



COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF EDUCATION

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

September 20, 2012

Mr. Ryan Bagwell
5219 Shorecrest Drive
Middleton, WI 53562

Re: Right-to-Know Law Request No. 2012-164

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 13, 2012. You requested:

Copies of contracts, memorandums of understanding and other agreements between Penn State University, its officers, trustees and/or other representatives of the university, and The Freeh Group, the law firm of Pepper Hamilton, any other firm that may have assisted in the inquiry into the Sandusky scandal and/or representatives of either firm.

For the reasons below, your request is denied.

Your request is 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).

In determining whether a request for records of communications is sufficiently specific, the OOR has determined that the totality of the circumstances have to be considered. As noted by the OOR in *Martin v. PUC*, OOR Dkt. No. AP 2010-0385, “[a] number of facts may be

considered such as time restrictions, subject matter, date restrictions, parties involved, types of records, etc. However, there is no formula or combination thereof that can be identified to meet specificity requirements.”

In *Pennsylvania State Police v. Office of Open Records*, 995 A.2d 515 (Pa. Cmwlth. 2010) (*PSP*), the Commonwealth Court concluded that the clause of the request seeking, “Any and all records, files, or manual(s), communications of any kind,” was “overbroad” and “insufficiently specific for the PSP to respond to the request.” *Id.*

Although your request refers to “the inquiry into the Sandusky scandal,” it fails to specifically explain the incident or occurrence to which this statement is intended to apply. Even if the Department reasonably interprets this description in your request to be intended to refer to the facts and occurrences surrounding the abuse allegations and criminal conviction of Jerry Sandusky, your request remains insufficiently specific. As written, it is unclear whether your request seeks only those “contracts, memorandums of understanding and other agreements” between the persons identified in your request for assistance or services provided specifically for an investigation into the allegations concerning Jerry Sandusky or if your request is intended to seek “contracts, memorandums of understanding and other agreements” between the specifically identified persons and “any other firm that may have assisted in the inquiry into the Sandusky scandal,” regardless of the reasons for or the products or services provided under the contracts, memorandums of understanding and other agreements. This is further complicated by the fact that your request fails to include a time period to which it applies. Additionally, your request seeks “contracts, memorandums of understanding and other agreements” between specifically identified persons as well as other persons which you only very broadly described as “other representatives of the university,” “any other firm,” and “representatives of either firm.” These broad descriptions could include an unknown number of persons and could relate to various products or services obtained through contracts, memorandums or understanding, or other “agreements,” again, without defined time, subject matter or product or service type limitations. Consequently, the Department is unable to determine which records you request.

In *PSP*, the Commonwealth Court explained that “agencies as a normal practice should raise all objections to access when the request is made if the reason for denying access can be reasonably discerned when the request is made.” *PSP*, 995 A2d at 517. Because your request lacks the specificity required by 65 P.S. § 67.703, and is, in part, illegible, the Department is unable to raise all the objections to access that may relate to your request in this response. Notwithstanding the deficiencies in your request, the Department has made a reasonable effort to determine whether any exemptions would be applicable to the records that may be encompassed by your request. The exemptions from access that could be discerned are detailed below, and access to the records that may be covered by your request is denied, in whole or in part, based on these reasons. Please be advised that the Department reserves the right to supplement these exemptions with additional exemptions or provide additional factual or legal justification for citing the exemptions below based on clarification of your request or other information made available to the Department in the future¹.

¹ Should you seek to clarify your request or more specifically describe the records you seek, your submission would be treated as a new RTKL request and should be submitted in accordance with the requirements of the RTKL and the Department’s RTKL Procedures.

If the Department has documents that are responsive to your request, the documents may not be records of the Department and may instead be documents of Penn State University or the persons identified in your request. Notwithstanding the fact that Secretary of Education Ronald Tomalis is a member of Penn State University'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). Additionally, any responsive information that does not document "a transaction or activity of [the Department]" or that was not "created, received or retained pursuant to law or in connection with a transaction, business or activity of [the Department]," is not a "record" of the Department and is, therefore, not subject to the RTKL. *See* 65 P.S. § 67.102 (definition of "record.")

If² the Department has records responsive to your request, the records could relate to criminal or noncriminal investigations conducted to determine compliance with or violations of applicable statutes, regulations or other requirements, and would therefore be exempt pursuant to 65 P.S. § 67.708(b)(16) and (17). *See also, Mitchell v. Office of Open Records*, 997 A.2d 1262 (Pa. Cmwlth. 2012); *Pennsylvania State Police v. Office of Open Records*, 5 A.3d 473 (Pa. Cmwlth. 2010); *Department of Health v. Office of Open Records*, 4 A.3d 803 (Pa. Cmwlth. 2010); and, *Pennsylvania Public Utility Commission v. Gilbert*, 40 A.3d 755 (Pa. Cmwlth. 2012). If you intended to seek records relating to contracts, memorandums of understanding or other agreements for products or services used to investigate allegations of misconduct by Jerry Sandusky or other persons, your request, on its face, would seek records relating to criminal and non-criminal investigations.

If the Department has records responsive to your request, the records may also include personal identification information or information, which, if disclosed, would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual, and would be exempt pursuant to 65 P.S. § 67.708(b)(1)(ii) and (6)(i).

Personal identification information and information, which, if disclosed, would be reasonably likely to result in a substantial and demonstrable risk of physical harm to or the personal security of an individual, would also be exempt from access under other Federal and State laws. *See*, 4th Amendment of the United States Constitution; Article I, § 8 of the Pennsylvania Constitution.

If the Department has records responsive to your request, the records may also include records or information that constitutes or reflects attorney-work product or attorney-client privileged communications. *See* 65 P.S. § 67.102; *Gillard v. AIG Ins. Co.*, 15 A.3d 44 (Pa. 2011), and statutes, rules and cases cited therein. On its face, your request seeks records of contracts, memorandums of understanding or other agreements with firms that provide legal representation and services.

² The RTKL exempts from access a record that reveals even the institution of a noncriminal investigation. *See* 65 P.S. § 67.708(b)(17)(vi)(A). Therefore, if an agency establishes that the requested records would be records of investigations conducted pursuant to the agency's statutory duty to determine compliance with statutory and regulatory requirements, nothing more is necessary to trigger the exemption. The agency need not disclose that an investigation was even conducted.

If the Department has records responsive to your request, the records or information therein could constitute trade secret or confidential proprietary information of the persons identified in your request and would be exempt from access pursuant to 65 P.S. § 67.708(b)(11).

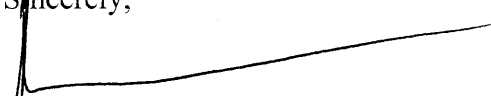
If the Department has records responsive to your request, the disclosure of the records or information could create a reasonable likelihood of endangering the safety or the physical security of a building, public utility, resource, infrastructure, facility or information storage system, or computer security, and would therefore be exempt from access pursuant to 65 P.S. § 67.708(b)(3) and (4).

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). 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,



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

Date Mailed: September 20, 2012