

I am a reporter with Spotlight PA who filed two similar Right-to-Know requests with the Pennsylvania Department of Education and the Pennsylvania Department of Agriculture seeking records connected to the respective department secretaries and their roles on the Pennsylvania State University's Board of Trustees.

Given the similarities of both the requests and the subsequent denials, I am arguing for the right to access in both cases in the appeal detailed below.

Pennsylvania Department of Education Request

On May 18, 2023, I filed an open records request with the Department of Education seeking the following:

- 1. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Eric Hagarty's role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.*
- 2. An electronic screenshot of all folders and files hosted on Diligent, the file-sharing service Penn State uses, related to Khalid Mumin's role on the Penn State Board of Trustees, including but not limited to his role as a member of the Academic Affairs, Research and Student Life committee, Outreach, Development and Community Relations Committee, and the full board of trustees.*
- 3. An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.*
- 4. An electronic copy of all materials hosted on Diligent in relation to the November 16, 2022 meeting of Penn State's Academic Affairs, Research and Student Life committee, of which Mr. Hagarty was a member.*

By nature of his previous position as secretary, Eric Hagarty was a voting member of Penn State's board of trustees in 2022. Similarly, current education secretary Khalid Mumin serves on Penn State's board of trustees as an ex officio and voting member.

For context, Diligent is a file-sharing service that Penn State's Board of Trustees uses for sharing information related to its meetings. These files can include agendas, background information, and other materials directly connected to items trustees vote on during committee and full board meetings.

Rather than requesting a copy of all documents hosted on Diligent, I requested an electronic screenshot of the files there so that, in the future, I could make more tailored requests (see requests #1 and #2). Using information I gathered before filing my request, I also made a specific request for documents hosted on Diligent concerning two events that involved the board (see requests #3 and #4).

On May 25, 2023, The Department of Education requested a 30-day extension to my request. On June 26, 2023, the department denied the request, writing that the department “does not have possession, custody, or control of the requested records. It is not a denial of access when an agency does not possess records and [there is no] legal obligation to obtain them,” citing *Jenkins v. Pennsylvania Dept. of State* from April 2009.

Pennsylvania Department of Agriculture Request

On May 18, 2023, I filed an open records request with the Department of Education seeking the following:

1. *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.*
2. *An electronic copy of all materials hosted on Diligent related to the August 2022 Penn State Board of Trustees retreat.*

By nature of his position as secretary, Russell Redding was a voting member of Penn State’s board of trustees in 2022 and remains a voting member today.

On May 18, 2023, I received confirmation via email that the department received my request. However, after inquiring with the department on June 29, 2023, I was informed by Susan West, via email, that my request was not in the department’s records system. My request was subsequently expedited and provided Log #230637 for the purpose of tracking.

On July 3, 2023, the department denied my request, writing that the department “does not have records related to this request” and that such records are not “under its custody or its control.” The department also cited *Jenkins v. Pennsylvania Dept. of State* from April 2009 in its denial.

The department also cited Section 705 of the Right-to-Know Law in that an agency is not mandated 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.”

Argument for Appeal

According to the [Pennsylvania Office of Open Records](#), which cites the state’s open records law, “all records are presumed to be public records unless disclosure is barred by: (1) state or federal law or regulation; (2) judicial order; (3), privilege, e.g., attorney-client or doctor-patient; or (4) one of the exceptions in Section 708 of the Right-to-Know Law.”

None of the exceptions outlined in Section 708 of the Right-to-Know Law pertain to these records requests and, to the best of my knowledge, the specific documents requested. The materials sought directly concern a public official’s work and statutory responsibilities as a member of the Penn State Board of Trustees.

Additionally, controlling law on this issue makes clear that the records are public. In a 2013 opinion in [Bagwell v. Pennsylvania Department of Education](#), the Commonwealth Court of Pennsylvania concluded that records connected to a Secretary of Education in their role as a member of the Penn State Board of Trustees are not exempt and are subject to the Right-to-Know Law:

Pursuant to a statutory requirement, the Secretary serves on behalf of the Department when serving on the PSU Board. Thus, the records the Secretary receives as a Board member are received by the Department pursuant to its statutory function as supporter and influencer of education at state-related institutions. Because the records are received by a Commonwealth agency to enable it to perform its statutory governmental function, they qualify as “records” under the RTKL.

The 2013 opinion also states that records held by Penn State may still be accessed through an agency subject to the RTKL because “the records of [Penn State] may be reached through the connection between the Department and PSU.”

Similarly, in [Edinboro University of Pennsylvania v. Ford](#), the Commonwealth Court of Pennsylvania ruled that an agency’s argument that it does not maintain, or never maintained, certain records does not constitute grounds for denial.

In that case, the court ruled that “The RTKL contains no requirement that the record be ‘maintained’ by the Commonwealth agency, and where the record is created or received by the Commonwealth agency, there is no requirement that it then be retained by the agency.”

The records sought in the requests outlined above relate directly to the roles and responsibilities of the respective secretaries as public officials. Through the file-sharing service Diligent, the records requested are sent to and received by a secretary to carry out the trustee position.

Moreover, the RTKL reaches records in an agency's actual or *constructive* possession under Section 901 of the law. See *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938-39 (Pa. Commw. Ct. 2014), *aff'd* 124 A.3d 1214 (Pa. 2015). In *Eiseman*, the Commonwealth Court explained the concept of constructive possession under the RTKL as follows:

Constructive possession focuses on an agency's access to a record. The analysis emphasizes the statutory language in Section 901 of the RTKL that mandates an agency "determine whether [it] has possession, custody or control of the identified record." 65 P.S. § 67.901. We recognize constructive possession under Section 901 as a means of access so agencies cannot frustrate the purposes of the RTKL by placing their records in the hands of third parties to avoid disclosure. See *Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa. Cmwlth. 2012); *Office of the Budget v. Office of Open Records*, 11 A.3d 618 (Pa. Cmwlth. 2011)...The litmus test under Section 901 remains whether the records document a transaction of the agency to which the request was directed.... *Office of the Budget*, 11 A.3d at 621.

Whether the Department of Education or the Department of Agriculture has “custody” or actual physical possession of the records is irrelevant given the nature of the requested records and the fact that they document a statutory duty of the respective secretaries.

The RTKL cannot be applied in a manner that allows agencies to thwart public access by claiming records exist solely in the possession, custody or control of a third party, and the RTKL was intentionally and expressly designed to prevent such an outcome.

Given previous rulings in open records cases and the remedial letter and intent of the act itself, it is clear that the requested records are subject to the RTKL and the Department of Education and the Department of Agriculture each has an affirmative legal duty to facilitate access to them.

For all the foregoing reasons, I respectfully request the OOR to grant access to the requested records and order the Department of Education and the Department of Agriculture to facilitate access.