

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

THE PENNSYLVANIA STATE	:	
UNIVERSITY and THE PENNSYLVANIA	:	
DEPARTMENT OF AGRICULTURE,	:	
	:	
Petitioners	:	
	:	
v.	:	No. __ C.D. 2023
	:	
WYATT MASSEY and SPOTLIGHT PA,	:	
	:	
Respondents	:	
	:	
Petition of: The Pennsylvania State	:	
University	:	

PETITION FOR REVIEW

Petitioner, The Pennsylvania State University (“Penn State”), by and through its counsel, McNees Wallace & Nurick LLC, hereby petitions for review of the October 6, 2023 Final Determination of the Pennsylvania Office of Open Records (the “OOR”) entered at docket number AP 2023-1520.

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).

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

II. Parties

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

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 Agriculture (the “Department”).

5. The Department was a participant in the proceeding before the OOR.

III. Determination Sought to be Reviewed

6. The determination to be reviewed is the October 6, 2023 Final Determination of the OOR entered at docket number AP 2023-1520, which ordered the Department to provide all documents responsive to Item 2 of Requesters’ RTKL Request and an unredacted copy of a 65-page document produced by the Department during the OOR proceeding. The October 6, 2023 Final Determination of the OOR is attached hereto as “Exhibit A.”

7. The documents sought in Item 2 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

8. The OOR erred in ordering the disclosure of all documents responsive to Item 2 of Requesters' 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.


9. The OOR erred in ordering the disclosure of all documents responsive to Item 2 of the Requesters' 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.

10. To the extent the requested 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).

11. The OOR erred in ordering the disclosure of an unredacted copy of the 65-page document produced during the OOR proceeding because the document contains information except from disclosure by Section 708(b) of the RTKL.

WHEREFORE, The Pennsylvania State University respectfully requests that this Court reverse the October 6, 2023 Final Determination of the Pennsylvania Office of Open Records entered at docket number AP 2023-1520.

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Date: October 25, 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.

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Date: October 25, 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 2023-1520
	:	
PENNSYLVANIA DEPARTMENT OF	:	
AGRICULTURE,	:	
Respondent	:	
	:	
and	:	
	:	
THE PENNSYLVANIA STATE	:	
UNIVERSITY,	:	
Direct Interest Participant	:	

FACTUAL BACKGROUND

On June 29, 2023,¹ Wyatt Massey, a reporter for Spotlight PA (collectively the “Requester”) submitted a request (“Request”) to the Pennsylvania Department of Agriculture (“Department”) pursuant to the Right-to-Know Law (“RTKL”), 65 P.S. §§ 67.101 *et seq.*, seeking:

[Item One:] An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Russell Redding’s role on the Penn State Board of Trustees, including but not limited to his role as a member of

¹ According to the Requester, the Request was initially emailed to the Department on May 18, 2023. However, upon the Requester’s follow-up, the Department informed the Requester that it had no record of the Request having been filed. As such, the Department, upon receiving another copy of the Request, indicated on June 29, 2023 that it would process and expedite the Request for a response. Thus, for purposes of this appeal, the submission date of the Request to the Department is considered to be June 29, 2023 when the Department actually received and began to process the Request.

the Governance and Planning Committee, Legal and Compliance Committee, and the full board of trustees.

[Item Two:] An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.

On July 5, 2023, the Department denied the Request, asserting that it did not have any responsive records in its possession, custody or control.

On that same date, the Requester appealed to the Office of Open Records (“OOR”), challenging the denial and stating grounds for disclosure.² 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).

On July 18, 2023, the Department submitted a position statement reiterating that it does not have any records responsive to Item One of the Request. With regard to Item Two of the Request, the Department indicates that, after receiving this appeal, it conducted “further due diligence” and discovered a responsive document of which it was previously unaware. The responsive document, which consisted of 65 pages, was attached to the Department’s appeal submission. Certain pages of the 65-page record were redacted. The Department argues that the information redacted is exempt under Section 708(b)(11) of the RTKL, which protects confidential

² The Requester granted the OOR additional time to issue a final determination. See 65 P.S. § 67.1101(b)(1) (“Unless the requester agrees otherwise, the appeals officer shall make a final determination which shall be mailed to the requester and the agency within 30 days of receipt of the appeal filed under subsection (a).”).

proprietary information from disclosure. 65 P.S. § 67.708(b)(11). In support of its position, the Department submitted the attestations of Shannon Harvey, Assistant Vice President and Secretary, Office of the Board of Trustees/Secretary of the Pennsylvania State University, and Susan West, the Department's Open Records Officer. Also attached to the Department's submission were "Amended and Restated Bylaws" and "Standing Orders of the Board of Trustees" for the Pennsylvania State University.

On July 24, 2023, the Pennsylvania State University ("University") submitted a Request to Participate in the appeal pursuant to 65 P.S. § 67.1101(c). On the same day, the OOR granted the Request to Participate. As part of its Request to Participate, the University submitted a position statement, arguing that any records residing on Diligent are not public records under the RTKL and are not within the possession, custody or control of the Department. As for any documents printed or downloaded from Diligent and in the possession of the Department's Secretary, the University acknowledges that those records would be considered "public" and in the Department's possession for purposes of the RTKL. Like the Department, the University maintains that the information redacted consists of confidential proprietary information under Section 708(b)(11) of the RTKL; the University also cites to Section 708(b)(10), relating to internal, predecisional deliberations, as a basis for the redactions made. 65 P.S. §§ 67.708(b)(10) and (11). In support of its position, the University provides a copy of the same Harvey attestation submitted by the Department, and copies of the University's bylaws and standing orders.

After securing an additional extension of time from the Requester in which to issue its decision, the OOR, on September 18, 2023, requested that the University and Department submit evidence in support of their position that the redacted information is confidential proprietary information. On September 25, 2023, the University filed a supplemental submission, which

included a sworn affidavit from its Senior Vice President for Finance and Business/Treasurer/Chief Financial Officer, Sara Thorndike. The Department did not submit any additional information in response to the OOR's inquiry.

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 Department is required to demonstrate, “by a preponderance of the evidence,” that records are exempt from public access. 65 P.S. § 67.708(a)(1). This burden also applies to third parties arguing an exemption. *See Highmark, Inc. v. Voltz*, 163 A.3d 485, 490 (Pa. Commw. Ct. 2017) (“The party asserting an exemption bears the burden of proving the exemption applies”). 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)).

1. The appeal is moot as to the records produced.

During the course of this appeal, the Department provided the Requester with a 65-page document which contained certain redacted information. Insofar as the Request sought the unredacted portions of that record, the appeal is dismissed as moot. *See Phila. Pub. Sch. Notebook v. Sch. Dist. of Phila.*, 49 A.3d 445 (Pa. Commw. Ct. 2012) (an appeal is moot if there is no actual case or controversy).

2. While the Department has proven that the screenshots sought in Item One of the Request do not exist, the records sought in Item Two of the Request are in the constructive possession of the Department and therefore subject to access under the RTKL.

The Department asserts that, except for the redacted document produced on appeal, the records sought by the Request do not exist in its possession, custody or control. By way of background, the Department explains that the Secretary of the Department, Russell Redding, became an *ex officio* member of the University's Board of Trustees in January of 2015 when he was appointed to serve as the Department's Secretary. The Department, indicates that "Secretary Redding was granted Diligent access on July 16, 2020."

With respect to Diligent, the Department explains that Diligent "is board management software used by the [University's] Board as a platform for sharing documents and other information with the Trustees." According to the Department, the University's 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 Secretary Redding "does not have the ability to post or delete anything in Diligent."

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, Ms. West, the Department's Open Records Officer, attests,³ in relevant part, as follows:

4. I conducted a thorough examination of files in the possession, custody and control of [the Department] for records responsive to this request. This search entailed coordinating with staff within [the Department's] Executive Office.

5. As a courtesy following receipt of [the Request], contact was made with the [University's] Board of Trustees' legal counsel to let them know [the Request] was received. Past [RTKL] requests received which were related to [University] Board of Trustee records resulted in the identification of confidential, third[-]party proprietary information. This required contact with [University] legal counsel based on section 67.707(b) and section 67.708(b)(11) of the [RTKL,] 65 P.S. §§ 67.101, *et seq.*

6. As a result of contacting [the University's] legal counsel regarding this [R]equest, this agency was informed that the Diligent platform is the property of [the University]. Trustees are able to view documents contained therein without the ability to print or download information hosted on the Diligent platform. Other than Secretary Russell Redding, we were informed that no other individuals within the [Department] have been given access to the Diligent platform.

8. Regarding records related to the August 2022 [University] Board of Trustees retreat, when initially checking with the Executive Office, it was confirmed such records were not in [the Department's] possession.

³ 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)).

9. Based upon the search of [the Department's] files and inquiries with relevant [Department] personnel prior issuing the letter of response, I made the determination that: (a) [the Department] does not have records related to this [R]equest in its possession, custody or control; (b) [the Department] does not own or maintain the Diligent database where the requested records reside; and (c) in conjunction with the appointment to the [University's] Board of Trustees, the Secretary of Agriculture, Russell Redding, does have access to the Diligent platform; however, such access is restricted to a read-only status which precludes documents being downloaded or otherwise in [the Department's] possession.

10. Following the receipt of the appeal by [the Requester] regarding [the Department's] response to [the Request], additional due diligence ensued related to the preparation of [the Department's] position statement in this matter.

11. The staff person within the Executive Office was again contacted regarding records. Additional information surfaced; not all duties were consistently handled by only one individual since the Diligent Platform became the data source for the [University's] Board of Trustees. This could be due to changes following a new administration or other reasons. Additional clarification with the staff person resulted in learning that one record which applies to this [R]equest is in [the Department's] possession, custody and control.

15. Therefore, following additional due diligence on the part of [the Department] related to [the Request], and in response to the statements provided by this [R]equester in his initial filing before the OOR in this matter, [the Department] is providing one responsive record, with redactions, related to the August 2022 [University] Board of Trustee Retreat while maintaining all other requested records are not in the possession, custody or control of [the Department].

Both the Department and University submitted an attestation from Shannon Harvey, which states, in part, the following:

2. I am the Assistant Vice President and Secretary, Office of the Board of Trustees at [the 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. Secretary Russell Redding became an ex officio member of the Board of Trustees in January of 2015 when he was appointed to serve as Secretary of [the Department.]
7. Secretary Redding was granted Diligent access on July 16, 2020.
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 Agriculture 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 the “controlling law on this issue makes clear that the records are public.” The Requester relies, in part, 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 of Education 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 appears to argue that the requested documents, unlike those in *Bagwell*, are not in the physical possession of the Secretary, and therefore not in the possession of the Department. 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.”⁴

⁴ The definition of “record” under the RTKL does not 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

Contrary to the arguments raised, the documents hosted on Diligent are no different than the records at issue in *Bagwell*. Item Two of the Request seeks materials hosted on Diligent related to the August 2022 Board retreat. Notably, these documents were/are accessible to Secretary Redding for the sole purpose of allowing him to carry out his respective role as an *ex officio* Voting Member of the Board. Although the documents on Diligent are “read-only” and are unable to be printed or downloaded by the Secretary, such does not alter our conclusion. The documents, regardless of how they were provided, enable the Secretary to fulfill his *ex officio* duties and represent the Department on the University’s Board. Accordingly, *Bagwell* controls in this matter, and records responsive to Item Two of the Request that are hosted on Diligent are public information and accessible.⁵

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

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

clear that the records are retained on Diligent in connection with a Department Secretary’s duties. Thus, they remain records of the Department.

⁵ Other than the exceptions cited to for the redactions made to the 65-page document produced during the pendency of this appeal, the Department did not raise any RTKL exemptions or other legal authority for denying access to records responsive to Item Two of the Request. The University argues “[t]o the extent that nonprinted documents on the Diligent platform are determined to be within the possession, custody, control of the [Department], 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 do not have the force and effect of law.

cannot be made to create a record that does not exist). Here, Item One of the Request seeks an “electronic screenshot of all folders and files hosted on Diligent” relative to Secretary Redding’s role on the [University’s] Board and related committees. Ms. West’s attestation states that Secretary Redding “has no business reason to take electronic screenshots of all folders and files hosted on Diligent” and that as a result of the search performed, “no records were found related to screenshots of the Diligent platform.” West Att. at ¶¶ 7 and 14. Therefore, based on the evidence provided, the Department has met its burden of proof that it does not possess the screenshots responsive to Item One 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 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 909.⁶

While the Department’s appeal submission only appears to address Section 705 in the context of the requested screenshots requested in Item One of the Request, to the extent that it is also arguing that it would need to create a record in order to provide the records requested in Item Two of the Request, we disagree. Unlike the records sought in Item Two of the Request, a “screenshot” of the folders and files requested would require the Department to, in essence, take

⁶ *In Massey and Spotlight PA v. Dep’t of Educ.*, OOR Dkt. No. AP 2023-1492, 2023 PA O.O.R.D. LEXIS 1976, the OOR reached the same conclusion as has been reached in the instant matter with regard to the accessibility of records contained in the Diligent software. The primary difference in *Massey v. Dep’t of Educ.* was that the records sought related to the Secretary of Education and his role on the University’s Board of Trustees.

an electronic photograph so as to provide an exact duplicate of the computer screen showing the folders and files within the software. Depending on the number of files and folders, a “screenshot” could also potentially require manipulation of the information in order to provide what is requested. In order for the Department to provide a screenshot, the evidence substantiates that such a record would need to be created in order to respond to the Request. A request under the RTKL can only seek records that exist at the time it is filed; any record created during the Department’s effort to respond to the Request cannot be responsive to the Request. *See Rice v. East Rockhill Twp.*, OOR Dkt. AP 2018-0346, 2018 PA O.O.R.D. LEXIS 541; *Grabuloff v. Borough of Middletown*, OOR Dkt. AP 2016-0608, 2016 PA O.O.R.D. LEXIS 716.

Conversely, providing an electronic copy of the responsive records that are stored on Diligent does not require the Department to create a record. Diligent, according to the evidence, is a file management and sharing software. Presumably, the documents that were uploaded and stored in Diligent for Board Trustees to access were created prior to their placement in the software for sharing purposes. The fact that the University would necessarily need to allow the Secretary to retrieve the responsive documents in Diligent or otherwise provide the documents/information in electronic form to the Department for provision to the Requester does not amount to the *creation of a new record* under Section 705 of the RTKL. Records transmitted to the Secretary due to his role on the Board are records of the Department under *Bagwell*, and thus, are subject to public access under the RTKL; the designation of those documents as “read-only” cannot circumvent that fact.⁷

⁷ Agencies or other parties that 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. *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”).

3. The Department and the University did not prove that the redacted information in the record produced is confidential proprietary information.

The Department and University contend that the redacted information in the record produced during the appeal is exempt from access because it constitutes confidential proprietary information under Section 708(b)(11) of the RTKL. Section 708(b)(11) of the RTKL exempts from disclosure “[a] record that constitutes or reveals a trade secret or confidential proprietary information.” 65 P.S. § 67.708(b)(11). Confidential proprietary information is defined in Section 102 of the RTKL as follows:

“Confidential proprietary information.” Commercial or financial information received by an agency:

- (1) which is privileged or confidential; and
- (2) the disclosure of which would cause substantial harm to the competitive position of the person that submitted the information.

65 P.S. § 67.102.

An agency must establish that both elements of this definition are met in order for the exemption to apply. *See Office of the Governor v. Bari*, 20 A.3d 634 (Pa. Commw. Ct. 2011). In determining whether certain information is “confidential,” the OOR considers “the efforts the parties undertook to maintain their secrecy.” *Commonwealth v. Eiseman*, 85 A.3d 1117, 1128 (Pa. Commw. Ct. 2014), *rev’d in part*, *Pa. Dep’t of Pub. Welfare v. Eiseman*, 125 A.3d 19 (Pa. 2015). “In determining whether disclosure of confidential information will cause ‘substantial harm to the competitive position’ of the person from whom the information was obtained, an entity needs to show: (1) actual competition in the relevant market; and, (2) a likelihood of substantial competitive injury if the information were released.” *Id.* Additionally, “[c]ompetitive harm analysis ‘is limited to harm flowing from the affirmative use of proprietary information by competitors. Competitive

harm should not be taken to mean simply any injury to competitive position.” *Dep’t of Corr. v. Maulsby*, 121 A.3d 585, 590 (Pa. Commw. Ct. 2015).

In support of the position that the redacted information constitutes confidential proprietary information, Ms. West attests that:

12. Records from a one-day attendance at the August 2022 ...Board of Trustees retreat were produced. The applicable record was marked “Confidential” and in conjunction with section 67.707(b), legal counsel at [University] was contacted and provided a copy of the confidential, third-party proprietary information for review.

13. The August 2022 retreat record, consisting of 65 pages, has been returned with recommended redactions to pages 1, 2, 28, 29, 30, 31, 39, 43, and 44. Therefore, [the Department] willingly produces this public record to the [R]equester with the assertion of the following exemption:

a) A record that constitutes or reveals a trade secret or confidential proprietary information is exempt from disclosure pursuant to section 67.708(b)(11) of the [RTKL].

In addition to the foregoing, Ms. Thorndike, the University’s Senior Vice President for Finance & Business/Treasurer/Chief Financial Officer attests as follows:

4. Among other roles at the University, I am responsible for the strategic planning and management of the Finance & Business unit at Penn State. The mission of the Finance & Business unit is to support the Penn State community through stewardship of the University’s human, financial, physical, and environmental resources.

5. In my role, I oversee [the University’s] financial performance and operating budget, which is \$9.5 billion for the 2023-24 fiscal year.

6. In August of 2022, I presented a slide deck entitled “The Student Success Imperative: Cost” at the University’s Board of Trustee Retreat. The presentation provided a strategic review and analysis of the following topics (i) the alignment of the University’s budget with its priorities and values, (ii) the University’s ability to lead in a resource-constrained environment, and (iii) the relationship between transforming the budgets of the University and transforming its culture.

7. The presentation was part of a two-day conference session with University leadership and Trustees to discuss some of the strategic goals and operational challenges impacting Penn State.

8. I understand that a hardcopy of this presentation was located in the possession of Pennsylvania's Secretary of Agriculture and that a redacted version has been provided to the Requester in this matter...pursuant to the Right-to-Know Law ("RTKL") and case law interpreting it. I further understand that [the Requester] and the Office of Open Records have requested additional support for the redactions made to certain pages.

9. I have reviewed the redactions and the underlying information.

10. The information that has been redacted on PDF pages 28, 29, 30, 31, and 39 is confidential proprietary information as defined in the RTKL. Namely,

a. The information is privileged or confidential because the slides provide confidential and proprietary financial information relating to specific non-core University assets being evaluated for strategic alternatives and possible re-prioritization, more specifically:

i. Page 28 of the PDF redacts a list of University non-core assets under evaluation by the University for business needs, along with certain expenses and services of the University being considered for strategic alternatives and possible re-prioritization.

ii. Page 29 of the PDF redacts information utilized in identifying and analyzing a particular asset, as well as confidential and proprietary financial information of the University relating to a University non-core asset being evaluated for strategic alternatives and possible re-prioritization.

iii. Pages 30 and 31 of the PDF redacts confidential and proprietary financial information of the University relating to subsidies and expenses paid by the University to provide certain services being evaluated for business needs of the University.

iv. Page 39 of the PDF redacts a confidential and proprietary financial analysis of the University's building construction costs and benchmarking analysis of average construction costs,

b. The disclosure of the information would cause substantial harm to the University's competitive position because disclosure of the identity of the assets and/or the financial reasons to consider prioritization of the assets would (1) damage current operations of the assets, (2) harm employee morale and retention, (3) reduce the

market value of any non-core assets, and (4) disadvantage the University if it elected to re-prioritize the assets by having its confidential, internal analysis publicly available, and

c. The University has taken steps to maintain the confidentiality of this information, namely (1) the Agenda for the Retreat, on the first page of the 65-page document produced to Requester, is marked “Confidential” to remind Trustees of the confidential nature of the information and their fiduciary responsibilities to maintain that confidentiality, (2) my presentation was made available for viewing by the Board of Trustees via Diligent, a secure communication portal with restrictive access permissions, and (3) within the University, the information has been closely held to individuals who need to know. The issues related to the redacted content in my presentation materials are in various stages of discussion, with some being in the very early stages, and the University is still gathering information to determine the possible options. Having any of the redacted data in the public domain would put us at a competitive disadvantage and would breach the confidentiality that is necessary and expected at this stage in business operations.

11. The information that has been redacted on PDF pages 43 and 44 is confidential proprietary information as defined in the RTKL. Namely,

a. The information is privileged or confidential because it discloses a set of options University leaders are considering to address the University’s fiscal challenges,

b. The disclosure of this information would cause substantial harm to the University’s competitive position because disclosure of information would (1) create distrust and confusion as these are mere considerations, rather than items for decision, (2) damage employee morale and retention, and (3) disadvantage the University in the future if it decided to pursue any of the options under consideration, and

c. The University has taken steps to maintain the confidentiality of this information, namely (1) the Agenda for the Retreat, on the first page of the 65-page document produced to Requester, is marked “Confidential” to remind Trustees of the confidential nature of the information and their fiduciary responsibilities to maintain that confidentiality, (2) my presentation was made available for viewing by the Board of Trustees via Diligent, a secure communication portal with restrictive access permissions, and (3) within the University, the information has been closely held to individuals

who need to know. As noted above, the redacted content in my presentation materials is at various stages of discussion, with some being in the very early stages, and the University is still gathering information to determine the best way to proceed. Having the redacted data in the public domain at this time would put us at a competitive disadvantage and would breach the confidentiality that is necessary and expected at this stage in business operations.

A review of the redacted slide deck presentation itself shows that the redactions are contained on pages with various titles, including “Strategic Questions,” “Leading in a resource-constrained environment,” and “Aligning the Budget with our priorities and values.”

The evidence submitted by the University establishes that the redacted information at issue is “confidential” in that the University took actions to ensure that redacted information in the slide deck presentation was maintained in secrecy. The evidence details that the record containing the information was identified as “confidential,” that access to the redacted information was limited and that it was closely held by individuals within the University on a need-to-know basis. Furthermore, we note that according to the Board of Trustee’s Standing Orders, Trustees are expected to “maintain the confidentiality of confidential information.” Thus, the efforts undertaken by the University show that it made various attempts to maintain the confidentiality of the redacted information and as such, it has met the “confidential” element required as part of the test for confidential proprietary information under Section 708(b)(11) of the RTKL.

Conversely, however, we are unable to conclude that the second element of the “confidential proprietary” test under Section 708(b)(11) has been proven. The second element of the test requires that the University and Department demonstrate, by a preponderance of the evidence, that the disclosure of the redacted information would cause substantial harm to the competitive position of the University. The University’s evidence provides a very generalized description of the information at issue and the harm that may result from disclosure of that

information. With regard to certain statements in the evidence, it is unclear as to what exactly the University is referring. For example, while the University indicates it does not wish to disclose the “non-core assets” at issue, additional description of the types of assets referred to would be helpful to understanding the University’s position and why the redacted content of the slide deck should be considered confidential proprietary. In addition, none of the evidence provided discusses the actual competitive nature of the relevant market from which we could better understand the effects of disclosure and the harm alleged. Lastly, the evidence provided does not demonstrate how the redacted information, should it be released by the University, could be used by its competitors to result in the harm alleged. As noted above, competitive harm does not mean any injury to competitive position; rather the harm must flow from a competitor’s affirmative use of the information at issue. *Maulsby, supra*. While the evidence generally shows that the University could suffer injury from the release of the redacted information should it be disclosed, such is not enough to meet the requirements of Section 708(b)(11). Absent further specifics and more detailed facts, the broad statements in the affidavit provided cannot carry even this low burden.

“Consistent with the RTKL’s goal of promoting government transparency and its remedial nature, the exceptions to disclosure of public records must be narrowly construed.” *Bagwell*, 114 A.3d at 1122. As such, we are constrained to find that the Department and University failed to meet their burden and that the redactions are improper as they are unsupported by the evidence.

4. Section 708(b)(10)(i)(A) of the RTKL does not apply.

The University also argues that Section 708(b)(10) of the RTKL, which relates to internal, predecisional deliberations, serves as a basis for the redactions made to the slide deck. *See* 65 P.S.

§ 67.708(b)(10)(i)(A). Section 708(b)(10)(i)(A) of the RTKL exempts from public disclosure 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, including predecisional deliberations relating to a budget recommendation, ... or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A). In order for this exemption to apply, three elements must be satisfied: 1) “[t]he records must ... be ‘internal’ to a governmental agency”; 2) the deliberations reflected must be predecisional, *i.e.*, before a decision on an action; and 3) the contents must be deliberative in character, *i.e.*, pertaining to proposed action. *See Kaplin v. Lower Merion Twp.*, 19 A.3d 1209, 1214 (Pa. Commw. Ct. 2011). Factual material contained in otherwise deliberative documents is required to be disclosed if it is severable from its context. *McGowan v. Pa. Dep’t of Env’tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014).

In support of is position that the redacted information on PDF page nos. 28, 29, 30, 31, 39, 43 and 44 of the slide deck presentation is exempt as reflecting internal predecisional deliberations, Ms. Thorndike attests that:

- a. These slides disclose University leadership’s internal, predecisional data points relating to a contemplated course of action and the research used in the University’s predecisional analysis. Namely, as described in more detail above, pages 28-31 and 39 detail non-core assets University leadership is considering for strategic alternatives and possible re-prioritization. Pages 43 and 44 posit a variety of possible strategic directions the University has considered that it could pursue to address the financial challenges it is facing.
- b. The information is prior to a related decision. The information was preliminary, and no decisions were made or intended to be made at the Board Retreat relating to these possible re-prioritizations of business assets or courses of action, and
- c. These strategic possibilities are internal to the University and confidential. The University took steps to keep the information internal to the University and maintain the confidentiality of this information, namely (1) the Agenda for the

Retreat, on the first page of the 65-page document produced to Requester, is marked “Confidential” to remind Trustees of the confidential nature of the information and their fiduciary responsibilities to maintain that confidentiality, (2) my presentation was made available for viewing by the Board of Trustees via Diligent, a secure communication portal with restrictive access permissions, and

(3) within the University, the information was closely held to individuals who needed to know. Again, the redacted content in my presentation materials is at various states of discussion and the University is still gathering information to enable fully informed decisions. Having the redacted data in the public domain at this time would put us at a competitive disadvantage and would breach the confidentiality that is necessary and expected at this stage in business operations.

Thorndike Affidavit at ¶12.

Records satisfy the “internal” element of Section 708(b)(10)(i)(A) when they are maintained internal to one agency or among governmental agencies. *Pa. Dep’t of Educ. v. Bagwell*, 131 A.3d 638, 658 (Pa. Commw. Ct. 2016). The evidence provided by the University asserts that the information redacted reflects internal deliberations of the University’s Board of Trustees. However, the University nor its Board are considered an “agency” as that term is defined in Section 102 of the RTKL. *Bagwell*, 76 A.3d 81, 88; 65 P.S. § 67.102. In addition, the Department has presented no evidence to show how the document could fall under this particular exemption. Thus, the redacted information at issue is not “internal” to an agency or among governmental agencies, and as such we find that the Section 708(b)(10)(i)(A) of the RTKL cannot apply to the redactions in the slide deck. 65 P.S. § 67.708(a).

CONCLUSION

For the foregoing reasons, the appeal is **granted in part, denied in part and dismissed as moot in part**, and the Department is required to provide all records responsive to Item Two of the Request within thirty days. In addition, the Department is also required to provide the Requester with an unredacted copy of the 65-page document produced during the pendency of this appeal. 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, but as the quasi-judicial tribunal that adjudicated this matter, the OOR is not a proper party to any appeal and should not be named as a party.⁸ All documents or communications following the issuance of this Final Determination shall be sent to oor-postfd@pa.gov. This Final Determination shall be placed on the website at: <http://openrecords.pa.gov>.

FINAL DETERMINATION ISSUED AND MAILED: October 6, 2023

/s/ Angela Edris

APPEALS OFFICER
ANGELA EDRIS, ESQ.

Sent via the OOR Portal to: Marija Kuren, Esq.;
Susan West, AORO;
Natalie Voris Grosse, Esq.

⁸ *Padgett v. Pa. State Police*, 73 A.3d 644, 648 n.5 (Pa. Commw. Ct. 2013).

PROOF OF SERVICE

I certify that I have caused a true and correct copy of the foregoing document to be served on this 25th day of October 2023 upon the persons below via First Class Mail, in accordance with Pennsylvania Rule of Appellate Procedure 121, Pa.R.A.P.

121:

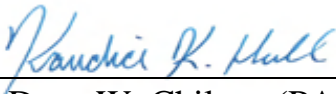
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Date: October 25, 2023

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University*