



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

May 1, 2014

**Sent via E-mail to: [jiwolfe@pa.gov](mailto:jiwolfe@pa.gov)**

Jill S. Wolfe, Esquire  
Appeals Officer  
Commonwealth of Pennsylvania  
Office of Open Records  
Commonwealth Keystone Building  
400 North Street, 4<sup>th</sup> Floor  
Harrisburg, PA 17120-0225

**RE: *Bagwell v. Pennsylvania Department of Education,*  
OOR Docket # AP 2014-0551**

Dear Ms. Wolfe:

The Pennsylvania Department of Education (PDE) is in receipt of your April 28, 2014 e-mail in the above referenced matter pending before the Office of Open Records (OOR). In your e-mail, you request additional information:

- explaining the following statement made by former Secretary of Education Ron Tomalis (Tomalis) in a November 11, 2011, 7:05 p.m., e-mail from Tomalis to Pennsylvania State University (PSU) Board of Trustees (Board) member Kenneth Frazier: "... I noted the same thing about Freeh when I had reviewed the names prior to forwarding them to John . . . ."
- explaining whether or not any of the three e-mails that are the subject of this appeal (Records) as identified in the *in camera* inspecting index filed by PDE were forwarded to John Surma, former vice-chair of PSU's Board.

You further request "a statement made under penalty of perjury . . . discussing the above allegation[, that Tomalis waived the attorney-client and attorney work-product privileges by disclosure to a third-party,] raised by Mr. [Ryan] Bagwell in his submission to the OOR on April 17, 2014.

**The RTKL and OOR's Interim Guidelines do not authorize  
the Appeal Officer's request for additional information from PDE.**

Respectfully, for the following reasons, PDE declines to provide the information as requested.

The RTKL expressly provides that the authority of an appeals officer in a RTKL appeal shall be to:

- (1) Set a schedule for the requester and the open-records officer to submit documents in support of their positions.
- (2) Review all information filed relating to the request. The appeals officer may hold a hearing. A decision to hold or not to hold a hearing is not appealable. The appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. The appeals officer may limit the nature and extent of evidence found to be cumulative.
- (3) Consult with agency counsel as appropriate.
- (4) Issue a final determination on behalf of the Office of Open Records or other agency.

65 P.S. § 67.1102(a)(1)-(4). The RTKL also addresses the procedures for appeals to the OOR, stating:

- (1) If an appeal is resolved without a hearing, 1 Pa. Code Pt. II (relating to general rules of administrative practice and procedure) does not apply except to the extent that the agency has adopted these chapters in its regulations or rules under this subsection.
- (2) If a hearing is held, 1 Pa. Code Pt. II shall apply unless the agency has adopted regulations, policies or procedures to the contrary under this subsection.
- (3) In the absence of a regulation, policy or procedure governing appeals under this chapter, the appeals officer shall rule on procedural matters on the basis of justice, fairness and the expeditious resolution of the dispute.

65 P.S. § 67.1102(b)(1)-(3). The OOR is authorized to “adopt procedures relating to appeals under this chapter.” 65 P.S. § 67.1102(b). OOR’s appeals officers “must comply . . . with the procedures under section 1102(b).” 65 P.S. § 67.13010(a)(5)(ii).

Although the OOR has not promulgated regulations, it has published and updated “*Interim Guidelines*” addressing appeals before the OOR. The *Interim Guidelines* (Section IV.C.) incorporate the authority and procedural mandates set forth in section 1102 of the RTKL, 65 P.S. § 67.1102. The *Interim Guidelines* also expand upon the procedures for hearings, Sections V-VI, and provide a process for *in camera* review by the OOR appeals officer of records that are the subject of the appeal, Section IV.D.

The RTKL and the *Interim Guidelines* do not authorize an appeals officer to advocate on behalf of one of the parties in the appeal, to demand discovery from any of the parties in the appeal, or cross-examine a party's affidavit, evidence or witnesses.

The Appeals Officer's demand for additional information from PDE goes beyond the limited authority in section 1102 of the RTKL and the *Interim Guidelines*. The Appeals Officer is taking on the role of advocate for Bagwell, and questioning PDE to further explore Bagwell's otherwise unsupported arguments of waiver of the attorney-client and attorney work-product privileges and 65 P.S. § 67.708(b)(10)(i)(a) exemption (Privileges) claimed by PDE. As characterized in the April 28, 2104 e-mail, the Appeals Officer is demanding additional information from PDE "discussing the above ***allegation raised by Mr. Bagwell in his submission to the OOR on April 17, 2014.***" (*emphasis added*). Further, despite PDE's submission of an affidavit stating that there has been no waiver of the Privileges, the Appeals Officer demands more from PDE than the law requires and commands that PDE produce a statement "under penalty of perjury," to respond to Bagwell's unsubstantiated allegation of waiver with very specific parameters of what the statement should explain – whether or not any Records were forwarded to John Surma. The Appeals Officer's directed information request is akin to a discovery request or a cross-examination of the affidavit previously filed by PDE in this appeal. This one-sided advocacy is not appropriate under the RTKL or in any context which calls for an impartial decision-maker in an adjudicative proceeding.

Notwithstanding the absence of any authority to compel PDE to provide the requested information, in respectful deference to the Appeals Officer's responsibility to act "on the basis of justice, fairness and the expeditious resolution of the dispute," 65 P.S. § 67.1102(b)(3), PDE submits the following additional statement.

**PDE has met its burden to establish the Records are exempt from disclosure**

As explained in PDE's April 17, 2014 and April 25, 2014 submissions, the record in this appeal includes an affidavit setting forth facts necessary to assert the Privileges and address each of the four prongs in the analysis in *Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259, 1264 (Pa. Super. 2007), *aff'd per curiam* 992 A.2d 74 (Pa. 2010). As also explained in PDE's April 17 and April 25 submissions, there is no dispute as to the nature of the communications – Tomalis sought legal advice concerning the hiring of legal and investigative counsel for PSU. PDE met its burden to assert the Privileges and set forth the necessary facts to show that the Privileges have been invoked and have not been waived. *See Heavens v. Pennsylvania Department of Environmental Protection*, 65 A.3d 1069, 1076-1077 (2013) (holding that agency met its burden to establish the attorney-client and attorney work-product privileges through the submission of affidavits).

Because PDE met its burden to initially set forth facts showing that the privileges have been properly invoked, the burden then shifts to Bagwell, as the party seeking disclosure, to set forth facts showing that disclosure will not violate the privileges. *Fleming*, 924 A.2d. at 1266.

Bagwell has not submitted any evidence to rebut PDE's affidavit. Bagwell attempts to respond to the affidavit by citing to a single statement, in a single e-mail dated November 11, 2011, in

which Tomalis states “. . . I noted the same thing about Freeh when I had reviewed the names prior to forwarding them to John . . . .” Bagwell theorizes that this single statement can mean only one thing – that Tomalis forwarded the Records to Surma. However, Bagwell does not provide any evidence to support his speculative accusation that Tomalis waived the Privileges. Accordingly, Bagwell has failed to meet his burden to rebut PDE’s evidence.

Despite the inescapable conclusion that the Records are protected by the Privileges and that Bagwell’s appeal must be denied, PDE again responds to Bagwell’s unsubstantiated allegation of waiver in accordance with the Appeals Officer’s April 28 e-mail.

Tomalis’ statement in the November 11, 2011 e-mail reveals only that Tomalis forwarded names, including that of Louis Freeh, to Surma. As stated by PDE in its April 25 filing with the OOR, nothing in Tomalis’ statement or in any other part of the November 11, 2011 e-mail reveals that Tomalis forwarded the Records or that he informed Surma or any other PSU Board member that his Office of General Counsel (OGC) attorneys provided him with recommendations of attorneys that PSU could hire. Even if Louis Freeh was recommended by OGC, Tomalis’ statement would reveal only that Tomalis used information he gathered in responsibly preparing to perform his function as an *ex officio* member of PSU’s Board in making recommendations to the Board and preparing a list of names to forward to Surma, as opposed to acting arbitrarily and without the benefit of educated advice. The statement does not, by necessity, lead one to the conclusion that the Privileges were waived.

In further support of the indisputable conclusion that there is no evidence of a waiver of the Privileges, PDE submits a copy of the response provided to Bagwell on April 30, 2014, to a RTKL request to PDE seeking, “All emails sent to former . . . Penn State trustee John Surma from former secretary of education Ron Tomalis between November 8, 2011[,] and November 11, 2011[,] regarding the hiring of external legal counsel for Penn State.” See Attachment 1. Following a good faith effort, PDE determined that it does not have possession, custody or control of records responsive to Bagwell’s request, and so informed Bagwell and provided an affidavit in support thereof. *Id.*

PDE asserted the Privileges to withhold the Records. PDE presented an affidavit in support of the Privileges. The affidavit makes clear that the Records contain communications made to and by OGC counsel for the purpose of providing professional legal advice concerning legal issues arising out of the Tomalis’ statutory role on the PSU Board. The affidavit and other evidence and arguments submitted throughout the course of this appeal also makes clear that the legal communication has remained confidential and has not been disclosed to third parties that are not a part of the confidential relationship. Under the RTKL’s “preponderance of the evidence”<sup>1</sup> standard, and indeed under any standard of proof applicable to administrative, civil or criminal proceedings, the only conclusion that can be reached is that the Records are protected from

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<sup>1</sup> “The burden of proving that a record of a Commonwealth agency . . . is exempt from public access shall be on the Commonwealth agency . . . by a preponderance of the evidence.” 65 P.S. § 67.708(a)(1). “A preponderance of the evidence standard, the lowest evidentiary standard, is tantamount to a more likely than not inquiry.” *Delaware County v. Schaefer ex rel. Philadelphia Inquirer*, 45 A.3d 1149, 1156 (Pa. Cmwlth. 2012).

disclosure by the Privileges. The OOR must therefore conclude that PDE has met its burden and it has not been rebutted by Bagwell. *See Heavens*, 65 A.3d at 1076-77.

### **Conclusion**

The OOR must recognize the burdens on each party in this proceeding and the magnitude of the impact of its decision in this appeal. The Pennsylvania Supreme Court “has repeatedly noted that the attorney-client privilege is deeply rooted in our common law and is the ***most revered*** of our common law privileges.” *Levy v. Senate of Pennsylvania*, 65 A.3d 361, 368 (Pa. 2013) (***emphasis added***) (quotations omitted). “Waiver of the attorney-client privilege is a ***momentous decision***. . . .” *Board of Supervisors of Milford Twp. v. McGogney*, 13 A.3d 569, 574 (Pa. Cmwlth. 2011) (***emphasis added***). Bagwell’s request that the OOR adopt his theory of a waiver based solely on the inconclusive statement made in a single e-mail must be rejected and his appeal must be denied.

For all the reasons stated above and in PDE’s other filing in this appeal, PDE respectfully requests that OOR deny Bagwell’s appeal and find the following:

- (1) The Records are protected from disclosure by the attorney-client privilege.
- (2) The Records are protected from disclosure by the attorney work-product privilege.
- (3) The Records are exempt from access as they reflect internal, predecisional deliberations of and between PDE and OGC and their officials and employees.

Sincerely,

*s/ Robert T. Datorre*

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c: Ryan Bagwell ([ryan@ryanbagwell.com](mailto:ryan@ryanbagwell.com))



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April 30, 2014

**Via Electronic Mail (ryan@ryanbagwell.com)**

Ryan Bagwell  
5219 Shorecrest Drive  
Middleton, WI 53562

**Re: Right-to-Know Law Request No. 2014-052**

Dear Mr. Bagwell,

Thank you for writing to the Pennsylvania Department of Education (PDE) with your request for information pursuant to the Pennsylvania Right-To-Know Law (RTKL), 65 P.S. § 67.101 *et seq.* Your request was received on April 23, 2014, and you requested the following:

All emails sent to former . . . Penn State trustee John Surma from former secretary of education Ron Tomalis between November 8, 2011[,] and November 11, 2011[,] regarding the hiring of external legal counsel for Penn State.

PDE does not have the records you requested in its possession, or under its custody or control. Please see the attached affidavit. Pursuant to the Office of Open Records Final Decision in *Jenkins vs. Pennsylvania Department of State*, OOR Dkt. AP 2009-065, it should be noted that: "It is not a denial of access when an agency does not possess records and [there is no] legal obligation to obtain them (*see, e.g.* section 67.506 (d)(1))." Notwithstanding the OOR's decision in *Jenkins*, PDE provides you with the following addition information concerning appeals.

You have a right to appeal this response in writing to Terry Mutchler, Executive Director, Office of Open Records (OOR), Commonwealth Keystone Building, 400 North Street, 4<sup>th</sup> Floor, Harrisburg, Pennsylvania 17120. If you choose to file an appeal you must do so within 15 business days of the mailing date of this response and send to the OOR:

- 1) this response;
- 2) your request; and
- 3) the reason why you think the agency is wrong in its reasons for saying that the record is not in its possession, or in its custody or control.

Also, the OOR has an appeal form available on the OOR website at:  
<https://www.dced.state.pa.us/public/oor/appealformgeneral.pdf>.

Should you have questions regarding this letter, please contact me by telephone, facsimile, or mail.

Sincerely,

Larry McComsey  
Agency Open Records Officer  
(717) 787-5380  
(717) 772-2317 (fax)

Attachment

### ATTESTATION

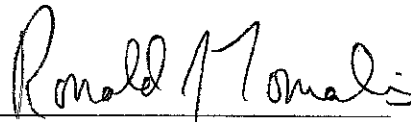
Date: April 30, 2014  
Agency: Pennsylvania Department of Education  
Requester: Ryan Bagwell

Records Requested: I hereby request copies of the following:

all e-mails sent to former . . . Penn State trustee John Surma from former secretary of education Ron Tomalis between November 8, 2011[,] and November 11, 2011[,] regarding the hiring of external legal counsel for Penn State.

I, Ronald J. Tomalis, am a Special Advisor to the Governor of Pennsylvania and former Secretary of Education, and I make this statement under the penalty of perjury as more fully set forth in 18 Pa.C.S. § 4904.

To the best of my knowledge and after a reasonable search of my records, I do not have in my possession, or under my custody or control any records responsive to Mr. Bagwell's request.

  
Ronald J. Tomalis

Dated: 4/30/2014