

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	
	:	
Petitioner	:	
	:	
v.	:	No. ____ C.D. 2023
	:	
WYATT MASSEY AND SPOTLIGHT PA,	:	
	:	
Respondents	:	

PETITION FOR REVIEW

Petitioner, The Pennsylvania State University (“Penn State”), by and through its counsel, McNeese Wallace & Nurick LLC, hereby petitions for review of the September 1, 2023 Final Determination of the Pennsylvania Office of Open Records (the “OOR”) entered at docket number AP 2023-1492.

I. Jurisdictional Statement

1. The Commonwealth Court has jurisdiction over this appeal pursuant to Section 1301(a) of the Right-to-Know Law¹ (“RTKL”), 65 P.S. § 67.1301(a).

II. Parties

2. Petitioner is Penn State, a direct interest participant in the proceeding before the OOR.

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

3. This Court has recognized that direct interest participants may petition for review of a final determination of the OOR. *Baron v. Dep't of Hum. Servs.*, 169 A.3d 1268, 1275 (Pa. Cmwlth. 2017).

4. Respondents are Wyatt Massey and Spotlight PA (“Requesters”), who filed the underlying RTKL Request with the Pennsylvania Department of Education (the “Department”).

III. Determination Sought to be Reviewed

5. The determination to be reviewed is the September 1, 2023 Final Determination of the OOR entered at docket number AP 2023-1492, which ordered the Department to provide all documents responsive to Items 3 and 4 of Requester’s RTKL Request. The September 1, 2023 Final Determination of the OOR is attached hereto as “Exhibit A.”

6. The documents sought in Items 3 and 4 are documents belonging to Penn State and hosted on the platform Diligent, a cloud-based software used by the university to host documents for the Penn State Board of Trustees.

IV. Objections to Determination

7. The OOR erred in ordering the disclosure of all documents responsive to Items 3 and 4 of Requester’s RTKL Request because documents belonging to Penn State and hosted on Diligent or in any like software, platform, or manner, are not “public records” as that term is defined in Section 102 of the RTKL, 65 P.S. § 67.102.

8. The OOR erred in ordering the disclosure of all documents responsive to Items 3 and 4 of the Requester's RTKL Request because documents belonging to Penn State and hosted on the platform Diligent or in any like software, platform, or manner, are not in the possession, custody, or control of the Department.

9. To the extent the documents at issue are public records in the possession, custody, or control of the Department, the OOR erred in concluding that the records are not exempt from disclosure by Section 708(b) of the RTKL, 65 P.S. § 67.708(b).

WHEREFORE, The Pennsylvania State University respectfully requests that this Court reverse the September 1, 2023 Final Determination of the Pennsylvania Office of Open Records entered at docket number AP 2023-1492.

McNEES WALLACE & NURICK LLC

By: 

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Date: September 28, 2023

Counsel for The Pennsylvania State University

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 factfinder ... 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 Env'tl. 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).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE PENNSYLVANIA STATE UNIVERSITY,	:	
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	:	
WYATT MASSEY AND SPOTLIGHT PA,	:	
	:	
Respondents	:	

NOTICE TO PARTICIPATE

TO: THE PENNSYLVANIA DEPARTMENT OF EDUCATION and ZACHARY STRITZINGER, ESQUIRE, its attorney:

If you intend to participate in this proceeding in the Commonwealth Court, you must serve and file a notice of intervention under Pennsylvania Rule of Appellate Procedure 1531, Pa.R.A.P. 1531, within 30 days.

McNEES WALLACE & NURICK LLC

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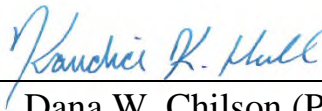
Date: September 28, 2023

Counsel for The Pennsylvania State University

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

McNEES WALLACE & NURICK LLC

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Date: September 28, 2023

Counsel for The Pennsylvania State University

PROOF OF SERVICE

I certify that I have caused a true and correct copy of the foregoing document to be served on this 28th day of September 2023 upon the persons below via First Class Mail, in accordance with Pennsylvania Rule of Appellate Procedure 121, Pa.R.A.P. 121:

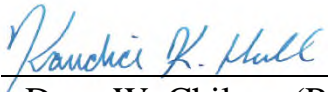
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Date: September 28, 2023

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