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GRAHAM B. SPANIER, Plaintiff, v. THE PENNSYLVANIA STATE UNIVERSITY, Defendant.	IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA CIVIL ACTION NO. 2012-2065

MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS OF DEFENDANT THE PENNSYLVANIA STATE UNIVERSITY TO PLAINTIFF GRAHAM B. SPANIER'S COMPLAINT

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Defendant, The Pennsylvania State University (the "University"), by and through its undersigned counsel Duane Morris LLP, hereby submits this Memorandum of Law in Support of its Preliminary Objections to the Complaint of Plaintiff Graham B. Spanier ("Spanier").

I. INTRODUCTION

The University respectfully requests that this Honorable Court dismiss Spanier's Complaint in its entirety. Spanier's claims for replevin and for an "amicable action" of mandamus to obtain e-mails, allegedly located on the University's servers, are without legal merit. As set forth in detail below, the University objects preliminarily to the Complaint on the following three grounds:

(A) The University asks this Court to dismiss Counts One and Two of the Complaint, with prejudice, because Spanier has failed to exhaust his statutory remedy under 65 P.S. § 67.101 *et seq.* (the "Right to Know Law"). Spanier's request for the subject e-mails is, at its core, an attack on the directive by the Office of Attorney General (the "Attorney General") not to disclose the e-mails it has obtained in the course of an investigation. Spanier's request, and its attendant challenge to the Attorney General's directive is properly directed toward the Attorney General—not the University. The Right to Know Law sets forth an explicit statutory scheme governing the rights, restrictions and obligations for the

request of these materials from the Attorney General, and for challenges to any determination by the Attorney General that such materials should not be disclosed;

(B) The University asks this Court to dismiss Count One of the Complaint, with prejudice, for failure to state a claim for replevin upon which relief can be granted, because e-mails allegedly located on University Servers are the property of the University and not the property of Spanier; and

(C) The University asks that this Court dismiss Count Two of the Complaint, with prejudice, for failure to state a claim for an "amicable action" mandamus upon which relief can be granted. Spanier cannot colorably contend that the University has a legal obligation to refuse to cooperate with the Attorney General's request not to disclose information potentially related to an ongoing investigation. Moreover, the University's statement that it would provide Spanier with the requested e-mails, but for the University's cooperation with the Attorney General's direction, does not constitute an "amicable action" for mandamus, or otherwise permit Spanier to treat the University as a proxy for the Attorney General in challenging the Attorney General's request not to provide the subject e-mails.

II. HISTORY OF THE CASE

On May 25, 2012, Spanier initiated suit upon the filing of a Complaint against the University. A true and correct copy of the Complaint, including

exhibits, is attached to the Preliminary Objections as Exhibit A. In his Complaint, Spanier asserts two causes of action (replevin and mandamus) seeking to obtain University e-mails.

III. STATEMENT OF THE FACTS

Spanier alleges that he resigned as president of the University, a position he had held for over sixteen years, on November 9, 2011, to "allow the Board of Trustees to have a free hand in investigating certain allegations relating to former University coach Jerry Sandusky." Compl. ¶¶ 5, 6.[1] As part of that investigation, Spanier alleges that he answered questions before the investigating grand jury and the Attorney General. *Id.* ¶¶ 7-8. Spanier also alleges that the University has engaged Freeh Group International Solutions, LLC (the "Freeh Group") to investigate matters arising out of the Sandusky allegations. *Id.* ¶ 12.

Subsequent to his contacts with the grand jury and the Attorney General, Spanier alleges that "at least some e-mails that pre-dated 2004 . . . ha[ve] been retrieved." *Id.* ¶ 14. Spanier alleges that "these [e-mails] have been produced to the Attorney General of Pennsylvania, the U.S. Attorney for the Middle District, and to the Louis Freeh Group's attorneys/investigators." Compl. Exhibit A.

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[1] Notwithstanding that the University must accept all of Spanier's allegations as true for purposes of these Preliminary Objections only, the University notes that Spanier did not "resign," but rather, was terminated without cause.

Spanier alleges that, at the request of the Attorney General, the University has not made the alleged e-mails available to him. Compl. ¶ 19; *see also* Compl. Exhibit C (the University has "received an explicit instruction from the Deputy Attorney General not to share the requested information for fear of compromising the Commonwealth's ongoing investigation").[2]

According to Spanier's allegations, he seeks disclosure of these e-mails to assist him in an interview with the Freeh Group. *Id.* ¶¶ 14, 17-18. Spanier further alleges that he has declined such an interview because "[t]he University felt constrained to abide by a request of the Pennsylvania Attorney General to not produce these documents to us, even though they have been shared with [the Freeh

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[2] The University notes that, 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 the same interest in preventing the disclosure of these e-mails. *See Ex-Penn State Officials May Face More Charges,* TODAY.COM, http://video.today.msnbc.msn.com/today/47762669# 47762669 (last accessed June 11, 2012), a copy of the published transcript of which is attached to the Preliminary Objections as Exhibit B. Unless and until the University receives contrary instruction, however, it maintains that its prevailing interest is in cooperating with the Attorney General's request. Moreover, publicly reported comments by attorneys for Messrs. Schultz and Curley indicating Spanier's participation in critical discussions involving the handling of the 2001 incident highlight Spanier's need to see those documents. *See Gary Schultz, Tim Curley Attorneys Respond to Graham Spanier Report*, CENTRE DAILY TIMES, http://www.centredaily.com/2012/06/11/3225006/schultz-curley-attorneys-respond.html (last accessed June 12, 2012), attached to the Preliminary Objections as Exhibit C.

Group], the U.S. Attorney in the Middle District, the Pennsylvania Attorney General and others within the University community." Compl. Exhibit B.

IV. QUESTIONS INVOLVED

A. Should all of Spanier's causes of action be dismissed with prejudice because Spanier has failed to exercise or exhaust a statutory remedy pursuant to Pennsylvania's Right to Know Law, which governs and contemplates challenges to the Attorney General's refusal to disclose information on grounds of investigative secrecy?

Suggested Answer: Yes.

B. Should Spanier's cause of action for replevin be dismissed for failing to state a claim upon which relief can be granted because the e-mails at issue are not Spanier's personal property?

Suggested Answer: Yes.

C. Should Spanier's cause of action for mandamus be dismissed for failing to state a claim upon which relief can be granted because the University does not have a legal obligation to refuse to cooperate with the Attorney General, and no agreement to an "amicable action" exists?

Suggested Answer: Yes.

V. LEGAL ARGUMENT

A. Spanier's Complaint is an Impermissible Evasion of Pennsylvania's Right to Know Law, Which Sets Forth an Explicit Statutory Scheme Governing Requests, and Challenges to the Attorney General's Directive Not to Disclose the E-mails.

Pennsylvania Rule of Civil Procedure 1028(a)(7) permits a party to object preliminarily to any pleading when a party fails to exercise or exhaust a statutory remedy. Pa.R.C.P. 1028(a)(7). Spanier has not alleged that he has undertaken any

effort to pursue his rights and remedies under Pennsylvania's Right to Know Law, 65 P.S. § 67.101 *et seq.*, and therefore, his Complaint must be dismissed in its entirety. The Right to Know Law sets forth an explicit statutory scheme that contemplates requests directed to the Attorney General for documents gathered in the course of an investigation, provides for express statutory exceptions permitting the Attorney General to refuse to provide such materials, and prescribes appellate remedies for any challenge to such a refusal. The Right to Know Law does *not* permit an individual to circumvent those procedures by filing a civil action against an entity that has provided its property, in this case e-mails, to the Attorney General in the first instance.

The gravamen of Spanier's Complaint is that the Attorney General is in possession of certain e-mails—e-mails to which Spanier seeks access—*and that Spanier disagrees with the Attorney General's determination that the e-mails should not be shared.* Spanier's disagreement with that determination by the Attorney General is not properly directed at the University. The Right to Know Law unambiguously governs the rights and remedies for requests for documents in the Attorney General's possession (and permits the Attorney General to deny such requests) obtained in the course of a criminal investigation—*and challenges to denials of such requests*. That statutory procedure, directed at the Attorney General, must be utilized in this instance. End runs are out of bounds.

Requests for e-mails in the possession of the Attorney General and challenges to the Attorney General's refusal to permit their disclosure fall within the scope of the Right to Know Law. *See id.* § 67.305 (presumption that "a record in the possession of a Commonwealth agency . . . shall be presumed to be a public record"). Under the Right to Know Law, Commonwealth agencies "shall provide public records in accordance with this act." *Id.* § 67.301; *see also id.* § 67.102 (defining the Pennsylvania Office of Attorney General as a Commonwealth agency under the Right to Know Law). In accordance with the Right to Know Law, several statutorily enumerated exemptions permit or require the Attorney General to decline to disclose records. *See id.* §§ 67.305(a)(1); 67.708(16) (iv) (exempting from disclosure "[a] record of an agency relating to or resulting in a criminal investigation" when that record "includes information made confidential by law or court order," such as in a grand jury investigation); *see also* Pa.R.Crim.P. 320 (requiring secrecy of testimony before the investigating grand jury); 65 P.S. § 67.708(16)(vi)(A) (exempting records from disclosure related to a criminal investigation that "[r]eveal the institution, progress or result of a criminal investigation"). We believe these provisions provide the rationale for the Attorney General's request that the subject e-mails not be provided to Spanier. *See* Compl. Exhibit C ("[w]e have received an explicit instruction from the Deputy Attorney

General not to share the requested information for fear of compromising the Commonwealth's ongoing investigation").

If Spanier's displeasure with the Attorney General's claim of secrecy is to be remedied, that remedy lies with the Attorney General. It is accomplished with the review and appellate prescriptions provided for by the Right to Know Law. *See* 65 P.S. §§ 67.1101–67.1102 (providing for appeal of the agency determination); *id.* §§ 67.1301–67.1310 (providing for judicial review of the disclosure determination). Although 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 (as Spanier has already unsuccessfully done in this case), the Right to Know Law *does* set forth the formal legal process and mechanism for making such requests, and *for challenging any refusal based upon the Attorney General's assertions of investigative secrecy.*

Spanier has not alleged that he has made any request upon the Attorney General for the subject e-mails, or invoked the clear procedures set forth in the Right to Know Law for challenging the Attorney General's position. Instead, Spanier seeks to evade the Right to Know Law's process for *directly* challenging an assertion by the Attorney General that investigative records must not be disclosed to protect the secrecy and integrity of an investigation. By circumventing the procedures for such challenges set forth in the Right to Know

Law, Spanier has not only failed to exercise or exhaust those statutory remedies, but seeks to place the University in the untenable position of defending the Attorney General's decisions concerning investigative secrecy. The University cannot, and should not, be forced to mediate disagreements about the scope of that secrecy between the Attorney General and Spanier.

Spanier has a statutory vehicle for both attempting to obtain the subject e-mails from the Attorney General, and challenging any dictate by the Attorney General that the e-mails cannot be shared. Spanier must avail himself of *those* procedures and not employ novel causes of action for replevin and mandamus against the University, lacking legal authority. Spanier has not done so. Accordingly, the University respectfully requests that this Court enter an Order sustaining its preliminary objection for failure to exercise or exhaust the required statutory remedy, and dismissing all causes of action in the Complaint with prejudice.

B. Spanier Has Failed to State a Claim for Replevin, Because the E-mails at Issue Are Not His Personal Property.

Count One of the Complaint should be dismissed because Spanier fails to state a claim for replevin. An action for replevin does not lie because the subject e-mails are the property of the University and not of Spanier. While the Court must accept as true all well-pleaded facts, the Court is not free to accept as true unwarranted inferences from facts, conclusions of law, argumentative allegations,

or opinions. *See Hyam v. Upper Montgomery Joint Auth.*, 160 A.2d 539, 541 (Pa. 1960). Spanier fails to state a claim for replevin because he has not sufficiently alleged (and cannot allege) his right of possession to the subject e-mails. *See Robinson v. Tool-O-Matic, Inc.*, 216 Pa. Super. 258, 263 A.2d 914 (Pa. Super. 1970) (action dismissed where plaintiff failed to allege possessory interest).

Replevin is a civil action[3] to enforce the claim of an owner of property for its delivery to him or her by one who wrongfully detains it. 4 Goodrich Amram 2d § 1071:1; *see also* 1-19 Pennsylvania Civil Practice § 19.01 (citing *Weaver v. Lawrence*, 1 U.S. 156, 1 L. Ed. 79 (Pa. C.C.P. Phila. 1785)). To state a claim for replevin, Spanier must have a general or special property right in the items taken or detained, and must show title and a right of immediate possession. *See Int'l Elec. Co. v. N.S.T. Metal Prod. Co.*, 370 Pa. 213, 88 A.2d 40 (Pa. 1952).

As a matter of law, Spanier has no such ownership or right of possession over e-mails on the University's servers. As a defense to a claim in a replevin action, the

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[3] Although Spanier's complaint is entitled a "Complaint in Equity," replevin is, in fact, an action at law, and not equity. *See Brandt v. Hershey,* 198 Pa. Super. 539, 541-542 (Pa. Super. 1962) ("[The action of replevin] is a legal form of action ordinarily employed only to recover possession or the value of specific personal property unlawfully withheld from the plaintiff plus damages for its detention."); *see also Gindin v. Silver,* 430 Pa. 409, 412 (Pa. 1968) (finding a remedy in equity to be improper because the appellee had an adequate remedy at law in a replevin action to obtain the return of an engagement ring); *Davis v. Republic Trust Co.*, 270 Pa. 447, 113 A. 689 (Pa. 1921) (stating that an action equity may not be substituted for replevin if the remedy at law is adequate).

defendant may "of course, show his or her own right of possession." 42-1 Pa. L. Ency. Courts § 7 (citing *Elliot v. Powell*, 10 Watts 453 (Pa. 1840), and *Hill v. Miller*, 5 Serg. & Rawle 355 (Pa. 1819)). Courts have routinely found that employee e-mail located in an entity's proprietary e-mail accounts is "owned" by the entity.

This issue of employee-employer ownership of e-mails has most frequently arisen in 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. *See, e.g.*, *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 100-01 (E.D. Pa. 1996) ("[u]nlike urinalysis and personal property searches, we do not find a reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management").

In finding the absence of any expectation of privacy in that context, "[t]he courts also stress the fact that all computers used to store, send, and receive the e-mails are owned by the employer, and thus are company property." Kevin W. Chapman, *I Spy Something Read! Employee Monitoring of Personal Employee Webmail Accounts*, 5 N.C. J.L. & TECH. 121, 132 (2003); *see, e.g., McLaren v. Microsoft Corp.*, No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103, at *11 (Tex. App. May 29, 1999), attached to the Preliminary Objections as Exhibit D,

(rejecting contention that his personal files in company, proprietary e-mail account, protected by password, were similar to a personal locker, locked with a personal lock, provided by an employer because the e-mail messages contained on the company computer were not plaintiff's property, but rather "merely an inherent part of the office environment"); *see also Kelleher v. City of Reading*, No. 01-3386, 2002 U.S. Dist. LEXIS 9408, at *24-25 (E.D. Pa. May 29, 2002), attached to the Preliminary Objections as Exhibit E, (citing *McLaren* with approval to assess employee's expectation of privacy); *TBG Ins. Servs. Corp. v. Superior Ct.*, 117 Cal. Rptr. 2d 155, 159-61 (Cal. Ct. App. 2002) (finding employee did not have a reasonable expectation of privacy in part because employer owned the computer and e-mail system).

Spanier's own allegations establish that he does not have an ownership interest in the e-mails because they are located "on the University's servers," and were "generated and received while acting in his official capacity as president of the University . . . ." Compl. ¶¶ 22-23. Curiously, Spanier appears to contend that any e-mail, of which he was the author or a recipient during his time at the University is his property in perpetuity (wherever those e-mails might be found). That contention is without legal merit. Because these e-mails were received and generated by Spanier in the course of his employment as the University's president and allegedly reside on the University's servers, these e-mails are the University's property and

not subject to an action in replevin by Spanier. Accordingly, the University respectfully requests that this Court enter an Order sustaining its preliminary objections and dismissing Count One against it with prejudice for failing to state a claim upon which relief can be granted.

C. Spanier Has Failed to State a Claim for Mandamus Because the University Does Not Have a Legal Obligation to Refuse to Cooperate with the Attorney General, and No Agreement to Turn Over These E-mails Exists.

Count Two of the Complaint should be dismissed because Spanier fails to state a claim for mandamus. 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 and that *mandatory non-compliance* with that directive is a ministerial, non-discretionary act. To the extent, however, that Spanier is attempting to use the University as a proxy for the Attorney General in order to challenge to the Attorney General's directive, Spanier must raise that with the Attorney General directly.

Mandamus is an extraordinary legal remedy[4] by which a court of competent jurisdiction compels a public official, municipality, or private corporation to perform

[4] Although Spanier's complaint is entitled a "Complaint in Equity," mandamus is an action at law, and not equity. *See Cnty. of Dauphin v. City of Harrisburg,* 24 A.3d 1083, 1092 (Pa. Cmwlth. 2011) ("A mandamus action is an action at law seeking an extraordinary remedy of compelling an official's performance of a ministerial duty." (citing *Rosario v. Beard,* 920 A.2d 931 (Pa. Cmwlth. 2007), and *Parents Against Abuse in Sch. v. Williamsport Area Sch. Dist.,*

a mandatory duty or ministerial act where the petitioner has a legal right to enforce the performance of that act, the defendant has a corresponding duty to perform the act, and there is no other adequate or appropriate remedy. *Logan v. Horn*, 692 A.2d 1157 (Pa. Cmwlth. 1997). Spanier's effort to enlist this Court in directing the University to disregard the Attorney General's request that the e-mails not be shared falls far short of establishing a right to this extraordinary remedy.

Mandamus lies to compel the performance of a ministerial act or mandatory duty, and is not available when the duty to be enforced is discretionary. *Hotel Casey Co. v. Ross,* 343 Pa. 573, 23 A.2d 737 (Pa. 1942). A ministerial act is one which the defendant is *required* to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his or her own judgment or opinion concerning the propriety or impropriety of the act to be performed. *M.B. Invs. v. McMahon*, 903 A.2d 642 (Pa. Cmwlth. 2006); *see also J.E. Brenneman Co. v. Schramm,* 456 F. Supp. 269 (E.D. Pa. 1978) (defining an act as "ministerial," for purposes of mandamus, only "when

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140 Pa. Commw. 559, 594 A.2d 796 (Pa. Cmwlth. 1991)); *see also Select & Common Council of Williamsport v. Commonwealth*, 90 Pa. 498, 506 (Pa. 1879) ("'[A] mandamus under our statute assumes the form of an ordinary action at law, and all questions properly arising are to be tried in the same manner as was formerly done at common law in the action for a false return.'" (quoting *Commonwealth ex rel. v. Comm'ns of Allegheny Cnty.*, 32 Pa. 218 (Pa. 1858))).

its performance is positively commanded and so plainly prescribed as to be free from doubt").

Spanier cannot credibly contend that the University *has a legal obligation to refuse to cooperate* with the Attorney General's request, and that cooperation requires the University *not* to provide Spanier with the e-mails. *See* Compl. Exhibit C (stating that the University has "received an explicit instruction from the Deputy Attorney General not to share the requested information for fear of compromising the Commonwealth's ongoing investigation").

Implicitly conceding that the University has no such obligation, Spanier instead alleges that the University amicably agreed to file this mandamus action under Pennsylvania Rule of Civil Procedure 1093(2) because "the University [has taken] the position that it would willingly turn over [the relevant e-mails] if it were not for the direction of the Pennsylvania Attorney General." Compl. ¶ 25. President Spanier alleges that the University "taking the position . . . has in effect agreed to an amicable action of mandamus." *Id.*

An amicable action for mandamus is not sufficiently plead, however, if there is no written agreement for an action in the record. *Cooke v. Greenville*, 2 Pa. Commw. 417, 419-20, 278 A.2d 182 (Pa. Cmwlth. 1971) (hearing the "amicable action" solely because "the parties do not complain of the form of the decision"); *see also Sibarco Stations, Inc. v. Bldg. Inspector of City of Erie*, 43 Pa. D. & C.2d 279,

280 (Pa. C.C.P. Erie 1967) (entering an amicable action of mandamus on the docket with the same effect as if a Complaint in mandamus had been filed, once a stipulation of agreement was entered into by the parties). Here, the University has not agreed to an amicable mandamus action. Spanier's contention is built on an unsupported inference—an unsupported inference that the University's willingness to share information with him, but for its prevailing interest in complying (or obligation to comply) with the Attorney General's request, amounts to an agreement to enlist the judiciary to challenge that request. The law precludes such reliance on unfound inferences, and no such agreement exists.

The University has neither agreed to challenge its own cooperation with the Attorney General, nor agreed to stand in the Attorney General's shoes in defending the directive not to disclose the subject e-mails. In lieu of an action in mandamus directed toward the University, Spanier has other—more appropriate—legal remedies to address his disagreement with the Attorney General's directive. Mandamus does not supersede legal remedies, and cannot be invoked by a party who has another adequate remedy at law. 16-3 Pa. L. Ency. Courts § 503. For the reasons described above, Spanier possesses an adequate remedy at law to attempt to obtain the alleged e-mails from the Attorney General directly, and to challenge any

determination that Spanier cannot obtain the e-mails.[5] In contrast, no basis exists for permitting Spanier to use the extraordinary writ of mandamus in order to interpose the University between the Attorney General and himself in order to avoid addressing this matter with Attorney General.

Accordingly, the University respectfully requests that this Court enter an Order sustaining its preliminary objections and dismissing Count Two against it with prejudice for failing to state a claim upon which relief can be granted.

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[5] Moreover, to the extent that a mandamus action directed toward the Attorney General is proper to challenge the Attorney General's directive, such an action must be brought in the Commonwealth Court, and this Court would lack subject matter jurisdiction. 42 Pa.C.S. § 761(a)(1) (Commonwealth Court has original jurisdiction over all civil actions "[a]gainst the Commonwealth government, including any officer thereof, acting in his official capacity").

VI. CONCLUSION

For all of the foregoing reasons, Defendant The Pennsylvania State University respectfully requests that this Honorable Court enter an Order in the form attached hereto, dismissing the Complaint with prejudice, and any other relief this Court deems just and proper.

Respectfully submitted,

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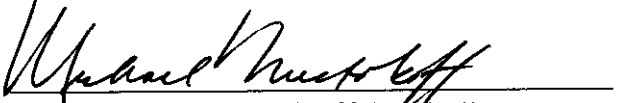
By: 

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