

BEFORE THE OFFICE OF OPEN RECORDS

CRAIG MCCOY AND THE PHILADELPHIA INQUIRER, Complainants	: : : : : : : : : :	AP 2021-1856
v.		
PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, Respondent		

**PENNSYLVANIA PUBLIC SCHOOL EMPLOYEES' RETIREMENT
SYSTEM'S RESPONSE TO RECONSIDERATION**

I. PROCEDURAL HISTORY

On May 18, 2021, Philadelphia Inquirer reporters Joseph DiStefano (“DiStefano”) and Craig McCoy (“McCoy”) (together, “Requesters”) submitted a Right-To-Know Law (“RTKL”) request to the Commonwealth of Pennsylvania, Public School Employees’ Retirement System (“PSERS”) via its Agency Open Records Officer Evelyn Williams (“Williams”). The submission made the following requests:

- 1- In October 2020, PSERS retained Funston Advisory Services LLC as board governance consultant to review governance. Regarding Funston's work, please provide:
 - The contract with Funston and any other document describing the arrangements under which Funston presented work product to PSERS since October 2020
 - All invoices submitted by Funston
 - All payments made by PSERS
 - A copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos), from October to the present, between PSERS staff and any employee or representative of Funston.
- 2- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos), from December 2018 to the present, between PSERS staff and any representative of the owners or sellers of the following parcels of real estate in the City of Harrisburg:
 - The former Patriot-News facilities at 812 Market St.
 - The former Department of General Services building at 908 Market St.

- Any other parcel in Harrisburg acquired by PSERS since 1 January, 2016
- 3A- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of ACA Compliance Group, related to investment performance reporting.
- 3B- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of ACA, related to risk-sharing calculations.
- 3C - Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos), from December 2020 to the present, between PSERS staff and any employee or representative of ACA, related to the discovery or identification of an error in calculating the historical investment performance, as part of the shared-risk determination. Please include, for example, the notice given ACA on Feb. 18, 2021 that Aon's source data was in error, and details of such error and its effect on the scale and direction of the calculation, and other notices related to the error.
- 4A- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of Aon, related to investment performance reporting; including but not limited to memos Aon sent PSERS on March 5, 2021 and April 16, 2021 and since that date.
- 4B- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of Aon, related to risk-sharing calculations.
- 4C- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from December 2020 to the present, between PSERS staff and any employee or representative of Aon, related to the [] discovery of, or the identification of an error in, calculating the historical investment performance, as part of the shared-risk determination.
- 5A- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of Buck Global, related to investment performance reporting.
- 5B- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from January 2020 to the present, between PSERS staff and any employee or representative of Buck Global, related to risk-sharing calculations.
- 5C- Please provide a copy of all written communications, electronic or otherwise (for example, e-mails, texts, letters, memos) from December 2020 to the present, between PSERS staff and any employee or representative of Buck Global, related

to the [] discovery of, or the identification of an error in, calculating the historical investment performance, as part of the shared-risk determination.

- 6- Please provide a copy of each monthly Moneyline report detailing PSERS assets, to date, for calendar year 2021.
- 7A- Please provide a list of all nonprofit corporations and other related-party entities which hold or manage PSERS assets, such as directly-owned properties, including all qualified subsidiaries set up under section 501(c)25 of the Internal Revenue Code.
- 7B - Please explain the purpose and functions of each 501(c)25 entity and other related-party entities set up to hold PSERS properties, for example by providing the footnotes to financial statements that explain each in detail, and the most recent I-990 submitted for each to the Internal Revenue Service.
- 7C - Please list directors and other officers, senior managers, all other owners in addition to PSERS, all subsidiaries of each 501(c)5 entity and other related-party entities set up to hold PSERS properties.

RTKL Request #2021-19; Williams Attestation ¶ 6.

On May 26, 2021, Williams responded to Requesters informing them that PSERS had received their request and would need at least 30 days to respond. Williams Attestation ¶ 8. Williams also asked the Requesters to provide additional information for requests 1, 2, 3A, 3B, 4A, 4B, 5A, and 5B, including identification of a narrower subject and the individual(s) for whom they were requesting said records so that PSERS could identify the records requested. *Id.* ¶¶ 9–10. Requesters provided responses to Williams’ requests on June 8, 2021. *Id.* ¶ 11. As described in detail below, these responses did not cure all of the requests’ lack of specificity, but where such deficiency was cured, PSERS produced responsive documents. *Id.* ¶¶ 12–14, 19–20, 26, 31–34.

On June 23, 2021, Williams informed Requesters that PSERS had gathered certain documents responsive to their request. *Id.* ¶¶ 15. Due to the voluminous nature of the records and the June 8, 2021 expansion of the request to include PSERS Board members, Williams also requested an additional 60-day extension to facilitate and complete the gathering and review of

the records to determine their responsiveness. *Id.* ¶ 16. McCoy approved the extension on June 24, 2021. *Id.* ¶ 17.

Williams provided Requesters with a production of records responsive to requests 7A, 7B, and 7C on June 25, 2021. *Id.* ¶ 18. As a result of some of the additional information Requesters provided in their June 8, 2021 correspondence, Williams was also able to provide a partial production of records responsive to requests 1 and 2. *Id.* ¶ 19. She noted that per the parties' agreement, PSERS had until August 25, 2021 to complete its response for the remaining records. *Id.* ¶ 21.

On August 25, 2021, Williams provided PSERS' final response to Requesters. *Id.* ¶ 22. PSERS granted a portion of requests 1 and 2, and all of request 6, and provided the associated records and information. *Id.* ¶ 23. PSERS denied the remainder of the requests. *Id.* ¶ 24. Relevant to the current appeal, PSERS denied requests 3A, 3B, 3C, 4A, 4B, 4C, 5A, 5B, and 5C on the grounds that the records requested related to criminal and noncriminal investigations, the disclosure of which would deprive a person of the right to a fair trial or an impartial adjudication. *See* 65 P.S. §§ 67.708(b)(16)(vi)(B), (17)(vi)(B). *Id.* ¶ 25. Additionally, because the requests asked for "any documents" and continued to include communications with "all PSERS' staff" or "all of PSERS," PSERS denied the requests as too broad and lacking sufficient specificity for PSERS to ascertain the records requested. *Id.* ¶ 26. PSERS noted that Requesters were not precluded from refining their request and making a new submission, and the agency reserved its right to raise any and all available bases for non-disclosure. *Id.* ¶¶ 27–28.

Requesters appealed PSERS' denial of requests 3 through 5. *Id.* ¶ 29. PSERS opposed Requesters' appeal and filed a brief in support on September 21, 2021. Requesters submitted

additional written argument on September 23, 2021 after the record closing date, and OOR considered the submission to develop the record.

On October 18, 2021, the OOR issued a final determination which granted in part, denied in part, and dismissed as moot in part the requests at issue. As part of OOR's final determination, PSERS was required to perform a good faith search for written communications between PSERS and Aon, Buck Global, and ACA Compliance Group related to the identification or discovery of the rate calculation error, for the time-period January 2020 to the date the summer 2020 investigation commenced and provide all responsive records within thirty days on November 17, 2021. PSERS performed a good faith search and informed Requesters on November 17, 2021, that the search did not identify any responsive documents and, therefore, PSERS had no documents to produce.

Without providing any notice to PSERS, Requesters sent an *ex parte* communication to the OOR on October 27, 2021 regarding a petition of reconsideration. PSERS was not involved in, notified of, or aware of that filing or communication until PSERS received the OOR ruling granting Requesters' petition for reconsideration on November 8, 2021. PSERS was not provided a copy of Requesters' petition and had to request a copy from the OOR.

For the reasons that follow, PSERS respectfully submits that the OOR did not err in its final determination and reconsideration is not warranted. Accordingly, PSERS requests that the OOR find no error occurred and uphold its original final determination.

II. RECONSIDERATION IS NOT WARRANTED

"The OOR has not promulgated any regulations regarding petitions for reconsideration." *Pa. Tpk. Comm'n v. Elec. Transaction Consultants Corp.*, 230 A.3d 548, 560 (Pa. Commw. Ct. 2020). "In general, however, an agency's 'decision to grant or deny a request for reconsideration is a matter of administrative discretion . . .'" *Id.* (quoting *Fleeher v. Dep't of Transp., Bureau*

of Driver Licensing, 850 A.2d 34, 36 (Pa. Commw. Ct. 2004); *Muehleisen v. State Civil Serv. Comm'n*, 443 A.2d 867, 869 (Pa. Commw. Ct. 1982)). A petition for reconsideration “shall state concisely the alleged errors in the adjudication or other order of the agency.” 1 Pa. Code § 35.241.

Here, the OOR committed no error of law or fact. Nor has there been an intervening change in controlling law or new evidence. Rather, Requesters, unsatisfied with the outcome of their appeal, rely on the same facts and same arguments in the hopes of securing a different result. However, the OOR did not err in its application of the RTKL. As much as Requesters may desire the information they seek, the drafters of the RTKL crafted important carveouts to public access with purpose and intention. As argued by PSERS and held by the OOR, certain of those exemptions applied here. In recognizing those exemptions, the OOR ensured that the RTKL as applied to the at-issue requests worked as designed and intended. To hold differently would run afoul of the RTKL and Pennsylvania case law interpreting its application.

III. THE CASES CITED BY THE OOR SUPPORT ITS FINAL DETERMINATION

The OOR has specifically requested that the parties address how the Commonwealth Court’s decisions in *Pennsylvania Department of Public Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014), *California University of Pennsylvania v. Schackner*, 168 A.3d 413 (Pa. Commw. Ct. 2017), and *Sherry v. Radnor Township School District*, 20 A.3d 515 (Pa. Commw. Ct. 2011), apply to the actions taken by PSERS. As detailed below, each of these decisions provides further support for the OOR’s final determination that PSERS engaged in a noncriminal investigation exempting the requested documents from disclosure.

A. ***Pa. Dep’t of Public Welfare v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014)**

In *Chawaga*, attorney Stephen Chawaga requested a Department of Public Welfare (“DPW”) performance audit report pursuant to the RTKL. The OOR granted in part and denied in part his request, and DPW appealed.

1. Unlike DPW, PSERS Engaged in a Noncriminal Investigation

DPW argued that its performance audit report was exempt from disclosure under the RTKL as part of a noncriminal investigation. The Commonwealth Court rejected this argument, finding that “DPW’s performance audit report was not part of a ‘systematic or searching inquiry’ or a ‘detailed examination.’” *Chawaga*, 91 A.3d at 259. “Rather, DPW conducted a one-time inquiry into [the National Comprehensive Center for Fathers’] finances by interviewing management; reviewing the general ledger, payroll records, invoices, and client case files; inventorying the manufacturing equipment; and examining various other supporting documents.” *Id.*

In stark contrast to DPW’s activities, beginning in the summer of 2020, PSERS engaged in comprehensive and repeated detailed inspection into its performance reporting and calculation of the shared risk/shared gain provision for the time period ending June 30, 2020. Williams Attestation ¶ 39. Unlike DPW, PSERS did not merely “review[] the general ledger, payroll records, invoices, and client case files.” *Chawaga*, 91 A.3d at 259. In addition to the extensive back-and-forth review process PSERS engages in with its expert consultant Aon during the course of its routine activities, PSERS staff had Aon perform additional targeted examination into the size and scope of financial return adjustments over a historical period, the reasons that PSERS’ consultants reported certain figures, whether the Comprehensive Annual Financial Report or any other official financial document should be amended, and the use of previous returns in determining contribution calculations. Williams Attestation ¶ 40. These inquiries

were not part of PSERS' and Aon's routine activities, and these steps had not been a part of PSERS' prior calculations of the shared risk/shared gain provision. Rather, these steps were taken as part of PSERS' targeted investigation into the calculation of the shared risk/shared gain provision that arose in the wake of a perfect storm of factors in the summer of 2020.

Aon's supplementary inspection was not the only unique searching inquiry PSERS performed. The PSERS Board's Audit/Compliance Committee also engaged the performance verification firm ACA to conduct the verification of the investment return for the nine years ending on June 30, 2020. *Id.* ¶ 41. The purpose was to, *inter alia*, to perform a calculation review of the investment performance data. *Id.* PSERS had never previously engaged ACA or any other performance verification firm to investigate its performance consultant's calculation process. There was nothing routine about the engagement of ACA, its scope of work, or the process PSERS undertook to investigate Aon's calculation of the shared risk/shared gain provision beginning in the summer of 2020.

2. Unlike DPW, PSERS Seeks to Protect Underlying Audit Materials

In *Chawaga*, the Commonwealth Court also instructed that, "[m]ore importantly, the RTKL specifically exempts the work papers underlying an audit without exempting the actual audit." 91 A.3d at 260 (citing 65 P.S. § 67.708(b)(17)(v)). Because the exemption includes work papers but not the resulting audit, the court presumed that "the General Assembly did not intend to exempt the actual performance audit report under principles of statutory construction." *Id.* (citing *Governor's Off. of Admin. v. Purcell*, 35 A.3d 811, 816 (Pa. Commw. Ct. 2011)).

Here, Requesters do not seek disclosure of an audit report or any final findings. Instead, they seek the communications and work product exchanged during the course of the execution of an audit. However, communications between PSERS and its agents, including the attachments to

those communications, constitute investigative materials, notes, correspondence, and reports, which are exempt from disclosure under 65 P.S. § 67.708(b)(17)(ii).

The plain language dictionary definition of an audit is “a formal examination of an organization’s or individual’s accounts or financial situation,” “the final report of an audit,” or “a methodical examination and review.” *Audit, Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/audit> (last visited September 16, 2021). Black’s Law Dictionary provides a similar definition: “A formal examination of an individual’s or organization’s accounting records, financial situation, or compliance with some other set of standards.” *Audit, Black’s Law Dictionary* (11th ed. 2019).

As PSERS has previously explained, PSERS’ investigation into the Fund’s performance reporting and the calculation of the shared risk/shared gain provision was unequivocally a formal examination of its accounting records, financial situation, and compliance with accounting standards. Williams Attestation ¶¶ 46–47. Via its own investigation in the summer, fall, and winter of 2020, and through its engagement of ACA, PSERS’ investigative activities constituted an audit. Accordingly, the requests for correspondence between PSERS, Aon, ACA, and Buck regarding this investigation of PSERS’ calculation of the shared risk/shared gain provision are, in fact, requests for underlying audit materials that are exempt from disclosure under 65 P.S.

§ 67.708(b)(17)(v). *Id.* *Chawaga* demands no other outcome.

3. Unlike DPW, PSERS Acted Within Its Legislatively Granted Fact-Finding and Investigative Powers

The *Chawaga* court also rejected DPW’s argument that the performance audit report was exempt from disclosure as a noncriminal investigation because “an ‘investigation’ in the context of section 708 of the RTKL [is defined] as a systematic or searching inquiry, a detailed examination, or an official probe[.]” and “[a]n official probe only applies to noncriminal

investigations conducted by an agency acting within its legislatively granted fact-finding and investigative powers.” 91 A.3d at 258–59 (citations and internal quotations omitted). The court held that “DPW’s performance audit was not part of the DPW’s legislatively granted fact-finding or investigative powers; rather, the audit was ancillary to DPW’s public assistance services.” *Id.* at 259. As Requesters quoted in part in their request for reconsideration, the court further explained that “[a] contrary interpretation of an ‘official probe’ would craft a gaping exemption, under which any governmental information-gathering could be shielded from disclosure.” *Id.*

However, despite Requesters’ assertions to the contrary, PSERS is not asking the OOR to craft a contrary interpretation. PSERS’ noncriminal investigation constituted an official probe as defined under the RTKL and applied by *Chawaga* because, unlike DPW, PSERS was acting in its legislatively granted fact-finding or investigative powers when it conducted its noncriminal investigation into the calculation of the shared risk/shared gain provision. As PSERS set forth in its original brief, and as held by the OOR:

While it is uncontested that PSERS and other agencies did, and continue to, investigate the calculation error, the OOR notes that the PSERS board is granted the “power and privileges of a corporation,” 24 Pa.C.S. § 8501(e), and is governed by a Statement of Organization Bylaws, and Other Procedures. Article VI of Section 4.2(b) sets forth the Audit/Compliance Committee duties, which include, but are not limited to, reviewing the findings and recommendations of any examination by regulatory agencies, auditor, staff and/or consultant observations related to compliance. The Committee is also empowered to oversee special investigations as needed. The Board has “exclusive control and management” of the fund and has the authority to perform “such other functions as are required” for the execution of its administrative duties. 24 Pa.C.S. §§ 8521(a), 8502. Thus, PSERS has the requisite statutory authority to perform noncriminal investigations; however, not all agency fact-finding constitutes a noncriminal investigation. *Pa. Dep’t of Pub. Welf. v. Chawaga*, 91 A.3d 257 (Pa. Commw. Ct. 2014).

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Accordingly, PSERS has checked each box set forth by the *Chawaga* court supporting the conclusion that the agency engaged in activities exempting records from disclosure. For all

these reasons, the Commonwealth Court’s decision in *Chawaga* supports the OOR’s final determination as originally issued.

B. Cal. Univ. of Pa. v. Schackner, 168 A.3d 413 (Pa. Commw. Ct. 2017) &

In *Schackner*, the court reiterated that, “[i]n construing the noncriminal investigation exemption in the context of section 708 of the RTKL, this Court has determined that the agency needs to show that it conducted an ‘investigation,’ which is defined as a ‘systematic or searching inquiry, a detailed examination, or an official probe.’” 168 A.3d at 418 (quoting *Dep’t of Health v. Off. of Open Recs.*, 4 A.3d 803, 811 (Pa. Cmwlth. 2010)). The court added that, “[a]bsent evidence of bad faith, the veracity of an agency’s submissions explaining reasons for nondisclosure should not be questioned.” *Id.* (quoting *Off. of Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

Attempting to trivialize PSERS’ activities in the summer of 2020, Requesters claim it is “instructive” that Ms. Williams’ affidavit described PSERS’ investigation as a “detailed examination,” “detailed review,” and “review.” This line of argument disregards, diminishes, and fails to address Pennsylvania courts’ unwavering instruction that, “as used in Section 708(b)(17), the term ‘investigation’ means a systematic or searching inquiry, **a detailed examination**, or an official probe.” *Dep’t of Health*, 4 A.3d at 811 (emphasis added).

Furthermore, although “[m]erely performing routine duties, such as determining the cause of a structure failure and the cost of its repairs, does not amount to an official probe or an investigation,” *Schackner*, 168 A.3d at 418, there was nothing routine about the activities undertaken by PSERS in the summer of 2020. It is true that in its day-to-day activities, PSERS must respond to shifting frameworks and changing market dynamics. Those dynamics, even in a volatile market, rarely require PSERS to change its day-to-day activities and routine, ordinary course of business practices.

However, there is a stark and material difference between a volatile stock market and a global pandemic that caused a worldwide economic crash. PSERS, responding to these external forces and increased internal scrutiny, took steps far beyond its routine duties to investigate the propriety of the processes and procedures underlying the calculation of the investment return for the nine years ending on June 30, 2020. These steps included supplemental, targeted inquiries with Aon that had never been part of PSERS' process in any prior calculation, as well as the engagement of ACA to conduct the verification of the investment return. Requesters might paint PSERS' actions in a routine light with sweeping language of regular "reviews," but that paint strips away when the actual actions of the agency are examined in contrast to its traditional day-to-day activities. There is no comparison.

C. Sherry v. Radnor Twp. Sch. Dist., 20 A.3d 515 (Pa. Commw. Ct. 2011)

Finally, *Sherry* no more changes the outcome. There, the Commonwealth Court closely examined the definition of a noncriminal investigation under the RTKL. Quoting yet again from *Department of Health v. Office of Open Records*, 4 A.3d 803 (Pa. Cmwlth. 2010), the same case PSERS cited for the definition of a noncriminal investigation in its original brief, the *Sherry* court explained:

While Section 708(b)(17) clearly exempts from public disclosure "record[s] of an agency relating to a noncriminal investigation," the RTKL does not define "noncriminal" or "investigation." It is well settled that, "[w]hen a statute fails to define a term, the term's ordinary usage applies." *Educ. Mgmt. Servs. v. Dep't of Educ.*, 931 A.2d 820, 825–26 (Pa. Cmwlth. 2007). Moreover, "[d]ictionaries provide substantial evidence of a term's ordinary usage." *Id.* We initially conclude that the use of the word "noncriminal" in Section 708(b)(17) is intended to signal that the exemption is applicable to investigations other than those which are criminal in nature. This conclusion is supported by the fact that Section 708(b)(16) of the RTKL also exempts records "relating to or resulting in a criminal investigation." 65 P.S. § 67.708(b)(16). Thus, our inquiry here is focused on determining the meaning of the term "investigation." Black's Law Dictionary does not define the term "investigation"; however, it defines the term "investigate" as follows: "1. To inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry.... 2. To make an official inquiry...." Black's Law

Dictionary 902 (9th ed. 2009). Webster's Third New International Dictionary defines the term "investigation" as follows: "1: the action or process of investigating: detailed examination ... 2. a searching inquiry: ... an official probe...." Webster's Third New International Dictionary 1189 (2002). ***Therefore, we conclude that, as used in Section 708(b)(17), the term 'investigation' means a systematic or searching inquiry, a detailed examination, or an official probe.***

20 A.3d at 522–23 (emphasis added) (quoting *Dep't of Health*, 4 A.3d at 810–811).

For all the reasons PSERS has extensively detailed, through its repeated targeted investigation efforts with Aon and its supplemental engagement of ACA to investigate the investment performance data for the nine years at issue, PSERS performed a searching inquiry, detailed examination, and official probe into its performance reporting and calculation of the shared risk/shared gain provision for the time period ending June 30, 2020.

Requesters insist that PSERS did not engage in an investigation until March 2021, when the PSERS Board passed a resolution authorizing its Audit/Compliance Committee to oversee an investigation into a possible error in the reporting of investment performance results. Requesters fail to acknowledge, however, that PSERS conducted distinct noncriminal investigations: (1) an affirmative investigation into the processes and procedures of its performance reporting and calculation of the shared risk/shared gain provision beginning in the summer of 2020; and (2) a reactive, retrospective investigation into a possible error in that calculation beginning in March 2021. The fact that PSERS later determined that a subsequent, retroactive investigation was also necessary has no bearing on the fact that PSERS had previously investigated its performance reporting and calculation of the shared risk/shared gain provision beginning in the summer of 2020.

IV. CONCLUSION

For the foregoing reasons, PSERS submits that the OOR did not err in fact or law in the issuance of its final determination, and respectfully requests that the OOR uphold its original determination.

November 23, 2021

Respectfully Submitted,

Charles K. Serine

Charles K. Serine, Acting Chief Counsel

The Pennsylvania Public School Employees'
Retirement System