

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

California University of Pennsylvania,	:		
	:		
Petitioner	:		
	:		
v.	:	No. 1491 C.D. 2018	
	:		
Gideon Bradshaw,	:		
	:		
Respondent	:		

BEFORE: HONORABLE P. KEVIN BROBSON, President Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY PRESIDENT JUDGE BROBSON**

FILED: October 13, 2021

This matter returns to the Court following our prior decision and the Supreme Court of Pennsylvania’s denial of allocatur in *California University of Pennsylvania v. Bradshaw*, 210 A.3d 1134 (Pa. Cmwlth.), *appeal denied*, 220 A.3d 532 (Pa. 2019). In that decision, this Court held that the California University of Pennsylvania (University) improperly denied Gideon Bradshaw’s (Respondent) request for certain donation records made pursuant to the Right-to-Know Law (RTKL).¹ *See Cal. Univ. of Pa.*, 210 A.3d at 1139-40. Currently before the Court is an “Application for Attorney’s Fees, Costs, and Statutory Damages for Bad Faith” (Application) filed by Respondent against the University stemming from that litigation. For the reasons that follow, the Application is granted.

¹ Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-.3104.

On August 22, 2018, Respondent submitted a RTKL request to the University seeking “all records related to donations from Manheim Corp[oration (Manheim)] to the Foundation for University of California [(Foundation)] between Jan[uary] 1, 2008, and Dec[ember] 31, 2013, and all records identifying the uses of those funds.” (Reproduced Record (R.R.) at 001a.)² On August 27, 2018, the University denied the request on two grounds: (1) the University does not possess donation records of the Foundation, an independent nonprofit organization; and (2) had the request been properly directed to donation records maintained by the University, the request would be denied pursuant to Section 708(b)(13) of the RTKL, 65 P.S. § 67.708(b)(13), which provides:

(b) Exceptions.--Except as provided in subsections (c) and (d) [relating to financial records and aggregated data], the following are exempt from access by a requester under [the RTKL]:

.....

(13) Records that would disclose the identity of an *individual* who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor.

(Emphasis added.)

Respondent appealed the University’s denial to OOR. Before OOR, Respondent supplemented the record with a copy of a Memorandum of Understanding (MOU) between the Foundation and the University, arguing that it showed that the Foundation receives and manages donations on behalf of the University, thus making the Foundation’s records subject to RTKL requests directed

² For convenience, the Court cites to the Reproduced Record filed by the University in connection with the merits of this appeal.

to the University. For its part, the University reiterated its position that the requested records were exempt from disclosure under Section 708(b)(13) of the RTKL, specifically claiming that Manheim, though a corporation, constituted an “individual” for purposes of that section. Notably, with respect to its position that it did not possess Foundation records as stated in its initial denial, the University submitted that “it does not matter whether the Foundation possesses the records or the University[;] access to donor records is protected from disclosure under [Section] 708(b)(13).” (R.R. at 025a-026a, University’s Position Statement, 9/26/2018, at 3-4 n.2.)

On October 15, 2018, OOR issued its final determination (Final Determination), granting Respondent’s appeal. Concluding that the University abandoned its argument that it did not possess the requested records, OOR turned its focus to the University’s contention that corporations qualify as “individuals” for purposes of Section 708(b)(13) of the RTKL. OOR rejected the University’s argument, relying primarily on its prior decision in *Roxbury News v. City of Harrisburg*, OOR Docket No. AP 2012-1748, slip op. at 6, which concluded that “only the identities of natural persons are exempt from disclosure under Section 708(b)(13) of the RTKL.” OOR thus determined that, having failed to demonstrate that the requested records were exempt from disclosure, the University was required to provide Respondent with all records that were responsive to the request.

The University then appealed to this Court, which affirmed OOR’s Final Determination. *Cal. Univ. of Pa.*, 210 A.3d at 1136. Before the Court, the University argued that OOR erred in determining that the requested records were not exempt under Section 708(b)(13) of the RTKL and in determining that the

University must disclose donation records of the Foundation. With respect to the University's first allegation of error, which presented an issue of first impression, the Court engaged in a statutory construction analysis to determine whether OOR's interpretation of the word "individual" was proper. We noted that, while the RTKL does not define "individual," Section 1991 of the Statutory Construction Act of 1972 (Statutory Construction Act), 1 Pa. C.S. § 1991, provided meanings for statutory terms to be used unless the particular statutory context clearly indicated that a different meaning should be given to the term at issue. *See Cal. Univ. of Pa.*, 210 A.3d at 1138. Most relevantly, we observed that the Statutory Construction Act defined the term "individual" as "[a] natural person" and that the context surrounding Section 708(b)(13) of the RTKL did not clearly indicate that the General Assembly intended to depart from the definition provided in the Statutory Construction Act. *Cal. Univ. of Pa.*, 210 A.3d at 1138-39 (relying upon 1 Pa. C.S. § 1991). We concluded, therefore, that the requested records were not exempt from access under Section 708(b)(13) because Manheim is not an "individual" for purposes of that section. *Id.* at 1139.

The Court then addressed the University's obligation to provide access to the requested donation records of the Foundation, reasoning:

When a private foundation performs fundraising pursuant to an MOU with a university, the fundraising is a governmental function that the foundation is performing on behalf of the university. *E. Stroudsburg Univ. Found. v. Off. of Open Recs.*, 995 A.2d [496,] 505-06[(Pa. Cmwlth. 2010) (en banc), *appeal denied*, 20 A.3d 490 (Pa. 2011)]. Pursuant to Section 506(d)(1) of the RTKL, 65 P.S. § 67.506(d)(1), records directly related to governmental functions are "public record[s] of the agency" which are accessible through the RTKL. The certified record in the instant matter reveals that the Foundation is engaged in performing a governmental function to the extent that it fundraises and manages donations on the University's behalf pursuant to the MOU, thereby rendering records directly related to those activities public

records of the University. As such, the University must disclose them pursuant to Section 506(d) of the RTKL, as it would any responsive records in its own actual possession. We conclude, therefore, that the OOR did not err in granting Respondent's appeal.

Cal. Univ. of Pa., 210 A.3d at 1139-40 (footnotes omitted).³

Following this Court's decision, the University filed a petition for allowance of appeal with the Supreme Court of Pennsylvania, which denied the petition by order dated November 19, 2019. *Cal. Univ. of Pa. v. Bradshaw*, 220 A.3d 532 (Pa. 2019). On December 17, 2019, Respondent filed the Application. The University filed an answer in opposition to the Application, and, thereafter, this Court ordered briefing on the Application, which is now ripe for disposition.

In the Application, Respondent avers that, shortly after the Supreme Court denied the University's petition for allowance of appeal, Respondent submitted an inquiry to the University concerning production of the requested records. (Application ¶ 4.) On December 3, 2019, the University sent a written response and related documentation to Respondent indicating that it sought responsive records

³ While the University argued that "the Foundation may collect donations which are not connected to the fundraising activities the Foundation conducts pursuant to the MOU and that records of such unconnected donations are 'not automatically records of the University,'" the Court noted that it appeared from the certified record that the RTKL request did seek "records that *are* directly related to the governmental function the Foundation performs on the University's behalf, and the University [did] not contend otherwise." *Cal. Univ. of Pa.*, 210 A.3d at 1139 n.11 (emphasis in original) (quoting the University's Brief at 21). The Court further reasoned that, regardless:

[T]he correct inquiry in any case addressing Section 506(d)(1) of the RTKL (concerning records of third[-]party contractors) is to ask whether the particular records requested are directly connected to a governmental function performed on an agency's behalf. This precise inquiry is necessary because the RTKL exposes to public access "only those records in a contractor's possession that relate to [the governmental] function, not other records that a contractor maintains during the normal scope of business."

Id. (quoting *E. Stroudsburg*, 995 A.2d at 504).

from the Foundation following the Supreme Court’s denial of allocatur and that the Foundation notified the University that no such records existed at the Foundation. (See Application ¶¶ 5-8 and attached Exhibit B.) In this regard, the University attached to its response an attestation of Robert J. Thorn, the Open Records Officer (ORO) for the University. The attestation provides, in relevant part:

4. I am familiar with the instant request that was denied by the University and subsequently litigated through the Pennsylvania Commonwealth and Supreme Courts.
5. In my capacity as the [ORO], pursuant to the decision of the [Pennsylvania] Supreme Court a request was made to the Foundation . . . on November 21, 2019
6. Upon receipt of the request, Foundation Executive Director, Denise Smith [(Smith)], conducted a thorough examination of files in the possession, custody and control of the Foundation for records responsive to the request underlying this appeal.
7. . . . Smith concluded no such records exist.
8. As such, the University is unable to produce any such donation records from Manheim . . . to the Foundation

(Application, attached Exhibit B, Attestation of Robert J. Thorn dated 11/26/2019.)⁴

In its supporting brief, Respondent further explains that, after receiving the University’s December 3, 2019 response, Respondent filed another RTKL request with the University, this time framing its request to encompass records of Manheim donations made directly to the University. (Respondent’s Brief at 4.) In response,

⁴ The University’s response to Respondent’s inquiry also included the email serving as the University’s “official request for Foundation donation records” sent to Smith following the Supreme Court’s denial of allocatur, as well as Smith’s email stating that the Foundation had no records that were responsive to the request. (Application, Exhibit B, emails dated 11/21/2019.)

the University provided records of donations made by Manheim to the University. (*Id.*)⁵

Before the Court, Respondent argues that the University engaged in various instances of bad faith and frivolous conduct in this matter given the above events. Specifically, Respondent first claims that the University failed to make a determination regarding whether the University and the Foundation as a third-party contractor had possession, custody, or control of the requested records prior to responding to Respondent’s first RTKL request in August 2018, in accordance with the University’s duties under Sections 506(d)(1) and 901 of the RTKL, 65 P.S. §§ 67.506(d)(1), 67.901.⁶ Instead, as evidenced by the University’s December 2019

⁵ Respondent attached to his brief an email exchange between Respondent and the University concerning Respondent’s second RTKL request. (*See* Respondent’s Brief, attached Exhibit A.) Notwithstanding any issues regarding whether the email exchange is properly of record, in its brief, the University “does not dispute that a new request for the donation records of Manheim . . . to the University was received.” (University’s Brief at 3 n.7.) The University explains that this second request expanded on the original request to include “records—including both records in the possession, custody or control of the [U]niversity and those in the possession, custody or control of the Foundation . . . —of donations from Manheim . . . to any [U]niversity program or any donation to the [U]niversity for any purpose” (*Id.*) Claiming that Respondent’s “new request expressly acknowledge[d] that his first request did not seek University records,” the University confirms that it provided records relating to donations by Manheim to the University in response to Respondent’s second request. (*Id.*)

⁶ Section 506(d)(1) of the RTKL most relevantly provides:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

It is also worth noting that pursuant to Section 506(d)(3) of the RTKL, 65 P.S. § 67.506(d)(3), “[a] request for a public record in possession of a party other than the agency shall be submitted to the open records officer of the agency.” Further, Section 901 of the RTKL provides, in pertinent part:

Upon receipt of a written request for access to a record, an agency shall make a good faith effort to determine if the record requested is a public record[] . . . and

response to Respondent's inquiry following the Supreme Court's denial of allocatur in the underlying litigation, the University waited until after the Supreme Court's denial to determine whether any such records existed with the Foundation. Respondent argues that the University's failure to ascertain prior to responding to the initial RTKL request whether the Manheim donation records existed at the Foundation in particular warrants a finding of bad faith on behalf of the University.

Respondent also argues that the University engaged in bad faith and frivolous conduct in asserting and litigating its bases for denying the initial RTKL request. Respondent argues that the University's first asserted basis for its denial (*i.e.*, that the University did not "possess" responsive records of the Foundation as an independent entity) was a legally untenable position given applicable precedent, as discussed in our prior decision involving the parties. Respondent further contends that, in light of the belated revelation that no records existed at the Foundation that were responsive to the request, the University's actions resulted in the litigation of a moot controversy, the unnecessary expenditure of party and judicial resources, and the issuance of improper advisory opinions from OOR and this Court.

Finally, Respondent argues that the University acted in bad faith following the Supreme Court's denial of allocatur in this matter. Respondent contends that, following the Supreme Court's denial of review, the University should have produced the records of Manheim donations it had in its own possession at that time.⁷

whether the agency has possession, custody or control of the identified record, and to respond as promptly as possible under the circumstances existing at the time of the request.

(Emphasis added.)

⁷ Indeed, Respondent accuses the University of knowing all along that the University (and not the Foundation) possessed Manheim donation records that were "germane to the request." (Respondent's Brief at 17.)

Instead, Respondent submits, the University “deceptively” produced an attestation asserting that no responsive records existed at the Foundation, causing him to submit another RTKL request specifically seeking records of the University in order to obtain those responsive records. (Respondent’s Brief at 13, 18.) Respondent argues that the University’s bad faith and frivolous conduct as outlined above entitles him to an award of attorney’s fees, costs, and damages under the RTKL.

In response, the University argues that it acted reasonably and in good faith throughout this matter. In so doing, the University admits that it did not seek potentially responsive records from the Foundation when the RTKL request was initially made. (Answer ¶ 9.) According to the University, however, it had no legal obligation to do so for the two reasons it asserted in denying the request, *i.e.*, the request did not seek University records and the records would be nonetheless “facially exempt” under Section 708(b)(13) of the RTKL as records relating to an individual donor. (University’s Brief at 10, 12.)

The University further argues that it acted reasonably in asserting its first basis for denying Respondent’s initial RTKL request given that: (1) the request sought records of donations made by a corporation to the Foundation, an independent non-profit corporation that is not subject to the RTKL; (2) the University does not possess Foundation records; and (3) the request did not indicate on its face that Respondent sought donation records as they related to the MOU or the Foundation’s performance of a “governmental function.” As such, the University submits, it was reasonable to dispute whether the University was to infer that the request concerned a specific type of Foundation donation (*i.e.*, donations to the University being held by or directed to the Foundation) without any explicit mention thereof in the

request.⁸ Regarding its second basis for denial, the University contends that its position on Section 708(b)(13) of the RTKL was based on a reasonable interpretation of the law at the time and that “[r]equiring an agency to search for a facially exempt record is illogical and wasteful of public resources.” (University’s Brief at 12.) The University adds that it did not mount a frivolous legal challenge in contesting the disclosure of the requested records reasonably believed to be protected by the RTKL.

The University also submits that, to the extent Respondent accuses it of acting improperly following the Supreme Court’s denial of allocatur by issuing a response that the Foundation did not possess any responsive records, the University simply responded to the original request as submitted, which sought records possessed by the Foundation, not the University. The University further argues that, with respect to the applicability of Section 506(d) of the RTKL, that provision “makes it possible for Foundation records to be considered University records, but it does not turn University records into Foundation records.” (University’s Brief at 11.) In light of the above, the University claims that it acted reasonably and in good faith in this matter, rendering the award of attorney’s fees, costs, and damages to Respondent improper.

Having set forth the parties’ contentions, the Court now turns to an analysis of whether an award of attorney’s fees, costs, and damages is appropriate in this matter. Regarding attorney’s fees and costs, Section 1304 of the RTKL, 65 P.S. § 67.1304, provides, in relevant part:

⁸ The University takes the position that, “[h]ad the initial request specified that the Foundation records it sought were related to the MOU, then the University’s obligation to search for the records would have been triggered.” (University’s Brief at 18 n.12.)

(a) Reversal of agency determination.--If a court reverses the final determination of the appeals officer⁹ or grants access to a record after a request for access was deemed denied, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester if the court finds either of the following:

(1) the agency receiving the original request willfully or with wanton disregard deprived the requester of access to a public record subject to access or otherwise acted in bad faith under the provisions of this act; or

(2) the exemptions, exclusions or defenses asserted by the agency in its final determination were not based on a reasonable interpretation of law.

(b) Sanctions for frivolous requests or appeals.--The court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to an agency or the requester if the court finds that the legal challenge under this chapter was frivolous.

As to an award of damages for an agency's bad faith conduct, Section 1305(a) of the RTKL, 65 P.S. § 67.1305(a), provides that "[a] court may impose a civil penalty of not more than \$1,500 if an agency denied access to a public record in bad faith."

This Court has expounded upon the RTKL's treatment of an agency's bad faith conduct as follows:

The core purpose of the RTKL is ensuring access to agency records. The RTKL "is remedial legislation designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions[.]" *Bowling v. Off[.] of Open [Recs.]*, 990 A.2d 813, 824 (Pa. Cmwlth. 2010) (en banc), *aff'd*, . . . 75 A.3d 453 ([Pa.] 2013); *Off[.] of Dist. Att'y of Phila. v. Bagwell (Phila. DA)*, 155 A.3d 1119, 1130 (Pa. Cmwlth. 2017) ("the RTKL is remedial in nature[]").

In the RTKL context, "bad faith" does not require a showing of fraud or corruption. The lack of good faith compliance with the RTKL and an abnegation of mandatory duties under its provisions rise to the

⁹ To be clear, the above language refers to "when the receiving agency determination is reversed." *Uniontown Newspapers, Inc. v. Pa. Dep't of Corr.*, 243 A.3d 19, 34 (Pa. 2020).

level of bad faith. *Phila. DA* (affirming trial court’s award of \$500 civil penalty for bad faith); *Chambersburg Area Sch. Dist. v. Dorsey*, 97 A.3d 1281 (Pa. Cmwlth. 2014) (agency failure to review responsive records was grounds from which fact-finder could discern bad faith); *Staub v. City of Wilkes-Barre & LAG Towing, Inc.* (Pa. Cmwlth., No. 2140 C.D. 2012, filed October 3, 2013) . . . (unreported) (affirming attorney fee award for agency failure to confer with contractor before responding to request). The RTKL reserves bad faith determinations for disposition by Chapter 13 Courts. *Bowling v. Off[.] of Open [Recs.]*, . . . 75 A.3d 453 ([Pa.] 2013).

The RTKL requires an agency to make a good faith effort to find and obtain responsive records before denying access. *Dorsey*. “[A]n agency [may not] avoid disclosing existing public records by claiming, *in the absence of a detailed search*, that it does not know where the documents are.” *Pa. State Police v. McGill*, 83 A.3d 476, 481 (Pa. Cmwlth. 2014) (emphasis added). Where an agency did not perform a search of its records under the RTKL until the matter was in litigation, the agency denied access in willful disregard of the public’s right to public records. *Parsons v. Pa. Higher Educ. Assist. Agency (PHEAA)*, 910 A.2d 177 (Pa. Cmwlth.) (en banc), *appeal denied*, . . . 917 A.2d 316 ([Pa.] 2006) (agency failure to review records before a hearing on denial showed willful violation of former Right-to-Know Law).

A requester bears the burden of proving an agency committed bad faith. *Uniontown Newspapers[, Inc. v. Pa. Dep’t of Corr.]*, 151 A.3d 1196, 1209 (Pa. Cmwlth. 2016)]. Evidence of bad faith is required. *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Cmwlth. 2012). After-discovered records are a type of evidence from which a court may discern bad faith. *Dorsey*. Evidence of an agency’s failure to perform its mandatory duties, including a failure to search its records prior to a denial of access, may suffice. *Dorsey; accord PHEAA*.

Uniontown Newspapers, Inc. v. Pa. Dep’t of Corr., 185 A.3d 1161, 1170-71 (Pa. Cmwlth. 2018) (single judge op.) (footnote omitted), *aff’d*, 243 A.3d 19 (Pa. 2020).¹⁰

¹⁰ Pursuant to Section 414(b) of the Commonwealth Court Internal Operating Procedures (IOPs), 210 Pa. Code § 69.414(b), a single-judge opinion of the Commonwealth Court in a

With respect to frivolous legal challenges, our Court has observed that a “RTKL challenge is frivolous under Section 1304(b) [of the RTKL] if it is arbitrary, vexatious or the result of bad faith.” *Pa. State Troopers Ass’n v. Scolforo*, 18 A.3d 435, 442 (Pa. Cmwlth. 2011). Further, albeit not in the context of a RTKL matter, this Court has held that “[a]n appeal that raises an issue that is well settled and presents no legal support is frivolous.” *Venafro v. Dep’t of Transp., Bureau of Driver Licensing*, 796 A.2d 384, 388 (Pa. Cmwlth. 2002); *see also Hewitt v. Commonwealth*, 541 A.2d 1183, 1185 (Pa. Cmwlth. 1988) (finding appeal frivolous where issue raised was well settled by prior decision of this Court and appellant presented no legal support for argument that prior decision did not control), *appeal denied*, 554 A.2d 511 (Pa. 1989).

Beginning with the University’s actions in initially responding to Respondent’s original RTKL request, the Court notes:

Upon receipt of a request, an open records officer “must make a good faith effort to determine whether: (1) the record is a public record; and, (2) the record is in the possession, custody, or control of the agency.” *Breslin v. Dickinson Twp.*, 68 A.3d 49, 54 (Pa. Cmwlth. 2013) (citing *Barkeyville Borough*, 35 A.3d at 96). Section 901 [of the RTKL] also includes the duty to perform a reasonable search for records in good faith. *Dep’t of Labor & Indus. v. Earley*, 126 A.3d 355 (Pa. Cmwlth. 2015). 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. *Breslin*.

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. *Breslin; Staub*. Under Section 506(d) of the RTKL, 65 P.S. § 67.506(d), “the agency is

non-election matter, “even if reported, shall be cited only for its persuasive value and not as a binding precedent.” Further, to the extent unreported panel decisions of this Court are relied upon herein, Section 414(a) of the Court’s IOPs, 210 Pa. Code § 69.414(a), provides that such decisions issued after January 15, 2008, may likewise be cited only for their persuasive value.

required to take reasonable steps to secure the records from the [contractor] and then make a determination if those records are exempt from disclosure.” *Staub*, slip op. at 6

After obtaining all potentially responsive records, an agency has the duty to review the records and assess their public nature under Sections 901 and 903 of the RTKL[, 65 P.S. § 67.903]. *Breslin*; *PHEAA*. It is axiomatic that an agency cannot discern whether a record is public or exempt without first obtaining and reviewing the record.

Uniontown Newspapers, 185 A.3d at 1171-72.¹¹

Based on the foregoing, the Court agrees with Respondent that the University was required to determine whether potentially responsive records existed at the Foundation as a third-party contractor prior to issuing its denial of Respondent’s original RTKL request. As noted, the University admittedly failed to make such an initial inquiry. Further, while the University argues that it had no initial obligation to make a determination in this regard given its asserted bases for denial of the request, the above pronouncements render the University’s position untenable. Indeed, this case demonstrates precisely why it is axiomatic that an agency fulfill its initial duties under the RTKL in searching for potentially responsive records as outlined above: had the University made an inquiry to the Foundation regarding the Foundation’s possession of Manheim donation records prior to issuing its denial of the original RTKL request, the University would have learned at that time that the Foundation did not possess any such records, thereby short-circuiting the ensuing

¹¹ Indeed, our Supreme Court granted review of the *Uniontown Newspapers* litigation and, subsequent to the filing of the Application in this case, confirmed that “[a] good faith response--either to produce records or assert an exemption--cannot occur absent a good faith search, followed by collection and review of responsive records, so an agency has actual knowledge about the contents of the relevant documents.” *Uniontown Newspapers*, 243 A.3d at 28-29 (concluding that Pennsylvania Department of Corrections acted in bad faith at request stage of RTKL litigation “in significant part because the open records officer failed to act with diligence in response to [the] request” by, *inter alia*, simply “relying on the representations of others” within agency).

litigation that occurred in this case. The University's admitted abnegation of its mandatory duties under the RTKL in failing to conduct a proper search for responsive records prior to issuing its denial to the RTKL request warrants a finding of bad faith on behalf of the University under Sections 1304(a)(1) and 1305(a) of the RTKL.

Turning to the University's grounds for denial, the Court observes that, in asserting its first basis for denying the request—that it did not possess Foundation records—the University took a position that was contrary to settled law. As explained in our prior decision involving the present parties, in *East Stroudsburg*, this Court made clear that a private foundation that conducts fundraising on behalf of a state university pursuant to an MOU performs a “governmental function,” thereby rendering records directly related to that governmental function “public record[s] of the agency” accessible through Section 506(d)(1) of the RTKL. *Cal. Univ. of Pa.*, 210 A.3d at 1139; *see also E. Stroudsburg*, 995 A.2d at 505 (explaining that, pursuant to Section 506(d)(1), OOR properly ordered disclosure of fundraising records of university foundation because foundation, “under the MOU [in that case], carrie[d] out fundraising on behalf of the [u]niversity, making any records ‘directly’ related to performing fundraising activities on behalf of the [u]niversity”). Thus, notwithstanding that the University does not actually possess responsive records existing at the Foundation, pursuant to Section 506(d)(1) and *East Stroudsburg*, any such records would be considered “public records” of the University by virtue of the MOU existing between the University and Foundation. As such, the University's first grounds for denial was “not based on a reasonable interpretation of law” and its

subsequent pursuit of its legal challenge on appeal in this respect was frivolous.¹² Section 1304(a)(2) and (b) of the RTKL, 65 P.S. § 67.1304(a)(2)-(b). Although ultimately unsuccessful on its second ground for denial—*i.e.*, that Manheim was an “individual” for purposes of Section 708(b)(13) of the RTKL—that ground for denial at least provided an issue of first impression, making pursuit of the appeal on that ground more reasonable than on the first ground. Nevertheless, the University’s unreasonable interpretation of the law on the first ground for denial, particularly when considered in conjunction with the University’s failure to comply with Section 901 of the RTKL and the ramifications of such failure, provide further evidence of bad faith on the part of the University.

Next, the Court addresses Respondent’s final claim of bad faith based on the University’s failure to disclose records of Manheim donations made to the University that it possessed until those records were specifically requested in Respondent’s second RTKL request. While Respondent essentially argues that the University nefariously viewed his original request with too narrow a lens and should have provided him with those records in response to his original request following the Supreme Court’s denial of allocatur in this matter at the latest, the original RTKL

¹² The University argues that it acted reasonably concerning its first basis for denial because, as alleged previously before this Court, the initial request did not specifically indicate that it was seeking Foundation records as it related to the MOU or the Foundation’s performance of a “governmental function.” The Court disagrees. Again, the initial request sought “all records related to donations from Manheim . . . to the Foundation . . . between Jan[uary] 1, 2008, and Dec[ember] 31, 2013, and all records identifying the uses of those funds.” As noted in this Court’s prior decision, the certified record indicated that the RTKL request sought “records that *are* directly related to the governmental function the Foundation performs on the University’s behalf, and the University [did] not contend otherwise.” *Cal. Univ. of Pa.*, 210 A.3d at 1139 n.11. Additionally, the relevant inquiry under Section 506(d)(1) of the RTKL is “whether the particular records requested are directly connected to a governmental function performed on an agency’s behalf.” *Id.* The University’s position, therefore, is meritless.

request sought records related to donations made by Manheim to the Foundation; it did not specify that it sought records related to donations made by Manheim directly to the University. While the University's provision of such documents prior to their specific request would have perhaps been in the spirit of the RTKL's purpose of open access, the Court concludes that the University's interpretation of the original request does not in and of itself rise to the level of a bad faith interpretation. Stated another way, Respondent has failed to demonstrate bad faith conduct on behalf of the University in construing the original request under the circumstances and evidence presented.¹³

In sum, the Court concludes that the University engaged in bad faith and frivolous conduct in denying Respondent's RTKL request without first determining whether the Foundation had potentially responsive records in its possession, in asserting its first basis for denying the request, and in litigating both bases for its denial on appeal. The Court further concludes, however, that the University did not engage in bad faith conduct in failing to produce records of Manheim donations given directly to the University until those records were specifically requested.

With regard to the amount of attorney's fees, costs, and damages to be awarded, Respondent seeks a total of \$15,298.32 in attorney's fees and costs under Section 1304 of the RTKL; however, he has presented the Court with documentation supporting an award of only \$14,298.32.¹⁴ Respondent also seeks the

¹³ Notwithstanding, it is worth noting that, had the University properly fulfilled its obligations under the RTKL in initially responding to the original RTKL request regarding Manheim donations made to the Foundation, Respondent would have been able to submit his subsequent request in an effort to obtain responsive records of Manheim donations made to the University much sooner.

¹⁴ It appears that the discrepancy between the amount Respondent claims is owed and the amount supported by the documentation is the result of a mathematical error. Respondent attached

maximum \$1,500 allowed in statutory damages under Section 1305 of the RTKL. While the University disputes the grounds upon which the request for attorney's fees, costs, and statutory damages is based, the University does not appear to take any position with regard to the requested amounts as unreasonable or excessive. In the absence of such a challenge and in view of the University's bad faith and frivolous conduct as outlined above and the documentation supporting Respondent's requested amounts, the Court finds the supported amounts to constitute an appropriate award. Respondent's Application, therefore, is granted, and Respondent is awarded \$14,298.32 in attorney's fees and costs under Section 1304 of the RTKL and \$1,500 in statutory damages under Section 1305 of the RTKL.



P. KEVIN BROBSON, President Judge

to the Application as Exhibit C a copy of the legal bills incurred for the work counsel provided in litigating the above-captioned matter and particularly the cost of preparing the Application, which Respondent claims amounts to a total of \$8,278.32, as well as an attestation of their authenticity. The invoices are dated March 4, 2019; May 7, 2019; June 4, 2019; August 5, 2019; and December 3, 2019; respectively, they reflect amounts of \$3,861.00, \$838.50, \$1,915.82, \$468.00, and \$195.00, for a total of \$7,278.32. Further, Respondent attached to his brief in support of the Application an affidavit of counsel as to the hours spent in preparing the brief and an accompanying invoice totaling \$7,020.00. In the attestation attached to Respondent's brief, counsel states that his rate is \$195 per hour and that the services provided are reasonable, as he has "represented the newspaper for 30 years and ha[s] developed professional skill in First Amendment and publishing law." (Respondent's Brief, Exhibit B, Affidavit of Colin E. Fitch dated 1/3/2020.) The affidavit further provides:

The issues involved in this litigation are important and involve the production of public records despite a government agency's denial of access to same. The issues involved are complicated given the nature of the case, *i.e.*, there was production of the records requested only one week ago. The results I have obtained have been successful and any award of attorney's fees will serve the statutory scheme and promote the RTKL statutory purpose.

Id.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

California University of Pennsylvania,	:		
	:		
Petitioner	:		
	:		
v.	:	No. 1491 C.D. 2018	
	:		
Gideon Bradshaw,	:		
	:		
Respondent	:		

ORDER

AND NOW, this 13th day of October, 2021, upon consideration of the “Application for Attorney’s Fees, Costs, and Statutory Damages for Bad Faith” (Application) filed by Respondent Gideon Bradshaw and the answer of Petitioner California University of Pennsylvania (University) filed in response thereto, and upon briefing of the matter, the Application is GRANTED. Accordingly, the University is ordered to pay \$14,298.32 in reasonable attorney’s fees and costs to Respondent pursuant to Section 1304(a) and (b) of the Right-to-Know Law (RTKL), Act of February 14, 2008, P.L. 6, 65 P.S. § 67.1304(a)-(b). Further, the maximum civil penalty in the amount of \$1,500 is imposed against the University and in favor of Respondent under Section 1305 of the RTKL, 65 P.S. § 67.1305. Counsel shall file a verified statement of the payment within thirty (30) days.



P. KEVIN BROBSON, President Judge