



FINAL DETERMINATION

IN THE MATTER OF: :
:
MR. DAN BERRET AND *THE* :
POCONO RECORD :
Complainants :
:
versus : **Docket No: AP 2009-0110**
:
EAST STROUDSBURG :
UNIVERSITY OF :
PENNSYLVANIA :
Respondent :

INTRODUCTION

Mr. Dan Berrett, on behalf of his employer *The Pocono Record* (collectively, “*The Pocono Record*”), filed a right-to-know request with East Stroudsburg University of Pennsylvania (“ESU”) regarding donor information and minutes of meetings held by the East Stroudsburg University Foundation (“ESUF”), pursuant to the Right to Know Law (“RTKL”), 65 P.S. §67.101, *et. seq.*. ESU denied *The Pocono Record*’s request stating that it sought records of an entity not subject to the RTKL. *The Pocono Record* timely appealed to the Office of Open Records (“OOR”).

For the reasons set forth in this Final Determination, the appeal is **granted in part and denied in part.**

FACTUAL BACKGROUND

The Pocono Record filed a RTK request on February 4, 2009 with ESU seeking the following:

- a list of donors to the Science and Technology Center, including the amounts of their pledge, payments (and the dates made) and outstanding balance;
- the opportunity to inspect donor files (including records of transactions, funds transfers, classification, and external and internal correspondence via e-mail and memoranda related to these gifts) for Warren Hoeffner, Robert Dillman HD Justi, Betty Baltz, Jone Bush and Doris Imbt; and
- copies of minutes of the ESU Foundation's board of directors meetings between 2005-07"

Mr. Richard A. Staneski, Vice President for Finance & Administration and Right to Know Officer responded for ESU on February 10, 2009. Mr. Staneski acknowledged that ESU is a Commonwealth Agency as defined in the RTKL, but denied the request stating that ESUF is a non-profit, non-stock Pennsylvania corporation that is an independent contractor, not performing an essential government function and not subject to the RTKL.

An appeal was timely filed with the OOR on February 23, 2009. *The Pocono Record* argued in support of disclosure that ESUF performs government services on behalf of ESU and also qualifies as an agency under the RTKL as it is staffed by public employees and the Vice President for University Advancement holds a dual position as Executive Director of ESUF.

Gayle C. Sproul, Esquire entered her appearance on behalf of *The Pocono Record* and submitted a Memorandum of Law in support of access to the above-mentioned records. She provided a backdrop for the request which arises from allegations of financial mismanagement of ESUF funds against Isaac Sanders, formerly Vice President of University Advancement for ESU and, contemporaneously, the former Executive

Director of ESUF. She argues that ESUF's records are subject to disclosure in accordance with section 67.506(d)(1) because ESU entered into a contract with the entity to perform a government function. In support of that conclusion, she relies upon the following facts:

- A Memorandum of Understanding ("MOU") between ESU and ESUF provides that ESUF was established "to perform the functions of and carry out the purposes of the University" and "to advance the charitable, educational and scientific purposes of ESU." The MOU includes provisions that
 - o ESU provides ESUF with facilities and services including clerical assistance, bookkeeping services, storage space, meeting rooms, telephone, computer services, consumable supplies, office purchases, reproduction capability, office space, postal service, graphics and communications services, utilities, maintenance and housekeeping.
 - o ESUF is permitted to use ESU's name in connection with its activities;
 - o In the event ESUF is dissolved, it must "transfer to ESU all of its assets";
- The ESUF website describes ESUF as "an organization dedicated to securing and stewarding private gifts and grants that benefit East Stroudsburg University";
- The Pennsylvania State System of Higher Education ("PSSHE") requires universities such as ESU to provide "high quality education at the lowest possible cost to students," 24 P.S. §20-2003-A;
- As an integral part of its operations, ESU must solicit and manage funds, and that activity is therefore a "governmental function" in accordance with the RTKL;

- Prior to the establishment of ESUF, ESU's Office of University Advancement performed all the functions now outsourced to ESUF and that office continues to support those functions.

Ms. Sproul argues that any exemptions not raised in ESU's response to *The Pocono Record*'s RTK request are waived pursuant to Hunt v. Pa. Dept. of Corrections, 698 A.2d 147 (Pa. Cmwlth. 1997). However, that case was decided under the former RTKL where there was no appeals process as there is now. The OOR permits agencies and requesters to supplement the record in its appeals and will consider an exemption not previously asserted in a denial letter.

It is important to note that Ms. Sproul does not claim that ESUF is an agency as defined in the RTKL, although Mr. Berrett made that argument in the appeal.

The Pocono Record further argues that minutes are not exempt under the RTKL and that donation records should be produced in full despite the language of 65 P.S. §67.708(b)(13) that exempts disclosure of the identity of donors. She couches it as a privacy issue, arguing that that ESU must demonstrate that the identities of the donors at issue are not already known or, in the case of deceased donors, that their privacy rights are extinguished. Ms. Sproul submitted documents with the Memorandum including an affirmation of Dan Berrett, Timeline of Events in the ESU sex scandal, a copy of the civil action commenced against ESU and members of its board of trustees, Policy 1985-04-A: University External Financial Support (PSSHE); Financial Statements and Auditor's Report of ESUF.

Finally, *The Pocono Record* submits case law from other jurisdictions that considered university fundraising to be a governmental function in the context of an open

records request: Gannon v. Bd. Of Regents of the State of Iowa, 692 N.W.2d 31 (holding that Iowa State University Foundation performs a government function by fundraising and managing the funds of the University and was subject to the disclosure requirements of the Iowa Freedom of Information Act); Toledo Blade Co. v. Univ. of Toledo Foundation, 602 N.E. 2d 1159 (holding that the University of Toledo Foundation performed government functions by soliciting and receiving donations for the University and is subject to the Ohio public records law).

Suzanne C. Hixenbaugh, Esquire entered her appearance on behalf of ESU and filed a Memorandum of Law in Support of the Denial of Records by ESU. ESU argues that ESUF is not a Commonwealth agency, the Foundation is not governed by the University, the documents are not within ESU's control, and that ESUF does not perform a governmental function pursuant to section 67.506(d).

In the event that it is determined that ESUF's records are subject to the RTKL, it argues that donor documents are protected by section 67.708(b)(13) and that disclosure of pledges, payments, dates of payments and amounts pledged but unpaid could injure the reputations of donors.

Robert J. Tribeck, Esquire made a formal request in accordance with Section 67.1101(c) of the Law to provide a position in opposition to the appeal on behalf of ESUF. He filed a Memorandum of Law in Support of the University's Denial of *The Pocono Record's* Request. He characterizes ESUF as a private, non-profit organization that is separate and distinct from ESU with its own bylaws, an independent board of directors, and which does not enjoy sovereign immunity.

Mr. Tribeck argues that the OOR's recent decision in Donohue v. Luzerne County controls (No. AP 2009-0077). In that case, a request for email directed to Luzerne County sought email sent and received by Luzerne/Schuykill Workforce Investment Board ("LSWIB") a separate entity. He also cites Dynamic Student Services v. State Systems of Higher Education, 697 A.2d 239 (PA 1997) a case decided under the previous RTKL. He argues that these cases control the outcome here.

ESUF further argues that it does not perform a governmental function on behalf of ESU "by raising capital for the University and supporting University programs." It states that Section 67.506(d)(1) "is restrictive and only applicable when: (1) the requested documents are public records; (2) the third party has been hired to perform a governmental function; and (3) the requested documents directly relate to the performance of a governmental function." ESUF argues that donor information and minutes of board meetings are not public records because ESUF is not a Commonwealth agency, citing Pennsylvania cases that interpret the phrase "governmental function." In Community College of Philadelphia v. Brown, 674 A.2d 670, the Pennsylvania Supreme Court considered whether or not community colleges are agencies subject to the former RTKL and concluded that they do not perform an essential government function. The Court pointed to previous cases holding that Temple University and Pennsylvania State University were not agencies within the meaning of the RTKL.

Finally, ESUF argues that even if it is determined that ESUF is an agency or is a third-party contractor subject to disclosing records under section 67.506(d)(1), the records requested are not public records as defined by the RTKL. Section 67.708(b)(13) protects records that "would disclose the identity of an individual who lawfully makes a

donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency...” Mr. Tribeck argues that the donor information requested by *The Pocono Record* falls within this exemption, and that it is not required (as suggested by Ms. Sproul) to determine whether or not the donors are already known or deceased. Minutes of ESUF’s board meetings are not subject to the RTKL, he argues, because a private nonprofit corporation cannot conduct “public meetings” unless it meets the definition of Commonwealth or local agency, which ESUF does not.

ESUF provided exhibits including *The Pocono Record*’s RTK request, entity details from the Department of State Corporations Bureau related to ESUF, Articles of Incorporation and bylaws, a printout of ESU’s website, declaring its independence from ESU, the MOU between ESU and ESUF, the denial letter sent to *The Pocono Record*, and this appeal.

LEGAL ANALYSIS

Pursuant to section 67.503(a), the OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). ESU is a Commonwealth agency subject to the RTKL, 65 P.S. §67.301.

The RTKL defines a “record” as follows: “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. The term includes a document, paper, letter, map, book, tape, photograph, film or sound recording, information stored or maintained electronically and a data-processed or image- processed document,” 65 P.S. §67.102.

The RTKL defines a “public record” as follows: “A record, including a financial record, of a Commonwealth or local agency that: (1) is not exempt under section 708; (2) is not exempt from being disclosed under any other Federal or State law or regulation or judicial order or decree; or (3) is not protected by a privilege,” 65 P.S. §67.102 (emphasis added). Section 67.506(d)(1) provides as follows:

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a governmental function on behalf of the agency, and which directly relates to the governmental function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

Section 67.708 of the RTKL clearly states that the burden of proof rests with the public body to demonstrate that the record is exempt. In pertinent part, section 67.708 states:

(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.

Preponderance of the evidence has been defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (8th ed.). *See also Commonwealth v. Williams*, 615 A.2d 716 (PA. 1992). ESU acknowledges this burden of proof in its Memorandum at page 15 (“the University is required to meet “the burden of proof that a record...is exempt from public access... by a preponderance of the evidence.”).

I. ESUF is not an “agency” Pursuant to the RTKL

ESU and ESUF argue that EUSF is not a Commonwealth agency as defined by the RTKL as it was not established by the Constitution, Statute or Executive Order. *The Pocono Record* does not suggest that it is an agency and did not present a RTK request

directly to ESUF, relying upon ESUF's status as a contractor and submitting the request directly to ESU. *The Pocono Record's* argument relies upon a finding that ESUF is "a party with whom the agency has contracted to perform a governmental function on behalf of the agency" (section 67.506(d)(1)). For purposes of this Final Determination, we find that ESUF is not an agency independently subject to the RTKL.

II. The MOU is a Contract for Performance of a Governmental Function

ESU entered into an agreement with ESUF to perform a governmental function. ESUF and ESU argue that higher education is not an essential governmental function, stating: "[w]hile it is well-settled that providing education at the primary and secondary school level is a governmental function, it is equally well-settled that a college education is neither constitutionally or statutorily mandated," In support, ESUF cites Community College of Philadelphia v. Brown, 674 A.2d 670, where the Pennsylvania Supreme Court considered whether or not community colleges are agencies subject to the former RTKL and concluded that they do not perform an essential government function. The Court pointed to previous cases holding that Temple University and Pennsylvania State University were not agencies within the meaning of the RTKL, and those institutions are now expressly included in the new RTKL. In fact, the General Assembly specifically chose to include government-funded higher educational institutions as agencies in the new law, thus eliminating the applicability of *Community College* in this appeal. We also note that the test under section 67.506(d)(1) is not whether or not the service is "essential" but whether or not it's "governmental." We also disagree with the analysis used by ESUF and ESU. The test is not whether or not higher education itself is an essential governmental function, but whether or not ESU has contracted out duties it

would otherwise have to perform. There is no question that ESU is an agency within the purview of the RTKL. As such, it may be legally permitted to contact with third parties to perform some or all of its functions. There is no requirement that it be an “essential” function under section 67.506(d)(1), only that it be a governmental function associated with the agency and that the record requested directly relate to that function. ESUF and ESU go to lengths to demonstrate their independence from each other, but this is irrelevant to the applicability of section 67.506(d)(1) which does not require proof of any relationship between the agency and a third party other than a contract for the performance of a governmental function.

ESUF argues that the OOR’s recent decision in Donohue v. Luzerne County controls (No. AP 2009-0077). In that case, a request for email directed to Luzerne County sought email sent and received by Luzerne/Schuykill Workforce Investment Board (“LSWIB”) a separate entity. Reliance upon this case is misplaced as the only similarity to this appeal is the involvement of a private nonprofit corporation. There was no argument in Donohue that a contract for the performance of a governmental function existed requiring disclosure of documents. The case is neither applicable nor controlling or binding.

ESUF also cites Dynamic Student Services v. State Systems of Higher Education, 697 A.2d 239 (PA 1997) a case decided under the previous RTKL that it argues controls the outcome in this appeal. In Student Services, Millersville University hired two nonprofit corporations to operate student bookstores (collectively “SSI”). A competitor filed a RTK request and the Supreme Court held that the University, which did not house the information requested, was not required to provide it. The Court said, “[T]he Act

does not authorize or contemplate a court order directing a state agency to compile and distribute information it did not solicit and does not possess.” Amendments to the RTKL changed that and require a different outcome than that posed by ESUF. The RTKL now not only contemplates, but expressly requires agencies to obtain and disclose records in possession of its contractors which directly relate to the performance of a governmental function. We disagree with ESU and ESUF that Student Services is controlling as it was decided under the previous RTKL with no comparable provision related to documents held by agency contractors.

We find the cases cited by *The Pocono Record* to be more consistent with Pennsylvania’s new RTKL than those cited by ESUF and ESU. While not controlling, they are instructive and persuasive regarding the inquiry necessary when a governmental agency contracts away parts of its function to parties not subject to open records laws. In Gannon v. Bd. of Regents, 692 N.W.2d 31 (2005), the Supreme Court of Iowa held that the Iowa State University Foundation performed a governmental function for Iowa State University, which would subject its records to disclosure under Iowa’s Freedom of Information Act, which states as follows: “A *government body shall not prevent the examination or copying of a public record by contracting with a nongovernment body to perform any of its duties or functions,*” (Iowa Code § 22.2). The University and the Foundation had a similar arrangement to that of ESU and ESUF whereby the Foundation solicited donations exclusively for the benefit of the University. The Court said,

“An activity need not be listed in the statute books to be a function of a university. To qualify, the activity at issue need only advance the statutory objects of the institution. We think the activities of the Foundation unmistakably advance the institutional goals of ISU. Successful fundraising and management is a very important, if not vital, function of the modern university and an integral part of its continuing viability. The Foundation's activities support a myriad of university

programs, scholarships, facilities, and projects. "The receipt and solicitation of gifts . . . is an indispensable function of any institution of higher learning," State ex rel. Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d at 1162. "The solicitation and receipt of donations for the university, and keeping records of that activity, are government functions." *Id.* at 1163; accord *Boston v. Tanner*, 29 F. Supp. 2d 743, 747 (W.D. La. 1998) (approving view that the power to "seek and accept donations . . . relates strictly to [a] university's academic function").

The functions performed by ESUF were once performed by ESU (*see* Affirmation of Dan Berrett). The Pennsylvania State System of Higher Education states as a matter of policy that the "development of independent resources of financial support by each university, to augment Commonwealth funding is hereby declared a policy of the Board of Governors. Each University, in conformity with this policy statement, is hereby directed to develop sources of independent support at levels sufficient to facilitate the enhancement of the university." (Policy 1985-04-A: University External Financial Support). The MOU specifically incorporates this language in addition to setting forth the responsibilities of ESUF to "raise, receive and manage endowments for the benefit of the University..." In the MOU, ESUF accepts responsibility for promoting ESU's academic mission. It is our view that this is a governmental function performed on behalf of ESU pursuant to the MOU and subject to the disclosure requirements of 65 P.S. §506(d)(1).

III. Minutes of ESUF are not Public Records

The Pocono Record does not claim that ESUF is a Commonwealth or local agency as defined in the RTKL, apparently conceding that it is a private corporation to which ESU outsourced some of its customary governmental functions. Records directly related to those services, it argues, are public records. ESUF argues that as a private corporation, its meetings are not "public meetings." We agree. The minutes of ESUF board meetings

do not meet the definition of a record which “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.” ESUF is not an agency required to conduct public meetings. The basis for disclosure of ESUF’s records is its status as ESU’s contractor pursuant to section 67.506(d)(1) which opens up records of a contractor that are “directly related” to the performance of a governmental function. A contrary holding would open up the board meetings of every private corporation that does business with a public agency and we do not believe that was the intent of the General Assembly.

IV. Donor Names are Protected from Disclosure by Section 67.708(b)(13)

The RTKL exempts from disclosure:

“Records that would disclose the identity of an individual who lawfully makes a donation to an agency unless the donation is intended for or restricted to providing remuneration or personal tangible benefit to a named public official or employee of the agency, including lists of potential donors compiled by an agency to pursue donations, donor profile information or personal identifying information relating to a donor,” (65 P.S. §67.708(b)(13).

To the extent that *The Pocono Record* seeks names, that information is exempt. The remainder of the request, including the amounts of pledges, payments (and the dates made) and outstanding balance, records of transactions, funds transfers, classification, and external and internal correspondence via e-mail and memoranda related to donations is public record subject to redaction of names. To the extent that records related to specific donors were requested, that information is exempt if disclosure would reveal their identity. We reject *The Pocono Record’s* argument that ESU must determine

whether or not donors are deceased or already known to be without merit as the RTKL is clear that records that would disclose identity of donors are exempt.

CONCLUSION

For the foregoing reasons, this appeal is **denied in part and granted in part**. ESU is directed to provide a list of donations to the Science and Technology Center including all of the information requested except for the names of the donors, which may be redacted in accordance with 65 P.S. §67.708(b)(13). It is further directed to make the information requested from its donor files available as requested, but it may redact names in accordance with 65 P.S. §67.708(b)(13). ESU is not required to provide copies of meeting minutes for ESUF's Board of Director meetings.

The parties are advised that this is a final determination. Within thirty (30) days of the mailing date of this determination, it may be appealed to the Commonwealth Court of Pennsylvania. In the event of an appeal for judicial review, all parties must be served with notice of the appeal. The Office of Open Records shall be served notice in accordance with Section 1301 and have an opportunity to respond to any appeal for judicial review.

The parties are advised that this Final Determination will be posted on the Office of Open Records website at: <http://openrecords.state.pa.us>

FINAL DETERMINATION ISSUED ON: April 10, 2009



DENA LEFKOWITZ, Esq.
Appeals Officer

