**From:** Applegate, Kyle
**To:** Henry, Faith
**Subject:** FW: [External] Re: McCoy v. PSERS, OOR Dkt. AP 2021-1856, final determination
**Date:** Wednesday, October 27, 2021 12:36:51 PM

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**From:** DiStefano, Joseph <joed@inquirer.com>
**Sent:** Wednesday, October 27, 2021 12:24 PM
**To:** Burlew, Erin <eburlew@pa.gov>
**Cc:** Craig McCoy <cmccoy@inquirer.com>; Applegate, Kyle <kyapplegat@pa.gov>; Joseph DiStefano <joed@inquirer.com>
**Subject:** [External] Re: McCoy v. PSERS, OOR Dkt. AP 2021-1856, final determination



We petition the Office of Open Records to reconsider its 18 October 2021 decision, McCoy v PSERS, OOR Dkt. AP 2021-1856, in so far as it accepts PSERS actions through December 2020 as constituting "a noncriminal investigation," shielding requested records from the public under the Right to Know law.As written, the decision accepts PSERS' after-the-fact characterization of one of the standard performance reviews the agency conducts in accordance with state laws (noted below) as constituting just such a "noncriminal investigation," in order to claim an after-the-fact exemption.But as noted in the decision, "not all agency fact-finding constitutes a noncriminal investigation."In fact. the steps described by Evelyn Williams in her affidavit describe, not an "investigation" whose steps if disclosed would likely "deprive a person of the right to an impartial adjudication." Rather, she describes routine actions used to conduct a state-mandated, triennial investment performance calculation on which the agency's annual funding formulas rest. The decision appears to accept that a "noncriminal investigation was initiated by PSERS alone in the summer of 2020 as a result of the COVID-19 pandemic and its impact on global markets and investment performance." But there is nothing provided to support the claim that those global, external causes led to an "investigation" requiring protection from public disclosure. Outside events continually affect investment values; PSERS conducts investment reviews on quarterly, part-year, annual, and many multi-year bases; the three-year cycle of legislatively-mandated "shared-risk" performance reviews rolls on, no matter the news.It is instructive that in the affidavit itself, as cited in the decision, the matter is described for five paragraphs as a "detailed examination," as "this detailed review," as a "review," a "review" and again as a "detailed review."

Finally, only in paragraph 44, the affidavit attempted to bootstrap this into "the investigation."What Ms. Williams is describing is the routine, core work of PSERS – figuring out returns on its investments. As PSERS notes in its appeal, "Pursuant to Act 120, P.L. 834," and its provision for the calculation of "shared risk," the PSERS Board "was required to certify PSERS' performance" from 2011 to 2020. It performed similar calculations in 2017 and 2014 and plans another for 2023, under the law.When the board voted in December to adopt a performance figure, there was no mention of an investigation in the previous months. (To the contrary, James Grossman, the fund's chief investment officer, told board members, "We did our due diligence. We covered it. I'm not worried about it.")It was not until March 2021, as the record and the decision itself point out, that the board even initiated what it finally, contemporaneously, termed an investigation. Again as noted, this was in the March 12, 2021 adoption of Resolution 2021-09, in which the board gives its audit committee "authority to oversee an investigation of the circumstances surrounding a possible error in the reporting of investment performance results" The same resolution for the first time

approved hiring an outside law firm for this “special investigation.”This is when investigation began, not the previous summer.The actions described in the Evelyn Williams affidavit cited in the decision do not support the “investigation” label that PSERS conveniently applies to them after-the-fact.To borrow phrases from an earlier case cited in the decision, this ruling risks creating “a gaping exemption” under which any regular, periodic, legislatively-mandated governmental information-gathering efforts, re-labeled much later as an “investigation,” could be retroactively “shielded from disclosure.”Surely the Right to Know office does not mean to set a precedent under which the regular and cyclical work expected of every state agency could retroactively be attributed to an investigation and removed from the public record.Please reconsider and recognize that these materials are of public interest and are not privileged to be exempt for disclosure.Sincerely,

Craig R. McCoy, and Joseph N. DiStefano: Philadelphia Inquirer, business news, phone 215.313.3124

On Mon, Oct 18, 2021 at 2:31 PM Burlew, Erin <eburlew@pa.gov> wrote:

> Parties-
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> Please find attached a copy of the OOR’s Final Determination in the above captioned appeal.
>
> Sincerely,
>
> **Erin Burlew**
> Attorney
> Office of Open Records
> 333 Market Street, 16th Floor
> Harrisburg, PA 17101-2234
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