IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION

GRAHAM B. SPANIER Plaintiff, v. PENNSYLVANIA STATE UNIVERSITY, Defendant.	Docket No. 2012-2065 RESPONSE TO PRELIMINARY OBJECTIONS and BRIEF IN SUPPORT OF RESPONSE Filed on behalf of: Plaintiff Counsel of record for this party: Peter F. Vaira (PA Id. No. 17042) John E. Riley (PA Id. No. 22504) Vaira & Riley 1600 Market Street, Suite 2650 Philadelphia, PA 19103 215-751-2700 215-751-9420 (facsimile)

IN THE COURT OF COMMON PLEAS OF
CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION

GRAHAM B. SPANIER	)	Docket No. 2012-2065
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
PENNSYLVANIA STATE UNIVERSITY,	)	
	)	
	)	
Defendant.	)	

PLAINTIFF GRAHAM B. SPANIER'S
RESPONSE TO THE PRELIMINARY OBJECTIONS OF
DEFENDANT THE PENNSYLVANIA STATE UNIVERSITY

Plaintiff Graham B. Spanier, by and through his undersigned counsel, hereby responds in opposition to the Preliminary Objections of Defendant the Pennsylvania State University to Plaintiff Graham B. Spanier's Complaint and states as follows:

1. It is admitted only that Defendant Pennsylvania State University (the "University") is requesting a dismissal, and that a copy of the Complaint is attached to the University's Preliminary Objections.

2. Denied. The allegations contained in paragraph 2 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

3. It is admitted only that the University objects on three grounds.

4. It is admitted only that the University is asking for the described relief.

5. Denied. As the University is under no formal legal obligation to obey the directive of the Office of Attorney General, Dr. Spanier's request for the subject emails is not merely an attack on the directive, but is at its core, a complaint against the University for choosing not to turn over the emails to Dr. Spanier.

6. Denied. To the contrary, Dr. Spanier's request and challenge are properly directed toward the University.

7. Denied. The allegations contained in paragraph 7 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

8. It is admitted only that the University is asking for the described relief.

9. It is admitted only that the University is asking for the described relief.

10. Denied. The allegations contained in paragraph 10 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

11. Denied. The allegations contained in paragraph 11 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

STATEMENT OF THE FACTS

12. The allegations contained in paragraph 12 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied. By way of further response, the statements in footnote 1 of the Preliminary Objections are denied. To the contrary, Dr. Spanier resigned from his position.

13. The allegations contained in paragraph 13 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

14. The allegations contained in paragraph 14 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

15. The allegations contained in paragraph 15 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

16. The allegations contained in paragraph 16 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

17. The allegations contained in paragraph 17 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied. By way of further response, the statements in footnote 2 of the Preliminary Objections are admitted, with the caveat that with respect to the third sentence of footnote 2, it is admitted only that the University is maintaining that its prevailing interest is in cooperating with the Attorney General's request to it.

18. The allegations contained in paragraph 18 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

19. The allegations contained in paragraph 19 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

20. Admitted.

PRELIMINARY OBJECTION TO ALL CAUSES OF ACTION

21. Denied. The allegations contained in paragraph 21 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

22. The allegations contained in paragraph 22 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

23. Denied. The allegations contained in paragraph 23 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

24. Denied. The allegations contained in paragraph 24 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

25. The allegations contained in paragraph 25 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied. By way of further

response, the gravamen of the Complaint is that the University has been in possession of the emails, that Dr. Spanier has a legal interest in the emails, and the University is improperly withholding them from Dr. Spanier.

26. Denied. To the contrary, Dr. Spanier's disagreement is properly directed at the University.

27. Denied. The allegations contained in paragraph 27 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

28. Denied. The allegations contained in paragraph 28 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

29. Denied. The allegations contained in paragraph 29 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

30. Denied. The allegations contained in paragraph 30 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

31. Denied. The allegations contained in paragraph 31 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

32. On information and belief, it is admitted only that the University believes this statement.

33. Denied. The allegations contained in paragraph 33 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

34. Admitted in part, denied in part. It is admitted only that the University does not contend that the Right to Know Law prohibits all efforts to obtain information from other than the Attorney General in all circumstances through informal requests. The remaining allegations contained in paragraph 34 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

35. The allegations contained in paragraph 35 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

36. Denied. Dr. Spanier is not seeking to evade the Right to Know Law's "process for directly challenging an assertion by the Attorney General . . . ." The University is under no compulsion to comply with the Attorney General's requests.

37. Denied. The allegations contained in paragraph 37 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied. By way of further response, Dr. Spanier neither has

failed to exercise or exhaust statutory remedies, nor does he seek to place the University in an untenable position. To the contrary, the University is under no compulsion to comply with the Attorney General's requests.

38. Denied. The University is not in a position of mediating a dispute. To the contrary, the University is complying with a mere request from the Attorney General. There is nothing that is compelling the University to deny Dr. Spanier access to the emails from his account.

39. Denied. The allegations contained in paragraph 39 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

WHEREFORE, Plaintiff Graham B. Spanier respectfully requests that the Court enter an Order overruling in their entirety the Preliminary Objections of Defendant the Pennsylvania State University, and granting to Dr. Spanier such other and further relief as is just and proper under the circumstances.

PRELIMINARY OBJECTION TO COUNT ONE (REPLEVIN)

40. Denied. The allegations contained in paragraph 40 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

41. Denied. The allegations contained in paragraph 41 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

42. Denied. The allegations contained in paragraph 42 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

43. Denied. The allegations contained in paragraph 43 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

44. Denied. The allegations contained in paragraph 44 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

45. Denied. The allegations contained in paragraph 45 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

46. Denied. The allegations contained in paragraph 46 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

47. Denied. The allegations contained in paragraph 47 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

48. Denied. The allegations contained in paragraph 48 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied. By way of further response, none of the University's legal citations support the proposition for which they are cited. Dr. Spanier may or may not have a reasonable expectation of privacy over his emails, but that is irrelevant to the issue of whether he has a property right over them.

49. Denied. The allegations contained in paragraph 49 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

50. The allegations contained in paragraph 50 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

51. Denied. The allegations contained in paragraph 51 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

WHEREFORE, Plaintiff Graham B. Spanier respectfully requests that the Court enter an Order overruling in their entirety the Preliminary Objections of

Defendant the Pennsylvania State University, and granting to Dr. Spanier such other and further relief as is just and proper under the circumstances.

PRELIMINARY OBJECTION TO COUNT TWO (MANDAMUS)

52. Denied. The allegations contained in paragraph 52 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

53. Denied. The allegations contained in paragraph 53 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

54. Denied. The allegations contained in paragraph 54 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied. By way of further response, Dr. Spanier is not using the University as a proxy for the Attorney General. The University is under no compulsion to comply with the Attorney General's requests.

55. Denied. The allegations contained in paragraph 55 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

56. Denied. The allegations contained in paragraph 56 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

57. Denied. The allegations contained in paragraph 57 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

58. Denied. The allegations contained in paragraph 58 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied. By way of further response, the University is required to refrain from violating Dr. Spanier's property rights. That the Attorney General may have requested the University to violate Dr. Spanier's property rights does not make the propriety or impropriety of the act a matter of judgment.

59. Denied. The allegations contained in paragraph 59 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

60. The allegations contained in paragraph 60 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

61. The allegations contained in paragraph 61 of the Preliminary Objections refer to the Complaint, which is a written document that speaks for itself, and any characterizations of the same are denied.

62. Denied. The allegations contained in paragraph 62 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

63. Denied. To the contrary, the University has agreed to an amicable mandamus action.

64. Denied. Dr. Spanier's contention is not based on an unsupported inference, but on the fact that the University has taken the position that it would willingly turn over Dr. Spanier's email record to him if it were not for the direction of the Pennsylvania Attorney General

65. Denied. To the contrary, there is such an agreement. The remaining allegations contained in paragraph 65 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

66. Denied. To the contrary, the University has agreed to these things.

67. Denied. The allegations contained in paragraph 67 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

68. Denied. The allegations contained in paragraph 68 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

69. Denied. The allegations contained in paragraph 69 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied.

70. Denied. The allegations contained in paragraph 70 of the Preliminary Objections constitute conclusions of law to which no response is required and the same are therefore denied. By way of further response, the University has not been "interposed" between the Attorney General and Dr. Spanier. The University is under no compulsion to comply with the Attorney General's requests.

WHEREFORE, Plaintiff Graham B. Spanier respectfully requests that the Court enter an Order overruling in their entirety the Preliminary Objections of Defendant the Pennsylvania State University, and granting to Dr. Spanier such other and further relief as is just and proper under the circumstances.

Respectfully submitted,

Date: July 2, 2012

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GRAHAM B. SPANIER	)	Docket No. 2012-2065
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	)	
PENNSYLVANIA STATE UNIVERSITY,	)	
	)	
Defendant.	)	

BRIEF IN SUPPORT OF PLAINTIFF GRAHAM B. SPANIER'S RESPONSE TO THE PRELIMINARY OBJECTIONS OF DEFENDANT THE PENNSYLVANIA STATE UNIVERSITY

It is undisputed that Defendant Pennsylvania State University is still in possession of emails from the email account of Plaintiff Graham B. Spanier, but is refusing to allow Dr. Spanier to read them. The only defenses that the University raises in its preliminary objections are technical in nature — essentially, the University argues that Dr. Spanier should be compelled to sue the Attorney

General instead, since the University originally decided to deny Dr. Spanier access to his emails in response to a request from the Office of the Attorney General that it do so. That argument lacks merit and the University is an appropriate defendant, as will be explained in greater detail below.

Setting aside those issues, however, it is notable that the Office of the Attorney General's ostensible rationale for making that request — that allowing Dr. Spanier to access his emails would have obstructed its investigation — no longer even makes any sense. As the University's preliminary objections state: "in light of recent media reports citing to the purported content of the subject e-mails, reportedly provided by 'law enforcement sources,' the Attorney General may no longer have an interest in preventing disclosure of these e-mails." Def.'s Prelim. Objs. at 5 n.2. If "law enforcement sources" believe it is appropriate to release selected snippets of Dr. Spanier's emails to the media, then they cannot sincerely claim, at the same time, that allowing Dr. Spanier to read the emails would constitute any sort of obstruction of the investigation. Neither can the University claim that it is under any legal compulsion to comply with the Attorney General's wholly informal request to withhold the emails from Dr. Spanier. Thus, the equities of this case strongly favor granting Dr. Spanier the relief he seeks in this action: Dr. Spanier has every right to review his own decade-old emails so

that he can be adequately informed before speaking to investigators about topics addressed in those emails.

ARGUMENT

A. The Right to Know Law Is Not Relevant To and Does Not Bar This Action.

The University first argues that Dr. Spanier's complaint should be dismissed for failure to exhaust a statutory remedy, specifically, the procedure set forth in Pennsylvania's Right to Know Law, 65 P.S. § 67.101 *et seq.*, which governs the public's right to access data held by the Commonwealth government (but does ***not*** govern the right of parties to obtain documents in the possession of the University, which is not a government agency). The University's argument fails because the Right to Know Law is not applicable.

In its brief, the University devotes most of its argument to a lengthy explication of various subsections of the Right to Know Law, but it glosses over the required premise of its argument, *i.e.* why the Right to Know Law is applicable in the first place. Instead, the University simply asserts in a conclusory manner that "[t]he gravamen of Spanier's Complaint is that the Attorney General is in possession of certain e-mails," and that "[t]he Right to Know unambiguously

governs the rights and remedies for requests for documents in the Attorney general's possession . . . ." Def.'s Mem. at 6.

As a matter of fact, however, that assertion is wrong, which is why the University is unable to cite anything in support of it. It is most assuredly ***not*** the "gravamen" of Dr. Spanier's complaint that the Attorney General is in possession of the subject emails. To the contrary, the complaint is quite clear in alleging that "[t]he emails are in Penn State's possession on Penn State's servers, and Penn State has refused to allow Dr. Spanier to access them." Complaint ¶ 22. Simply put, the University still has the emails. Therefore, it is entirely immaterial whether "[t]he Right to Know Law unambiguously governs the rights and remedies for requests for documents in the Attorney General's possession," Def.'s Mem. at 6, or whether Dr. Spanier "invoked the clear procedures set forth in the Right to Know Law," *id.* at 8. The University's entire analysis of the various subsections of the Right to Know Law is simply a *non sequitur* — it does not matter what the Right to Know Law says if it does not apply. *See id.* at 7-8.

The basis of the University's contention regarding the "gravamen" of Dr. Spanier's complaint is apparently the fact that the ***reason*** why the University has withheld the emails from Dr. Spanier has been to accommodate a request to that effect from the Office of the Attorney General. *See* Complaint ¶¶ 19-20. But

that logic does not follow: what matters is not why the University decided to withhold the emails, but ***who has the emails***. 65 P.S. § 67.305 ("a record in the possession of a Commonwealth agency . . . shall be presumed to be a public record" subject to the procedures of the Right to Know Law). The University has the emails, and the University does not even attempt to argue that the Right to Know Law applies to documents in its possession. Thus, there was no duty to exhaust, and no basis for dismissing Dr. Spanier's replevin claim.

To the extent that the University might be arguing that it has been "constructively" deprived of possession of the emails because it no longer has the ability to give Dr. Spanier access to them, that argument is likewise insupportable. Dr. Spanier has not alleged — and the University cannot represent — that the Attorney General's request was anything other than just that: a request. The University's reluctance to flout that request may be understandable, but there is no reason to believe that the University is under any legal compulsion to obey it, or that it would face any consequences for not obeying it other than angering the Attorney General. The fact remains that the University has the emails and has the legal right to dispose of them as it sees fit, and hence, Dr. Spanier has no obligation to exhaust Right to Know Law procedures before bringing a replevin claim against the University.

B. Dr. Spanier Has a Property Interest in His Own Emails.

Second, the University contends that Dr. Spanier cannot sue it for replevin because the subject emails "are not his personal property." Def.'s Mem. at 9. This argument also fails because not one of the authorities cited by the University holds that employees lack ownership rights over emails that they author and receive.

As the University itself admits, the authorities on which it relies arise out of "the context of common law privacy claims related to e-mail monitoring, with courts holding that employees have no reasonable expectation of privacy in company-maintained, proprietary e-mail accounts." *Id.* at 11. Such authorities are simply inapposite because whether a person has an ownership interest in something and whether a person has a reasonable expectation of privacy are two very different questions. A person has a reasonable expectation of privacy in a telephone booth, but he does not have an ownership interest in the booth. A person does ***not*** have a reasonable expectation of privacy on his front lawn, but he ***does*** have an ownership interest in the lawn.

Dr. Spanier is not suing the University for monitoring his email account or reading his emails. This case is not about email privacy. Rather, it concerns the University's refusal to allow Dr. Spanier to access his own account or

read his own emails. The authorities on which the University relies here are simply inapposite.

C. There Is a Cause of Action for Mandamus Here.

Third, the University objects to Count Two of the Complaint, arguing that Dr. Spanier does not have a valid mandamus claim against it. Specifically, the University maintains that (1) mandamus applies only when a petitioner, *inter alia*, has a legal right to force someone to perform a mandatory duty or ministerial act, Def.'s Mem. at 13-14; and (2) Dr. "Spanier cannot credibly contend that the University has a mandatory duty to refuse to cooperate with the Attorney General's directive not to provide Spanier with the subject e-mails," *id.* at 13 (emphasis omitted).

However, the University never explains ***why*** it is so inconceivable that it might have a mandatory duty to refuse to cooperate with the Attorney General. The mere fact that the Attorney General asks (or even "instructs") someone to do something does not mean that one must obey, or even has the option to obey, the Attorney General. Rather, it depends on the content of the request. The Attorney General is a fallible human being, and it is not impossible for the Attorney General to instruct someone to violate his/her legal obligations.

Here, the Attorney General directed the University to deny Dr. Spanier access to his email, notwithstanding that Dr. Spanier was their author or recipient, has a completely reasonable desire to review them at this time, and has a property interest in them (and notwithstanding that "law enforcement sources" have been selectively leaking the contents of those emails to the media). Since the Attorney General's directive was not legally justifiable, the University does, in fact, have a mandatory duty to disobey it. This is doubly true here, given that the Attorney General's directive to the University was purely in the nature of a request, not an order. There is no reason to believe that there would have been any consequences for disregarding the request, other than perhaps annoying the Attorney General.

Finally, as a sidelight, the University argues that Dr. Spanier cannot bring an amicable action for mandamus against it, because such an action "is not sufficiently plead . . . if there is no written agreement for an action in the record." *Id.* at 23. The University has overread the complaint's offhand reference to an "amicable action" by assuming that it referred to an archaic term of art when it, in fact, did not. As the 1991 explanatory comment to Pennsylvania Rule of Civil Procedure 1007 explains, an "amicable action" (the term of art) was a procedural device that once provided a third way for plaintiffs to commence civil actions (in addition to complaints and praecipes for writ of summons) — it existed so that

plaintiffs and defendants would have a way of commencing litigation between them without having to incur the unnecessary time and expense of retaining the sheriff to perform service of process. To do so, they were indeed required to submit a written agreement to the court where they wished to litigate. The "amicable action" was eliminated in 1991, as the device had become obsolete once parties were permitted to commence litigation through acceptance of service, without the sheriff's intervention. Pa. R. Civ. P. 1007 cmt. (1991).

Thus, the University's argument regarding "amicable actions" is confused and irrelevant. It simply does not matter whether or not Dr. Spanier has pleaded an "amicable action" (the term of art). First, "amicable actions" do not exist anymore. Second, even when they did exist, they were merely procedural devices that parties could use at their option — no plaintiff was ever required to plead an "amicable action" in order to state a claim, whether in mandamus or otherwise. In alleging in his complaint that the University had "in effect agreed to an amicable action of mandamus," Dr. Spanier was simply noting that the University had been sympathetic to his demands, and seemed to be ready and willing to turn over the emails provided that a court ordered it first. It was not a reference to the term of art, which would not have made any sense even if it was not archaic.

The University does not need to have agreed to anything for Dr. Spanier's mandamus claim to be valid here. The University violated a mandatory duty to Dr. Spanier, and Dr. Spanier served it with a complaint. That is all that is necessary for Count Two to state a cause of action in mandamus.

CONCLUSION

WHEREFORE, Plaintiff Graham B. Spanier respectfully requests that the Court enter an Order overruling in their entirety the Preliminary Objections of Defendant the Pennsylvania State University, and granting to Dr. Spanier such other and further relief as is just and proper under the circumstances.

Respectfully submitted,

Date: July 2, 2012

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CERTIFICATE OF SERVICE

I, John E. Riley, hereby certify that on this 2nd day of July, 2012, I caused a true and correct copy of the foregoing Plaintiff Graham B. Spanier's Response to the Preliminary Objections of Defendant The Pennsylvania State University, with supporting brief and proposed order, to be served by hand delivery upon the following counsel of record:

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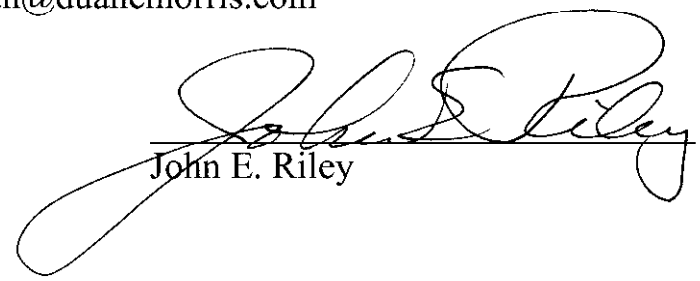

John E. Riley