



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

333 MARKET STREET
HARRISBURG, PA 17126-0333
www.pde.state.pa.us

October 2, 2012

Ryan Bagwell
5219 Shorecrest Drive
Middleton, WI 53562

Re: Right-to-Know Law Request No. 2012-169

Dear Mr. Bagwell,

Thank you for writing to the Department of Education (Department) 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 September 25, 2012. You requested:

Copies of contracts, memorandums of understanding and other agreements between:

1. Penn State University and The Freeh Group, and/or its representatives, and/or
2. Penn State University and the law firm of Pepper Hamilton, and/or its representatives.

Specifically, and at a minimum, I am seeking a copy of the agreement, and any subsequent agreements, that established or furthered the relationship between Penn State and The Freeh Group during its recent investigation of the university's response to child abuse allegations.

Your request is initially denied because it is not sufficiently specific to enable us to ascertain which records are being requested. The RTKL requires that a request for records be made with "sufficient specificity to enable the agency to ascertain which records" are being requested. 65 P.S. § 67.703. In considering RTKL requests, the Department attempts to determine what the requester is seeking, but must also respond to the actual words of the request. If the request is overly broad and does not narrow, without limitation, the universe of potential records encompassed by the request, it remains insufficiently specific. Such requests must be denied to ensure that the Department has the proper opportunity to raise all other substantive reasons for denial and narrow the issues for consideration by the Office of Open Records (OOR), if review of the denial is sought. An agency may be compelled to produce records that were not envisioned by the agency as being within the scope of a request if, on appeal, the OOR determines that the agency waived an objection based on insufficient specificity by not raising it in the initial denial. *See, e.g., Pennsylvania Department of Environmental Protection v. Legere*, 3 C.D. 2012 (Pa. Cmwlth. July 31, 2012); *Schillinger v. Lackawanna*, OOR Dkt No. AP 2009-1059 (Jan. 8, 2010).

Because you have not identified any specific representatives of The Freeh Group or Pepper Hamilton, the Department does not know to whom you are referring when you refer to representatives of The Freeh Group or representatives of Pepper Hamilton. Therefore, your request for documents between Penn State and representatives of The Freeh Group and/or representatives of Pepper Hamilton lacks sufficient specificity for the Department to ascertain the documents being requested. The lack of specificity is compounded by the fact that your request does not specify an individual or individuals within the Department who may be in possession of the requested documents or a transaction or activity of the Department pursuant to which the requested documents may have been created, received or retained.

However, notwithstanding that part of your request lacks specificity as noted above, the Department can respond to the part of your request that seeks contracts, memorandums of understanding and other agreements between Penn State and The Freeh Group and/or Penn State and Pepper Hamilton, that established or furthered the relationship between Penn State and The Freeh Group during its recent investigation of the university's response to child abuse allegations. In response to this part of your request, the Department denies your request because the requested documents are not records of the Department even if the Department had such documents in its possession, or under its custody or control. Notwithstanding the fact that Secretary of Education Ronald Tomalis is a member of Penn State's Board of Trustees, documents in Secretary Tomalis's possession, custody or control solely by virtue of his position on the Board are not records of the Department. *See Bagwell v. Pennsylvania Department of Education*, OOR Dkt. No. 2012-1355 (September 13, 2012) ("While it is true that the Secretary serves as a member of the Penn State Board of Trustees *ex officio* . . . , this role does not serve to transform the activities of the Penn State Board of Trustees into activities of the Department"). In addition, a record is defined in the RTKL as "information, regardless of physical form or characteristics, that documents a transaction or activity of an agency and that is created, received or retained pursuant to law or in connection with a transaction, business or activity of the agency." 65 P.S. §67.702 (definition of record) (emphasis added). Even if in possession, under the custody or control of the Department, contracts, memorandums of understanding and agreements between Penn State and The Freeh Group and/or Pepper Hamilton do not document any transaction or activity of the Department and were not created, received or retained pursuant to law or in connection with a transaction, business or activity of the Department; thus, they are not records of the Department and are not subject to the RTKL.

Although part of your request lacks sufficient specificity, as noted above, and the requested documents are not records of the Department, the Department further responds that it does not have the requested documents in its possession, under its custody or control. 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))." As stated in the attached affidavit, the Secretary of Education would likely be the only person in the Department that might have such documents in his possession, under his custody or control, because he is a member of the Penn State Board of Trustees. After a reasonable search, the Secretary of Education does not have the requested documents in his possession, under his custody or control. In addition, the Department also determined that members of the Department's Executive staff and Deputy Secretaries do not have such documents in their

possession, under their custody or control. Therefore, after a reasonable search, the Department does not have the requested documents in its possession, under its custody or control.

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, 4th 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;
- 3) the reason why you think your request is sufficiently specific, why you think information may be "records" of the agency, and the reasons why you think any records are public (a statement of the grounds you assert for the requested record being a public record) and why you think the agency is wrong in its reasons for saying that records are not public (a statement that addresses any ground stated by the agency for the denial) and why you think the records exist under the custody or control of the agency. 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,

Handwritten signature of Michael E. Bressi in black ink, with the initials 'KE' written at the end of the signature.

Michael E. Bressi
Agency Open Records Officer
(717) 783-9795
(717) 772-2317 (fax)

Date Mailed: October 2, 2012

ATTESTATION OF NONEXISTENCE OF RECORDS

Date: October 2, 2012

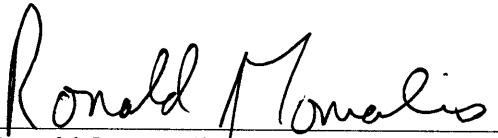
Agency: Pennsylvania Department of Education

Requester: Ryan Bagwell

Records Requested: Copies of contracts, memorandums of understanding and other agreements between: (1) Penn state University and The Freeh Group, and/or its representatives and/or (2) Penn State University and the law firm of Pepper Hamilton, and/or its representatives. Specifically, and at a minimum, a copy of the agreement, and any subsequent agreements, that established or furthered the relationship between Penn State and The Freeh Group during its recent investigation of the university's response to child abuse allegations.

I, Ronald J. Tomalis, am the Secretary of the Pennsylvania Department of Education (PDE) and I make this statement under penalty of perjury as more fully set forth in 18 Pa. C.S. § 4904.

I attest that I am a member of the Board of Trustees of the Pennsylvania State University and, to my knowledge, would likely be the only person in the Pennsylvania Department of Education (PDE) who possibly would have possession, custody or control of the requested records. Notwithstanding that the requested records are not considered to be records of PDE, after a reasonable search for the records requested, I have determined that such records are not in my possession, custody, or control. In addition, in a good faith effort to determine whether PDE has possession, custody or control of the records requested, PDE also determined that members of the Executive staff and Deputy Secretaries do not have the requested records in their possession, custody or control. It is understood that this does not mean that the records do not exist under another spelling, another name, or under another classification.


Ronald J. Tomalis

Dated: 10/2/12