**IN THE COURT OF COMMON PLEAS**
**OF CENTRE COUNTY, PENNSYLVANIA**

The ESTATE of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA");

MARK EMMERT, individually and as President of the NCAA; and

EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

CIVIL DIVISION

Docket No. 2013-2082

**BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF SUBPOENA *DUCES TECUM* DIRECTED TO PEPPER HAMILTON LLP**

Filed on Behalf of:
The Pennsylvania State University

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**THE PENNSYLVANIA STATE UNIVERSITY'S**
**BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF SUBPOENA *DUCES TECUM* DIRECTED TO PEPPER HAMILTON LLP**

Nominal defendant The Pennsylvania State University ("Penn State" or "the University"), hereby respectfully files this brief in opposition to the plaintiffs' Motion for Enforcement of the Subpoena *Duces Tecum* that that the plaintiffs served on Pepper Hamilton LLP (the "Motion"). As set forth *infra*, Penn State concurs with Pepper Hamilton that the Motion is procedurally unorthodox and not properly before the Court. In particular, Penn State notes that, although Pepper Hamilton served a written response, including objections, to the subpoena, the Plaintiffs' Motion fails to address the merits of *any* of those objections.

Accordingly, Penn State respectfully submits that Plaintiffs have waived any and all challenges to those objections.

Penn State is aware, however, that Pepper Hamilton attached those objections to its response to Plaintiffs' Motion. Accordingly, in the event the Court is inclined to address those objections on the merits, Penn State renews and preserves its objections to any order that would compel its current or former attorneys, including Pepper Hamilton, to produce documents that Penn State contends are protected from disclosure by the attorney-client privilege and/or the attorney work product doctrine. As this Court is aware, those objections are the subject of an appeal presently pending before the Superior Court. Any ruling that would compel Pepper Hamilton to produce attorney-client privileged documents or work product documents before that appeal is resolved would improperly destroy those privileges. Such a result would be inconsistent with Pennsylvania law, and should not be countenanced.

To be clear, Penn State does *not* object to Pepper Hamilton producing the Freeh Firm's communications with third parties, including the NCAA and the Big Ten Conference. Nor does Penn State object to producing responsive "source" documents from the 3.5 million-document database the Freeh Firm maintained (except to the very limited extent those source documents are themselves privileged). Indeed, counsel for Penn State has been working with Plaintiffs' counsel to search that database using mutually agreeable search terms.

Penn State *does* object, however, to any order that would compel Pepper Hamilton to produce: (a) confidential communications between Penn State representatives and the Freeh Firm and its agents (including communications with members of Penn State's Special Investigative Task Force and notes of interviews of Penn State personnel); and (b) the work product (interview notes, internal emails, drafts, etc.) prepared by the Freeh Firm and its agents.

## PROCEDURAL BACKGROUND

On February 26, 2014, plaintiffs served the parties with a Notice of Intent to Serve a Subpoena *Duces Tecum* upon non-party Pepper Hamilton.[1] Penn State objected to that notice on several grounds, including on the grounds that the proposed subpoena sought the production of documents protected by the attorney-client privilege and the attorney work product doctrine. On September 11, 2014, this Court entered an Opinion and Order (the "Sept. 11 Order"), in which it overruled most of Penn State's objections.

In overruling Penn State's objections that plaintiffs are seeking documents that are protected by the attorney-client privilege, the Court concluded, *inter alia*, that: (a) Penn State did not seek an opinion of law, legal services, or assistance in a legal matter from the Freeh Firm; (b) the Freeh Firm did not provide an opinion of law, legal services, or assistance in a legal matter to Penn State; (c) Penn State waived the attorney-client privilege by producing (or authorizing the Freeh Firm or Freeh Group International Solutions ("FGIS") to produce) protected communications to one or more third parties; and (d) the appropriate scope of any subject-matter waiver of the attorney-client privilege that may have occurred are the four divisions outlined in the Scope of Engagement section of the engagement letter between Penn State and the Freeh Firm, namely: (i) failures that occurred in the reporting process; (ii) the cause for those failures; (iii) who had knowledge of the allegations of sexual abuse; and (iv) how

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[1] Pepper Hamilton employs the attorneys that formerly were part of Freeh Sporkin and Sullivan ("the "Freeh Firm" or "FSS"). Pepper Hamilton also acquired Freeh Group International Solutions ("FGIS"), an investigation firm that had been affiliated with the Freeh Firm. As more fully described *infra*, on November 18, 2011, Penn State and the Freeh Firm executed an engagement letter wherein the Freeh Firm agreed to perform certain services, and wherein the Freeh Firm advised Penn State that it may retain other firms, including FGIS, to assist in that work. A true and correct copy of the November 18, 2011 engagement letter is attached hereto as Exhibit 1.

those allegations were handled by the Trustees, PSU administrators, coaches and other staff. Sept. 11 Order, pp. 19-22.

Then, in overruling Penn State's objection that plaintiffs improperly are seeking documents protected from disclosure by the attorney work product doctrine, the Court concluded that: (a) Penn State lacks standing to assert the attorney work product doctrine; (b) the protection of the attorney work product doctrine is not available unless the document requests are made in connection with the litigation for which the material was prepared; and (c) the Scope of Engagement set forth in the engagement letter did not contemplate legal advice or legal services in conjunction with *this* case. Sept. 11 Order, pp. 22-23. In a subsequent opinion (issued November 20, 2014) (the "Nov. 20 Order"), the Court clarified that its observations about the applicability (or non-applicability) of the work product doctrine were dicta, insofar as the Court first had determined that "Penn State did not have standing to raise this objection, and Pepper Hamilton – which did have standing – did not so do." Nov. 20 Order p. 4 ("there has been no ruling on [Pepper Hamilton's] work product objections").

Penn State filed a timely notice of appeal from the Court's September 11, 2014, Order. In the meantime, Plaintiffs served the subpoena on Pepper Hamilton. Pepper Hamilton responded by filing a motion asking the Court to stay its obligations to produce documents for which Penn State (or Pepper Hamilton) claimed a privilege pending the outcome of Penn State's appeal, and asking the Court to enter a commensurate protective order. *See* Motion for Stay Pending Appeal and for Protective Order by Non-Party Pepper Hamilton LLP (Oct. 13, 2014) ("Pepper's Motion for Limited Stay"). Penn State joined Pepper's Motion for Limited Stay. This Court denied Pepper's Motion for Limited Stay on November 20, 2014, and Pepper Hamilton filed a timely notice of appeal from that order.

In its November 20 Order, this Court indicated that, because Pepper Hamilton "ha[d] not yet responded to the subpoena," "there has been no ruling on its work product objections." Nov. 20 Order p. 5. Then, in response to the Court's observation, Pepper Hamilton served (on December 16, 2014) a written response to the subpoena, in which it raised appropriate objections, including an objection to producing documents that are protected from the disclosure by the attorney work product doctrine.

Despite receiving Pepper Hamilton's written response to their subpoena, Plaintiffs filed the instant Motion, which does not address the merits of *any* of Pepper Hamilton's objections, but which instead improperly asks the Court to order Pepper Hamilton to comply with the subpoena as written – as if those objections did not exist at all.

## ARGUMENT

### A. Plaintiffs' Subpoena to Pepper Hamilton Seeks Documents That Are Protected From Disclosure By The Attorney-Client Privilege.

In their subpoena to Pepper Hamilton, Plaintiffs seek the production of 25 categories of documents. Some of those requests, on their face, expressly seek the production of communications between Penn State (the client) and the Freeh Firm/FGIS (the attorneys and the attorneys' agents). Indeed, *all* of the requests in the subpoena are drafted using such broad language (*e.g.*, seeking "all documents that evidence, reflect, or relate in any way to" various actions and conduct) that they *all* seek, at least in part, documents protected by the attorney-client privilege.

As Penn State has advised the Court and Plaintiffs' counsel on several prior occasions, Penn State has no objection to Pepper Hamilton producing (and Pepper Hamilton has in fact begun producing) communications between the Freeh Firm and third parties (*e.g.*, the NCAA and the Big Ten Conference). However, to the extent the Freeh Firm communicated *with Penn State*

about its communications with those third parties, *those* communications – which would be privileged – would "relate in any way to" the non-privileged communications and thus would fall within the ambit of the Plaintiffs' document requests.

In their Motion, the Plaintiffs are asking the Court to enforce the subpoena as written. Accordingly, to grant the Motion would be to order Pepper Hamilton to produce documents for which Penn State has properly asserted – here and before the Superior Court – the attorney-client privilege. Because well-established case law counsels strongly against a trial court destroying a privilege while a litigant's appeal is pending, this Court should deny the Motion.[2]

**1. Penn State and the Freeh Firm had an attorney-client relationship.**

As this Court is aware, the attorney-client privilege provides: "In a civil matter counsel shall not be competent or permitted to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client." 42 Pa. C.S. § 5928. The Supreme Court of Pennsylvania has confirmed that the attorney-client privilege "operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice." *Gillard v. AIG Ins. Co.*, 15 A.3d 44, 59 (Pa. 2011).

With all due respect, this Court's conclusion in its September 11, 2014, Opinion that no attorney-client relationship existed between Penn State and the Freeh Firm, based on the language of the November 18, 2011 engagement letter, is not supportable. For example,

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[2] As Pepper Hamilton explained in its response to the Motion, Pepper Hamilton is not refusing to respond to the subpoena altogether. To the contrary, Pepper Hamilton has made several extensive document productions, withholding *only* those documents for which it (or Penn State) has asserted the attorney-client privilege and/or the attorney work product doctrine. The Motion thus has no apparent purpose other than to seek to vitiate those privileges while Penn State's and Pepper Hamilton's appeals are before the Superior Court.

although the Court concluded that "at no point does the scope [of the engagement section of the letter] mention a purpose of securing an opinion of law, legal services, or assistance in a legal matter," the engagement letter actually is *replete* with references to the provision of "legal services" by "legal counsel":

- *See* Ex. 1, § 1 (the Freeh Firm "has been engaged to serve as independent, external **legal counsel**");
- *id.*, § 5 **("[f]or the purposes of providing legal services** to the Task Force, [the Freeh Firm] will retain [ FGIS] to assist");
- *id.*, § 6 ("[t]he work and advice which is provided to the Task Force under this engagement by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, **is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges**");
- *id.*, § 7 ("FSS will provide the above-described **legal services** for the Task Force's benefit, for which the Trustees will be billed");
- *id.*, § 8 ("FSS is free to represent any clients (including your adversaries) and to take positions adverse to either you or an affiliate in any matters (**whether involving the same substantive areas of law for which you have retained us . . .** or some other unrelated areas, and whether involving business transactions, counseling, litigation or otherwise), which do not involve **the same factual and legal issues as matters for which you have retained us**");
- *id.*, § 10 ("FSS may terminate **its legal services** and withdraw from this engagement in the event our invoices are not paid in a timely manner");
- *id.*, p. 7 ("FSS, of course, is delighted to be asked to provide **legal services** to the Task Force"); and
- *id.* ("should the Task Force ever wish to discuss any matter relating to **our legal representation**, please do not hesitate to call me directly").

(all emphases added).

Indeed, the November 18, 2011, engagement letter between Penn State and the Freeh Firm specifically contemplates that there would be confidential, privileged communications – the

very communications for which Penn State is asserting the attorney-client privilege in this litigation. Specifically, § 6 of the engagement letter provides:

> 6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the [Penn State] Task Force under this engagement by [the Freeh Firm], and any third party working on behalf of [the Freeh Firm] to perform services in connection with this engagement, *is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges,* unless appropriately waived by the parties or otherwise determined by law. In the event that [the Freeh Firm], or an third party working on behalf of [the Freeh Firm] to perform services in connection with this engagement, is required to respond to a subpoena or other formal request from a third party or a governmental agency for our records or other information relating to services we have performed for [Penn State], or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide [Penn State] notice of such a request and give you and [Penn State] reasonable opportunity to object to such disclosure or testimony . . . .

(emphasis added).

Consistent with these provisions of the engagement letter, the Report of the Special Investigative Counsel Related to the Allegations of Child Sexual Abuse by Gerald A. Sandusky the Freeh Firm prepared (the "Freeh Report") confirmed that "[t]he information in this report was gathered under the applicable attorney-client privilege and the attorney work product doctrine . . . ." Freeh Report, p. 9 (Exhibit 2).

Lest there be any doubt, the lead project manager of the engagement, Omar Y. McNeill, Esq., an attorney with the Freeh Firm during the course of the investigation, recently confirmed that:

> [t]he work and advice provided under the engagement by FSS and any third party working on behalf of FSS to perform services in connection with the engagement was, again pursuant to the engagement letter, to be "subject to the confidentiality and privilege protection of the attorney-client . . . privilege[ ], unless appropriately waived by the parties or otherwise determined by law."

Exhibit 3 (Dec. 18, 2014 Declaration of Omar Y. McNeill) ("McNeill Dec."), ¶ 6. Attorney McNeill confirmed that Penn State's Board of Trustees and the Freeh Firm "understood and

expected that FSS's work would be subject to the attorney-client privilege . . ., and [the Freeh Firm] conducted the investigation accordingly." *Id.*, ¶ 8. And, toward that end, it was "routine practice" for the Freeh Firm investigators to "advise Penn State employee witnesses that information they provided in interviews would be protected by an attorney-client privilege that belonged to the University . . . ." *Id.*

In sum, the Court's conclusion in its September 11, 2014, Opinion and Order that "communications between Penn State and the Freeh Firm were not sought pursuant to seeking legal services; as such they are not subject to the attorney client privilege" simply is not accurate.

Moreover, in reaching that conclusion, this Court seems to have been under a misapprehension of fact. Specifically, the Court concluded that *FGIS* "was providing legal services to Penn State," meaning that "communications between Penn State and [FGIS] may be subject to the attorney-client privilege." Sept. 11 Order p. 21. The Court has the relationship precisely backward: Penn State's engagement letter (which, as described *supra*, is filled with references to the provision of legal services) was with the law firm of Freeh Sporkin and Sullivan; the Freeh Firm, in turn, retained FGIS to assist with the engagement. Lawyers (including Judge Louis Freeh) had roles with both entities. *See* Ex. 1 (engagement letter), § 5 ("Louis J. Freeh is a partner and member in FSS and FGIS").

In any event, however, Penn State respectfully submits that there is no factual support for a conclusion that communications between Penn State and FGIS were privileged, but communications between Penn State and the Freeh Firm were not. To the contrary, *all* of the confidential communications between Penn State and the Freeh Firm/FGIS were and are protected from disclosure by the attorney-client privilege. *See Commonwealth v. Noll*, 662 A.2d 1123, 1126 (Pa. Super. 1995) (communications between an agent of an attorney and the client

are protected by the attorney-client privilege where, as here, the agent is assisting the attorney in giving advice to the client).

**2. Neither Penn State nor the Freeh Firm/FGIS waived the protections of the attorney-client privilege.**

This Court's conclusion in its September 11, 2014, Opinion and Order that Penn State waived the attorney-client privilege is not sustainable, either. Once it is established that the attorney-client privilege applies, the burden shifted to the Plaintiffs to establish that Penn State waived that privilege. *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259, 1266 (Pa. Super. 2007), *aff'd on other grounds by an equally divided court,* 992 A.2d 65 (Pa. 2010). Here, the Plaintiffs have failed to satisfy their burden of establishing that the attorney-client privilege has been waived with respect to *any* communication (other than the Freeh Report itself, as discussed *infra*), much less on a global basis. Given that abject failure of proof, there is no basis for the Court to enforce the Plaintiffs' subpoena and order Pepper Hamilton to produce documents Penn State contends are privileged.

During the course of its work, the Freeh Firm took significant steps "to protect the confidentiality and attorney-client . . . privileges of the engagement." Ex. 3 (McNeill Dec.), ¶ 9. Freeh Firm attorneys, staff, and third parties working on behalf of the Freeh Firm were advised in writing of, and frequently briefed about, the importance of maintaining confidentiality. *Id.* Toward that end, the Freeh attorneys and staff worked in a "secured facility with access controlled by electronic locks," and stored physical evidence "in a locked room within [that] secured facility." *Id. Accord* Ex. 2 (Freeh Report) pp. 9-10 ("All materials were handled and maintained in a secure and confidential manner."). When members of the Freeh Firm conversed with members of Penn State's Special Investigative Task Force, they did so in confidence. Ex. 3 (McNeill Dec.), ¶ 7.

The Court's September 11, 2014, Opinion and Order with respect to the alleged waiver of the attorney-client privilege appears to have been written under the misapprehension (fostered by the Plaintiffs without any factual basis whatsoever) that the Freeh Firm provided the NCAA and/or the Big Ten with documents pertaining to its investigation. *See* Sept. 11 Order p. 21 ("Plaintiffs note that the Freeh Firm was communicating with third parties during the investigation – specifically, The Big Ten Athletic Conference and the NCAA. It is unquestioned that . . . with respect to all documents – source and non-source – that were shared with the Big Ten or NCAA, the attorney-client privilege (if it ever existed) was waived"); *id.* at pp. 21-22 (concluding that the waiver of the attorney-client privilege that allegedly occurred when Mr. McNeill spoke with Messrs. Remy and Barrett "applies to the subject matter of the privileged documents disclosed").

That assumption simply was not accurate. Although Attorney McNeill had periodic brief conference calls with Donald Remy (General Counsel of the NCAA) and Jonathan Barrett (outside counsel (Mayer Brown) for the Big Ten Conference), those calls did not involve any waiver of the attorney-client privilege. Ex. 3 (McNeill Dec.), ¶ 10 ("Those calls did not . . . in any way either compromise the independence of the investigation or result in a waiver of the attorney-client or work product privileges); *accord* Ex. 2 (Freeh Report) p. 10 ("[No advance copy [of the report] was provided to the Board or to any other person outside of the Special Investigative Counsel's team, and the work product was not shared with anyone who was not part of the Special Investigative Counsel's team.").

The NCAA's Remy confirmed in his deposition (taken in another case) – without qualification – that *the Freeh Firm did not provide any documents whatsoever (source documents, work product or otherwise) to the NCAA at any time.*

Q: Was the idea of NCAA participation in witness interviews -- shadowing, as you call it -- rejected?

A: It did not happen.

Q: Did any of the elements that you have described as typical, in your internal investigative process in which NCAA participates, get folded into the interaction between Freeh Group and NCAA?

A: Status updates.

Q: We'll talk about those. Sharing of documents?

A: We gave them educational information. They never shared any documents with us, that I recall of.

Q: Did they ever give you the substance of any documents, even if they didn't show you the documents themselves?

A: Not that I recall.

Q: Did they ever give you, to your recollection, summaries of interviews?

A: No. No.

Q: No interview notes?

A: No.

Q: How about during status updates? Any type of preliminary results?

A: No.

Exhibit 4 (Transcript of Nov. 20, 2014 Deposition of Donald Remy (excerpts) in *Corman v. NCAA,* Pa. Commw. Ct. No. 1 M.D. 2013) at 107:15 – 108:16.

Indeed, to the contrary, as Mr. McNeill made abundantly clear in *his* deposition, although Penn State had authorized the Freeh Firm to speak with representatives of the NCAA and the Big Ten, Penn State did *not* authorize the Freeh Firm to undermine the privileges in any way in those calls:

Q. Ultimately was there a decision about whether you could communicate information to NCAA and Big Ten?

A. Yes.

Q. And what was the decision?

A. The decision was that at the direction of the task force and with permission of the task force, could provide general updates to the NCAA, but we couldn't go into anything that, again, would in any way undermine the privilege. We couldn't share information with them that would in any way be deemed attorney work product. And we agreed that we would have regular calls, and I think that was the sum and substance.

Exhibit 5 (Transcript of Dec. 17, 2014 Deposition of Omar Y. McNeill (excerpts) in *Corman v. NCAA*, Pa. Commw. Ct. No. 1 M.D. 2013) at 39:22-40:11; *see also id.* at 148:13-22 (confirming that Penn State never authorized the Freeh Firm to waive the provisions of the attorney-client privilege and that the Freeh Firm never waived the protections of the work product doctrine).

In short, there simply is no factual basis whatsoever for a conclusion that Penn State waived the attorney-client privilege when the Freeh Firm gave representatives of the NCAA and the Big Ten perfunctory status updates. This provides still further reason why the Court should deny Plaintiffs' Motion to enforce the subpoena.

Nor did Penn State waive the protections of the attorney-client privilege with respect to hundreds, or potentially thousands, of private privileged communications merely by authorizing the Freeh Firm to release its report – and only the report – to the public. Indeed, the Court's September 11, 2014, Opinion and Order does not even *mention* the release of the Freeh Report as grounds for its conclusion that the attorney-client privilege had been waived. Moreover, as the Commonwealth Court recently noted in a case also involving Penn State's and the Freeh Firm's documents, "Pennsylvania courts have not adopted subject-matter waiver" with respect to the attorney-client privilege. *Bagwell v. Pa. Dep't of Education*, 103 A.3d 409, 419 (Pa. Commw. 2014) (Exhibit 6 hereto).[3]

[3] In concluding otherwise, this Court relied on decisions from several federal district courts. Sept. 11 Order p. 22 (citing *Murray v. Gemplus Int'l, S.A.*, 217 F.R.D. 362, 367 (E.D. Pa.

In any event, as the November 18, 2011, engagement letter itself makes clear, Penn State authorized the Freeh Firm to "waive" the attorney-client privilege only to the limited extent that the Freeh Firm was authorized to publicize its final report. Ex. 1, p. 1. Even then, and consistent with the limited scope of Penn State's instruction with respect to that limited waiver, the Freeh Firm was careful to redact identifying information of the individuals it interviewed in the course of its investigation. Indeed, far from giving the Freeh Firm carte blanche to disclose its preliminary findings, observations or privileged communications with Penn State, the engagement letter made it abundantly clear that the Freeh Firm would be permitted "to communicate regarding its independent investigation . . . with media, police agencies, governmental authorities and agencies, and any other parties," only "*as directed by*" Penn State. Ex. 1, p. 2 (emphasis added).[4]

Any conclusion that, by authorizing the release of the Freeh Report, Penn State waived the attorney-client privilege with respect to all communications that predated, led up to, or in any way informed that Report, would lead to absurd and untenable results never before seen in this Commonwealth. For example, as Pepper Hamilton aptly notes in its response, prior to filing a complaint or other legal document with the court, a lawyer likely will have numerous

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2003); *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 132 F.R.D. 204, 207 (N.D. Ind. 1990)). As noted in *Bagwell,* however, this is not the law in Pennsylvania.

[4] The only exception to the requirement in the November 18, 2011, engagement letter that disclosures needed to be cleared with, and directed by, Penn State, relates to the instruction that the Freeh Firm should immediately report discovered evidence of criminality to law enforcement personnel. Ex. 1, p. 2. That instruction does not, however, constitute a waiver of the attorney-client privilege, either. Any such reports of criminal conduct would have related to the activities of particular *individuals*, not the actions of Penn State. And, as paragraph 9 of the engagement letter makes clear, none of the University's employees were the Freeh Firm's clients. *Id.*, p. 6. Accordingly, Penn State's act of authorizing the Freeh Firm to report the potential criminal actions of individuals with whom the Freeh Firm had no attorney-client relationship could not have formed, and did not form, the factual basis for a waiver of Penn State's attorney-client privilege.

confidential conversations with his or her client about the facts, the nature of the potential claims, potential defendants, and other matters. The filing of the complaint in a public forum simply does not render those otherwise privileged communications non-privileged and subject to discovery by opposing counsel. That, however, is *precisely* the result Plaintiffs advocate here when they contended in their earlier briefing that the release of the Freeh Report waived the attorney-client privilege with respect to all of the communications between Penn State and the Freeh Firm/FGIS. Penn State is aware of no case that supports such an argument.

In any event, even the few trial courts that have adopted the concept of subject matter waiver with respect to the attorney-client privilege apply it only where the litigant disclosed the otherwise privileged documents in order "to gain a tactical advantage." *Minatronics v. Buchanan Ingersoll,* 23 Pa. D. & C.4th 1, 18-21 (Allegheny C.C.P. 1995). Penn State did not, however, voluntarily disclose the Freeh Report in order to gain a tactical advantage in any litigation, much less this one in particular. To the contrary, as Judge McCullough noted in her concurring opinion in *Bagwell*, to the extent Penn State (or the Freeh Firm) disclosed any privileged documents or information to third parties, it simply did not use those "selective disclosures" of privileged documents as a sword:

> Instead, PSU, through its legal counsel and chief investigator, [FSS], provided limited disclosures to certain law enforcement authorities and periodic updates of its investigation to [the NCAA and the Big Ten] which . . . did not include privileged information. Such limited disclosures, coupled with the fact, as noted by the Majority, that Pennsylvania courts have not generally adopted the subject matter waiver doctrine, support the Majority's application of a selective/limited waiver in this case.

Ex. 5, *Bagwell*, 103 A.3d at 424 (McCullough, concurring).

In sum, because the Plaintiffs have not established, and cannot establish, that any subject matter waiver of the attorney-client privilege occurred, the applicability of the privilege, and the determination of whether it was waived with respect to any particular document must be

evaluated on a document-by-document basis. As explained *supra,* however, the requests in the Plaintiffs' subpoena to Pepper Hamilton are a frontal assault on the attorney-client privilege. Accordingly, this Court should deny the Motion to the extent it seeks an order requiring Pepper Hamilton to produce documents for which Penn State has asserted the attorney-client privilege.

### 3. Plaintiffs' effort to destroy the privilege while appeals are pending is improper.

Lastly, it bears noting that Plaintiffs' motion to enforce the subpoena it issued to Pepper Hamilton is nothing more than an improper end-run around the Superior Court. Penn State has appealed the Court's September 11, 2014, Opinion and Order, with respect to (a) the Court's overruling of Penn State's attorney-client privilege objection and (b) the Court's overruling of its work product objection on the grounds that Penn State lacks standing to raise that argument.[5] As the Superior Court of Pennsylvania repeatedly has recognized, if a trial court orders the production of documents for which a litigant asserts a privilege while an appeal is pending, the litigant will lose the ability to argue that the documents are privileged. *See Berkeyheiser v. A-Plus Investigations, Inc.*, 936 A.2d 1117 (Pa. Super. 2007); *Carbis Walker, LLP v. Hill, Barth & King, LLC*, 930 A.2d 573, 577 (Pa. Super. 2007) (noting that "the claimed right will be irreparably lost" if immediate review is denied). Indeed, the Superior Court's intent to *protect* documents for which a privilege is claimed *until there is no doubt but that the privilege does not apply* was the impetus behind the Superior Court's ruling (in *Berkeyheiser*) that orders overruling privilege claims are immediately appealable as collateral orders under Rule 313(a) of the Pennsylvania Rules of Appellate Procedure:

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[5] In addition, although the Court has since indicated that its statement in the September 11 Opinion (p. 23) that the work product doctrine does not apply because "the Scope of Engagement [between Penn State and the Freeh Firm] did not contemplate legal advice or legal services in conjunction with the case at bar" is dicta, Penn State intends, in an abundance of caution, to brief that issue in the Superior Court as well.

> [T]he issues of attorney-client and work-product privileges, as well as privacy concerns, implicate rights deeply rooted in public policy, especially where the disclosure of such information affects individuals other than those involved in this particular case. . . . Furthermore, enforcement of the orders would force [the party] to disclose the disputed documents; thus, there would be no effective means of review available [after final judgment]. . . . As such, the orders on appeal are collateral to the principal action and immediately appealable.

*Berkeyheiser,* 936 A.2d at 1124 (citations omitted).

The same analysis applies to the Motion before this Court. It would be highly incongruous for Penn State to have a right to take an interlocutory appeal in order to have the Superior Court examine the disputed privilege rulings immediately only for this Court to cut the legs out from under that appeal by ordering the production the very documents that are at issue on the appeal. This is especially true with respect to the Freeh Firm's interview notes. The individuals who were interviewed cooperated voluntarily with the Freeh Firm, many provided information about highly sensitive matters, and many were asked questions about their current or former colleagues. The members of the investigative team "advise[d] Penn State employee witnesses that information provided in interviews would be protected by an attorney-client privilege that belonged to the University" and that the interviews were "confidential." Ex. 3 (McNeill Dec.) ¶ 8; *accord* Ex. 2 (Freeh Report) p. 9 (also noting that the information in the report was gathered "with due regard for the privacy of the interviewees"); *id.,* p. 10 ("Citations in this report have been redacted to protect the identity of people who spoke with the Special Investigative Council [sic, Counsel].). To compel the disclosure of those confidential interview notes while Penn State's appeal is pending would work a significant injustice. This provides still further reason why the Motion should be denied.

## B. Plaintiffs' Subpoena to Pepper Hamilton Seeks Documents That Are Protected From Disclosure By The Attorney Work Product Doctrine.

In its September 11, 2014, Opinion and Order, this Court concluded that Penn State, as the client, lacks "standing" to assert the attorney work product doctrine with respect to work product created by the Freeh Firm. Penn State respectfully disagrees with that conclusion, and will brief it to the Superior Court.[6]

In any event, however, while remaining cognizant of the Court's ruling that it lacks standing to assert the work product doctrine, Penn State incorporates by reference the arguments set forth in Pepper Hamilton's response to the Motion. Specifically, Penn State maintains its positions that: (a) its engagement of the Freeh Firm plainly *did* contemplate the rendering of legal advice and legal services (see discussion *supra*); (b) the work product of the Freeh Firm (and those working with it and on its behalf) is protected from disclosure by the work product doctrine, irrespective of whether the work had been performed in anticipation of *any* litigation; (c) in any event, the work product plainly *was* prepared in anticipation of litigation; (d) it is legally insignificant that the work product may not have been prepared specifically in anticipation of *this* litigation; and (e) neither Penn State nor the Freeh Firm waived the protection of the work product doctrine by releasing the Freeh Report, or by any other conduct.

Indeed, the Commonwealth Court recently rejected as "novel" the argument that the work product doctrine protects only those records that are prepared in anticipation of litigation. *Bagwell,* 103 A.3d 409, 416. In rejecting the plaintiff's effort to access the Freeh Firm's work

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[6] In stark contrast to this Court's opinion, *in Bagwell,* the Commonwealth Court, sitting in its appellate capacity, recently addressed the merits of an attorney work product objection asserted by a member of Penn State's board of trustees (the Secretary of Education). There was no suggestion whatsoever in the Commonwealth Court's opinion that the board member lacked standing to assert that privilege with respect to the Freeh Firm's work product.

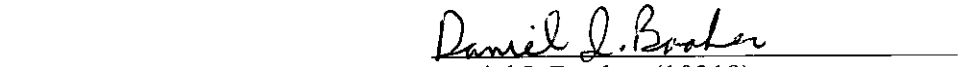
product in the *Bagwell* case, the Commonwealth Court squarely held: "Materials do not need to be prepared in anticipation of litigation for work-product privilege to attach." 103 A.3d at 417.

Accordingly, to the extent the Court addresses the merits of Pepper Hamilton's work product objection, Penn State urges the Court to sustain that objection.

**C. Conclusion**

For all of the reasons set forth above, Penn State respectfully requests that the Court deny Plaintiffs' Motion to Enforce the Subpoena *Duces Tecum* directed toward Pepper Hamilton LLP.

Respectfully submitted,



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*Attorneys for*
*The Pennsylvania State University*

Freeh Sporkin & Sullivan, LLP

PRIVILEGED AND CONFIDENTIAL

November 18, 2011

Steve A. Garban
Chairman, Board of Trustees
and
Paula R. Ammerman
Director, Office of the Board of Trustees
The Pennsylvania State University
205 Old Main
University Park, PA 16802

Re: Engagement to Perform Legal Services

Dear Mr. Garban and Ms. Ammerman:

We are pleased that the Board of Trustees of The Pennsylvania State University ("Trustees", "you" or "your"), on behalf of the Special Committee established by the Trustees (the "Special Committee"), has engaged us to represent the Special Committee. This is a new engagement for Freeh Sporkin & Sullivan, LLP ("FSS"). Accordingly, this is to set forth the basic terms upon which FSS has been engaged to represent the Special Committee, including the anticipated scope of our services and billing policies and practices that will apply to the engagement. Although our services are limited at this time to the specific matter described herein, the general terms of this letter will apply to any other matters that FSS may hereafter undertake to handle for the Trustees or the Special Committee.

1. Scope of Engagement. FSS has been engaged to serve as independent, external legal counsel to the Special Committee to perform an independent, full and complete investigation of the recently publicized allegations of sexual abuse at the facilities and the alleged failure of The Pennsylvania State University ("PSU") personnel to report such sexual abuse to appropriate police and government authorities. The results of FSS's investigation will be provided in a written report to the Special Committee and other parties as so directed by the Special Committee. The report will contain FSS's findings concerning: i) failures that occurred in the reporting process; ii) the cause for those failures; iii) who had knowledge of the allegations of sexual abuse; and iv) how those allegations were handled by the Trustees, PSU administrators, coaches and other staff. FSS's report also will provide recommendations to the Special Committee and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again.

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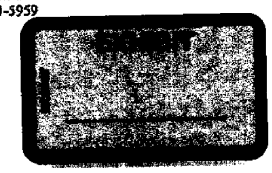

It is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that FSS will act under the sole direction of the ~~Special Committee~~ Task Force in performing the services hereunder. It also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that FSS's investigation will be completed in parallel to, but indeprendent of, any other investigation that is conducted by any policy agencies, governmental authorities or agencies, or other organizations within or outside of (e.g., The Second Mile) PSU, and will not interfere with any such other investigations.

It also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that during the course of FSS's independent investigation performed hereunder, FSS will immediately report any discovered evidence of criminality to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~ Task Force. If FSS's investigation identifies any victims of sexual crimes or exploitation, FSS will immediately report such information to the appropriate law enforcement authorities, and provide notice of such reporting to the ~~Special Committee~~ Task Force.

FSS also will communicate regarding its independent investigation performed hereunder with media, police agencies, governmental authorities and agencies, and any other parties, as directed by the ~~Special Committee~~ Task Force. However, it also is understood by FSS, the Trustees and the ~~Special Committee~~ Task Force that neither the Trustees nor the ~~Special Committee~~ Task Force will interfere with FSS's reporting of evidence of criminality or identities of any victims of sexual crimes or exploitation discovered throughout the course of FSS's independent investigation performed hereunder, as discussed in the paragraph immediately above.

The precise time frame in which FSS's services will be performed cannot presently be determined. However, FSS, the Trustees and the ~~Special Committee~~ Task Force all recognize that the investigation must be completed in a thorough manner, but also as expeditiously as possible.

2. Rates. It is anticipated that Louis J. Freeh will be the lead and billing attorney on this engagement. Other FSS, and other non-FSS professionals, will be assigned from time to time to assist in the representation. FSS will charge you for the services provided under the terms of this engagement letter based on the hourly rates of the professionals working on this matter, plus reasonable expenses as described below in the "Disbursements" section of this engagement letter. The hourly rates that will be charged in connection with this matter are as follows: Mr. Freeh -- [redacted] USD per hour; other FSS partners -- [redacted] USD per hour; investigators and FSS non-partner lawyers -- [redacted] USD per hour; and paraprofessional support staff -- [redacted] USD per hour. We reassess our hourly rates from time to time and adjustments are made when we believe such adjustments are appropriate. These adjustments may be reflected in the billing rates utilized to determine our charges to you during the course of our engagement. FSS bills in quarter of an hour increments.

3. Disbursements. In addition to fees for our services, we also charge separately for certain costs incurred on the ~~Special Committee~~ Tail Force's behalf, such as travel related expenses. Our invoices also will include costs incurred on the ~~Special Committee~~ Tail Force's behalf for services and materials provided by third-party vendors, including but not limited to courier and messenger service, airfreight service, outside copy service, shipping and express mail, filing fees, deposition transcripts, and court reporters. Under certain circumstances, for certain large disbursements, we may either bill you directly or ask you to advance funds outside our normal billing cycle. In addition to the third-party disbursements noted above, other charges that will be reflected on our invoices include the following:

   - International calling costs will be charged at the standard provider rates.
   - Computerized research costs will be charged at the standard provider rates.
   - Office supply costs are not passed on to a client unless a purchase is specifically required for a particular engagement.

   We make every effort to include disbursements in the invoice covering the month in which they are incurred. However, there may be occasions when disbursements may not be posted in the billing system until the following month. If the required payment of our invoices is based on the completion of a specific assignment, pursuant to any alternative timing arrangements that have been established and are described in the "Rates" section of this engagement letter, an estimate of unposted disbursements in addition to an estimate of unposted charges for services will be included in our invoice payable at completion.

4. Payment Terms. Generally, our invoices are prepared and forwarded to our clients monthly covering fees and costs incurred for the prior month. Any alternative timing arrangements for invoicing that have been established are described in the "Rates" section of this engagement letter.

   Unless stated differently in the "Rates" section of this engagement letter, our invoices for service are due and payable within thirty (30) days of receipt. Clients whose invoices are not paid within this period may have a late charge assessed on their unpaid balance at the rate of 1% per month. The intent of the late charge is to assess on an equitable basis additional costs incurred by FSS in carrying past-due balances.

   FSS requires payment at the conclusion of this engagment of all accrued and unpaid fees and disbursements to the extent invoiced, plus such additional amounts of fees and disbursements as shall constitute our reasonable estimate of fees and disbursements incurred or to be incurred by us through the conclusion of this engagement (though such estimate shall not thereafter preclude a final settling of accounts between us when final detailed billing information is available).

During this engagement, the Trustees and the ~~Special Committee~~ Task Force may request from us an estimate of fees and/or costs that we anticipate incurring on the ~~Special Committee~~ Task Force's behalf. While we may provide an estimate for your or the ~~Special Committee~~ Task Force's general planning purposes, our estimate is only a preliminary approximation based on facts that are currently available and the currently anticipated level of work required to complete the engagement. In no event is an estimate to be construed as a commitment of FSS to render services at a minimum or maximum cost.

Unless otherwise agreed, our invoice will be presented in our standard format. If this format is not sufficient for your needs, we will work with you to find one that is. FSS will review individually any requests to use a third party vendor for electronic billing. Depending on the vendor requested, we might provide alternative recommendations in order to insure that electronic billing through a third party is both practical and efficient. All charges related to using a third party vendor for this purpose, including initial start-up costs and maintenance fees, will be payable by the Trustees directly.

Where required, your billing statement may include applicable international taxes such as VAT, GST, and consumption tax, etc.

Upon request, we will forward our billing statements to a third party designated by you who is assuming payment responsibility for your or the ~~Special Committee~~ Task Force's legal expenses, e.g., an insurance carrier who holds your liability coverage. In the event that timely payment is not received from the third party, we will look to the Trustees for payment of our legal fees and costs and you agree that you are responsible for prompt payment in that event.

All payments should be sent directly to: 3711 Kennett Pike, Suit 130, Wilmington, Delaware 19807. If you choose to pay by wire transfer, wire transfer instructions are as follows:

Account Holder: Freeh Sporkin & Sullivan, LLP

Bank:

Account No.:

ABA/Routing No.:
(For Domestic Payments)

SWIFT Code:
(For International Payments)

The billing attorney assigned to this matter will review your billing statement before it is sent to you and make any adjustments he or she views as appropriate. If you have

any questions concerning any invoice item, please do not hesitate to contact the billing attorney.

5. Retention of Third Parties. We may determine that it is necessary to involve third parties to assist us in performing services in connection with this engagement. If that determination is made, we will notify the ~~Special Committee~~ Task Force promptly to discuss the proposed third parties, the expected scope of the services to be provided by the third parties and the related fees and costs expected to be charged by those third parties. FSS will consult with the ~~Special Committee~~ Task Force about any changes to the third parties' scope of services or related fees and costs that may occur throughout the course of this engagement.

   For the purpose of providing legal services to the ~~Special Committee~~ Task Force, FSS will retain Freeh Group International Solutions, LLC ("FGIS") to assist in this engagement. It should be noted that Louis J. Freeh is a partner and member in FSS and FGIS, respectively, and has a controlling interest in both. FSS is a law firm and FGIS is a separate investigative and consulting group.

   As described in the "Disbursements" section of this engagement letter, our invoices will include fees and costs incurred on the ~~Special Committee~~ Task Force's behalf for services and materials provided by third parties, unless stated otherwise in the "Rates" section of this engagement letter, or in a separate writing signed by FSS and the Trustees.

6. Confidentiality and Responding to Subpoenas and Other Requests for Information. The work and advice which is provided to the ~~Special Committee~~ Task Force under this enagagment by FSS, and any third party working on behalf of FSS to perform services in connection with this engagement, is subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law. In the event that FSS, or any third party working on behalf of FSS to perform services in connection with this engagement, is required to respond to a subpoena or other formal request from a third party or a governmental agency for our records or other information relating to services we have performed for the ~~Special Committee~~ Task Force, or to testify by deposition or otherwise concerning such services, to the extent permitted by law, we will provide you and the ~~Special Committee~~ Task Force notice of such a request and give you and the ~~Special Committee~~ Task Force a reasonable opportunity to object to such disclosure or testimony. It is understood that you will reimburse us for our time and expense incurred in responding to any such demand, including, but not limited to, time and expense incurred in search and photocopying costs, reviewing documents, appearing at depositions or hearings, and otherwise litigating issues raised by the request.

7. General Responsibilities of Attorney and Client. FSS will provide the above-described legal services for the ~~Special Committee~~ Task Force's benefit, for which the Trustees will be billed in the manner set forth above. We will keep the ~~Special Committee~~ Task Force

apprised of developments as necessary to perform our services and will consult with the ~~Special Committee~~ Task Force as necessary to ensure the timely, effective and efficient completion of our work. However, although we will make every reasonable effort to do so, we cannot guarantee that we will be able to provide specific results and the Trustees and the ~~Special Committee~~ Task Force acknowlege that FSS does not promise any result.

We understand that the ~~Special Committee~~ Task Force will provide us with such factual information and documents as we require to perform the services, will make any business or technical decisions and determinations as are appropriate to facilitate the completion of our services, and will remit payment of our invoices when due, pursuant to the terms of this engagement letter.

Moreover in connection with any investigation, civil or criminal action, administrative proceeding or any other action arising out of this matter, the Trustees have agreed to indemnify FSS, it's partners, employees, agents and third-party vendors who have provided or are providing services in connection with this engagement, for all costs, expenses, attorney's fees (to be paid as accured and billed) and judgements, including any amounts paid in settlement of any claims. This obligation shall survive the termination of this engagement.

8. Waiver of Future Conflicts. Our agreement to represent the ~~Special Committee~~ Task Force is conditioned upon our mutual understanding that FSS is free to represent any clients (including your adversaries) and to take positions adverse to either you or an affiliate in any matters (whether involving the same substantive areas of law for which you have retained us on behalf of the ~~Special Committee~~ Task Force or some other unrelated areas, and whether involving business transactions, counseling, litigation or otherwise), which do not involve the same factual and legal issues as matters for which you have retained us on behalf of the ~~Special Committee~~ Task Force or may hereafter retain us. In this connection, you and the ~~Special Committee~~ Task Force should be aware that we provide services on a wide variety of legal subjects, to a number of clients, some of whom are or may in the future operate in the same areas of business in which you are operating or may operate. Subject to our ethical and professional obligations, we reserve the right to withdraw from representing the ~~Special Committee~~ Task Force should we determine that a conflict of interest has developed for us.

9. Engagement Limited to Identified Client. This will also confirm that, unless we otherwise agree in writing, our engagement is solely related to the ~~Special Committee~~ Task Force established by The Pennsylvania State University Board of Trustees and the specific matter described above. By entering into this engagement, we do not represent any individuals or entities not named as clients herein, nor do we represent any owner, officer, director, founder, manager, general or limited partner, employee, member, shareholder or other constituent of any entity named as a client in this letter, in their individual capacities or with respect to their individual affairs.

10. Termination. Our engagement may be terminated at any time by FSS or the ~~Special Committee~~ upon written notice and, with respect to FSS, subject to our ethical and professional obligations. In addition to other reasons, the Trustees and the ~~Special Committee~~ agree that FSS may terminate its legal sevices and withdraw from this engagement in the event our invoices are not paid in a timely manner, pursuant to the terms of this engagment letter. Upon termination, all fees and expenses due and owing shall be paid promptly. Your and the ~~Special Committee~~'s acceptance of this engagement letter constitutes your and the ~~Special Committee~~'s understanding of, and consent to, the particular terms, conditions, and disclosure herein.

11. Client Files. In the course of our representation of the ~~Special Committee~~, we will maintain a file containing, for example, correspondence, pleadings, agreements, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary for the ~~Special Committee~~'s representation ("Client File"). We may also place in such file documents containing our attorney work product, mental impressions or notes, drafts of documents, and internal accounting records ("Work Product"). The ~~Special Committee~~ is entitled upon written request to take possession of its Client File, subject to our right to make copies of any files delivered to the ~~Special Committee~~. The Trustees and the ~~Special Committee~~ agree that the Work Product is and shall remain our property. Under our document retention policy, we normally destroy files ten years after a matter is closed, unless other arrangements are made with the client.

FSS, of course, is delighted to be asked to provide legal services to the ~~Special Committee~~, and we are looking forward to working with the ~~Special Committee~~ on this engagement. While ordinarily we might prefer to choose a less formal method of confirming the terms of our engagement than a written statement such as this, it has been our experience that a letter such as this is useful both to FSS and to the client. Moreover, in certain instances, FSS is required by law to memorialize these matters in writing. In any event, we would request that the Trustees and the ~~Special Committee~~ review this letter and, if it comports with your and the ~~Special Committee~~'s understanding of our respective responsibilities, so indicate by returning a signed copy to me at your earliest convenience so as not to impede the commencement of work on behalf of the ~~Special Committee~~. If you or the ~~Special Committee~~ have any questions concerning this engagement letter, or should the ~~Special Committee~~ ever wish to discuss any matter relating to our legal representation, please do not hesitate to call me directly, or to speak to one of our other attorneys who is familiar with the engagement.

Task Force
Again, we look forward to serving the ~~Special Committee~~ and thank the ~~Special Committee~~ and the Trustees for looking to FSS to assist the ~~Special Committee~~ in this matter.

Sincerely,

Louis J. Freeh*
Senior Managing Partner
Freeh Sporkin & Sullivan, LLP

APPROVED AND AGREED TO ON BEHALF OF
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Board of Trustees of The Pennsylvania State University

Printed Name: Steve A. Garban

Title: Chair, Board of Trustees
The Pennsylvania State University

Date: 12/2/11

Investigations Task Force

APPROVED AND AGREED TO ON BEHALF OF
The Special ~~Committee~~ established by
The Board of Trustees of The Pennsylvania State University:

By: _____
an authorized signatory of The Special ~~Committee~~ established by
The Board of Trustees of The Pennsylvania State University

Printed Name: K. C. Frazier

Title: Chair, Special Investigations Task Force

Date: 12/2/11

* Licensed to practice law in New York, New Jersey and Washington, DC only.

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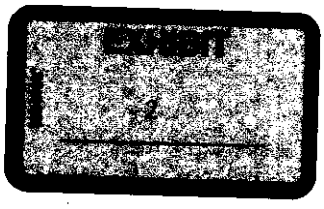
# Report of the Special Investigative Counsel Regarding the Actions of The Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky

Freeh Sporkin & Sullivan, LLP

July 12, 2012



particular regard to institutional governance, decision making, oversight and culture.

- Identify any failures and their causes on the part of individuals associated with the University at any level or in any office, or gaps in administrative processes that precluded the timely and accurate reporting of, or response to, reports of these incidents.

The Special Investigative Counsel implemented the investigative plan by:

- Conducting over 430 interviews of key University personnel and other knowledgeable individuals to include: current and former University Trustees and Emeritus Trustees; current and former University administrators, faculty, and staff, including coaches; former University student-athletes; law enforcement officials; and members of the State College community at the University Park, Behrend, Altoona, Harrisburg and Wilkes-Barre campuses, and at other locations in Delaware, Pennsylvania, New York, Maryland and the District of Columbia, and by telephone;
- Analyzing over 3.5 million pieces of pertinent electronic data and documents;
- Reviewing applicable University policies, guidelines, practices and procedures;
- Establishing a toll-free hotline and dedicated email address to receive information relevant to the investigation, and reviewing the information provided from telephone calls and emails received between November 21, 2011 and July 1, 2012;
- Cooperating with law enforcement, government and non-profit agencies, including the National Center for Missing and Exploited Children (NCMEC), and athletic program governing bodies;
- Benchmarking applicable University policies, practices and procedures against those of other large, public and private universities and youth-serving organizations; and
- Providing interim recommendations to the Board in January 2012 for the immediate protection of children.

The information in this report was gathered under the applicable attorney-client privilege and attorney work product doctrine, and with due regard for the privacy of the interviewees and the documents reviewed. All materials were handled and

maintained in a secure and confidential manner. This report sets forth the essential findings of the investigation, pursuant to the appropriate waiver of the attorney-client privilege by the Board.

Citations in this report have been redacted to protect the identity of people who spoke with the Special Investigative Council. Citations also include references to the internal database maintained by the Special Investigative Council to collect and analyze documents and emails. The references include citation to a unique identifying number assigned to each individual piece of information and are located in the endnotes and footnotes of this report.

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| The ESTATE of JOSEPH PATERNO, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | Docket No. 2013-2082 |
| | ) | |
| vs. | ) | Type of Case: Commercial |
| | ) | |
| NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"), et al. | ) | |
| | ) | |
| Defendants. | ) | |

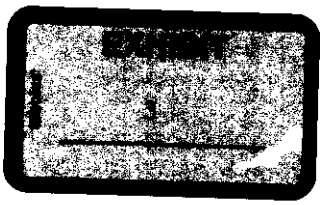
**DECLARATION OF OMAR Y. MCNEILL**

I, Omar Y. McNeill, do hereby declare and say as follows based on personal knowledge:

1. I am an adult citizen of Delaware and have been admitted to practice law in Delaware since 1992. I am currently on inactive status because I am not engaged in the practice of law at this time.

2. From 2009 to 2012, I was an attorney with Freeh Sporkin & Sullivan, LLP ("FSS"), a partnership engaged in the practice of law, ultimately holding the title of Partner and General Counsel. In late 2011, I began work on an investigation at The Pennsylvania State University and served for the next eight months as the lead project manager of this engagement. I was a practicing attorney during the entire course of the investigation.

3. On or about December 2, 2011, the Board of Trustees (the "Board") of The Pennsylvania State University ("Penn State" or the "University"), on behalf of a Special Investigations Task Force (the "Task Force") created by the Board, engaged FSS as counsel to perform an independent investigation, as set forth in an engagement letter.



4. As part of its engagement as legal counsel, FSS was to provide the results of the investigation in a written report to the Task Force and to other parties as the Task Force may direct. Pursuant to the engagement letter, FSS was also engaged to "provide recommendations to the Task Force and Trustees for actions to be taken to attempt to ensure that those and similar failures do not occur again."

5. FSS's engagement was conducted in anticipation of litigation. Indeed, as the investigation took place, litigation and criminal investigations were already pending and more litigation was anticipated

6. The work and advice provided under the engagement by FSS and any third party working on behalf of FSS to perform services in connection with the engagement was, again pursuant to the engagement letter, to be "subject to the confidentiality and privilege protection of the attorney-client and attorney work product privileges, unless appropriately waived by the parties or otherwise determined by law." If FSS were required to respond to a subpoena or other formal request from a third party or governmental agency for FSS records or other information relating to the services performed for the University, or to testify by deposition or otherwise concerning such services, FSS was to provide the University with notice of the request to provide a reasonable opportunity to object to such disclosure or testimony.

7. FSS attorneys and staff communicated with members of the Special Investigative Task Force from time to time in confidence.

8. The Board and FSS understood and expected that FSS's work would be subject to the attorney-client privilege and the work product doctrine, and FSS conducted the investigation accordingly. It was routine practice, for instance, for the investigators to advise Penn State employee witnesses that information they provided in interviews would be protected

by an attorney-client privilege that belonged to the University, and for the investigators to advise witnesses that the interviews were confidential. The notes taken by FSS attorneys, staff, and third parties working on behalf of FSS incorporated those individuals' mental impressions.

9. FSS took other steps to protect the confidentiality and attorney-client and attorney work product privileges of the engagement as well. FSS attorneys, staff, and third parties working on behalf of FSS were advised in writing of confidentiality expectations for the engagement. The attorneys and staff worked within a secured facility with access controlled by electronic locks. Physical evidence was stored in a locked room within the secured facility. The attorneys and staff frequently were briefed on the importance of maintaining confidentiality on the engagement.

10. During the course of the investigation, I participated in telephone conference calls on multiple occasions with Donald Remy, General Counsel of the National Collegiate Athletic Association ("NCAA") at the time, and Jonathan Barrett, outside counsel for the Big Ten Conference ("Big Ten"). I participated in these calls at the direction of the Task Force to cooperate with the NCAA and the Big Ten. Those calls did not, however, in any way either compromise the independence of the investigation or result in a waiver of the attorney-client or work product privileges. Although initially scheduled to take place on a weekly basis during the course of the investigation, the conference calls were frequently canceled.

11. During the conference calls with Messrs. Remy and Barrett, which lasted on average approximately fifteen minutes, I informed them in general terms about the progress of the investigation. I did not provide them with detailed information nor did I reveal our work product to them. In particular, to the best of my recollection, I did not provide the names of specific individuals that we interviewed or that we were scheduled to interview. Instead, I

informed Messrs. Remy and Barrett of the general categories of personnel that we were interviewing, but I did not reveal individual names and I did not disclose the substance of any of the interviews we conducted.

12. My only recollection of the discussion of interviews of specific named individuals is that Mr. Remy or Mr. Bartlett inquired whether we intended to interview Graham Spanier, Tim Curley or Gary Schultz and I told them that we were attempting to interview each of these individuals.

13. I hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: December 18, 2014

OMAR Y. McNEIL

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1 M.D. 2013

JAKE CORMAN, in his official capacity as Senator from the 34th Senatorial District of Pennsylvania and Chair of the Senate Committee on Appropriations; and ROBERT M. McCORD, in his official capacity as Treasurer of the Commonwealth of Pennsylvania,

Plaintiffs,

v.

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant.

v.

PENNSYLVANIA STATE UNIVERSITY,

Defendant.

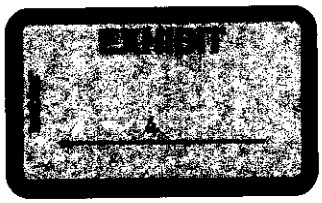
X

** REVISED **

Thursday, November 20, 2014

9:01 a.m.

Deposition of Donald Remy




Job No: 86979

Reported by: Randi Garcia

Thursday, November 20, 2014

9:01 a.m.

Deposition of DONALD REMY, ESQUIRE taken by Plaintiff, at the offices of Latham & Watkins, LLP, 555 Eleventh Street, NW, Washington, D.C., before Randi J. Garcia, Registered Professional Reporter, and Notary Public in and for the District of Columbia, beginning at approximately 9:01 a.m., when were present on behalf of the respective parties:

A P P E A R A N C E S:

ATTORNEYS FOR PLAINTIFF.
CONRAD O'BRIEN
BY: MATTHEW HAVERSTICK, ESQ
MARK SEIBERLING, ESQ
ANDREW KABNICK GARDEN, ESQ
1500 Market Street
Philadelphia, PA 19102

ATTORNEYS FOR NCAA.
LATHAM & WATKINS
BY: EVERETT JOHNSON, ESQ
BRIAN KOWALSKI, ESQ
SARAH GRAGERT, ESQ
555 Eleventh Street, N.W.
Washington, D.C. 20004

and -
SCOTT BEARBY
ASSOCIATE GENERAL COUNSEL NCAA
P.O. BOX 6222
Indianapolis, IN 46206

and -
KILLIAN & GEPHART
BY: THOMAS SCOTT, ESQ
218 Pine Street
Harrisburg, PA 17108

///

(Continued)

ATTORNEYS FOR PENN STATE.

REED SMITH

BY: DONNA DOBLICK, ESQ

225 Fifth Avenue

Pittsburgh, PA 15222

Also Present:

Kevin M. McKenna, Esquire

I N D E X

can provide you data and information to understand how we traditionally examine those types of issues." 12:23:20 12:23:22 12:23:25

Q Freeh Group, as best as you recall, solicited from you your assistance -- your, NCAA's assistance -- in educating Freeh Group on NCAA bylaws issues? 12:23:29 12:23:32 12:23:34 12:23:39

A I don't recall whose idea it was. I don't recall if it was our idea, if it was their idea, if it was part of our original thought process about how we would engage. 12:23:42 12:23:44 12:23:46 12:23:49

But the Freeh Group said, "Okay. We can receive that information that might be helpful to us." 12:23:52 12:23:55 12:23:57

Q Was the idea of NCAA participation in witness interviews -- shadowing, as you call it -- rejected? 12:23:59 12:24:04 12:24:07

A It did not happen. 12:24:09

Q Did any of the elements that you have described as typical, in your internal investigative process in which NCAA participates, get folded into the interaction between Freeh Group and NCAA? 12:24:13 12:24:17 12:24:21 12:24:23 12:24:27

A Status updates. 12:24:31

Q We'll talk about those. 12:24:32

Sharing of documents? 12:24:34

A We gave them educational information. 12:24:38

They never shared any documents with us, that I 12:24:40

recall of. 12:24:42

Q Did they ever give you the substance of 12:24:43

any documents, even if they didn't show you the 12:24:44

documents themselves? 12:24:47

A Not that I recall. 12:24:48

Q Did they ever give you, to your 12:24:50

recollection, summaries of interviews? 12:24:53

A No. No. 12:24:56

Q No interview notes? 12:24:58

A No. 12:24:59

Q How about during status updates? Any 12:25:04

type of preliminary results? 12:25:09

A No. 12:25:12

Q Were the discussions, in what we'll soon 12:25:13

talk about are the weekly phone calls, about 12:25:18

Freeh Group's assessment of potential NCAA 12:25:25

violations? 12:25:29

A Not that I recall, no. 12:25:29

Q Assessments of Freeh Group's opinion on 12:25:32

whether there was a lack of institutional 12:25:34

control at Penn State? 12:25:35

A No. I mean, let me do it this way. 12:25:37

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

- - -

| | | |
|---|---|---|
| JAKE CORMAN, in his official capacity as Senator from the 34th Senatorial District of Pennsylvania and Chair of the Senate Committee on Appropriations; and ROBERT M. McCORD, in his official capacity as Treasurer of the Commonwealth of Pennsylvania | : | NO. 1 M.D. 2013 |
| Plaintiffs, | : | |
| vs. | : | |
| NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, | : | |
| Defendant, | : | |
| vs. | : | |
| PENNSYLVANIA STATE UNIVERSITY, | : | |
| Defendant. | : | |

- - -

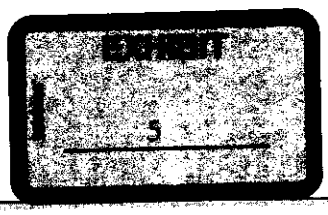
December 17, 2014

- - -

Oral deposition of OMAR MCNEILL, taken at the offices of Proctor Heyman LLP, 300 Delaware Avenue, Wilmington, Delaware 19103, beginning at 1:00 p.m., before LINDA ROSSI RIOS, a Federally Approved RPR, CCR and Notary Public.

- - -

Job No. 88377



A P P E A R A N C E S :

For Plaintiff

CONRAD O'BRIEN
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For Defendant, Penn State

REED SMITH
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For the Witness:

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3000 Two Logan Square
Philadelphia, PA 19103

A L S O  P R E S E N T :

KEVIN M. McKENNA, ESQUIRE

JORDAN MUMMERT, Videographer

- - -

discussion of the Big Ten. And that's the extent of my recollection. 13:48:07 13:48:12

Q. What was the attorney-client privilege issue that you discussed? What was the concern? 13:48:14 13:48:16 13:48:19

A. That we, by sharing information with the NCAA, would violate the attorney-client privilege that was owned by our client. 13:48:20 13:48:23 13:48:28 13:48:30

Q. Was there a decision reached on whether information could be shared with the NCAA? 13:48:30 13:48:32 13:48:34

A. During that meeting, I don't think that there were any decisions made. I think that -- I do recall that we left the meeting with sort of a follow up for us to sort of consider what we could do, if anything. I do recall saying we have to go back to our client and we might have set a firm date for us to get back, but I don't recall that. 13:48:35 13:48:39 13:48:43 13:48:49 13:48:53 13:48:56 13:48:59 13:49:02 13:49:05

Q. Ultimately was there a decision about whether you could communicate information to NCAA and Big Ten? 13:49:05 13:49:07 13:49:10

A. Yes. 13:49:12

Q. And what was the decision? 13:49:12
A. The decision was that at the 13:49:14
direction of the task force and with 13:49:18
permission of the task force, could provide 13:49:21
general updates to the NCAA, but we couldn't 13:49:24
go into anything that, again, would in any 13:49:26
way undermine the privilege. We couldn't 13:49:29
share information with them that would in any 13:49:32
way be deemed attorney work product. And we 13:49:34
agreed that we would have regular calls, and 13:49:42
I think that was the sum and substance. 13:49:47
Q. Tell me about the independence 13:49:49
issue discussed, what was the conversation 13:49:52
about on that topic? 13:49:55
A. I don't remember the details. 13:49:56
I know generally it was, as I mentioned 13:49:59
earlier, Freeh, Sporkin & Sullivan was 13:50:02
brought in to do an independent investigation 13:50:05
and we would not do anything that would in 13:50:08
any way suggest otherwise. 13:50:13
Q. Now, at this point was one of 13:50:13
the charges of Freeh, Sporkin & Sullivan to 13:50:16
review whether Penn State had violated any 13:50:19
NCAA bylaws? 13:50:23
A. If you're talking about, when 13:50:24

recall about the nature of those communications? 16:03:36 16:03:38

A. Certainly to anyone that was an employee of the university we provided the typical Upjohn warnings, if you will, for those who are familiar with those, essentially letting them know that the investigation was being conducted at the request of the university under the privilege that the university had the right to maintain or waive at any time and, therefore, they were to act accordingly. 16:03:38 16:03:40 16:03:50 16:03:51 16:03:52 16:03:55 16:03:57 16:03:59 16:04:02 16:04:06

Q. To the best of your knowledge, did anybody from the university ever authorize the Freeh firm or the Freeh Group to waive the attorney-client privilege? 16:04:06 16:04:08 16:04:10 16:04:13

A. They certainly permitted us to make the report public. But beyond that, no. 16:04:15 16:04:20

Q. To the best of your knowledge, did the Freeh firm ever waive the protections of the attorney work product doctrine? 16:04:22 16:04:28 16:04:31

A. No. 16:04:33

MS. DOBLICK: I have no further questions. 16:04:49 16:04:51

103 A.3d 409
Commonwealth Court of Pennsylvania.

**Ryan BAGWELL**, Petitioner
v.
PENNSYLVANIA DEPARTMENT OF EDUCATION, Respondent.

Argued Sept. 10, 2014. | Decided Oct. 31, 2014. | Reargument Denied Dec. 18, 2014.

Synopsis
**Background:** Requestor submitted a request for records from the Department of Education related to sexual abuse investigation at Pennsylvania State University. The Office of Open Records (OOR), No. AP 2013-1753denied access to certain information under the attorney-client privilege and work-product doctrine. Requestor appealed.

**Holdings:** The Commonwealth Court, No. 79 C.D. 2014, Simpson, J., held that:

[1] work-product protection applied to material created by law firm engaged to investigate allegations of sexual abuse at state university that subsequently became the subject of lawsuits handled by other counsel;

[2] Department's selective disclosure of privileged documents through its agent at grand jury hearing that reflected the same subject as documents sought by records requestor under the Right-to-Know Law did not constitute a subject-matter waiver of attorney-client and work-product privilege of records that contained attorneys' mental impressions; and

[3] requestor bore the burden of proving Department waived attorney-client and work-product privileges through selective disclosure of privileged documents.

Affirmed.

Patricia A. McCullough, J., filed concurring opinion.

West Headnotes (19)

[1] **Appeal and Error**
Authority to find facts

Although the Commonwealth Court may exercise jurisdiction as a fact-finder, and make independent findings based on its review of the evidence, that is unnecessary when it is presented with pure matters of legal construction.

Cases that cite this headnote

[2] **Appeal and Error**
Review Dependent on Whether Questions Are of Law or of Fact

For a question of law, the Commonwealth Court's scope of review is plenary.

Cases that cite this headnote

[3] **Records**
In general; freedom of information laws in general

The Right-to-Know Law imposes a duty of disclosure on an agency within the Office of Open Records (OOR) jurisdiction as to any public records in its possession. 65 P.S. § 67.101 et seq.

Cases that cite this headnote

[4] **Privileged Communications and Confidentiality**
Presumptions and burden of proof

The burden of proving a privilege rests on the party asserting it.

Cases that cite this headnote

[5] **Pretrial Procedure**
Information secured in anticipation of litigation or in preparation for trial

Work-product protection applied to material created by law firm engaged to investigate allegations of sexual abuse at state university that subsequently became the subject of lawsuits handled by other counsel, even though the material was prepared without reference to specific litigation; there was no dispute that an attorney's mental impressions were protected by work product, the university anticipated litigation related to the purported sexual abuse, and preparation for litigation was underway, albeit with other counsel handling the litigation aspect. Rules Civ.Proc., Rule 4003.3, 42 Pa.C.S.A.

Cases that cite this headnote

[6] **Pretrial Procedure**
Work-product privilege

The work-product doctrine, while closely related to the attorney-client privilege, provides broader protection.

Cases that cite this headnote

[7] **Privileged Communications and Confidentiality**
Communications from client to attorney and from attorney to client

Confidential information flows from the client to the attorney, and vice versa, in the attorney-client relationship; the attorney-client privilege protects such confidential communications.

Cases that cite this headnote

[8] **Pretrial Procedure**
Work-product privilege

Work-product privilege only applies to records that are the work-product of an attorney, and may extend to the product of an attorney's representative secured in anticipation of litigation. Rules Civ.Proc., Rule 4003.3, 42 Pa.C.S.A.

Cases that cite this headnote

[9] **Pretrial Procedure**
Work-product privilege

At the core of the work-product doctrine is that attorneys need a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Rules Civ.Proc., Rule 4003.3, 42 Pa.C.S.A.

Cases that cite this headnote

[10] **Pretrial Procedure**
Work-product privilege

The underlying purpose of the work product doctrine is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case. Rules Civ.Proc., Rule 4003.3, 42 Pa.C.S.A.

Cases that cite this headnote

[11] **Pretrial Procedure**
Work product privilege; trial preparation materials

The work-product doctrine protects materials prepared by agents for the attorney; this includes an attorney's investigator's or other agent's opinions, theories, or conclusions as part of

preparing his client's case. Rules Civ.Proc., Rule 4003.3, 42 Pa.C.S.A.

Cases that cite this headnote

[12] **Pretrial Procedure**
Work-product privilege

The work-product doctrine protects any material prepared by the attorney in anticipation of litigation, regardless of whether it is confidential. Rules Civ.Proc., Rule 4003.3, 42 Pa.C.S.A.

Cases that cite this headnote

[13] **Privileged Communications and Confidentiality**
Waiver of privilege

Once attorney-client communications are disclosed to a third party, the attorney-client privilege is deemed waived.

Cases that cite this headnote

[14] **Privileged Communications and Confidentiality**
Waiver of privilege

Under traditional waiver doctrine, voluntary disclosure to a third party waives the attorney-client privilege, even if the third party agrees not to disclose the communications to others; the waiver extends to the communication disclosed.

Cases that cite this headnote

[15] **Pretrial Procedure**
Government records and papers
**Privileged Communications and Confidentiality**
Waiver of privilege

Department of Education's selective disclosure of privileged documents through its agent at grand jury hearing that reflected the same subject as documents sought by records requestor under the Right-to-Know Law did not constitute a subject-matter waiver of attorney-client and work-product privilege of records that contained attorneys' mental impressions; subject-matter waiver, to the extent recognized, applies where the party seeking disclosure is an adversary in the litigation, Department was not using its selective disclosures as weapons to the detriment of records requestor, and there was no evidence that agent waived the privilege as to the content of the records sought. 65 P.S. § 67.101 et seq.

Cases that cite this headnote

[16] **Pretrial Procedure**
Government records and papers
**Records**
Evidence and burden of proof

Records requestor bore the burden of proving Department of Education waived attorney-client and work-product privileges through selective disclosure of privileged documents through its agent at grand jury hearing that reflected the same subject as documents sought by requestor under the Right-to-Know Law. 65 P.S. § 67.101 et seq.; Rules Civ.Proc., Rule 4003.3, 42 Pa.C.S.A.

Cases that cite this headnote

[17] **Privileged Communications and Confidentiality**
Elements in general; definition

The four elements required to establish attorney-client privilege are: (1) the asserted holder of the privilege is or sought to become a

client; (2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; (3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and is not waived by the client.

Cases that cite this headnote

[18] **Privileged Communications and Confidentiality**
Presumptions and burden of proof

When waiver of the attorney-client privilege is the focus of a dispute, the burden is shifted to the party asserting waiver.

Cases that cite this headnote

[19] Records
Internal memoranda or letters; executive privilege

If a privilege is established, a record sought under the Right-to-Know Law is exempt as to the privileged information. 65 P.S. § 67.101 et seq.

Cases that cite this headnote

**Attorneys and Law Firms**

*411 Joshua D. Bonn, Harrisburg, for petitioner.

Robert L. Byer, Pittsburgh, for intervenor Pennsylvania State University.

BEFORE: DAN PELLEGRINI, President Judge, BERNARD L. McGINLEY, Judge, ROBERT SIMPSON, Judge, PATRICIA A. McCULLOUGH, Judge, and ANNE E. COVEY, Judge.

OPINION BY Judge ROBERT SIMPSON.

This is a Right–to–Know Law (RTKL)[1] appeal from a final determination of the Office of Open Records (OOR) that denied access to certain information under the attorney-client privilege and the work-product doctrine. **Ryan Bagwell** (Requester) sought records from the Department of Education (Department) regarding correspondence sent to the Secretary of Education (Secretary) as an *ex officio* member of the Pennsylvania State University (PSU) Board of Trustees (Board). The request implicates the scandal involving former PSU football coach Jerry Sandusky, and the related investigation conducted by the law firm of Freeh Sporkin & Sullivan LLP (Freeh).

PSU submitted material as a party with a direct interest. The OOR reviewed the records to which PSU and the Department asserted the privileges *in camera*. Based on its review, OOR directed disclosure of certain records, but it agreed the majority ***412** of the records fell within the privileges. Requester argues that OOR applied the privileges too broadly, and that some elements are not met. Requester also asserts PSU waived the privileges by disclosing the subject-matter to third parties, including to the public in the Freeh Report. Requester also seeks fees under the RTKL. Based on the legal challenges raised here, we affirm.

## I. Background

Pursuant to the RTKL, Requester submitted a request for records from the Department seeking "all letters, memos, reports, contracts and emails sent to former Secretary Ron Tomalis and/or his assistant Jane Shoop between November 5, 2011 and July 31, 2013 from any of the following individuals:

1. Louis Freeh [counsel] ...

2. Omar McNeill [counsel] ...

3. Kenneth Frazier [PSU Board member] ...

4. Annette DeRose [Frazier's assistant] ...

5. Paula Ammerman [PSU Board member] ...

6. Karen Peetz [PSU Board member] ... [and]

7. Steve Garban [PSU Board member].

Reproduced Record (R.R.) at 4a (Request).

The Department denied the Request in part based on the attorney-client and attorney work-product privileges, and based on several RTKL exceptions. The Department provided some responsive records and additional records in redacted form. It also submitted an index that identified withheld records by date range, participants, email subject line, and reason for denying access (Index).

Requester appealed to OOR as to the records withheld in their entirety, and he asked OOR to review the withheld records *in camera*. The Department submitted 673 pages of responsive records to OOR for *in camera* review. The Department asserted the privileges and exceptions should be applied to protect the records sent to the Secretary as a member of PSU's Board.

PSU submitted materials to participate as an entity with a direct interest under Section 1101(c) of the RTKL, 65 P.S. § 67.1101(c). As part of its materials, PSU submitted a position statement identifying various counsel, both in-house and private firms, who were hired to investigate legal matters or to provide legal advice. PSU advised that Freeh was engaged as counsel to the Board and to the Special Investigative Task Force of the Board.[2]

PSU provided an affidavit from legal counsel Frank Guadagnino (Guadagnino) explaining the Secretary's role and fiduciary duty to PSU. PSU submitted another affidavit of Jane Andrews, Director of the Office of the Board, attesting that none of the documents identified as privileged were disclosed to third parties (Andrews Affidavit).

In response to Requester's contention that PSU did not properly invoke the privileges, PSU submitted a supplemental affidavit from Guadagnino that Freeh did not reveal privileged information to third parties. Guadagnino represented that although Freeh provided periodic updates of its investigation to the National Collegiate ***413** Athletic Association (NCAA) and to the Big Ten Conference, neither entity revealed privileged information. As a result, PSU asserted certain withheld records were protected under either the attorney-client privilege or the work-product doctrine.[3]

To OOR, Requester argued the attorney-client privilege did not attach to records sent from Freeh because PSU hired Freeh for its fact-finding expertise, not legal advice. In the alternative, Requester contended that to the extent a privilege existed, PSU waived any privileges by permitting Freeh to discuss matters involving the same subject with third-party organizations and government entities.

The day before OOR issued its final determination, Requester asked OOR to hold a hearing regarding applicability of the privileges, and to receive proof of the alleged waiver.[4] OOR denied the request "because [it] ha[d] the necessary, requisite information and evidence before it to properly adjudicate the matter." *See* Bagwell v. Dep't of Educ. & PSU, OOR Dkt. No. AP 2013–1753, 2013 WL 6841605 (Pa. OOR, filed December 20, 2013), (Final Determination) at 6.

Based on its *in camera* review, OOR concluded certain records are protected by the attorney-client privilege and/or attorney work-product doctrine. OOR found that PSU did not waive any privilege. OOR also determined that certain material qualified as work-product; therefore, that material could be redacted from additional pages. *See* Final Determination at 9–10. The majority of the protected records are described as communications from counsel. In its Final Determination, OOR characterized these redactions as reflecting attorney opinions or mental impressions. *Id.* at 9.

OOR concluded the remaining records or parts of records were not privileged because they did not qualify as mental impressions, or were not made for the purpose of securing legal assistance, or were not made by a party's attorney. OOR reasoned that none of the RTKL exceptions under Section 708(b) applied to protect the records because the exceptions only apply to an agency, not to PSU.[5]

Requester appealed, asserting that the work-product privilege is reserved for material prepared in anticipation of litigation, and that PSU waived the privileges. Prior to briefing, Requester filed an application for relief for permission to conduct discovery or for an evidentiary hearing regarding PSU's waiver of the privileges. This Court, speaking through President Judge Pellegrini, denied the application. On the record before us,[6] we review this matter in our appellate capacity.

## ***414 II. Issues**

During oral argument, this Court confirmed there are two legal issues before us:[7] first, whether OOR erred in exempting certain records under the work-product doctrine when there is no evidence that such records were prepared in anticipation of litigation; second, whether

OOR erred by finding that PSU did not waive any privilege when it entered waiver agreements with third parties and disclosed materials pertaining to the same subject matter. In the event this Court finds in his favor, Requester also seeks attorney fees under the RTKL, asserting PSU acted in bad faith by not producing evidence showing its waiver of the privilege.

### III. Discussion

[1] [2] Although this Court may exercise jurisdiction as a fact-finder, and make independent findings based on its review of the evidence, *Bowling v. Office of Open Records*, 990 A.2d 813 (Pa.Cmwlth.2010), *aff'd*, 621 Pa. 133, 75 A.3d 453 (2013), that is unnecessary when we are presented with pure matters of legal construction. For a question of law, our scope of review is plenary. *Dep't of Corr. v. Office of Open Records*, 18 A.3d 429 (Pa.Cmwlth.2011). This appeal challenges OOR's legal interpretation of the privileges invoked under specified circumstances.

[3] This Court previously determined that records sent to the Secretary in his *ex officio* capacity as a PSU Board member on behalf of the Department are records received by an agency within OOR's jurisdiction. *Bagwell v. Dep't of Educ.*, 76 A.3d 81 (Pa.Cmwlth.2013) (*en banc*). Thus, the fact that PSU is not defined as an "agency" by the RTKL is immaterial to the application of any exemptions, which inure to records of the Department. *Id.* Ultimately, the RTKL imposes a duty of disclosure on the Department as to any public records in its possession.[9] *Bowling*.

[4] Under the RTKL, records in possession of a Commonwealth agency are presumed to be public unless they are: (1) exempt under Section 708 of the RTKL; (2) "*protected by a privilege;* " or, (3) exempt under any other Federal or State law or regulation or judicial order or decree. Section 305 of the RTKL, 65 P.S. § 67.305 (emphasis added). Section 102 of the RTKL defines "privilege" as:

> The *attorney work-product doctrine*, the *attorney-client privilege*, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court incorporating the laws of this Commonwealth.

65 P.S. § 67.102 (emphasis added). The burden of proving a privilege rests on the party asserting it. *Heavens v. Dep't of Envtl. Prot.*, 65 A.3d 1069 (Pa.Cmwlth.2013).

As background, the Department represented that a number of the records were sent to the Secretary in his role as co-chairperson of the Task Force investigating the Sandusky scandal. As part of that investigation, PSU engaged attorneys. Specifically, the Board hired Freeh to be counsel to the Task Force, and hired the law firm of Reed Smith as special counsel to advise the Board as to various matters arising out of the allegations regarding misconduct by senior administration officials and Sandusky.

*415 Pursuant to his role overseeing PSU, the Secretary received records pertaining to the PSU Board. As a Board member, the Secretary falls under the client umbrella and is protected by the privileges. Because the records are only sought in his capacity as a Board member, there is no impediment to applying the attorney-client and work-product privileges to records received by the Secretary as a member of the Board, to the extent they otherwise qualify as privileged.

Here, Requester challenges protection of emails that discussed Freeh's investigation as work-product or under the attorney-client privilege. He contends materials compiled to cooperate with an external investigation, and completion of a public report, are not prepared "in anticipation of litigation." Requester also argues PSU waived privileges by disclosing parts of the findings and conclusions to third parties, including the public. Further, PSU entered a waiver agreement with the Office of the Attorney General that allowed disclosure of privileged communications in grand jury testimony. Given these facts, Requester asserts PSU did not prove non-waiver of the privileges as to Freeh's investigation.

PSU counters that Requester misstates the burdens of proof with regard to waiver of a privilege. PSU represents it never disclosed the specific records at issue here to a third party. Further, it refutes that the requested records are within the limited waivers and disclosures made in response to the grand jury investigation. In addition, PSU argues Pennsylvania law does not recognize subject-matter waiver of the attorney-client or work-product privileges.

#### A. Attorney Work–Product Doctrine

[5] [6] [7] [8] The work-product doctrine, while closely related to the attorney-client privilege, provides broader

protection. *Levy v. Senate of Pa. (Levy III)*, 94 A.3d 436 (Pa.Cmwlth.2014); *Dages v. Carbon Cnty.*, 44 A.3d 89 (Pa.Cmwlth.2012). Confidential information flows from the client to the attorney, and vice versa, in the attorney-client relationship. *Gillard v. AIG Ins. Co.*, 609 Pa. 65, 15 A.3d 44 (2011). The attorney-client privilege protects such confidential communications. *Id.* By contrast, work-product privilege only applies to records that are the work-product of an attorney, and may extend to the product of an attorney's representative secured in anticipation of litigation. *Rittenhouse v. Bd. of Sup'rs* (Pa.Cmwlth., No. 1630 C.D.2011, filed April 5, 2012), 2012 WL 8685549, 2012 Pa. Commw. Unpub. LEXIS 248 (applying Pa. R.C.P. No. 4003.3 in RTKL context) (work product extends to investigator's report prepared for litigation). Neither privilege protects mere facts. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (privilege extends only to communications and not to underlying facts); *Commonwealth v. Vartan*, 557 Pa. 390, 733 A.2d 1258 (1999).

Under the Pennsylvania Rules of Civil Procedure, the work product doctrine provides that a party may obtain discovery of material prepared in anticipation of litigation or trial by a party's attorney, but discovery "shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories." Pa. R.C.P. No. 4003.3.

[9] [10] At the core of the work-product doctrine is that "attorneys need a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Commonwealth v. Kennedy*, 583 Pa. 208, 876 A.2d 939, 945 (2005) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510–11, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). "The ***416** underlying purpose of the work product doctrine is to guard the mental processes of an attorney, providing a privileged area within which he can analyze and prepare his client's case." *Commonwealth v. Sandusky*, 70 A.3d 886, 898 (Pa.Super.2013).

[11] The work-product doctrine also "protects materials prepared by agents for the attorney." *Kennedy*, 876 A.2d at 945 (quoting *U.S. v. Nobles*, 422 U.S. 225, 239, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)); *Commonwealth v. Hetzel*, 822 A.2d 747, 757 (Pa.Super.2003). This includes an attorney's "[investigator's or other agent's] opinions, theories, or conclusions" as part of preparing his client's case. *Sandusky*, 70 A.3d at 898.

[12] In the RTKL context, this Court recently held the work-product doctrine protects the "mental impressions, theories, notes, strategies, research and the like created by an attorney in the course of his or her professional duties, *particularly in anticipation or prevention of litigation* " from disclosure. *Levy III*, 94 A.3d at 443 (emphasis added) (citing *Heavens* ). Moreover, the "doctrine protects any material prepared by the attorney 'in anticipation of litigation,' regardless of whether it is confidential." *Dages*, 44 A.3d at 93 n. 4 (quoting *Nat'l R.R. Passenger Corp. v. Fowler*, 788 A.2d 1053, 1065 (Pa.Cmwlth.2001)).

Our Supreme Court also previously "held that, to the extent material constitutes an agency's work product, it is not subject to compulsory public disclosure pursuant to the RTKL." *In re Thirty–Third Statewide Investigating Grand Jury*, ___ Pa. ___, 86 A.3d 204, 225 (2014) (citing *LaValle v. Office of Gen. Counsel*, 564 Pa. 482, 769 A.2d 449, 459 (2001) (decided under former RTKL[9])).[10]

Against this backdrop, we analyze whether work-product protection applies when the work product at issue was created by a law firm engaged to investigate allegations that subsequently became the subject of lawsuits.

Requester urges this Court to accept his novel construction of the doctrine to limit work-product protection to *only* those records that are "prepared in anticipation of litigation." Requester presents the "in anticipation of litigation" part of the description of attorney work product as a prerequisite, without which the doctrine may not apply.

The anticipation of litigation part of the work-product doctrine is not an absolute requirement, as discussed by (now President) Judge Pellegrini in the single judge opinion in *Sedat v. Department of Environmental Resources*, 163 Pa.Cmwlth. 29, 641 A.2d 1243 (1994) (single j. op.). After recognizing that government in-house counsel are entitled to exercise the privileges, Judge Pellegrini reasoned that a memorandum containing legal analysis of a court decision prepared for other agency lawyers, without reference to specific litigation, is protected by the work-product doctrine.

Analyzing Pa. R.C.P. No. 4003.3, Judge Pellegrini determined that the Rule contains no condition precedent of "anticipated litigation" for the doctrine to attach. Judge Pellegrini explained, "[t]he Rule's protection of an attorney's mental impressions ***417** is unqualified." *Id.* at 1245. He noted that agency counsel frequently face the same issues, and so may "carry over" their work product from earlier litigation. *Id.*

Requester's construction restricts the doctrine, whereas decisional law does not. Our Supreme Court explained that discovery of material prepared in anticipation of litigation may be obtained provided it does not include an attorney's mental impressions or opinions. This Court similarly enunciated the protection as including materials prepared in anticipation of litigation. *Levy III; Heavens.* Contrary to Requester's assertion, that expression does not limit the doctrine to *only* materials prepared in anticipation of litigation. Rather, "materials prepared in anticipation of litigation" constitutes an example of the doctrine's coverage. Materials do not need to be prepared in anticipation of litigation for work-product privilege to attach.

Therefore, this Court rejects Requester's invitation to constrain application of work product to the litigation context. Such a confined construction would render attorney drafts of contracts, memoranda and countless other examples of work product, prepared in a transactional or any non-litigation capacity, susceptible to discovery or disclosure.

Because we hold the work-product privilege is not limited to the litigation context, PSU did not need to establish that Freeh was retained in anticipation of litigation. Nevertheless, given the surrounding circumstances and the impact of the Sandusky scandal on a national scale, it is apparent that PSU anticipated related litigation. Preparation for litigation was underway, albeit with other counsel handling the litigation aspect.

Requester also implies that facts discovered in the course of an investigation are not protected as work product. *See* Pet'r's Br. at 19–20 n. 6. However, it is clear from OOR's description of the material redacted as work product that they consist of mental impressions and opinions, not mere facts. *See* Final Determination at 9.

Eliminating any doubt as to a litigation requirement, there is no dispute that an attorney's mental impressions are protected work product. Accordingly, OOR's conclusion upholding the redaction of mental impressions from emails authored by counsel as work product is affirmed.

### B. Waiver of Privileges

During oral argument, Requester essentially conceded that the attorney-client privilege applied to the records at issue. Having concluded OOR properly applied the work-product privilege, we next consider whether PSU waived either of these privileges by disclosing information pertaining to the same subject, the Sandusky scandal. We start with a review of waiver in the context of each privilege generally.

[13] Once attorney-client communications are disclosed to a third party, the attorney-client privilege is deemed waived. *Commonwealth v. Chmiel*, 558 Pa. 478, 738 A.2d 406 (1999); *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24 (Pa.Cmwlth.2001); *see also United States v. Fisher*, 692 F.Supp. 488 (E.D.Pa.1988) (any voluntary disclosure by the holder of the privilege that is inconsistent with the confidential nature of the relationship thereby waives the privilege). Similarly, our Supreme Court holds that "the work-product doctrine is not absolute but, rather, is a qualified privilege that may be waived." *Kennedy*, 876 A.2d at 945; *see Sandusky*, 70 A.3d at 900 n. 15. "What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances." *Nobles*, 422 U.S. at 238–40, 95 S.Ct. 2160.

*418 [14] Under traditional waiver doctrine, voluntary disclosure to a third party waives the attorney-client privilege, *Joe*, even if the third party agrees not to disclose the communications to others. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414 (3d Cir.1991). The waiver extends to the communication disclosed.

That PSU's disclosure was deliberate is undisputed; instead, the parties contest the impact of specific disclosures on non-disclosed materials. Requester contends PSU deliberately disclosed the *subject-matter* of the communications sought here to third parties, including law enforcement and the public. That disclosure, Requester asserts, suffices to destroy the protection afforded by the attorney-client privilege or work-product privilege.

PSU does not dispute that the content of the communications protected involves the same subject matter. PSU emphasizes that the *records themselves* have not been disclosed to third parties, and that such a broad waiver should not be adopted in Pennsylvania. PSU argues that with a deliberate disclosure, the waiver may be limited in scope so as not to destroy the privilege.

#### 1. Type of waiver (Selective v. Subject-matter)

[15] Under federal decisional law, the general rule regarding the voluntary disclosure of privileged attorney-client communications is that the disclosure waives the privilege as to all other communications on the

same subject. *Nationwide Mut. Ins. Co. v. Fleming*, 605 Pa. 468, 992 A.2d 65 (2010) (op. in support of affirmance; equally divided court); *Helman v. Murry's Steaks, Inc.*, 728 F.Supp. 1099 (D.Del.1990). The rationale underlying the waiver of the attorney-client privilege in this situation is one of "fairness." *Kelsey–Hayes Co. v. Motor Wheel Corp.*, 155 F.R.D. 170, 172 (W.D.Mich.1991). Courts recognize that, in litigation, it would be fundamentally unfair to allow a party to disclose opinions that support its position and to simultaneously conceal those that are unfavorable or adverse to its position. *Katz v. AT & T Corp.*, 191 F.R.D. 433 (E.D.Pa.2000); *Saint–Gobain/Norton Indus. Ceramics Corp. v. Gen. Elec. Co.*, 884 F.Supp. 31 (D.Mass.1995).

In *Fleming*, in the opinion in support of affirmance, Justices Eakin and Baer reasoned that the attorney-client privilege is waived by disclosing documents reflecting the same subject as the withheld documents. The Justices explained a party in litigation may not selectively disclose records that help its position, while protecting others on the subject as privileged, because to do so is to wield the privilege as both a sword and a shield. To do so is fundamentally unfair to the opposing party, in addition to not serving the interest in candor to the courts.

Requester predicates his waiver argument on testimony before the grand jury, unsealed two days before OOR issued its determination. Former Deputy Attorney General Frank Fina explained that Penn State waived the attorney-client privilege so PSU and retired Justice Baldwin could cooperate with the Attorney General. Fina stated,

> It was a waiver focused upon the issues of Gerald Sandusky, his relationship with the University, any conduct of his that was known by the University, and it extended to the contacts between the University and this grand jury and investigators, again, looking into Gerald Sandusky, his personal conduct, his—any alleged misconduct and indeed also the acts of the University in compliance or noncompliance with investigative efforts. ***419** All of those issues were opened to us to discuss with [Justice] Baldwin.

*See* Pet. for Review (quoting Transcript of Proceedings of Grand Jury taken on October 22, 2013, at 3–4). Although these materials were submitted after the record closed, OOR considered them as part of the record. Final Determination at 5. However, it did not discuss their impact on its conclusion of no waiver.

From review of the correspondence submitted by Requester (Certified Record, Item No. 20, email dated 12/19/13), he based his allegations of waiver of the privilege by Freeh on the communications by Justice Baldwin. Requester did not submit any evidence of waiver by Freeh. Requester alluded to waiver agreements, whereby PSU limited the waiver of the privilege by agreement.

Assuming for current purposes that PSU allowed Freeh to waive the privilege as to specific information, provided in a specific form, such limited waiver would not waive the privilege as to the records sought here unless this Court applies a broad subject-matter waiver. This Court declines to apply subject-matter waiver here for a number of reasons.

First and foremost, Pennsylvania courts have not adopted subject-matter waiver.

Second, subject-matter waiver, to the extent it is recognized, applies where the parties seeking disclosure are adversaries in litigation. Here, however, PSU is not using its selective disclosures as weapons to the detriment of Requester. Unlike a party seeking waiver of the privilege in a discovery dispute or otherwise in litigation, Requester claims no punitive effect from PSU's selective disclosure. Therefore, the "fairness" reasons for imposing a broad subject-matter waiver do not exist here.

Third, there is no evidence that Freeh waived the privilege as to the content of the records sought. PSU's counsel represented that it communicated no privileged information to the NCAA or Big Ten Conference; rather, PSU provided status updates. R.R. at 236a–37a (Guadagnino affidavit). Requester presumes the content of the records requested matches the disclosures sufficiently so as to qualify for subject-matter waiver.

Moreover, Pennsylvania courts recognize selective waiver in the context of work product. In *Commonwealth v. Sandusky*, our Superior Court held that the core purpose of the work-product doctrine was not violated by a limited disclosure "to the Court and to the Supervising Judge of the Grand Jury." *Com. v. Sandusky*, 70 A.3d at 898. The information was disclosed pursuant to a court order. Under such circumstances, where the disclosure was very limited, the work-product privilege remained intact and was not waived for other purposes.

Our Supreme Court addressed the issue of selective disclosure as a means of waiving the work-product privilege in *LaValle v. Office of General Counsel.* In *LaValle,* the Office of General Counsel (OGC) permitted access to a consultant report prepared in anticipation of litigation to certain members of the General Assembly. Our Supreme Court reasoned that the record was insufficient to show that the report as a whole was disclosed and was also deficient as to the extent or manner of disclosure as would be necessary to evaluate waiver. However, in *LaValle,* the "uncontested status of the report as work product" removed it from the category of records subject to disclosure.[11] *Id.* at 460.

*420 In assessing waiver, the context and content of disclosure are material. Applying our Supreme Court's affirmance reasoning in *Fleming,* we conclude the circumstances here do not warrant waiver of the privileges. The circumstances here weigh in favor of selective or limited waiver, retaining the privileged nature of the records where they contain mental impressions.

### 2. Burden of proving waiver

[16] Lastly, Requester contends he should not bear the burden of proving waiver. Imposing such a burden on a requester in the scope of a RTKL appeal, which affords no evidentiary discovery and limited due process, puts a requester at a procedural disadvantage.

[17] The confusion regarding who bears the burden of proving waiver of a privilege is understandable. Absence of waiver is one of the elements required to establish the privilege.[12] *Nationwide Mut. Ins. Co. v. Fleming,* 924 A.2d 1259 (Pa.Super.2007), *aff'd by an equally divided court,* 605 Pa. 468, 992 A.2d 65 (2010).

[18] However, when waiver is the focus of a dispute, the burden is shifted to the party asserting waiver. *See Joe; Joyner v. Southeastern Pa. Transp. Auth.,* 736 A.2d 35 (Pa.Cmwlth.1999). Acknowledging the burden shift in non-RTKL cases, Pet'r's Reply Br. at 1, Requester nonetheless asks this Court to alter that burden in RTKL cases so that the burden remains on the agency to disprove public nature. He asserts imposing such a burden on a requester undermines due process because a requester has no opportunity to gather evidence to establish the facts he must prove through the limited process offered by the RTKL.

While recognizing the procedural shortcomings of the RTKL, we disagree that RTKL cases should be exempt from the burden shift applied to privilege challenges. To carve out such an exception in privilege jurisprudence for RTKL disputes would needlessly complicate RTKL adjudications and would undermine the applicability of established case law that assists agencies and OOR in determining how to assess privilege. Moreover, this Court recognizes case law construing attorney privileges applies in the RTKL context. *See Levy III.*

[19] In addition, the RTKL requires a requester to address an agency's grounds for denial, thus imposing some burden on a requester. 65 P.S. § 67.1101(a); *Dep't of Corr. v. Office of Open Records.* Also, the presumption of public nature does not apply in cases of privileged records. *See* 65 P.S. § 67.305(a)(2). Thus, if a privilege is established, a record is exempt as to the privileged information. An agency lacks the discretion to provide access to a privileged record. *See* Section 506(c) of the RTKL, 65 P.S. § 67.506(c). Acknowledging *421 these statutory provisions, altering existing law regarding the burden of proof in RTKL privilege cases is not justified.

Regardless, Requester did not allude to evidence establishing that PSU disclosed to third parties the specific records and redactions at issue here. The evidence of record, in the form of the Andrews and Guadagnino affidavits, establishes that the disputed records themselves were not disclosed. Although PSU disclosed or permitted disclosure of information pertaining to the same subject, we decline to apply subject-matter waiver principles to this case.

### C. Fees Request

Lastly, Requester asks this Court to impose attorney fees. Pursuant to Section 1304(a) of the Law, 65 P.S. § 67.1304(a), if a court reverses a final determination, it may impose penalties on the agency when the agency acted with willful or wanton disregard of the right to access in bad faith, or its denial was not based on reasonable interpretation of law.

As this Court is affirming the final determination, the prerequisite for a fee award under this provision of the RTKL is not met. *See* 65 P.S. § 67.1304(a); *Chambersburg Area Sch. Dist. v. Dorsey,* 97 A.3d 1281 (Pa.Cmwlth.2013). Moreover, the Department's assertion of the privileges was not based on an unreasonable interpretation of law. Additionally, evidence of bad faith by the Department or by PSU is necessary to impose fees on that basis. There is no such evidence here.[13]

*Barkeyville Borough v. Stearns*, 35 A.3d 91 (Pa.Cmwlth.2012).

### IV. Conclusion

For the foregoing reasons, the final determination of OOR is affirmed. Regarding the redactions, OOR sufficiently described the content of the materials reviewed *in camera* to enable this Court to uphold its legal judgment without needing to review the documents. Regarding waiver of the privileges, there is no contention that PSU or the Department disclosed the specific records at issue. We further decline to recognize subject-matter waiver. As this Court did not reverse the final determination, Requester's request for attorney fees is denied.

Judges LEADBETTER, COHN JUBELIRER and BROBSON did not participate in this decision.

### *ORDER*

**AND NOW**, this 31st day of October, 2014, the final determination of the Office of Open Records is **AFFIRMED.** Further, Petitioner **Ryan Bagwell's** request for attorney fees is **DENIED.**

CONCURRING OPINION BY Judge McCULLOUGH.

I concur in the result reached by the Majority. I write separately to address my concerns regarding the record before the Office of Open Records (OOR) and to expound upon the Majority's discussion of whether, or under what circumstances, the attorney work-product and attorney-client privileges can be waived under the Right–to–Know Law (RTKL).[1]

Regarding the record created before the OOR, it is not clear the OOR had "the *422 necessary, requisite information and evidence before it to properly adjudicate the matter," (op. at 413, citing OOR's Final Determination at 6), or that this Court would not benefit from a more developed record in resolving the legal issues presented in this case. (*See* op. at 413–14.)

Here, the OOR issued its final determination on December 20, 2013. The day before, the Court of Common Pleas of Dauphin County unsealed the grand jury testimony of Penn State University's (PSU's) former general counsel. This testimony related directly to the issue of PSU's purported waiver of attorney-client privilege. Requester immediately asked for a hearing in this regard but his request was denied by the OOR. The Majority notes that the OOR appears to have considered this grand jury testimony but concedes that the OOR did not discuss the impact that the testimony could have had on its conclusion that PSU did not waive the asserted privileges. (op. at 419.) While the OOR notes in its final determination that PSU and Requester "made various other submissions after the record closed in this matter" and that these submissions "will be considered as part of the record before the OOR," (OOR's Final Determination at 5), the OOR never identified what those records were and made no specific mention of the grand jury testimony. Nevertheless, given my conclusion below that waiver would not apply, as well as the OOR's discretion with respect to holding a hearing and accepting evidence which it deems probative, I cannot conclude that the OOR erred in this regard. *See Office of Open Records v. Center Township*, 95 A.3d 354 (Pa.Cmwlth.2014) (noting the discretion afforded to an OOR appeals officer to hold a hearing and accept and assess evidence that is deemed probative); *Office of the Governor v. Scolforo*, 65 A.3d 1095 (Pa.Cmwlth.2013) (*en banc*) (noting that section 1101(b)(3) of the RTKL, 65 P.S. § 67.1101(b)(3), makes clear that the OOR has discretion to conduct a hearing).

Initially, the Majority notes that our Supreme Court has held that "the work-product doctrine is not absolute but, rather, is a qualified privilege that may be waived," (op. at 417, citing *Commonwealth v. Kennedy*, 583 Pa. 208, 876 A.2d 939, 945 (2005)), and states that "[o]nce attorney-client communications are disclosed to a third party, the attorney-client privilege is deemed waived." (Op. at 417 citing *Commonwealth v. Chmiel*, 558 Pa. 478, 738 A.2d 406 (1999)). The Majority then assumes that the attorney work-product and attorney-client privileges are waivable for purposes of the RTKL.

However, in a 2012 unpublished opinion, *Rittenhouse v. Board of Supervisors of Lower Milford Township*, 2012 WL 8685549 (Pa.Cmwlth., No. 1630 C.D.2011, filed April 5, 2012), this Court held that waiver principles did not apply to a requested document which constituted attorney work product and was not accessible in the first place, even if it was disclosed to other parties. In so holding, we relied on, and extended the reasoning of, our decision in *LeGrande v. Department of Corrections*, 920 A.2d 943 (Pa.Cmwlth.), *appeal denied*, 593 Pa. 751, 931 A.2d 659 (2007).[2]

In *LeGrande*, we held that the Department of Corrections'

(DOC) Sentence Computation Procedures Manual (Manual) constituted attorney work product and, hence, by definition, was not a public record. Additionally, we held in *LeGrande* that even if DOC had disclosed the Manual to third parties, this disclosure would not *423 convert the Manual into a public record. Citing *LaValle v. Office of General Counsel*, 564 Pa. 482, 769 A.2d 449 (2001), we explained that since work product does not fall under the definition of a "public record," waiver principles did not apply. We noted that "[a] waiver cannot transform a document, which is by definition not a public record, into a document that comports to the very same definition." *LeGrande*, 920 A.2d at 949. Further, we cited the holding of *LaValle* that "the character of the material as work product serves not as an exception to the disclosure of material which would otherwise qualify as accessible, in which case waiver principles might be pertinent, but rather, as a definitional limitation upon what would be accessible in the first instance. We find that, where records are not the *type* of materials within the [Law]'s initial purview, waiver principles cannot be applied to transform them into records subject to its coverage." *LaValle*, 769 A.2d at 460 (emphasis in original).

Somewhat akin to the definition of a "public record" under the former Right to Know Act,[3] the definition of a "public record" under the current RTKL does not include a record protected by a privilege, such as attorney work product and attorney-client communications. Additionally, while section 305(a) of the RTKL, 65 P.S. § 67.305(a), states the general rule that "[a] record in the possession of a Commonwealth agency or local agency shall be presumed to be a public record," section 305(a)(2), 65 P.S. § 67.305(a)(2), provides that the presumption shall not apply if "the record is protected by a privilege." Notably, the attorney work-product and attorney-client privileges are not enumerated as "exemptions" under section 708 of the RTKL, 65 P.S. § 67.708. Rather, as discussed above, these privileges serve not "as an exception to the disclosure of material ... in which case waiver principles might be pertinent," but "as a definitional limitation upon what would be accessible in *424 the first instance." *LaValle*, 769 A.2d at 460. Given *Rittenhouse*, and the cases upon which it relies, *LaValle* and *LeGrande*, it is quite possible that the attorney work-product and attorney-client privileges can never be waived under the RTKL. However, I believe the Majority correctly declines to adopt such a bright-line rule and, instead, applies a selective/limited waiver.

Nevertheless, it is not clear to me how the Majority is applying our Supreme Court's affirmance in *Nationwide Mutual Insurance Co. v. Fleming*, 605 Pa. 468, 992 A.2d 65 (2010) (op. in support of affirmance; equally divided court), to "conclude the circumstances here do not warrant waiver of the privileges." (op. at 420.) In *Fleming*, both the opinion in support of affirmance and the opinion in support of reversal applied the subject matter waiver doctrine to the attorney-client privilege, but reached opposite conclusions. The opinion in support of affirmance ultimately held that the disclosure of two documents addressing the same subject matter as the requested document effectuated a waiver of the attorney-client privilege as to the requested document.[4] However, the opinion in support of affirmance did explain that subject matter waiver is grounded on the premise that a party cannot selectively disclose information to its advantage, thereby using the selective disclosure as both "a sword and a shield." 992 A.2d at 69 (citation omitted.) This opinion also noted that unless the limited disclosure is used in such a manner, the application of subject matter waiver would not be justified. *Id.*

In the present case, PSU is not using its selective disclosures as weapons to the detriment of Requester or any adverse party. Instead, PSU, through its legal counsel and chief investigator, the law firm of Freeh Sporkin & Sullivan, LLP, provided limited disclosures to certain law enforcement authorities and periodic updates of its investigation to the National Collegiate Athletic Association and the Big Ten Conference, which, according to the affidavit of Frank Guadagnino, another legal counsel for PSU, did not include privileged information. Such limited disclosures, coupled with the fact, as noted by the Majority, that Pennsylvania courts have not generally adopted the subject matter waiver doctrine, support the Majority's application of a selective/limited waiver in this case.[5]

As to the burden of proving waiver, I believe the Majority correctly imposed the burden on Requester. This Court has previously addressed the shifting burdens of proof in an attorney-client privilege inquiry. In *Joyner v. Southeastern Pennsylvania Transportation Authority*, 736 A.2d 35, 38 n. 3 (Pa.Cmwlth.1999), we concluded that our Supreme Court's holding in *Commonwealth v. Maguigan*, 511 Pa. 112, 511 A.2d 1327, 1334 (1986), establishes that "the party asserting [attorney-client] privilege has the initial burden to prove that it is properly invoked" and only then does the burden shift to "the other party to prove why the applicable privilege would not be violated by the disclosure, e.g., the privilege was waived, an exception to the *425 privilege exists and is applicable, etc." In *Joe v. Prison Health Services, Inc.*, 782 A.2d 24, 31 (Pa.Cmwlth.2001), we held that "[t]he party asserting [attorney-client] privilege has the initial burden to prove that it is properly invoked, and the party seeking to

overcome the privilege has the burden to prove an applicable exception to the privilege."

For the reasons stated above, I concur in the result reached by the Majority.

**Parallel Citations**

311 Ed. Law Rep. 1018

Footnotes

1 Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101–67.3104.

2 In addition to the exceptions asserted by the Department, PSU asserted certain records are exempt as criminal investigative records, confidential proprietary information, and as communications with an insurance carrier. PSU raised the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA) to support redaction as well. PSU also submitted its own index, later revised, outlining these grounds to protect the records at issue.

3 The following records were withheld based on the privileges: 1–124, 127–130, 140–217, 228–247, 255–259, 317–377, 379–401, 403–406, 417–423, 573–583, 588–591, 612–613 and 640–657.

4 On December 19, 2013, the Dauphin County Court of Common Pleas unsealed the grand jury testimony of former PSU general counsel Cynthia Baldwin. The testimony contained statements regarding PSU's waiver of attorney-client privilege as to communications pertaining to PSU's compliance with the Attorney General's Sandusky investigation.

5 Records received by the Secretary may be protected under applicable RTKL exceptions. Such is the consequence of our core holding in *Bagwell v. Department of Education*, 76 A.3d 81 (Pa.Cmwlth.2013) (*en banc*).

6 This Court did not review the unredacted records that OOR reviewed *in camera*. Indeed, those documents are not included in the certified record.

7 Notably, Requester did not raise a challenge based on the content of the withheld records. Thus, it is unnecessary for this Court to conduct its own *in camera* review of the unredacted records.

8 The Department elected not to participate in this appeal, leaving the defense of the privileges to PSU.

9 Act of June 21, 1957, P.L. 390, *as amended*, 65 P.S. §§ 66.1–66.9 (repealed by RTKL).

10 Under the former RTKL, Pennsylvania senators sought access to a report prepared by an accounting firm for a Commonwealth agency during the course of litigation against that agency by a contractor. Our Supreme Court protected the report, reasoning the privilege removed it from the definition of public record.

11 This part of the *LaValle* decision depends upon the limited definition of public records under the former RTKL. Notably, the current RTKL removes privileged records from the presumption of openness in Section 305 of the RTKL, and excludes privileged records from the definition of public records in Section 102 of the RTKL.

12 The four elements are:
(1) The asserted holder of the privilege is or sought to become a client.
(2) The person to whom the communication was made is a member of the bar of a court, or his subordinate.
(3) The communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort.
(4) The privilege has been claimed and is not waived by the client.
*Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259 (Pa.Super.2007), *aff'd by an equally divided court*, 605 Pa. 468, 992 A.2d 65 (2010).

13 Requester implies that PSU committed bad faith by omitting information from its submissions to OOR that would show it waived the privilege. However, this does not constitute bad faith when the confines of subject-matter waiver are neither established nor recognized by Pennsylvania law.

1 Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101–67.3104.

2 *LeGrande* was decided under the RTKL's predecessor statute, the Right to Know Act, formerly the Act of June 21, 1957, P.L. 390, 65 P.S. §§ 66.1–66.9.

3 Former section 1 of the Right to Know Act, 65 P.S. § 66.1, defined a "public record" as:

> Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, That the term "public records" shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those reports filed by agencies pertaining to safety and health in industrial plants; it shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, excepting therefrom however the record of any conviction for any criminal act.

The current RTKL defines "privilege" and "public record" in section 102 as:

> "Privilege." The attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth.
>
> * * *
>
> "Public record." 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.

4 The opinion in support of reversal concluded that the disclosed documents and the requested document do not contain the same subject matter and, hence, the attorney-client privilege was not waived with respect to the requested document.

5 As the Majority notes, our Superior Court recognized the concept of selective waiver in the context of attorney work product in *Commonwealth v. Sandusky*, 70 A.3d 886 (Pa.Super.2013), holding that the core purpose of the attorney work-product doctrine was not violated by a limited disclosure to the court and the supervising judge of a grand jury.

End of Document

## CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 23rd day of February, 2015, a true and correct copy of the foregoing THE PENNSYLVANIA STATE UNIVERSITY'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT OF SUBPOENA DUCES TECUM DIRECTED TO PEPPER HAMILTON LLP was served upon the following counsel via United States mail, first class, postage prepaid:

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