on 45 of 48 counts of sexual abuse. See <http://www.npr.org/2011/11/08/142111804/penn-state-abuse-scandal-a-guide-and-timeline> (visited 9/12/13).

Mr. Fina resigned his position with the OAG, effective January 18, 2013, and has been employed as an Assistant District Attorney with the DA's Office since then. The DA's Office is wholly separate from the OAG. The DA's Office did not participate in either the OAG criminal investigation into Sandusky's abuse or the Freeh investigation into Penn State's involvement. Furthermore, the DA's Office has not conducted any business transactions or activities with the Freeh Group. Since his separation from the DA's Office, Mr. Fina has not had any business activities or transactions with any OAG investigations, including the Sandusky investigation or the investigations and prosecutions of Penn State administrators, nor has he had any business activities or transactions with the Freeh Group. *See* Declaration of Assistant District Attorney Brad P. Bender, attached hereto as Exhibit A and incorporated by reference herein.

By letter dated July 16, 2013, Complainant Ryan Bagwell submitted a request pursuant to the RTKL to the Open Records Officer of the DA's Office. In his request, Mr. Bagwell requested the following documents:

Copies of all e-mails that were sent or received by Frank G. Fina between December 1, 2012 and July 15, 2013, and were sent to or from the following individuals:

1. Louis Freeh
2. Tom Cloud
3. Greg Paw
4. Barry Feudale
5. Randy Feathers.

While Mr. Bagwell did not expressly specify the nature of his request, all of the named individuals were involved with either the OAG investigation or the Freeh investigation into the Sandusky abuse allegations.<sup>1</sup> After invoking a 30-day extension under Section 902(b)(2), the

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<sup>1</sup> Upon information and belief, Louis Freeh, Tom Cloud and Greg Paw are employed by the Freeh Group. Judge Barry Feudale was the supervising grand jury judge who oversaw the grand jury which investigated Sandusky. Upon information and belief, Randy Feathers was an investigator with the OAG.

Open Records Officer denied Mr. Bagwell's request because the request does not seek records of the DA's Office. The Open Records Officer based her denial on the fact that the DA's Office has not conducted any business transaction or activity with respect to the Freeh Group or the Sandusky investigations handled by either the Freeh Group or the OAG.

### **LEGAL ARGUMENT**

Mr. Bagwell's RTKL request does not implicate public records of the DA's Office. Accordingly, his request was properly denied.

The RTKL defines the term "record" to encompass "[i]nformation, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." 65 P.S. § 67.102 (emphasis added). Plainly, the precise words chosen by the General Assembly illustrate that there is only one agency at issue: the one who had the documented transaction or activity. Thus, the phrase "of the agency" amplifies the earlier "an agency" to demonstrate that they are, in fact, one and the same agency under this definition. In other words, there are two components to the definition: an agency must have had a transaction or activity, and that agency (or "the agency" in the General Assembly's parlance) must have created, received or retained documentation of the activity or transaction. The burden of proving that a requested piece of information is a "public record" lies with the requester. *Barkeyville Borough v. Stearns*, 35 A.3d 91, 94 (Pa. Commw. Ct. 2012).

Here, the OAG conducted a grand jury investigation and ultimately prosecuted Sandusky. The Freeh Group was retained by Penn State – not the OAG – to investigate the University with respect to Sandusky's activities. Mr. Fina separated from the OAG in January 2013 and, since then, has been employed by the DA's Office. The DA's Office is wholly separate from the

OAG. The DA's Office did not participate in either the OAG criminal investigation into Sandusky's abuse or the Freeh investigation into Penn State's involvement. Furthermore, the DA's Office has not conducted any business transactions or activities with the Freeh Group. Since his separation from the OAG and since becoming employed by the DA's Office, Mr. Fina has not conducted any business activities or transactions with any OAG investigations, including the Sandusky investigation or the investigations and prosecutions of Penn State administrators, nor has he had any business activities or transactions with the Freeh Group.

The instant RTKL request was directed to the DA's Office and, therefore, seeks records of the DA's Office. Again, the DA's Office has not conducted any activities relating to the Sandusky criminal investigation and prosecution or the Freeh investigation. Indeed, there are no official activities of the DA's Office being implicated by the request. Rather, the activities at issue were conducted by the OAG or the Freeh Group, and any "record" of the OAG's activities relating to the Sandusky or Penn State investigations would be in the possession of the OAG.<sup>2</sup> Mr. Bagwell cannot direct a request to the DA's Office, a separate agency, for documentation pertaining to the OAG's activities.

Moreover, there is absolutely no support for Mr. Bagwell's broad and absurd argument that the General Assembly intended that the requirements set forth in the RTKL would travel with individual public employees should they happen to subsequently be employed by a completely different public agency. Rather, the statute plainly is directed at agencies, not individuals, that have conducted public business or transactions and documented said activities. As a former employee, Mr. Fina is now a private citizen *vis a vis* the OAG. That he happens to

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<sup>2</sup> Mr. Bagwell apparently has made numerous RTKL requests to the OAG for these emails and other related documents, which he has catalogued on his personal website. *See* <http://www.bagwellforpennstate.com/right-to-know-law-requests/> (visited September 11, 2013).

be employed by another public agency does not mean that any personal communications he currently may have are subject to access via a request to his current employer. Such a convoluted interpretation of the statute would have far-reaching consequences and provide far greater access than the General Assembly intended.

Because Mr. Bagwell has not met his burden of proving, as a threshold matter, that the requested records are “public records” of the DA’s Office, the denial of his request should be affirmed. Moreover, given this threshold determination, his request for an in camera inspection of documents is unwarranted and should be denied.

Respectfully submitted,

/s/ Brad P. Bender  
Brad P. Bender  
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Date: September 12, 2013

# **EXHIBIT A**

**COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF OPEN RECORDS**

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**RYAN BAGWELL**  
**Complainant,**

**vi.**

**PHILADELPHIA DISTRICT  
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**DOCKET # AP 2013-1586**

**DECLARATION OF ASSISTANT DISTRICT ATTORNEY BRAD P. BENDER  
IN OPPOSITION TO THE APPEAL OF JAMES ANDERSON**

I, Assistant District Attorney Brad P. Bender, intending to be legally bound and subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities), declare as follows:

1. Frank G. Fina currently serves as an Assistant District Attorney with the Philadelphia District Attorney's Office ("DA's Office").
2. Mr. Fina previously served as the Chief Deputy Attorney General of the Criminal Prosecutions Section for the Pennsylvania Office of Attorney General ("OAG").
3. Mr. Fina resigned his position with the OAG, effective January 18, 2013, and has been employed as an Assistant District Attorney with the DA's Office since then.
4. The DA's Office is wholly separate from the OAG.
5. The DA's Office did not participate in either the OAG criminal investigation into Sandusky's abuse or the Freeh investigation into Penn State's involvement.
6. The DA's Office has not conducted any business transactions or activities with the Freeh Group.

7. Since his separation from the DA's Office, Mr. Fina has not conducted any business activities or transactions with any OAG investigations, including the Sandusky investigation or the investigations and prosecutions of Penn State administrators, nor has he had any business activities or transactions with the Freeh Group.

I declare under penalty of perjury under the laws of the Commonwealth of Pennsylvania that the foregoing is true and correct.

Date: September 12, 2013

/s/ Brad P. Bender

Brad P. Bender