

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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NO. 1491 CD 2018

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CALIFORNIA UNIVERSITY OF PENNSYLVANIA

Petitioner

v.

GIDEON BRADSHAW

Respondent

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BRIEF OF RESPONDENT

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APPEAL FROM THE FINAL DETERMINATION ISSUED  
BY THE OFFICE OF OPEN RECORDS DATED  
OCTOBER 15, 2018 AT DOCKET NO. AP 2018-1657

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OFFICE OF OPEN RECORDS

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## SUMMARY OF ARGUMENT

The Office of Open Records correctly determined that the request for release of records of financial donations by Manheim Corporation to the Foundation for California University of Pennsylvania are public records and that release was not prohibited by the exception of Section 708(b)(13) which exempts from disclosure “[r]ecords that would disclose the identity of an individual who lawfully makes a donation to an agency.” While the Right to Know Law does not define “individual,” application of the Statutory Construction Act and reference to other provisions of the Right to Know Law leave no other conclusion but that Manheim Corporation, the donor in this case, is not an “individual” whose participation exempts records of its donations from public disclosure.

The fact that the donations were made to the Foundation and not directly to the University is immaterial. According to a Memorandum of Understanding between the Foundation and the University, any record in possession of the Foundation is a record of the University. Accordingly, the University is in possession of all records concerning the donations to the Foundation in accordance with Section 506(d) of the Right to Know Law. Therefore, the request made to the University for the record of financial donations made to the Foundation must be granted.

## ARGUMENT

- I. THE OOR CORRECTLY DETERMINED THAT THE REQUESTED FINANCIAL RECORDS ARE NOT EXEMPT FROM PRODUCTION BECAUSE MANHEIM CORPORATION IS NOT AN "INDIVIDUAL" UNDER SECTION 708(b)(13) OF THE RTKL.

While the Right to Know Law itself does not define "individual" or "person," those terms' definitions are incorporated by reference into that Law by application of the Pennsylvania Statutory Construction Act's universal definitions. Subchapter (F) of the Statutory Construction Act is entitled "Definition of Words and Phrases." It reads:

**"§ 1991. Definitions.**

The following words and phrases, when used in any statute finally enacted on or after September 1, 1937, unless the context clearly indicates otherwise, shall have the meanings given to them in this section:

... '**Individual.**' A natural person.

... '**Person.**' Includes a corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person."

1 Pa. C.S.A. § 1991.

As the Act clearly provides, the definitions contained therein apply to “any statute” enacted after September 1, 1937. Those definitions govern interpretation of the Right to Know Law and its various provisions.

The definitions of “individual” and “person” are not interchangeable. An “individual” is a natural person, nothing else. A “person” can be either a natural person or a corporation, limited liability company, etc. Without doubt, those terms, as used in the RTKL, refer to distinct and separate things; to wit, a living being as opposed to an incorporeal entity.

The use of those terms in the RTKL is not indiscriminate. An examination of 65 P.S. § 67.708 in its entirety shows that the legislature purposely distinguished “individuals” from “persons.” For instance, the word “individual” is used in Section 708(b)(28) when discussing the exception for human social services and an individual’s eligibility for the same. In contrast, Section 708(b)(29) exempts “correspondence between a person and a member of the General Assembly and records accompanying the correspondence which would identify a person that requests assistance or constituent services.” Similarly, Section 708(b)(16) uses the word “person” in the context of records relating to criminal investigations, as distinct from an “individual.” Victim information which would “deprive a person of a right to a fair

trial or an impartial adjudication” applies to business entities as well as individuals. (Subsection (v)(B).) However, an employment application of an “individual” only is protected by Section 708(b)(6)(iv).

Given the Legislature’s considered and deliberate insertion of the words “individual” and “person” within § 708 itself, it is clear that only an individual’s donations are potentially exempt from production under Section 708(b)(13), but not a person’s – i.e., a corporation’s – donations.

Section 708(b)(13) exempts:

“[r]ecords 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 supplied.]

Significantly, while the Right to Know Law does not define the term “personal identifying information relating to a donor,” it does expressly state a definition for its equivalent, “personal financial information,” in Section 102 (“Definitions”):

“An individual’s personal credit, charge or debit card information; bank account information; bank, credit or financial statements, account or PIN numbers and other information relating to an individual’s personal finances.” 65 P.S. § 67.102. [Emphasis supplied.]



By itself, the language of Section 708(b)(13) is ineluctably clear: It does not comprehend an exemption for a corporation's donation to a state agency. The suggestion that the Legislature meant to include a corporation within the Section 708(b)(13) exemption for donations is conclusively belied by the language the Legislature actually and plainly used.

Indeed, in Parsons v. Urban Redevelopment Authority of Pittsburgh, 893 A.2d 164, 169 (Pa. Cmwlth. 2006), this court recognized the distinction between an "individual" and a "person" by referencing and relying upon the definitions stated in the Statutory Construction Act. The case involved loan delinquency records of a redevelopment authority. The requestor asserted that there was a difference between a "person" and an "individual" while invoking the general principle that a corporation does not possess a right to privacy. The Parsons court said this:

"The court accepts in part the analytical approach taken by the trial court. It properly rejected Parsons' contention that the concept of privacy and of impairment of reputation under the Act can never apply to businesses. Under 1 Pa. C.S. § 1991, the concept of "person" in the phrase 'a person's reputation' in the definition of Public Record in Section 1 of the Act is not clearly limited by the context to natural persons, and therefore, the broader definition under Section 1991 applies, which includes a corporation." Id. at 169.

The court thus recognized that the use of the words “person’s reputation” within the predecessor Right to Know Act (65 P.S. § 66.1), in accordance with the Statutory Construction Act definition, permitted consideration of a business’s purported interest in reputation. *Id.* *A fortiori*, the Legislature’s use of the word “individual” in Section 708(b)(13) must mean the opposite. The Legislature did not intend to extend the donation record exemption to corporations or business entities in Section 708(b)(13) of the new RTKL.

Even if the above analysis of the actual language of the statute were insufficient to compel disclosure, Commonwealth Court has clearly held that the financial information to be protected by Section 708(b)(13) of the RTKL relates only to an individual’s constitutional right of privacy. In Municipality of Mt. Lebanon v. Gillen, 151 A.3d 722 (Pa. Cmwlth. 2016), this court considered whether property owners who allowed a municipality to temporarily use their property free of charge for a deer control program and individuals who provided time and services as archers in the deer control program made a “donation” subject to disclosure under Section 708(b)(13) of the RTKL. The result in Gillen, a case of first impression, turned on the meaning of the term “donation,” which was not defined in the RTKL. As it construed “donation,” the court said:

“While the donation of the property here is temporary and not a gift in fee simple and the volunteer archers are donating time and services rather than property, Section 708(b)(13) does not limit its exemption from disclosure to large donations or permanent gifts of money or property. We will not write in restrictions on the type and size of donations to which Section 708(b)(13) applies where the legislature did not see fit to impose such restrictions. It is a fundamental principle of statutory construction that courts must give effect to the legislative intention as expressed by the words of the statute and cannot, under the guise of construction, add requirements or conditions that the General Assembly did not include in the statute's language. . . . [I]t is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include.” 151 A.3d at 730. [Citations omitted.]

Likewise here, the court must follow the legislative intention expressed by the actual words contained in the statute and cannot add requirements or conditions that the Legislature did not insert. It would be improper to accept Petitioner's argument that the Legislature really meant “person” when it specifically said “individual” in Section 708(b)(13). Exemptions contained in the RTKL are to be narrowly construed to further the public purpose of the statute. Id. If the Legislature meant to include corporate donations in Section 708(b)(13), it would have said so. It did not. The suggestion in Petitioner's Brief that the Business Corporation Law should be referred

to for obtaining an understanding of the use of the term “individual” in Section 708(b)(13) is improper.

As the Gillen court concluded:

“The purpose of the RTKL is ‘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.’ . . . The donor exception of Section 708(b)(13) protects the identity of individuals acting as private citizens to make contributions to their government, not to the acts, decisions or policies of public officials.” 151 A.2d at 730.

Any attempt to shield the actions of University or Foundation officials from public scrutiny concerning the specifics of the Manheim donation is at odds with the language and purpose of the RTKL. Financial donations by a corporation to a state university, which may or may not have influenced that corporation’s award of a lucrative construction contract by the state university, are something the public has a right to know about.

Such an understanding of Section 708(b)(13) is further supported by this Honorable Court’s decision in Butler Area School District v. Pennsylvanians for Union Reform, 171 A.3d 1173 (Pa. Cmwlth. 2017). In that case, the court considered whether a property list which was comprised of the assessment roll of subjects of real estate taxation was a public record. After examining the scope of the right to privacy

under Article I, Section 1 of the Constitution and several cases, the court determined that individual property addresses contained on the list were not personal in nature and, therefore, the list should have been produced. The court said this:

“[T]he source of the information contained in the Property List is not necessarily an individual. Indeed, the real property listed in property tax records may be owned by corporations or other entities. The constitutional right to informational privacy only inures to individuals. Stated differently, individuals, as distinct from ‘persons’ (which may include corporations), may assert a privacy interest under Article I, Section 1.” *Id.* at 1184. [Citations omitted.] [Emphasis supplied.]

Accordingly, Manheim Corporation does not have a privacy right to be protected by Section 708(b)(13) of the RTKL. The use of the word “individual” in Section 708(b)(13) instead of “person” mandates that the donation records must be produced by the University.<sup>1</sup> The OOR’s finding must be affirmed.

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<sup>1</sup> While obviously not binding on this court, the decision of the Washington County Court of Common Pleas in Hallowich v. Range Resources Corporation, 30 Pa. D. & C. 5<sup>th</sup> 91 (2013), confirmed that corporations do not have privacy rights. The decision contains an encyclopedic analysis of the right to privacy and concluded that corporations do not possess privacy rights except in the context of criminal law; again, a position consistent with the actual language of Section 708 of the RTKL.

II. THE OOR CORRECTLY DETERMINED THAT ANY RECORDS IN POSSESSION OF THE FOUNDATION ARE RECORDS OF THE UNIVERSITY AND ARE NOT PROTECTED FROM DISCLOSURE UNDER SECTION 708(b)(13) OF THE RTKL.

65 P.S. § 67.506(d) provides as follows:

**“(d) Agency possession.--**

(1) 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.

...

(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. Upon a determination that the record is subject to access under this act, the open records officer shall assess the duplication fee established under section 1307(b) and upon collection shall remit the fee to the party in possession of the record if the party duplicated the record.”

Respondent’s request was submitted to the University and sought all records relating to Manheim’s donations to the Foundation from January 1, 2008 through December 31, 2013. (R.R. 1a.)

The Memorandum of Understanding between the Foundation and the University recognizes that a record in possession of the Foundation is actually a record of the University. (R.R. 18a – 19a.) It also recognizes that the Foundation is performing a

“governmental function” on behalf of the University as fundraising is an important part of a university’s mission “which promote[s] the educational purposes of the University.” (R.R. 14a – 15a.) The MOU requires the Foundation to “provide the University with an annual report summarizing the contributions.” (R.R. 17a.) It further states that the Foundation will “[s]erve as the managing organization for private funds given directly to the University.” (R.R. 15a.). Thus, the Manheim donation records are “in the possession of the University” and the University must produce them.<sup>2</sup>

This court’s decision in East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496 (Pa. Cmwlth. 2010), is directly on point. In that case, the requestor sought production of financial donor information. Id. at 498. The court ordered production, determining that the Foundation was performing a governmental function for the University. Id. at 501. In holding that the “possession” requirement of Section 506(d) was met, the court said:

“In this case, there is no dispute that the Foundation, under the MOU, carries out fundraising on behalf of the University, making any records ‘directly’ related to performing fundraising activities on behalf of the

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<sup>2</sup> “Foundations at the various institutions of the SSHE in large part are alter egos of the member universities to carry out activities that those universities want to undertake; otherwise, they would not exist. As a result the OOR did not err in determining that the requested documents are ‘public records’ subject to disclosure under the RTKL.” West Chester University of Pennsylvania v. Schackner, 124 A.3d 382, 395 (Pa. Cmwlth. 2015).

University. Because the OOR properly determined that access should be permitted to records of fundraising activities of the Foundation, the OOR properly ordered that *The Record* could review and copy the list of donors, albeit with redacted names, including financial information.” Id. at 505.

For this reason, Petitioner’s argument that the University may not be in possession of records held by the Foundation is spurious. Irrespective of whether the OOR correctly stated that this issue had been waived, it is clear under East Stroudsburg University Foundation and its progeny that donor records are “in the possession of” the university regardless of whether they are actually held by a foundation. A record of the foundation is a record of the university. A state agency cannot prevent a public record from being considered public by creating a convoluted change of custody for the record. The OOR properly determined that the financial donation records of Manheim Corporation are public and had to be produced.

As in East Stroudsburg University Foundation, the Foundation donor records at issue in this case relating to Manheim Corporation must be produced. A corporation does not have a right to confidentiality under Section 708(b)(13). The insinuation that a request for a specific donor record changes this requirement is absurd. The purpose of the RTKL is openness. The RTKL requires that requestors specifically identify the



records sought.<sup>3</sup> If a record sought must be produced in response to a blanket request, it also must be produced when specifically requested.

Finally, Petitioner's Brief also suggests that it is the requestor's burden to show "that a public official or employee received remuneration or a personal or tangible benefit from the donation." (Petitioner's Brief at p. 23.) This assertion is again at odds with the purpose of the RTKL and the general rule of access to public records. 65 P.S. § 67.701, (Access), reads:

**"(a) General rule.** – Unless otherwise provided by law, a public record, legislative record or financial record shall be accessible for inspection and duplication in accordance with this act."

This provision of the RTKL was added to negate the burden of proof imposed under the prior statute (65 P.S. § 66.1, repealed effective January 1, 2009) upon a requesting party to establish that a document was public. The Act now presumes that all records in the possession of a governmental agency are public and therefore accessible for inspection and duplication. Hearst Television, Inc. v. Norris, 54 A.3d 23 (Pa. 2012). Thus, if a burden exists with respect to dispelling the employee remuneration or personal tangible benefit aspect of the donations, it is on Petitioner, not Respondent.

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<sup>3</sup> "A written request should identify or describe the records sought with sufficient specificity to enable the agency to ascertain which records are being requested . . . ." 65 P.S. § 67.703.

**CONCLUSION**

For the above stated reasons, Respondent respectfully requests that the Court affirm the Final Determination of the Office of Open Records dated October 15, 2018.

Respectfully submitted,

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Date: March 6, 2019

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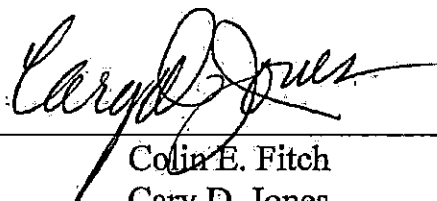
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**CERTIFICATE OF COMPLIANCE**

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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A handwritten signature in cursive script, appearing to read "Cary D. Jones", written over a horizontal line.

Colin E. Fitch  
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**CERTIFICATE OF SERVICE**

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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