



***VIA ELECTRONIC MAIL***

December 17, 2013

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](mailto:jschnee@pa.gov)

**Re: Bagwell v. Pennsylvania Department of Education, Docket #AP 2013-1753;  
Reply of The Pennsylvania State University to Requester's Rebuttal**

Dear Appeals Officer Schnee:

In your email dated November 12, 2013, you provided a schedule for the parties to file additional evidence and/or legal support with respect to this appeal. No party filed objections to this schedule. Although Mr. Bagwell complied with this schedule initially by submitting additional evidence and argument on November 22, 2013, he has since offered two additional submissions well outside the time frame given to the parties.<sup>1</sup> However, to the extent that you are inclined to consider Mr. Bagwell's late-filed submissions, The Pennsylvania State University ("Penn State" or "University") respectfully requests that you also consider this brief reply.

### **REPLY ARGUMENT**

In his "reply" dated December 9, 2013, and his "rebuttal" dated December 16, 2013, Mr. Bagwell challenges the University's assertion and invocation of the attorney-client privilege and the attorney-work product doctrine to certain documents specifically identified in the Index attached to its December 5, 2013 submission (hereinafter "Penn State Index"). Contrary to Mr. Bagwell's position, the University has offered evidence to show that it hired certain attorneys and law firms, including Lanny Davis and Associates, and Freeh, Sporkin &

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<sup>1</sup> In his "rebuttal," Mr. Bagwell claims that evidence such as the Consent Decree between Penn State and the National Collegiate Athletic Association ("Consent Decree") was "discovered on December 14, 2013." The Consent Decree was made publically available on July 23, 2012.  
<http://news.psu.edu/story/147825/2012/07/23/athletics/president-ericksons-statement-regarding-ncaa-consent-decree>

Sullivan LLP (“FSS”), to provide legal advice and counsel. *See* Affidavit of Frank Guadagnino attached to October 11, 2013, submission and Exhibit 4 thereto (FSS engagement letter), and Supplemental Affidavit of Frank Guadagnino attached to December 5, 2013, submission. Penn State also submitted evidence that it properly invoked and did not waive its attorney-client and/or attorney-work product privileges with respect to specific documents identified on the Penn State Index. *Id.*, *see also* Affidavit of Janine Andrews attached to December 5, 2013 submission.

Mr. Bagwell ignores established authority and the evidence of record. He asserts, without citation, that the attorney-client privilege “offers no protection from disclosure to documents.” There is no basis for this argument. Pennsylvania courts consistently hold the opposite – that the attorney-client privilege protects confidential communications between an attorney and his/her client, which includes both oral and written communications. *See e.g., Board of Sup’rs of Milford Tp. V. McGogney*, 13 A.3d 569 (Pa. Cmwlth. 2011) (applying the attorney-client privilege to documents); *McElwee v. Leber*, 2002 WL 32085677 (Pa. Com. Pl., Dec. 9, 2002) (“The term communication includes written communications by the client to the attorney.”); *Levy v. Senate of Pennsylvania*, 65 A.3d 361 (Pa. 2013) (“[T]he determination of the applicability of the attorney-client privilege does not turn on the category of the information ... or the category of a document. ... Instead, the relevant question is whether the content of the writing will result in disclosure of information otherwise protected by the attorney-client privilege. For example, descriptions of legal services that address the client’s motive for seeking counsel, legal advice, strategy or other confidential communications are undeniably protected under the attorney client privilege.”); *Sedat, inc. v. Dep’t of Environ. Resources*, 163 Pa. Cmwlth. 29; 641 A.2d 1243 (1994) (applying attorney-client privilege to memorandum written by departmental attorney in response to request for legal advice from department administrator); *In re Investigating Grand Jury of Philadelphia County*, 527 Pa. 432; 593 A.2d 402 (1991) (holding that a client’s handwritten notes regarding privileged communications between client and their counsel is protected under attorney-client privilege).

Mr. Bagwell also relies on various sources, such as language in press releases and the Consent Decree, to argue that Penn State has somehow waived its attorney-client privilege and/or work-product privilege with respect to the documents at issue on appeal. The documents cited by Mr. Bagwell from completely separate contexts are irrelevant to this appeal. The University may have made limited waivers of privilege with respect to specific material in other contexts,<sup>2</sup> but there is no evidence that the University has ever waived the attorney-client or attorney-work product privileges for the documents at issue here. To the

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<sup>2</sup> The limitation of Ms. Andrews’ Affidavit is clear. She avers that “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 on the Index attached as Exhibit 1 hereto.”

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contrary, the evidence of record shows that the University has not acted to waive these privileges with respect to the documents specifically identified on the Penn State Index. *See* Andrews Affidavit. Mr. Bagwell offers no evidence to show otherwise.

### CONCLUSION

Based on the evidence and the argument provided by Penn State in its previous submissions and in this Reply, Penn State respectfully requests that Mr. Bagwell's appeal be denied.

Respectfully submitted,



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Associate General Counsel

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