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SEP 27 2023

OFFICE OF OPEN RECORDS

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PENNSYLVANIA DEPARTMENT
OF EDUCATION,

Petitioner,

v.

WYATT MASSEY,

Respondent.

and

THE PENNSYLVANIA STATE UNIVERSITY,

Direct Interest

Participant

Docket No. _____ C.D. 2023

PETITION FOR REVIEW

(Appellate Jurisdiction)

The Pennsylvania Department of Education (Department), through its undersigned counsel, petitions this Honorable Court to review the September 1, 2023, Final Determination of the Office of Open Records (OOR) and the denial of the Request for Reconsideration dated September 20, 2023, in OOR Docket No. AP 2023-1492, based on the following:

Statement of Jurisdiction

1. This Court has appellate jurisdiction over this matter under section 1301(a) of the Right-to-Know Law (RTKL), 65 P.S. § 67.1301(a), and section 763(a)(2) of the Judicial Code, 42 Pa.C.S. § 763(a).
2. The Court exercises de novo standard of review and plenary scope of review of questions of both law and fact in appeals from determinations of the OOR, independently reviews OOR's

orders and may substitute its own findings of fact for that of the OOR. *Bowling v. Office of Open Records*, 75 A.3d 453 (Pa. 2013).

Parties

3. The Department is a Commonwealth agency as defined in section 102 of the RTKL, 65 P.S. § 67.102, and subject to the RTKL pursuant to section 301 of the RTKL, 65 P.S. § 67.301.
4. Wyatt Massey (Requester) submitted to the Department the request for records (RTKL Request) that is the subject of this Petition for Review.

Factual and Procedural Background

5. On or about May 18, 2023, the Department received from Requester a RTKL Request (the Request) seeking:

“(1) An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Eric Hagarty’s role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.

(2) An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Khalid Mumin’s role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.

(3) An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.

(4) An electronic copy of all materials hosted on Diligent in relation to the November 16, 2022 meeting of Penn State's Academic Affairs, Research and Student Life committee, of which Mr. Hagarty was a member."

6. By letter dated May 25, 2023, the Department advised Requester that it would require up to an additional 30 days (until June 26, 2023) to respond to the Request.
7. By letter dated June 26, 2023, the Department issued a Final Response which explained that PDE does not have possession, custody, or control of the requested records and that it is not a denial of access where the agency does not possess records and there is no legal obligation to obtain them.
8. On or about July 5, 2023, Requester appealed to OOR, Challenging the Department's Final Response (the Appeal).
9. On or about July 11, 2023, OOR issued the parties a letter notice (the Notice of Appeal) instructing the parties to submit information and legal argument in support of their positions in the Appeal no later than seven (7) business days from the date of the Notice of Appeal.
10. On or about July 18, 2023, the Department submitted additional information in support of its position in the Appeal and argued that the Department did not have possession, custody, or control of the records requested. The Department submitted a supporting Affidavit from Shannon S. Harvey, Vice President and Secretary, Office of the Board of Trustees at the Pennsylvania State University (PSU) indicating that the Department does not have the ability to print or download documents on Diligent and that the ability to print and download documents is controlled by PSU. Accordingly, the Department submitted the supporting affidavit of Kari Worley, Executive Assistant with the Department, indicating that former Acting Secretary Hagarty and Secretary Mumin did not screen capture, save, print, or in any

way maintain information accessible on Diligent outside of the Diligent software. The Department argued that the Request is clearly distinguishable from the request in *Bagwell v. Pennsylvania Department of Education*. *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013) since the Department has no means to obtain a copy of the information on Diligent and has no means to compel PSU to provide copies of the information to the Department, and thus the Department does not have possession, custody, or control of the requested documents. The Department also argued that the RTKL at 65 P.S. § 67.705 holds that an agency is not required to create a record that does not currently exist. The Request asked for screen shots and the Department argued that creating a screen shot would constitute the creation of a record which is not required under the RTKL.

11. On or about September 1, 2023, OOR issued its Final Determination granting the Appeal in part and denying the Appeal in part. OOR denied the Appeal with respect to prongs one (1) and (2) of the Request holding that the Department is not required to create a document in response to the Request and therefore is not required to create the screenshots requested therein. OOR granted the Appeal in part finding that PDE has custody, possession, or control of documents hosted on Diligent and ordered the Department to provide all documents responsive to prongs three (3) and four (4) of the Request.
12. On or about July 15, 2023, the Department filed a Petition for Reconsideration with the OOR alleging that the OOR erred in its ruling that the documents hosted on Diligent are no different than the records at issue in *Bagwell*. The Department argued that the OOR's ruling that the Department is not required to create documents under Section 705 of the RTKL was correct, however such ruling is contradictory to the OOR's ruling that the Department is required to produce the documents requested under prongs three (3) and four (4) of the

Request. PDE asserted that it does not have the ability to produce the documents requested under prongs three (3) and four (4) of the Request. On or about September 16, 2023 PSU filed a similar petition for reconsideration with the OOR.

Determination Sought to be Reviewed

13. By Final Determination dated September 1, 2023, OOR denied the Appeal with respect to prongs one (1) and (2) of the Request holding that the Department is not required to create a document in response to the Request and therefore is not required to create the screenshots requested therein.
14. By Final Determination dated September 1, 2023, OOR granted the Appeal in part finding that PDE has custody, possession, or control of documents hosted on Diligent as they are no different than the records at issue in *Bagwell*. OOR ordered the Department to provide all documents responsive to prongs three (3) and four (4) of the Request. Specifically, the OOR required the Department to produce “[a]n electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat” and “[a]n electronic copy of all materials hosted on Diligent in relation to the November 16, 2022 meeting of Penn State’s Academic Affairs, Research and Student Life committee, of which Mr. Hagarty was a member.” *Wyatt Massey v. Pa. Department of Education*, OOR Dkt. No. AP 2023-1492. A true and correct copy of the OOR’s Final Determination is attached hereto as exhibit A.
15. By Response to Petitions for Reconsideration dated September 20, 2023, OOR denied the Department and PSU’s petitions for reconsideration. A true and correct copy OOR’s Response to Petitions for Reconsideration is attached hereto as exhibit B.

Objections to the Determination

16. The OOR erred in finding that the Department has possession, custody, or control of Diligent.

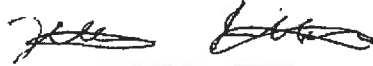
17. The OOR erred in finding that the Department has possession, custody, or control of the documents in Diligent.
18. The OOR erred in finding that the documents in Diligent are “public records”.
19. The OOR erred in finding that the documents in Diligent are “accessible” to the Department.
20. The OOR erred in finding that the Department “received” the documents in Diligent.
22. The OOR erred in finding that the documents on Diligent are records of the Department.
23. The OOR erred in concluding that the documents hosted on Diligent are no different than the records at issue in *Bagwell*.
24. The OOR erred in ordering the Department to produce records responsive prongs 3 and 4 of the Request, specifically, “[a]n electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat” and “[a]n electronic copy of all materials hosted on Diligent in relation to the November 16, 2022 meeting of Penn State’s Academic Affairs, Research and Student Life committee, of which Mr. Hagarty was a member.”

Relief Sought

WHEREFORE, Petitioner, Pennsylvania Department of Education, respectfully requests that this Honorable Court REVERSE the Final Determination of OOR and affirm the Department’s denial of the Request on the basis that PDE does not have possession, custody or control of the requested documentation and grant such other relief as the Court deems appropriate.

Signature submitted on the following page.

Respectfully submitted,



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Date: September 27, 2023

EXHIBIT

“A”



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:
	:
WYATT MASSEY AND SPOTLIGHT PA,	:
Requester	:
	:
v.	: Docket No.: AP 2023-1492
	:
PENNSYLVANIA DEPARTMENT OF	:
EDUCATION,	:
Respondent	:
	:
And	:
	:
THE PENNSYLVANIA STATE	:
UNIVERSITY,	:
Direct Interest Participant	:

FACTUAL BACKGROUND

On May 18, 2023, Wyatt Massey, a reporter with Spotlight PA (collectively “Requester”), submitted a request (“Request”) to the Pennsylvania Department of Education (“Department” or “PDE”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

1. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Eric Hagarty’s role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.
2. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Khalid Mumin’s role on the Penn

State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.

3. An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.
4. An electronic copy of all materials hosted on Diligent in relation to the November 16, 2022 meeting of Penn State's Academic Affairs, Research and Student Life committee, of which Mr. Hagarty was a member.

On June 26, 2023, after extending its time to respond by thirty days, *see* 65 P.S. § 67.902(b)(2), the Department denied the Request, stating that the records do not exist within the Department's possession, custody or control.

On July 6, 2023, the Requester filed an appeal with the Office of Open Records ("OOR"), challenging the denial and stating grounds for disclosure.¹ Specifically, the Requester states that "controlling law on this issue makes clear that the records are public." The Requester cites to three cases in support of his argument: (1) *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013); (2) *Edinboro Univ. of Pa. v. Ford*, 18 A.3d 1278 (Pa. Commw. Ct. 2010); and (3) *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 939 (Pa. Commw. Ct. 2014), *aff'd*, 124 A.3d 1214 (Pa. 2015). The OOR invited both parties to supplement the record and directed the Department to notify any third parties of their ability to participate in this appeal. 65 P.S. § 67.1101(c).

¹ In the appeal, the Requester granted the OOR an additional thirty days to issue this Final Determination. *See* 65 P.S. § 67.1101(b)(1).

On July 18, 2023, the Department submitted a position statement reiterating its grounds for denial. In support, the Department provided the attestations of Angela Riegel (“Riegel Attestation”), the Department’s Open Records Officer; Kari Worley (“Worley Attestation”), an Executive Assistant with the Department; and Shannon Harvey (“Harvey Attestation”), the Assistant Vice President and Secretary, Office of the Board of Trustees at The Pennsylvania State University.

On July 14, 2023, The Pennsylvania State University (“University” or “Penn State”) submitted a Request to Participate in the appeal pursuant to 65 P.S. § 67.1101(c). The University argues, in part, that the Department “does not have possession, custody or control of the requested documents....” On the same day, the OOR granted the request to participate.

LEGAL ANALYSIS

The Department is a Commonwealth agency subject to the RTKL. 65 P.S. § 67.301. Records in the possession of a Commonwealth agency are presumed to be public, unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. As an agency subject to the RTKL, the Commonwealth is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). 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. Scolforo*, 18 A.3d 435, 439 (Pa. Commw. Ct. 2011) (quoting *Pa. Dep’t of Transp. v. Agric. Lands Condemnation Approval Bd.*, 5 A.3d 821, 827 (Pa. Commw. Ct. 2010)).

The Department asserts that the responsive records do not exist in its possession, custody or control. By way of background, the Department explains that Eric Hagarty (“Hagarty”) “served as Pennsylvania Acting Secretary of Education beginning on or about April 2022 and he left

[C]ommonwealth service on or about January 15, 2023.” Dr. Khalid Mumin (“Mumin”) “began service as Pennsylvania Acting Secretary of Education on or about January 17, 2023 and was confirmed as Pennsylvania Secretary of Education on or about June 26, 2023.” The Department further states that the “Pennsylvania Secretary of Education serves [as] an Ex Officio Voting Member of the Pennsylvania State University Board of Trustees (“PSU Board”).” As such, Hagarty was an ex officio voting member from April 2022 to January 2023, and Mumin became an ex officio voting member of the PSU Board in January 2023.

With respect to Diligent, the Department explains that Diligent “is board management software used by the PSU Board as a platform for sharing documents and other information with the Trustees.” According to the Department, the PSU Board “maintains all aspects of Diligent, including with respect to access, controls, posting of documents, deleting documents and other posting information.” The Department contends that Hagarty and Mumin “do not have the ability to post or delete anything in Diligent” and that “there is no [Department] record that indicated ... Hagarty formerly or ... Mumin currently printed or downloaded the requested documents.”

In response to a request for records, “an agency shall make a good faith effort to determine if ... the agency has possession, custody or control of the record[.]” 65 P.S. § 67.901. While the RTKL does not define the term “good faith effort,” in *Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr.*, the Commonwealth Court stated:

As part of a good faith search, the open records officer has a duty to advise all custodians of potentially responsive records about the request, and to obtain all potentially responsive records from those in possession.... When records are not in an agency’s physical possession, an open records officer has a duty to contact agents within its control, including third-party contractors.... After obtaining potentially responsive records, an agency has the duty to review the records and assess their public nature under ... the RTKL.

185 A.3d 1161, 1171-72 (Pa. Commw. Ct. 2018) (citations omitted), *aff'd*, 243 A.3d 19 (Pa. 2020).

An agency must show, through detailed evidence submitted in good faith from individuals with knowledge of the agency's records, that it has conducted a search reasonably calculated to uncover all relevant documents. *See Burr v. Pa. Dep't of Health*, OOR Dkt. AP 2021-0747, 2021 PA O.O.R.D. LEXIS 750; *see also Mollick v. Twp. of Worcester*, 32 A.3d 859, 875 (Pa. Commw. Ct. 2011).

In support of the Department's argument that it does not possess responsive records, the Riegel Attestation² states, in part, as follows:

3. PDE does not have any records in its possession or under its custody or control that are responsive to the ... [R]equest.
4. I have confirmed this by personally checking with the appropriate PDE staff member Kari Worley, Executive Assistant.
5. Upon receipt of the Request, the Request was provided to Kari Worley, so that she could inform me as to whether Mr. Hagarty formerly and Dr. Mumin, currently, had any documents relevant to the [R]equest.
6. After Kari Worley was notified of the Request, she discussed the [R]equest with Secretary Mumin.
7. Kari Worley informed me that Mr. Hagarty did not screen capture, save, print, or in any way maintain information accessible on *Diligent* outside of the *Diligent* software.
8. After speaking with Secretary Mumin, Kari Worley informed me that Secretary Mumin did not receive access to *Diligent* until May 8, 2023 and that on the date of the [R]equest, May 18, 2023 Secretary Mumin still had not accessed *Diligent*.

Additionally, the Worley Attestation provides, in part, as follows:

² Under the RTKL, an attestation may serve as sufficient evidentiary support. *See Sherry v. Radnor Twp. Sch. Dist.*, 20 A.3d 515, 520-21 (Pa. Commw. Ct. 2011); *Moore v. Office of Open Records*, 992 A.2d 907, 909 (Pa. Commw. Ct. 2010). In the absence of any evidence that the Department has acted in bad faith, "the averments in [the attestations] should be accepted as true." *McGowan v. Pa. Dep't of Envtl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

2. In my capacity as Executive Assistant, I perform a wide variety of highly responsible management duties such as serving as the primary executive staff assistant to the Secretary and Executive Deputy Secretary of the Pennsylvania Department of Education (PDE). I work and collaborate with the senior leadership team to plan and direct PDE operations.
3. Eric Hagarty served as Pennsylvania Acting Secretary of Education beginning on or about April 2022, and he left [C]ommonwealth service on or about January 15, 2023.
4. Khalid N. Mumin, Ed.d., began serving as Pennsylvania Acting Secretary of Education on or about January 17, 2023 and was confirmed as Pennsylvania Secretary of Education on or about June 26, 2023.
5. As Executive Assistant, I worked closely with Mr. Hagarty during his tenure as Acting Pennsylvania Secretary of Education.
6. Since Secretary Mumin's appointment as Pennsylvania Acting Secretary of Education and currently since being confirmed as Pennsylvania Secretary of Education, as Executive Assistant I have worked closely with Secretary Mumin.
7. The Pennsylvania Secretary of Education serves an Ex Officio Voting Member of the ... [PSU Board].
8. Mr. Hagarty served as an Ex Officio Voting Member of the PSU Board during his term as Pennsylvania Acting Secretary of Education.
9. Dr. Mumin currently serves as an Ex Officio Voting Member of the PSU Board.
10. During his tenure as Acting Secretary, Mr. Hagarty was granted access to *Diligent* individually in his capacity as a trustee to the PSU Board. During Mr. Hagarty's tenure as Acting Secretary he was the only member of PDE who had access to *Diligent* for PSU Board purposes.
11. Secretary Mumin, as Pennsylvania Secretary of Education is currently granted access to *Diligent* individually in his capacity as a trustee to the Trustees. No one else in PDE has access to *Diligent* for PSU Board purposes.
12. As of the date of the Right-to-Know-Law [R]equest at issue in the above captioned appeal, May 18, 2023, Dr. Mumin did not attempt to access *Diligent*.

13. Mr. Hagarty has not screen captured, saved, printed, or in any way maintained information accessible on *Diligent* in any format outside of the *Diligent* software.
14. Secretary Mumin has not screen captured, saved, printed, or in any way maintained information accessible on *Diligent* in any format outside of the *Diligent* software.
15. Mr. Hagarty, while serving as Pennsylvania Acting Secretary of Education was the only member of PDE who had access to *Diligent*.
16. Currently, Secretary Mumin is the only member of PDE who has access to *Diligent*.

Both the Department and University submitted the Harvey Attestation, which states, in part, the following:

2. I am the Assistant Vice President and Secretary, Office of the Board of Trustees at [t]he ... University.... In this capacity, I serve as the elected Secretary of the University with responsibilities as outlined in Section 5.06 of the University Bylaws (Exhibit PSU #1). I am also responsible for the management and operation of the Office of the Board of Trustees including oversight of all activities, meetings, agenda preparation and filing of minutes, Trustee certifications and questionnaires in compliance with legal requirements and University policy to ensure the Board is as effective and efficient as possible in the conduct of its oversight responsibilities.

...

4. For approximately three years, the University's Office of the Board of Trustees (the "Board Office") has utilized the services of Diligent as a platform for sharing documents and other information with the members of its Board of Trustees ("Trustees"). Diligent Boards is an online board portal tool that facilitates secure digital communication from the Board Office to Trustees. We utilize Diligent to securely share board meeting agendas, meeting materials, and other documents.
5. The Board Office staff, with the assistance of other University staff members as appropriate, maintains all aspects of the Diligent site, including with respect to access controls, posting of documents, deleting documents and posting other information.

6. Former Acting Secretary of Education Eric Hagarty was an ex officio Trustee from April of 2022 to January 2023. Dr. Mumin became an ex officio member of the Board of Trustees in January of 2023 when he was appointed to serve as the Acting Secretary of the Department....
7. Mr. Hagarty was granted Diligent access on May 18, 2022 and removed from access on January 22, 2023. Dr. Mumin was granted Diligent access on May 3, 2023.
8. The Board Office controls the Secretary's ability to print or download any document from the Diligent platform. The Secretary does not have the ability to post or delete anything in the Diligent platform.
9. Access is given to the Secretary of Education individually, in their capacity as a Trustee. No one else in the ... Department ... is given access to Diligent by the University.
10. The Secretary, like all other members of the Board of Trustees is subject to the University's Bylaws and Board of Trustees' Standing Orders, attached herein as Exhibits PSU #1 and PSU #2, stating in relevant part:

"Members of the Board of Trustees stand in a fiduciary relationship to the University which reposes special confidence in each member. Members of the Board of Trustees shall act in good faith, with due regard to the interests of the University, and shall comply with the fiduciary principles of conduct in addition to any other state or federal requirements. 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."

Section 8.07 of the Bylaws (Fiduciary Duty) (See Exhibit PSU #1)

"It is expected that each Trustee will

(x) Maintain the confidentiality of confidential information without exception; it being recognized and understood that for this purpose 'confidential information' includes nonpublic information concerning the University, including its finances, operations and personnel, as well as nonpublic information about internal Board discussions and dynamics;"

Order VIII, Section 1(d)(x) (Expectations of Membership) (See Exhibit PSU #2)

The Requester, in response, contends that “controlling law on this issue makes clear that the records are public.” The Requester relies on *Bagwell v. Pa. Dep’t of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013), in support of his claim. In *Bagwell*, the Commonwealth Court held that certain records received by the Secretary of the Department in his ex officio capacity as a board member of PSU Board constituted “records” that may be subject to public access. *Id.* at 90. The RTKL request at issue in *Bagwell* sought “copies of letters, emails, reports and memoranda received by Secretary of Education Ronald J. Tomalis....” *Id.* at 83. The Court determined that “the records the Secretary receives as a Board member are received by the Department pursuant to its statutory function as supporter and influencer of education at state-related institutions. Because the records are received by a Commonwealth agency to enable it to perform its statutory governmental function, they qualify as ‘records’ under the RTKL.” *Id.* at 92.

Both the Department and the University attempt to distinguish the within matter from the facts set forth in *Bagwell*. Specifically, the Department asserts that unlike *Bagwell*, the instant Request “does not ask for any physical documents such as letters, emails, reports and memoranda.” Similarly, the University argues that the “documents were not received by the Secretary. To receive a document, it must come into one’s possession, that is, one must receive a modicum of control over the document.”

Contrary to the arguments raised, the documents hosted on Diligent are no different than the records at issue in *Bagwell*. In particular, Item 3 of the Request seeks materials hosted on Diligent related to the August 2022 PSU Board retreat, while Item 4 seeks materials hosted on Diligent “in relation to the November 16, 2022 meeting of Penn State’s Academic Affairs, Research and Student Life committee, of which ... Hagarty was a member.” Notably, these documents were accessible to Hagarty formerly and are accessible to Mumin currently for the sole

purpose of allowing them to carry out their respective role as an Ex Officio Voting Member of the PSU Board. Accordingly, *Bagwell* controls in this matter, and responsive records hosted on Diligent are accessible.³

The Department further maintains that it is not required to create a record that does not exist. Specifically, the Department argues that “[a]sking PDE to take electronic screen shots of the records in Diligent would require PDE to create records.”

Section 705 of the RTKL provides that when responding to a request, “an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record.” 65 P.S. § 67.705; *see also Moore*, 992 A.2d at 909 (holding that an agency cannot be made to create a record that does not exist). Here, Items 1 and 2 of the Request seek an “electronic screenshot of all folders and files hosted on Diligent” relative to Hagarty and Mumin’s roles on the PSU Board. The Worley Attestation states that neither Hagarty nor Mumin have “screen captured ... information accessible on Diligent in any format outside of the Diligent software.” Worley Attestation, ¶¶ 13-14. Therefore, based on the evidence provided, the Department has met its burden of proof that it does not possess the screenshots responsive to Items 1 and 2 of the Request, and, pursuant to 65 P.S. § 67.705, the Department is not required to create a record, i.e., a screen shot, in order to respond to the Request. *See Hodges v. Pa. Dep’t of Health*, 29 A.3d 1190, 1192 (Pa. Commw. Ct. 2011); *see also Pa. Dep’t of Health v. Mahon*, 283 A.3d

³ The Department did not raise any RTKL exemptions or other legal authority for denying access to the records. The University argues that “to the extent that documents on the Diligent platform are determined to be within the possession, custody, or control of the PDE, the documents would be subject to exclusions and the exceptions provided in the RTKL under 65 P.S. § 67.708(b), as well as any other relevant protections afforded through other legal authorities.” Notably, however, the University did not identify what RTKL exemptions or “other legal authorities” are applicable and did not submit any evidence in support of this argument. Although the University references its Bylaws, which state, in part, that “[i]t is expected that each Trustee will ... [m]aintain the confidentiality of confidential information,” such Bylaws to not have the force and effect of law.

929, 936 (holding that, when there is evidence that a record does not exist, “[i]t is questionable to what degree additional detail and explanation are necessary....”); *Campbell v. Pa. Interscholastic Athletic Ass’n*, 268 A.3d 502 (Pa. Commw. Ct. 2021) (noting that an agency need only prove the nonexistence of records by a preponderance of the evidence, the lowest evidentiary standard, and is tantamount to a “more likely than not” inquiry); *Moore*, 992 A.2d at 909.

CONCLUSION

For the foregoing reasons, the appeal is **granted in part** and **denied in part**, and the Department is required to provide all records responsive to Items 3 and 4 of the Request within thirty days. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal or petition for review 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. 65 P.S. § 67.1303. However, as the quasi-judicial tribunal adjudicating this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁴ This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: September 1, 2023

/s/ Magdalene C. Zeppos-Brown
MAGDALENE C. ZEPPOS-BROWN, ESQ.
DEPUTY CHIEF COUNSEL

Sent via OOR e-file portal: Wyatt Massey; Angela Riegel, AORO; Zachary Stritzinger, Esq.;
and Natalie Voris Grosse, Esq.

⁴ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

EXHIBIT

“B”

RESPONSE TO PETITIONS FOR RECONSIDERATION

DATE ISSUED AND MAILED: September 20, 2023

IN RE: *Wyatt Massey and Spotlight PA v. Pa. Dep't of Educ. and the Pennsylvania State Univ.*, OOR Dkt. AP 2023-1492

The Office of Open Records (“OOR”) is in receipt of Petitions for Reconsideration (“Petitions”) submitted by the Pennsylvania Department of Education (“Department”) and the Pennsylvania State University (“PSU”), respectively. The Petitions largely challenge the underlying Final Determination’s holding that documents hosted on Diligent¹ are subject to public access under Pennsylvania’s Right-to-Know Law (“RTKL”).

I have reviewed the Final Determination, as well as the Petitions, and I find the arguments set forth in the Petitions to be unavailing. The Request at issue seeks two categories of records: 1) electronic screenshots “of all folders and files hosted on Diligent” as related to the Department’s former Acting Secretary and current Secretary, and 2) records hosted on Diligent concerning the former Department Acting Secretary’s role as an ex officio member of the PSU Board of Trustees. The Final Determination treats the two categories of records differently. It finds that the Department met its burden of proving that it does not possess the requested screenshots, and is not required to create them; however, it grants access to the records hosted on Diligent. Both the Department and PSU argue that this holding is contradictory. However, the first category of records (electronic screenshots of folders and files) clearly contemplates the creation of a record that does not currently exist,² while the second category of records (records hosted on Diligent) asks the Department to provide access to currently existing records/information. I cannot find that the holding is contradictory or warrants reconsideration.

The second category of records, those hosted on Diligent, are clearly subject to access under *Bagwell v. Pa. Dep't of Educ.*, 76 A.3d 81 (Pa. Commw. Ct. 2013). These records are not merely PSU records, but records of the PSU Board of Trustees, and specifically concern the former Department Acting Secretary’s participation on the Board.³ The Commonwealth Court held in

¹ The Final Determination quotes the Department, who explains that Diligent “is board management software used by the PSU Board as a platform for sharing documents and other information with the Trustees.”

² A request for an electronic screenshot of folders and files is no different than asking an agency to take a photograph of a filing cabinet or box of records. While the documents contained within constitute records under the RTKL, 65 P.S. § 67.102, the organizational scheme is not its own record.

³ Item 3 of the Request seeks “all materials ... related to the August 2022 [PSU] Board of Trustees retreat,” while Item 4 seeks “all materials ... in relation to the November 16, 2022 meeting of [PSU]’s Academic Affairs, Research and Student Life committee, of which [the former Acting Secretary] was a member.”

Bagwell that “the records the Secretary receives as a Board member are received by the Department pursuant to its statutory function as supporter and influencer of education at state-related institutions.” *Id.* at 92. Both the Department and PSU argue that the records’ presence on Diligent somehow renders them inaccessible under the RTKL because access to Diligent is read-only, making the Department unable to print or download documents. There is no legal support for these arguments. Agencies or other parties that may possess public records cannot save or store records in software or databases as “read-only” and then argue the records are incapable of duplication; permitting that conduct would lead to an absurd result wherein the public would be unable to obtain public records. Further, it would encourage agencies in similar situations to use file sharing platforms and software to avoid releasing those records. The Commonwealth Court has interpreted the RTKL to avoid such loopholes to access. *See, e.g., Commonwealth v. Cole*, 52 A.3d 541, 549 (Pa. Commw. Ct. 2012) (finding that pulling information from a database does not constitute the creation of a record because “[t]o hold otherwise would encourage an agency to avoid disclosing public records by putting information into electronic databases”). The fact remains that Department secretaries have access to public records on Diligent because of their status as an ex officio member of the PSU Board of Trustees.

As explained in *Bagwell*, the records “[d]ocument’ the Department’s participation on PSU’s Board.... The Secretary only has a place on PSU’s Board because he represents the Department. The records he receives to enable him to perform his *ex officio* duties thus evidence the Department’s governmental function of representing the Commonwealth’s education interests on the Board.” *Bagwell*, 76 A.3d at 91. While the Department Secretary in *Bagwell* had physical possession of the documents at issue, it is difficult to sanction an arrangement wherein a Department Secretary is able to view documents containing public information but is then permitted to avoid public disclosure of those documents simply by proclaiming they have never actually *received* them.⁴ When Department secretaries are granted access to Diligent, they clearly **receive** the documents and information necessary to enable them to perform their duties. Regardless, I note that the definition of “record” under the RTKL does not necessarily require physical receipt; indeed, the document/information must merely be “created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency.” 65 P.S. § 67.102. To the extent that access on Diligent does not constitute receipt, *Bagwell* makes clear that the records are retained on Diligent in connection with a Department

⁴ PSU argues that the Final Determination “would seem to include information on the Diligent platform that the Commonwealth Secretary might not have ever viewed, which highlights the untenable nature of the ... Final Determination when contrasted with the legislative intent of the RTKL.” However, this argument is speculative, and it is unclear how PSU would demonstrate that the former Department Acting Secretary has not reviewed these records. This alleged ambiguity exists no matter how the records would have been transmitted, as there is no guarantee that an individual has actually reviewed the material transmitted to them. Regardless, the definition of “record” in the RTKL does not impose any requirement of proof that an individual has reviewed the document. 65 P.S. § 67.102.

Secretary's duties. Thus, they remain records of the Department. If the records did not have a connection to Department business or activity, there would not be any reason for a Department Secretary to access the records on Diligent.

The Harvey Attestation explains that "[t]he Board Office controls the Secretary's ability to print or download any document from the Diligent platform." As a result, a situation exists where a third party is directly impeding the public's right to access public records. There is no legal authority for a third party to do so, and pursuant to *Bagwell*, PSU cannot dictate what records may be disclosed. The RTKL is clear that "[a] Commonwealth agency shall provide public records in accordance with this act." 65 P.S. § 67.301(a). How the Department provides these records is within its discretion.

Finally, with respect to PSU's argument that it "reserves the right to raise additional legal arguments should this matter proceed to the judicial system for adjudication," we note that PSU had an ample opportunity to raise and support those arguments before the OOR, and PSU was clearly aware of the Commonwealth Court's holding *Bagwell*. PSU's Request to Participate in this matter acknowledges that "the request may seek information that is subject to protection from disclosure, whether that protection is afforded under the RTKL itself or other legal authorities and doctrines such as a privilege....," but PSU did not provide any evidence in support of withholding records. PSU has had sufficient notice and an opportunity to participate in this appeal as a Direct Interest Participant. Nevertheless, as the record shows, PSU has not developed or supported any grounds for withholding the records at issue, and the consideration of any "additional legal arguments" would mean "the proverbial second bite at the apple." *Highmark Inc. v. Voltz*, 163 A.3d 485, 491 (Pa. Commw. Ct. 2017) (declining to accept additional evidence or remand to the OOR when a third party had an adequate opportunity to submit evidence and defend itself).

For the above reasons, the Petitions are **DENIED**.

Issued by:

/s/ Kyle Applegate

CHIEF COUNSEL

Sent via email and portal to: Wyatt Massey; Zachary Stritzinger, Esq.; Natalie Voris Grosse, Esq.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RECEIVED

PENNSYLVANIA DEPARTMENT OF
EDUCATION,

Petitioner,

v.

WYATT MASSEY,

Respondent.

and

THE PENNSYLVANIA STATE UNIVERSITY,

Direct Interest

Participant

SEP 27 2023

OFFICE OF OPEN RECORDS

Docket No. ____ C.D. 2023

CERTIFICATE OF SERVICE

I, Zachary Stritzinger, Assistant Counsel, Pennsylvania Department of Education, hereby certify that on this 27th day of September, 2023, I served a true and correct copy of the foregoing Petition for Review upon the following in the manner described below:

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