



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 18, 2023

Commonwealth of Pennsylvania  
Office of Open Records  
ATTN: Angela Edris, Appeals Officer  
333 Market Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101-2234

**By OOR E-File Portal and by Regular Mail**

**In the Matter of:**

**OOR Docket No. AP 2023-1520  
Massey and Spotlight PA v. Pennsylvania Department of Agriculture Agency  
Response**

Dear Appeals Officer Edris:

I have previously entered my Notice of Appearance on behalf of the Pennsylvania Department of Agriculture (“PDA”) in the above matter (the “subject appeal”).

By letter of July 7, 2023, Office of Open Records (“OOR”) Executive Director Elizabeth Wagenseller provided PDA notice of the subject appeal and notice of the window within which additional argument and factual information might be submitted. PDA’s response is due on July 18, 2023. The Requester in this matter is Wyatt Massey (“Mr. Massey”). This letter and its accompanying attachments are offered on PDA’s behalf.

The RTKL request that is the subject of this appeal are as follows (PDA RTKL# 230637):

An electronic screenshot of all folders and files hosted on Diligent, the file sharing service Penn State uses, related to Russell Redding’s role on the Penn State Board of Trustees, including but not limited to his role as a member of the Governance and Planning Committee, Legal and Compliance Committee, and the full board of trustees. An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.

In summary:

At the time of PDA's response letter dated July 3, 2023, PDA believed that it did not have records related to Mr. Massey's initial RTKL request. No records related to screenshots were found in PDA's possession, custody or control. As a courtesy to the third party involved, PDA made a good-faith effort and contacted the Penn State Board of Trustees' legal counsel to let them know this request was received. Past Right-to-Know Law requests received which were related to Penn State Board of Trustee records resulted in the identification of confidential, third-party proprietary information. This required contact with Penn State University ("PSU") legal counsel based on section 67.707(b) and section 67.708(b)(11) of the Pennsylvania *Right-To-Know Law 65 P.S. §§ 67.101, et seq.*

Penn State Board of Trustees' legal counsel informed PDA that only trustees have access to the Diligent file-sharing platform and the Board Office controls a Trustee's ability to print or export documents from the platform. Therefore, PDA believed records related to the August 2022 retreat to not be in its possession, under its custody or its control. Pursuant to the Office of Open Records Final Decision in *Jenkins vs. Pennsylvania Department of State*, Docket # 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))."

Following receipt of Mr. Massey's appeal on July 7, 2023, PDA conducted further due diligence and discovered a document in its possession, which PDA was previously unaware of, that met the criteria of Mr. Massey's RTKL request. This document was responsive to the second part of Mr. Massey's RTKL request: *materials related to the August 2022 Penn State Board of Trustees Retreat*. The responsive materials, with applicable exemptions allowable under the RTKL, are hereby provided with PDA's position statement. Although PDA did not raise these exemptions from the onset in its response to Mr. Massey's initial RTKL request, the Commonwealth Court stated in *Levy v. Senate of Pa.*, 94 A.3d 436 (Pa. Commw. 2014) that "[a]n agency must raise all its challenges before the fact-finder closes the record. This will allow efficient receipt of evidence from which facts may be found to resolve the challenges." *Id.* at 441. Thus, PDA raises these exemptions as this position statement is now before the appeals officer. *Id.* at 442.

PDA, however, still maintains that it does not have documents related to Mr. Massey's first part of his request regarding screenshots of the Diligent platform.

I have attached an Affidavit by Shannon S. Harvey, Assistant Vice President, Office of the Board of Trustees/Secretary of the Pennsylvania State University ("Board"). This Attestation is marked as Attachment A and is incorporated herein.

Under the Bylaws of the Pennsylvania State University, Article II Trustees Section 2.01 Number, Election and Term of Office (a)(i) the Pennsylvania Secretary of Agriculture shall serve as an Ex

Officio Voting Member of the Pennsylvania State University Board of Trustees (“PSU Board”). *See Attachment C PSU Exhibits #1 and #2*, Article II Section 2.01(a)(i) (May 7, 2021); *See also, Affidavit of Shannon S. Harvey*.

Secretary Russell Redding became an ex officio member of the Board of Trustees in January of 2015 when he was appointed to serve as Secretary of the Pennsylvania Department of Agriculture. Secretary Redding was granted Diligent access on July 16, 2020. The Board Office controls the Secretary’s ability to print or download any document from the Diligent platform. The Secretary does not have the ability to post or delete anything in the Diligent platform. Access is given to the Secretary of Agriculture individually, in his capacity as a Trustee. No one else in the Pennsylvania Department of Agriculture is given access to Diligent. *See Attachment A Affidavit of Shannon S. Harvey, Assistant Vice President, Office of the Board of Trustees/Secretary Pennsylvania State University*. The Secretary, like all other members of the Board of Trustees is subject to the University’s Bylaws and Board of Trustees’ Standing Orders. *See Attachment C PSU Exhibits #1 and #2 The Pennsylvania State University Bylaws and Standing Orders of the Board of Trustees*.

*Diligent* is a board management software used by the PSU Board as a platform for sharing documents and other information with the Trustees. *See Attachment A Affidavit of Shannon S. Harvey*. For approximately three years PSU’s Office of the Board of Trustees (the “Board Office”) has utilized *Diligent* as a platform for sharing documents and other information with members of the PSU Board. *Id.* *Diligent* is an online board portal tool that facilitates secure digital communication from the Board Office to the PSU Board. *Id.* PSU utilizes *Diligent* to securely share board meeting agendas and meeting materials, and other documents. *Id.* The Board Office, with the assistance of other PSU staff members as appropriate, maintains all aspects of *Diligent*, including with respect to access, controls, posting of documents, deleting documents and other posting information. *Id.*

Secretary Redding like all other members of the PSU Board are subject to the University’s Bylaws and Board of Trustees’ Standing Orders, attached hereto as *Attachment C Exhibits PSU #1 and #2*, stating in relevant part:

“Members of the Board of Trustees stand in a fiduciary relationship to the University which reposes special confidence in each member. Members of the Board of Trustees shall act in good faith, with due regard to the interests of the University, and shall comply with the fiduciary principles of conduct in addition to any other state or federal requirements. Trustees bring to their roles varied backgrounds and expertise, and they are selected in different ways, but they must keep the welfare of the entire University, not just a particular constituency, at all times paramount.”

*Section 8.07 of the Bylaws (Fiduciary Duty)* See also a copy of PSU's Bylaws Section 8.07 attached as Exhibit PSU #1 to the Affidavit of Shannon S. Harvey.

"It is expected that each Trustee will ....

(x) Maintain the confidentiality of confidential information without exception; it being recognized and understood that for this purpose "confidential information" includes nonpublic information concerning the University, including its finances, operations and personnel, as well as nonpublic information about internal Board discussions and dynamics;"

*Order VIII, Section 1(d)(x) (Expectations of Membership)* See also a copy of Order VIII, Section 1(d)(x) (Expectations of Membership) attached as Exhibit PSU #1 to the Affidavit of Shannon S. Harvey.

Section 705 of the RTKL reads "[w]hen responding to a request for access, an agency shall not be required to create a record which does not currently exist or to compile, maintain, format or organize a record in a manner in which the agency does not currently compile, maintain, format or organize the record." 65 P.S. § 67.705. Asking PDA to take electronic screen shots of the records in *Diligent* would require PDA to create record. PDA is not required to create records under 65 P.S. § 67.705 and therefore, does not need to create screen shots of the documents stored on *Diligent*.

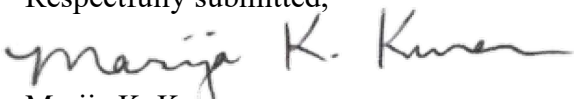
I have also attached an Attestation by Susan L. West, PDA's Agency Open Records Officer, confirming that PDA did not have the requested records responsive to the first part of Mr. Massey's RTKL request in PDA's possession, custody or control. However, after further due diligence PDA discovered records responsive to the second part of Mr. Massey's RTKL request. This Attestation is marked as Attachment B and is incorporated herein.

In the absence of any competent evidence that PDA acted in bad faith or that additional responsive records exist, "the averments in [the attestation] should be accepted as true." *McGowan v. Pa. Dep't of Env'tl. Prot.*, 103 A.3d 374, 382-83 (Pa. Commw. Ct. 2014) (citing *Office of the Governor v. Scolforo*, 65 A.3d 1095, 1103 (Pa. Commw. Ct. 2013)).

It is PDA's position that it has acted in good faith and conducted a thorough examination of records in its possession, custody and control, seeking records responsive to the subject RTKL request quoted above. The attestation of PDA's Agency Open Records Officer verifies this and warrants a conclusion by the OOR that PDA has fulfilled its obligations under the RTKL in this matter.

If there is anything more I can answer or provide, please advise. Thank you.

Respectfully submitted,

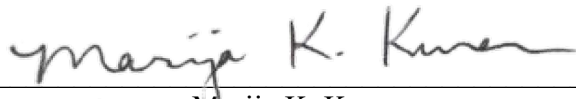


Marija K. Kuren  
Assistant Counsel

---

**Verification**

Pursuant to 18 Pa.C.S.A. § 4904(a), and subject to the penalties applicable to unsworn falsification to authorities, and under penalty of perjury, I declare the averments of fact in the foregoing document to be true and correct to the best of my knowledge.



---

Marija K. Kuren  
Assistant Counsel  
Pennsylvania Department of Agriculture

Atts:

- Attachment A – Affidavit of Shannon S. Harvey, Assistant Vice President, Office of the Board of Trustees/Secretary Pennsylvania State University
- Attachment B – Attestation by Susan L. West, Open Records Officer, PDA
- Attachment C - PSU Exhibits #1 and #2 The Pennsylvania State University Bylaws and Standing Orders of the Board of Trustees

by regular mail, with all attachments, to:

Wyatt Massey  
Spotlight PA  
210 W. Hamilton Avenue #331  
State College, PA 16801

# **ATTACHMENT A**

**Affidavit of Shannon S. Harvey  
Assistant Vice President, Office of the Board of  
Trustees/Secretary  
Pennsylvania State University**

**AFFIDAVIT OF SHANNON S. HARVEY**

I, Shannon S. Harvey, declare:

1. My name is Shannon S. Harvey. I am over the age of 18 and fully competent to make this affidavit. The facts stated herein are true and correct and based on my personal knowledge.

2. I am the Assistant Vice President and Secretary, Office of the Board of Trustees at The Pennsylvania State University (“Penn State” or the “University”). In this capacity, I serve as the elected Secretary of the University with responsibilities as outlined in Section 5.06 of the University Bylaws (Exhibit PSU #1). I am also responsible for the management and operation of the Office of the Board of Trustees including oversight of all activities, meetings, agenda preparation and filing of minutes, Trustee certifications and questionnaires in compliance with legal requirements and University policy to ensure the Board is as effective and efficient as possible in the conduct of its oversight responsibilities.

3. My business address is Office of the Board of Trustees at The Pennsylvania State University, 201 Old Main, University Park, Pennsylvania 16802.

4. For approximately three years, the University’s Office of the Board of Trustees (the “Board Office”) has utilized the services of Diligent as a platform for sharing documents and other information with the members of its Board of Trustees (“Trustees”). Diligent Boards is an online board portal tool that facilitates secure digital communication from the Board Office to Trustees. We utilize Diligent to securely share board meeting agendas, meeting materials, and other documents.

5. The Board Office staff, with the assistance of other University staff members as appropriate, maintains all aspects of the Diligent site, including with respect to access controls, posting of documents, deleting documents and posting other information.

6. Secretary Russell Redding became an ex officio member of the Board of Trustees in January of 2015 when he was appointed to serve as Secretary of the Pennsylvania Department of Agriculture.

7. Secretary Redding was granted Diligent access on July 16, 2020.

8. The Board Office controls the Secretary's ability to print or download any document from the Diligent platform. The Secretary does not have the ability to post or delete anything in the Diligent platform.

9. Access is given to the Secretary of Agriculture individually, in their capacity as a Trustee. No one else in the Pennsylvania Department of Agriculture is given access to Diligent by the University.

10. The Secretary, like all other members of the Board of Trustees is subject to the University's Bylaws and Board of Trustees' Standing Orders, attached herein as Exhibits PSU #1 and PSU #2, stating in relevant part:

“Members of the Board of Trustees stand in a fiduciary relationship to the University which reposes special confidence in each member. Members of the Board of Trustees shall act in good faith, with due regard to the interests of the University, and shall comply with the fiduciary principles of conduct in addition to any other state or federal requirements. Trustees bring to their roles varied backgrounds and expertise, and they are selected in different ways, but they must keep the welfare of the entire University, not just a particular constituency, at all times paramount.”



*Section 8.07 of the Bylaws (Fiduciary Duty) (See Exhibit PSU #1)*

“It is expected that each Trustee will ....

(x) Maintain the confidentiality of confidential information without exception; it being recognized and understood that for this purpose ‘confidential information’ includes nonpublic information concerning the University, including its finances, operations and personnel, as well as nonpublic information about internal Board discussions and dynamics;”

*Order VIII, Section 1(d)(x) (Expectations of Membership) (See Exhibit PSU #2)*

Further affiant sayeth not. I hereby certify and declare that the above information is true and correct and that the statements contained herein are made subject to the penalties of 18 Pa.C.S.A. § 4904.

Executed on July 17, 2023.

*Shannon S. Harvey*  
\_\_\_\_\_  
**Shannon S. Harvey**

## **ATTACHMENT B**

**Attestation of Susan L. West  
Agency Open Records Officer  
Pennsylvania Department of Agriculture**

**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF AGRICULTURE**

**ATTESTATION THAT AGENCY PROVIDED ALL RESPONSIVE RECORDS**

**Name of Requester:**

Wyatt Massey

**Records Requested:**

The Requester filed a request with PDA, as part of PDA RTKL #230637, which is the subject of this appeal.

An electronic screenshot of all folders and files hosted on Diligent, the filesharing service Penn State uses, related to Russell Redding's role on the Penn State Board of Trustees, including but not limited to his role as a member of the Governance and Planning Committee, Legal and Compliance Committee, and the full board of trustees. An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.

**Appeal Caption:**

OOR Docket No. AP 2023-1520

*Massey and Spotlight PA vs. PA Department of Agriculture*

I, Susan L. West, hereby declare, pursuant to 18 Pa.C.S. § 4904, that the following statements are true and correct based upon my personal knowledge, information and belief:

1. I serve as the Open Records Officer for the Pennsylvania Department of Agriculture ("PDA").
2. I am responsible for responding to Right-to-Know requests filed with PDA.
3. In my capacity as the Open Records Officer, I am familiar with the records of PDA.
4. I conducted a thorough examination of files in the possession, custody and control of PDA for records responsive to this request. This search entailed coordinating with staff within PDA's Executive Office.

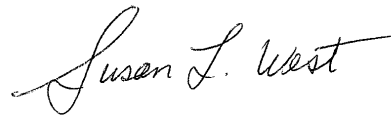
5. As a courtesy following receipt of this request for records, contact was made with the Penn State Board of Trustees' legal counsel to let them know this request was received. Past Right-to-Know Law requests received which were related to Penn State Board of Trustees records resulted in the identification of confidential, third-party proprietary information. This required contact with Penn State University (PSU) legal counsel based on section 67.707(b) and section 67.708(b)(11) of the Pennsylvania *Right-To-Know Law 65 P.S. §§ 67.101, et seq.*
6. As a result of contacting Penn State legal counsel regarding this request, this agency was informed that the Diligent platform is the property of PSU. Trustees are able to view documents contained therein without the ability to print or download information hosted on the Diligent platform. Other than Secretary Russell Redding, we were informed that no other individuals within the PA Department of Agriculture have been given access to the Diligent platform.
7. Secretary Redding in his capacity as a Trustee had and has no business reason to take electronic screenshots of all folders and files hosted on Diligent, including but not limited to his role as a member of the Governance and Planning Committee, Legal and Compliance Committee, and the full board of trustees. Such files and folders are readily available to the Secretary as needed when on the Diligent Platform; therefore, screen shots of what is contained on the platform provides no benefit and serves no purpose to his participation on the Board. No records were found related to screenshots of the Diligent platform as stated in the RTKL request above. Additionally, pursuant to section 67.705 of the RTKL, agencies are not required to create records which do not exist.
8. Regarding records related to the August 2022 Penn State Board of Trustees retreat, when initially checking with the Executive Office, it was confirmed such records were not in PDA's possession.
9. Based upon the search of PDA's files and inquiries with relevant PDA personnel prior issuing the letter of response, I made the determination that: (a) PDA does not have records related to this request in its possession, custody or control; (b) PDA does not own or maintain the Diligent database where the requested records reside; and (c) in conjunction with the appointment to the Penn State Board of Trustees, the Secretary of Agriculture, Russell Redding, does have access to the Diligent platform; however, such access is restricted to a read-only status which precludes documents being downloaded or otherwise in PDA's possession.
10. Following the receipt of the appeal by Wyatt Massey regarding PDA's response to RTKL No. 230637, additional due diligence ensued related to the preparation of PDA's position statement in this matter.
11. The staff person within the Executive Office was again contacted regarding records. Additional information surfaced; not all duties were consistently handled by only one individual since the Diligent Platform became the data source for the

PSU Board of Trustees. This could be due to changes following a new administration or other reasons. Additional clarification with the staff person resulted in learning that one record which applies to this request is in PDA's possession, custody and control.

12. Records from a one-day attendance at the August 2022 Penn State Board of Trustees retreat were produced. The applicable record was marked "Confidential" and in conjunction with section 67.707(b), legal counsel at Penn State was contacted and provided a copy of the confidential, third-party proprietary information for review.
13. The August 2022 retreat record, consisting of 65 pages, has been returned with recommended redactions to pages 1, 2, 28, 29, 30, 31, 39, 43, and 44. Therefore, PDA willingly produces this public record to the requester with the assertion of the following exemption:
  - a) A record that constitutes or reveals a trade secret or confidential proprietary information is exempt from disclosure pursuant to section 67.708(b)(11) of the Pennsylvania *Right-To-Know Law 65 P.S. §§ 67.101, et seq.*
14. This agency maintains that screenshots of information from the Diligent platform were not previously, and are not currently, in the possession, custody or control of PDA.
15. Therefore, following additional due diligence on the part of PDA related to RTKL Request No. 230637, and in response to the statements provided by this requester in his initial filing before the OOR in this matter, this agency is providing one responsive record, with redactions, related to the August 2022 PSU Board of Trustee Retreat while maintaining all other requested records are not in the possession, custody or control of PDA.

Date: July 18, 2023

Signature:



---

Susan L. West,  
Agency Open Records Officer  
Pennsylvania Department of Agriculture  
2301 North Cameron Street  
Harrisburg, PA 17110-9408

# **ATTACHMENT C**

## **PSU Exhibits #1 and #2**

### **The Pennsylvania State University Bylaws and Standing Orders of the Board of Trustees**