

**LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.**

WASHINGTON, D.C.

NEW YORK

PHILADELPHIA

DENVER

2112 WALNUT STREET  
THIRD FLOOR  
PHILADELPHIA, PA 19103  
(215) 988-9778 PHONE  
(215) 988-9750 FAX  
www.lskslaw.com

Writers' Direct Dial  
215-988-9782  
215-988-9751  
gsprout@lskslaw.com  
klarsen@lskslaw.com

September 14, 2009

**VIA FACSIMILE (717-425-5343)**

Lucinda Glinn, Esquire  
Appeals Officer  
Office of Open Records  
400 North Street, 4th Floor  
Harrisburg, PA 17120-0225

**Re: Berrett/*The Pocono Record* ("Dow Jones") v. East Stroudsburg  
University of Pennsylvania ("ESU"), Docket No. AP-2009-0644**

Dear Ms. Glinn:

Pursuant to 1 Pa. Code § 35.241, Dan Berrett and Dow Jones Local Media Group, Inc. (collectively referred to as "Dow Jones") hereby request that the Office of Open Records ("OOR") reconsider its Final Determination in *In the Matter of Dan Berrett and The Pocono Record*, Docket No. AP 2009-644, Sept. 3, 2009 ("the Final Determination") for the following reasons.

1. In the Final Determination, the OOR concluded that the KPMG audit records were not directly related to the governmental function performed by East Stroudsburg University Foundation ("ESUF") for East Stroudsburg University ("ESU") and thus held that the records sought were not accessible to Dow Jones pursuant to 65 Pa. C.S. § 67.506(d)(1). That function, as previously described by the OOR and reiterated here, is "raising, receiving and managing endowments' for the benefit of the University." Final Determination at 5. The OOR concluded, in large part based on the content of affidavits submitted by ESUF's counsel and a member of its board, that the KPMG audit and the engagement letter related only to "the internal controls and operations of the Foundation itself." *Id.* at 15; *see also id.* at 16. Thus, the OOR concluded that the audit and related documents "do not directly relate to the Foundation's performance of fundraising."<sup>1</sup> *Id.* at 15. The OOR further concluded, again because the KPMG audit focused on internal "control" issues, that the audit could not relate to management of the endowment (*see, e.g.,* Final Determination at 17).

---

<sup>1</sup> Dow Jones did not assert in its submissions that the KPMG audit pertained to fundraising.

**LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.**

Lucinda Glinn, Esquire  
September 14, 2009  
Page 2

Dow Jones respectfully disagrees with this conclusion. First, a finding that the KPMG audit reviewed the application of ESUF's internal control mechanisms, along with the financial records that ESUF conceded were subject to review, does not mean that the audit could not or did not implicate endowment management issues. Indeed, it means just the opposite: The proper management of the endowment depends on ESUF's utilization of proper internal controls. The fact that the audit may also shed light on the controls that should be in place in the future to prevent the mismanagement that occurred under ESUF's former executive director (and senior manager), Dr. Isaac Sanders, does not preclude the OOR from finding that the audit also implicates issues related to ESUF's endowment management.

Second, the KPMG audit was ordered as a direct result of formal allegations of Dr. Sanders' misconduct in his official capacity directly implicating the use of scholarship funds ("the Sanders lawsuit"),<sup>2</sup> Statement of ESUF Chairman, Feb. 19, 2009, <http://www.poconorecord.com/apps/pbcs.dll/article?AID=/20090220/NEWS/902200355/-1/NEWS0911> ("The [ESUF board] voted to engage an independent certified public accounting firm to conduct a forensic audit of the Foundation's books and records. The board took this action in response to recent allegations of irregularities in the use of Foundation assets, made against its former executive director.") ("Feb. 19 Statement") (cited in Dow Jones' Supplemental Memorandum at 4), and after the annual audit by Concannon Miller & Co. identified "instances" where "management was not following its established policy for disbursements related to expense reimbursements and payment of scholarships."<sup>3</sup> Letter dated Oct. 22, 2008 from Concannon Miller & Co. to ESUF (attached as Ex. 2 to Dow Jones' Opening Brief), at 2 (emphasis added). The award of scholarship funds is indisputably at the heart of ESUF's mission in support of ESU. Thus, it is difficult to conceive of any scenario in which the KPMG audit could be more related to endowment management.

The OOR also appears to have concluded that because the KPMG audit was undertaken in response to the allegations raised by the Sanders lawsuit, it was different in kind from the type of audit required by the MOU to be produced to ESU. Final Determination at 17. Even if that were the case, however, because the KPMG audit directly relates to the governmental function of management being performed by ESUF – the management of the endowment – the KPMG audit and related records are nevertheless section 506(d)(1) records and must be disclosed. See

---

<sup>2</sup> See, e.g., Dow Jones Ex. 7, at Ex. B (Original Complaint in *F.B. v. East Stroudsburg University*, Civil Action No. 1336-cv-2009, at ¶ 145 (alleging that Sanders admitted giving F.B. scholarship money and money for food, glasses, rent, and car repairs)).

<sup>3</sup> For this reason, Dow Jones has referred to the KPMG Audit as a "supplemental audit." ESUF has not explained what it means by the term "forensic audit" and, in any event, that designation, even if appropriate, would not exempt the audit from disclosure for the reasons expressed here and in Dow Jones' previous submissions.

**LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.**

Lucinda Glinn, Esquire

September 14, 2009

Page 3

Supplemental Memorandum at 4-7. Whether the MOU required ESUF to provide these records to ESU is simply not dispositive.

2. In addition, the fact that the OOR rested its decision on the untested and decidedly one-sided affidavits submitted by ESUF is both unfair to Dow Jones and contrary to the RTKL, in letter and in spirit. The OOR accepted those affidavits at face value, while observing that “[t]here has been no evidence submitted to substantiate that the engagement of KPMG or the forensic audit performed by KPMG are required by the MOU or by any other obligation imposed upon the Foundation by the University.” Final Determination at 16; *see also id.* at 14 (“No evidence has been submitted to show that the forensic audit or the engagement of KPMG are necessary or in furtherance of the MOU.”); *id.* at 17 (noting that Dow Jones’s contention that there is a direct relationship is based “upon the *unsubstantiated* fact that the forensic audit and engagement of KPMG document the management of the endowment”) (emphasis added).<sup>4</sup> Thus, the OOR placed a burden of proof on Dow Jones but simultaneously failed even to acknowledge that Dow Jones had requested that it be permitted to conduct discovery on the issues raised in the affidavits the OOR has now deemed to be conclusive.<sup>5</sup> Dow Jones Supplemental Memorandum at 13-14. This outcome is untenable. Indeed, it echoes the predicament faced by requesters under the former Right to Know Law, who bore the burden of demonstrating the public nature of the records requested without the concomitant power to demand discovery to enable them to sustain that burden of proof.

The new Right to Know Law purposefully changed that “catch-22.” First, it shifted the burden of proof to the agency to prove that the records sought are not public in nature, as the presumption is that all records are public unless the agency can prove otherwise. 65 P.S. § 67.305(a); *id.* § 67.708(a)(1). Second, it – and the OOR’s own interim guidelines – provide requesters with access to subpoenaed testimony and other evidence. OOR Appeals Process – Interim Guidelines (“Interim Guidelines”) § IV.C.10 (section governing “procedure for administering appeals” provides that “[s]ubpoenas for the attendance of witnesses or for the production of documentary evidence” may issue “upon application in writing to the Appeals Officer . . . who is hereby given authority to determine the relevancy and materiality of the evidence sought and to issue such subpoenas accordingly”); *see also* 65 P.S. § 67.1102(b)(3). Dow Jones should thus be permitted to inquire into, for example, the level of control and involvement ESU and its personnel, including those employed for the benefit of ESUF, have at ESUF, in addition to and notwithstanding the express terms of the MOU, and the extent to which

<sup>4</sup> In concluding that this contention is “unsubstantiated,” the OOR appears to have inexplicably discounted ESUF’s explicit public statements confirming that the KPMG audit was undertaken to explore charges of misuse of ESU’s endowment funds. *See, e.g.,* Feb. 19 Statement, *quoted supra.*

<sup>5</sup> Similarly, the OOR did not address Dow Jones’ request for oral argument. Letter from K. Larsen to L. Glinn, dated Aug. 12, 2009, at 2 (requesting telephonic argument).

**LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.**

Lucinda Glinn, Esquire  
September 14, 2009  
Page 4


ESU has been privy to the findings contained in the KPMG audit. If Dow Jones cannot probe these assertions, it can never "substantiate" any contrary theory, even assuming that it is its burden to do so.

Finally, if the OOR considers and denies Dow Jones' application to conduct this discovery, it can and should make the determination at issue here based on facts rather than unsupported assertions by ESU and ESUF by directing them to produce to the OOR the documents at issue for *in camera* review. Interim Guidelines § VI.J (setting out "[t]he procedure for an in camera inspection of records"). Without an objective review of the documents at issue, it is simply impossible for the OOR to conclude on the basis of substantial evidence that the requested records do not directly relate to ESUF's responsibility of "raising, receiving and managing endowments' for the benefit of the University." If discovery is not permitted, *in camera* review is likely to conclusively demonstrate whether the premise of Dow Jones' argument is correct. Moreover, such review will avoid the distinct possibility that agencies will now routinely submit self-serving affidavits, assured that their assertions will not be challenged or even reviewed for accuracy.

For all these reasons, and those set forth in Dow Jones' previous submissions, Dow Jones respectfully requests that the Final Determination be reversed outright or, in the alternative, that Dow Jones be permitted to engage in discovery to test the assertions contained in the ESUF affidavits or that the OOR engage in *in camera* review of the requested documents.

Respectfully submitted,

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

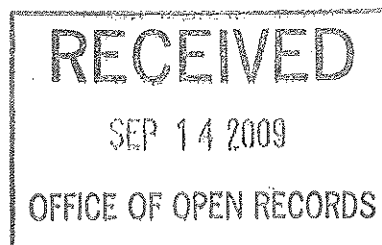
By:   
\_\_\_\_\_  
Gayle C. Sproul  
Katharine Larsen

cc: Suzanne C. Hixenbaugh, Esq., via email  
Robert J. Tribeck, Esq., via email

**LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.**

2112 WALNUT STREET  
THIRD FLOOR  
PHILADELPHIA, PENNSYLVANIA 19103

(215) 988-9778  
FACSIMILE (215) 988-9750

**FACSIMILE COVER SHEET**

DATE: September 14, 2009

TOTAL PAGES: 5

NAME/COMPANY	FACSIMILE NUMBER	CONFIRMATION NUMBER
Lucinda Glinn, Esquire	717-425-5343	

FROM: Katharine Larsen

DIRECT DIAL: 215.988.9751

CLIENT/MATTER: Berrett/*The Pocono Record* ("Dow Jones") v. East Stroudsburg University  
of Pennsylvania ("ESU"), Docket No. AP-2009-0644

REMARKS:

**If you do not receive all of the pages, please call 215.988.9778 as soon as possible.**

THE INFORMATION CONTAINED IN THIS FAX MESSAGE IS INTENDED ONLY FOR THE PERSONAL AND CONFIDENTIAL USE OF THE DESIGNATED RECIPIENTS NAMED ABOVE. THIS MESSAGE MAY BE AN ATTORNEY-CLIENT COMMUNICATION, AND AS SUCH IS PRIVILEGED AND CONFIDENTIAL. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT YOU HAVE RECEIVED THIS DOCUMENT IN ERROR, AND THAT ANY REVIEW, DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS MESSAGE IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US BY MAIL. THANK YOU.



VIA EMAIL AND FIRST CLASS US MAIL

September 25, 2009

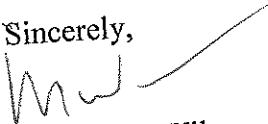
Gayle Sproul  
Levine Sullivan Koch & Schulz, L.L.P.  
3112 Walnut Street  
Third Floor  
Philadelphia, PA 19103

RE: Petition for Reconsideration dated September 14 / OOR Dkt. AP 2009-0644

Dear Gayle:

We are in receipt of your Petition for Reconsideration dated September 14 in connection with the Office of Open Records Final Determination in *Dow Jones v. East Stroudsburg University*, OOR Dkt. AP 2009- 0644. We hereby deny your Petition.

Sincerely,



Corinna V. Wilson  
Chief Counsel

cc: Terry Mutchler, Executive Director, Office of Open Records  
Suzanne C. Hixenbaugh, Esq.  
Robert J. Tribeck, Esq.

Commonwealth Keystone Building | 400 North Street, 4th Floor  
Harrisburg, Pennsylvania 17120-0225  
(717)346-9903 | (717) 425-5343 (Fax)  
<http://openrecords.state.pa.us>