

THE COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY

IN RE: RIGHT TO KNOW ACT :  
REQUESTS BY JIM PARSONS , :  
JAN MURPHY, AND MARTHA :  
RAFFAELE : :

**FINAL DECISION**

**I. INTRODUCTION**

This is the final agency decision with respect to the Right To Know Act (“RTKA”) Requests by Jim Parsons, Jan Murphy and Martha Raffaele submitted in July and August 2005 (“the Requests”). PHEAA has given the Requests a great deal of consideration because they raise unique and important questions about the scope of the RTKA. In reaching the decision set forth below, PHEAA has primarily considered the content of the documents requested, the limitations on the RTKA reflected in the statute and developed by relevant case law, and the impact that the public release of information contained in the requested documents is likely to have on PHEAA’s ability to achieve its statutory mission.

**II. DISCUSSION**

**A. THE REQUESTS**

Parsons submitted his request by letter dated July 22, 2005 (the “Parsons Request”), a copy of which is attached to this Decision under Tab 1. Murphy submitted her request by letter date August 1, 2005, a copy of which is attached to this Decision under Tab 2 (the “Murphy Request”). Raffaele submitted her request by letter dated August 15, 2005, a copy of which is attached to this Decision under Tab 3 (the “Raffaele Request”). Parsons, Murphy and Raffaele (collectively, “Requesters”) are each journalists employed by media outlets in Pennsylvania.

The Parsons Request seeks access to, among other things, (a) “all vouchers (including supporting receipts and documentation) for travel by PHEAA employees and board members for 2003, 2004 and 2005 to the present, including, but not limited to, travel for seminars, conferences, training and college fairs; (b) receipts for all of PHEAA’s training expenditures for 2004 and 2005 to the present; (c) all PHEAA credit card bills for incidental expenses for 2004 and 2005 to the present; (d) all bills for PHEAA’s “purchasing card program” for 2004 and 2005 to the present; (e) receipts for all expenditures related to any employee recognition program for PHEAA; (f) PHEAA payroll records, including job titles and salaries; and (g) the “most recent performance and financial audits conducted on PHEAA.”

At the hearing regarding this matter held on April 4, 2006 before Hearing Examiner Warren G. Morgan, Parsons agreed to limit his requests to the vouchers described in the first sentence of item (a), the bills described in (c) and (d) and the financial audits described in (g). Also, at the hearing, PHEAA agreed to grant access to Parsons to the credit card bills requested in (c) and the bills for the “purchasing card program” requested in (d).<sup>1</sup> However, even as limited by these agreements, the Parsons Request involves approximately 30,000 pages of documents, largely consisting of travel voucher forms completed by PHEAA employees and board members, general invoice forms, and business promotion reimbursement forms. For the most part, these forms are created and maintained by PHEAA in connection with travel by PHEAA employees for business development.

The Murphy Request seeks access to “receipts for all expenses that PHEAA incurred” on its board retreats to Nemacolin Woodlands Resort on June 1-3, 2005, The Homestead on June 2-5, 2004, the Hyatt Regency in Cambridge, Maryland on September 12-14,

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<sup>1</sup> The “credit card” and “purchasing card program” bills are one and the same.

2004, Colonial Williamsburg Inn on May 28-31, 2001, The Greenbriar on May 16-18, 2001, Meadowood on November 6-11, 2001, The Greenbriar on September 10, 13, 2000 and the Hotel DuPont on April 4-8, 2000.

The Raffaele Request seeks access to “all vouchers, bill and receipts submitted to PHEAA concerning expenses paid by the Agency for the Board’s Business Development Conference held from June 1-3 at Nemaocolin Woodlands Resort” and the “Conference agenda and any minutes, orders, decisions, or other records of any official business conducted by the Board” at the Nemaocolin Retreat.” (The documents covered by the Requests will be referred to collectively as the “Requested Documents.”)

The PHEAA board retreats are held for several purposes. First, the retreats give the board an opportunity to undertake a thorough, strategic review of PHEAA’s operations with minimal outside distractions. Second, PHEAA invites some of its customers to the retreats to thank them for their business and strengthen the relationship between them and PHEAA board members and senior PHEAA employees. Third, it gives the PHEAA board a chance to exchange information with customers about the current student loan environment.

At the hearing, Murphy, Parsons and Raffaele collectively testified that if PHEAA granted access to the information described in the Requests, the information would receive widespread publicity, reaching PHEAA’s competitors and the general public through 80-90 newspapers outlet via the Associated Press wires and also to millions of people via the Internet.

PHEAA has undertaken a thorough review of the Requested Documents. This review shows that the Requested Documents contain information which, if made available to them, would permit PHEAA’s competitors to compete more effectively against PHEAA. Such information includes:

- Information regarding who PHEAA called on for business development purposes and the reason for such meetings
- How many times PHEAA met with business partners and potential business partners, with dates and identity of participants
- The business purpose for meeting with business partners and potential business partners
- What was discussed at business development meetings PHEAA employees had with current and potential clients, and current and potential business partners
- Information regarding new product lines PHEAA is developing; and
- Information regarding highly confidential discussions regarding strategic alignments and relationships.

For the reasons discussed below, public release of this information is likely to injure PHEAA's ability to maximize its success in the student loan industry which, in turn, will retard its ability to best accomplish its mission.

**B. PHEAA'S MISSION AND HOW IT IS ACCOMPLISHED**

**1. PHEAA is a Unique, Highly Regulated State Agency With a Board Controlled by Legislators.**

PHEAA is a not-for-profit public corporation and government instrumentality created by the Pennsylvania Legislature. Its purpose is to help Pennsylvania students attain their goals in higher education by providing student financial aid and lowering the cost of higher education. Unlike other state agencies, PHEAA competes in the private sector and receives no funding for its operations from the General Assembly.

Sixteen of PHEAA's twenty-member board of directors are current legislators. These sixteen legislators include four from the House Republican caucus, four from the House Democratic caucus, four from the Senate Republican caucus, and four from the Senate Democratic caucus. Each party's caucus appoints its PHEAA board representatives for six-year terms. However, if an appointee's term in the Senate or House ends before his six-year board term, either the President Pro Tem of the Senate or the Speaker of the House reappoints a member of the same party to serve the remainder of the departing member's board term. Similarly, a vacancy occurs when a board appointee switches party affiliation, and the appointing authority secures a replacement from the switching party's original caucus.

Membership on the PHEAA board is a substantial commitment of time and energy. In addition to monthly board meetings, the directors engage in activities such as public meetings around the state to discuss student loan needs, hearing borrower appeals, holding statewide public hearings regarding the formula that should be used to determine the amount of grant money to which students will be entitled, reviewing and deciding PHEAA personnel and compensation issues, and representing PHEAA at public events. However, because they are acting in their legislative capacities, legislative appointees receive no compensation in addition to their legislative compensation for their service on PHEAA's board.

The PHEAA legislative appointees act as the General Assembly's ombudsmen to PHEAA and vice-versa. They are charged with making sure, in a bipartisan manner, that PHEAA executes the will of the Legislature with respect to providing Pennsylvania students access to higher education, and that the Legislature takes into account how PHEAA believes it can best accomplish its mission.

The political balance of the board and the fact it is dominated by legislators who, at the same time, act as legislators and PHEAA board members, has allowed the PHEAA board to develop PHEAA into an agency that has been highly successful in furthering the interests of the Commonwealth. In the last six years, PHEAA has added 1,500 Pennsylvanians to its payroll. And, as discussed more below, over the past 10 years PHEAA has steadily increased the direct benefits it provides to Pennsylvania students from zero to more than \$220 million per year.

PHEAA is a highly regulated and audited state agency. PHEAA is audited more than 40 times each year. Thus, its financial activities are subject to considerable governmental and private scrutiny. The federal government, including the Department of Education and the Federal Deposit Insurance Corporation, audits PHEAA operations, performing compliance and Third-Party Servicer Review audits. The FDIC audits PHEAA procedures especially as they relate to the management of money entrusted to PHEAA by its lender partners. Federal regulations require that the FDIC audits not be released to the public, **Part 309 FDIC Regs.**

Additionally, because PHEAA manages loan portfolios valued in the billions of dollars for private-sector lenders, independent auditors examine PHEAA operations on behalf of the third-party lenders. The auditing firm KPMG, for example, annually audits the servicing and guaranty processes and controls used by PHEAA for third-party loans. These audits contain proprietary information, information about personal identity and also reveal whether the third-party lenders that hire PHEAA are properly managing their loan portfolios. PHEAA enters into confidentiality agreements with third parties when the audits involve confidential aspects of PHEAA's operations to maintain the confidentiality of the information in the audits.

As representatives of the Legislature, the PHEAA board of directors expends PHEAA funds at its discretion. 24 P. S. § 5104(3). PHEAA's enabling legislation charges the board with the duty to disburse earnings to carry out PHEAA's corporate purposes. 24 P.S. § 5104. "All accrued and future earnings from funds invested by the board of directors and such other accrued and future non-appropriated funds including but not limited to those funds obtained from the Federal government, insurance premiums, charges assessed by the agency, loan servicing revenues . . . shall be available to the agency . . . and may be utilized at the discretion of the board of directors for carrying out any of the corporate purposes of [PHEAA]." Id. (emphasis added).

**2. PHEAA's Ability to Compete in the Private Sector Enables It to Fulfill Its Unique Mission to Lower the Cost of Higher Education.**

Although an "agency" under the RTKA, PHEAA is unique because it is a commercial enterprise. PHEAA competes with hundreds of private sector lenders in multiple lines of business throughout the country to accomplish its mission to provide greater access to higher education by lowering educational costs for Pennsylvanians. In the 2005-06 academic year, PHEAA contributed \$170 million from its earnings to fund critical programs for Pennsylvania students. In the 2006-07 academic year, PHEAA will contribute approximately \$220 million toward the cost of its numerous student programs. PHEAA projects that its ability to make direct financial contributions to higher education programs in Pennsylvania will continue to escalate in future years, provided it is able to compete on a level playing field.

Applying the earnings from its competitive activities to discount student loans allows PHEAA to provide no-fee loans for Pennsylvania citizens through the Keystone Best Program. PHEAA led the market in providing discounted student loans through the Keystone Best Program and also encouraged 380 other lenders to participate in the program by applying

PHEAA earnings to pay one-half of the cost of the loans' percentage points and thereby enable 380 other lenders to be financially able to also offer discounted student loans.

PHEAA creates a competitive environment in Pennsylvania that further benefits student borrowers. By taking the lead and providing low-cost loans, PHEAA regulates the market by setting the pace for the competition to match its low rates for student borrowers. In addition to low-cost loans, PHEAA operates three loan forgiveness programs, which are targeted to benefit educators in early childhood development, nurses, and members of the armed services.

Using its earnings, PHEAA also provides grants to students through the Academic Excellence Scholarship, a nursing scholarship program, and the Pennsylvania State Grant Program. PHEAA, at no cost to the Commonwealth, administers the funds received from the General Assembly for Pennsylvania State Grant Program. In addition to absorbing the \$15 million cost of administration of the State Grant Program in 2005-06, PHEAA also supplemented the Legislature's appropriation by \$25 million. During the 2006-2007 academic year, PHEAA will supplement the State Grant Program with a total of \$72.5 million in additional funding without taxpayer support.

PHEAA provides financial services by managing billions of dollars of loans for third-party, private sector lenders. Its profit-making activities include loan origination and secondary marketing, loan servicing, loan guaranteeing, and leasing computer programs that process student loans.

Relationship building is very important to PHEAA's business, as its clients' mid and upper level managers must trust PHEAA's employees to manage the institutions' significant loan portfolios. To foster this trust, PHEAA requires potential clients and business partners to sign confidentiality agreements and also maintains a secure environment in its offices by

restricting physical access to certain areas, carefully shredding documents, and closely monitoring e-mail and other communications to restrict public release. PHEAA understands and responds to its clients' needs because PHEAA operates in an active national, and sometimes international, market that is highly competitive. Thirty percent of PHEAA's total earnings come from outside the Commonwealth and PHEAA expects that percentage to increase.

The higher education business is a \$20 billion business in Pennsylvania. Six hundred thousand students attend institutions of higher education within Pennsylvania. PHEAA Programs reach hundreds of thousands of these students, including over 150,000 through the Pennsylvania State Grant Program alone. PHEAA has 400 competitors in the lending business, 6 in guaranteeing, 3-4 in loan servicing, and 2-3 in computer-program leasing. PHEAA's success vis a vis its competitors benefits Pennsylvania students and Pennsylvania's economy. In short, PHEAA is the financial engine of higher education in Pennsylvania.

In 2004, one of PHEAA's competitors and the largest student loan provider in the country, Sallie Mae, launched a hostile effort to take over PHEAA to destroy its non-profit mission of helping students and families by lowering the cost of access to higher education in Pennsylvania. After Sallie Mae's attempted takeover, PHEAA clients questioned whether they should do business with PHEAA, fearing a loss of continuity. Sallie Mae persists in its effort to acquire, weaken or dismantle PHEAA, using every competitive advantage available to it.

Additionally, since becoming a for-profit entity in 1994, Sallie Mae has undertaken, with considerable success, a nationwide effort to acquire state non-profit student loan agencies, such as PHEAA, making them part of Sallie Mae's for-profit enterprise. This has resulted in hundreds of millions of dollars of profits being diverted from students to Sallie Mae's management and shareholders.

If Sallie Mae acquires PHEAA, or otherwise takes control of the student loan market in Pennsylvania, the result to Pennsylvania is likely to be devastating. Unlike PHEAA, Sallie Mae is a for-profit corporation whose objective is to generate returns for its out-of-state shareholders and management. Undoubtedly, Sallie Mae will not continue to contribute all of its profits for the benefit of Pennsylvania students, as PHEAA does.

### **C. PHEAA'S OBLIGATIONS UNDER THE RTKA**

Clearly, the RTKA is designed to serve the important public objective of permitting the public access to “public records” in the possession of Commonwealth agencies. Equally clear, however, is that the public’s right of access is not unfettered. It is well established that the RTKA is limited in three ways which are relevant to the Requests. First, the RTKA exempts from the definition of “public record” any record or document “access to which or the publication of which is prohibited, restricted or forbidden by statute, law or order or decree of Court.” 65 P.S. § 66.1. This is the so-called statutory exemption. Second, the Pennsylvania Supreme Court has held that the legislature did not include legislative records within the purview of the RTKA. Uniontown Newspapers, Inc. v. Roberts, 576 Pa. 231, 839 A.2d 185 (Pa. 2003). Third, the RTKA specifically exempts information that will endanger the security or invade the privacy of a private citizen. See Sapp Roofing Co. v. The Sheet Metal Workers’ International Association, 713 A.2d 627, 630 (Pa. 1998); Tribune-Review Publishing Co. v. Bodack, 875 A.2d 402, 407 (Pa. Commw. 2005). The applicability of each of these limitations will be discussed below.

## **1. The Statutory Exception.**

A document or record is exempt from the RTKA if access to that document or record is protected by statute. In 2004, Pennsylvania passed the Pennsylvania Uniform Trade Secret Act, 12 Pa. C.S. §§ 5301-5308 (the “UTSA”). The UTSA makes it illegal to disclose or use another’s “trade secret.” The UTSA defines a trade secret as

Information . . . including a customer list, program . . . method, technique, or process that: (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Discrete pieces of information which satisfy this definition are protected from disclosure or use under the UTSA. Patient Transfer Systems, Inc. v. Patient Handling Solutions, Inc., 2001 U. S. Dist. LEXIS 12215 (E. D. Pa. 2001) (part number and prices list protected as trade secret information); Alexander & Alexander, Inc. v. Drayton, 378 F. Supp. 824, 833 (E. D. Pa.), aff’d, 505 F. 2d 729 (3d Cir. 1974) (terms of specific customer accounts protected); J. W. S. Delavau Co., Inc. v. Lederman, 26 Phila. 338, 1991 Phila. Cty. Rptr. LEXIS 122 (1991) (pricing and financial information protected as trade secret).

Additionally, compilations of information are protected from disclosure under the UTSA when, taken in the aggregate, the information in the compilation is not generally known, even if the discrete pieces of information in the compilation are generally known. National Risk Management v. Bramwell, 819 F. Supp. 417, 431 (E. D. Pa. 1993), quoting Anaconda Co. v. Metric Tool & Die Co., 485 F. Supp. 410, 422 (E. D. Pa. 1980) (trade secret protection applied to a compilation of components, each of which was in public domain, but which combined were unique and afforded a competitive advantage); BIEC International, Inc. v. Global Steel Services, Ltd., 791 F. Supp. 489, 542 (E. D. Pa. 1992) (trade secret protection afforded to compiled

products of plaintiff's ability and experience that were recorded for repetitive use and represented over thirty years of investment dollars); Continental Data Systems, Inc. v. Exxon Corp., 638 F. Supp. 432, 442 (E. D. Pa. 1986) (combination of information reflected market research and might provide novelty that could qualify sales manual as trade secret).

No court has addressed the UTSA exception to the RTKA. Prior to the passage of the UTSA in 2004, two cases addressed whether public records which contain alleged trade secrets were subject to the RTKA. Although both cases state that the records at issue were subject to the RTKA, the decisions are based on the lack of *statutory* protection for the documents requested. The statutory bases for exempting PHEAA's records now clearly exists in the UTSA.

In Envirotest Partners v. Dept. of Transportation, 664 A. 2d 208, 210 (Pa. Commw. 1995), a public contractor contracted with the Department of Transportation ("PennDOT"). A Pennsylvania citizen (a lawyer who represented a competitor of the contractor) submitted a RTKA request to PennDOT seeking to inspect the contract and related documents. PennDOT did not object to producing the requested documents and advised the contractor of the request and its intent to produce responsive documents. Id.

In response, the contractor filed a declaratory judgment action in the Commonwealth Court, contending, among other things, the request sought its trade secrets and that such documents were not public records under the statutory exception. Id. at 215. The Court recognized that "Pennsylvania courts have denied access to public records based upon a prohibition found in statutory law," but found no *statutory* prohibition against the disclosure of the requested records. Id. Instead, the Court found only case law prohibitions, which were insufficient to deny access to records under the RTKA Id. The Court noted, however, that

Pennsylvania courts have denied access to public records based on a prohibition found in statutory law. *Id.* at 214, citing McMullan v. Wohlgemuth, 453 Pa. 147, 308 A. 2d 888 (1973), appeal dismissed, 415 U.S. 970, 921 S. Ct. 1547 (1974). The court interpreted the language of the RTKA “to mean that disclosure is prohibited if statutory law forbids such disclosure....” 664 A. 2d at 215. The clear implication of the Court’s opinion is that it would have held the requested records were exempt from the RTKA if statutory protection of trade secrets existed then, as it does now.

In Hoffman v. Pennsylvania Game Commission, 455 A. 2d 731, 733 (Pa. Commw. 1983), the requesting citizen sought access to the subscribers’ mailing list of a magazine the Game Commission distributed. The agency resisted production of the list, contending the distribution of its magazine was a “proprietary function, not governmental, and that, accordingly, the list is a trade secret.” *Id.* The court determined the RTKA applied. However, the agency did not attempt to fit its “trade secret” argument into a statutory exception. Perhaps most significantly, the UTSA had not been adopted in Pennsylvania.

The UTSA is a *statutory* prohibition against the public disclosure of trade secrets as defined in the UTSA. This statutory prohibition against the public disclosure of trade secrets applies in the instant case to prevent disclosure of PHEAA’s trade secrets.

Moreover, PHEAA, unlike the contractor in Envirotest and the agency in Hoffman, is a unique public corporation engaged in private business for the benefit of the Commonwealth. PHEAA’s mission to provide access to higher education and lower the cost of higher education for Pennsylvanians cannot be accomplished if PHEAA must disclose trade secrets to its competitors. The loss of revenue resulting from disclosure will severely damage PHEAA’s efforts to fulfill its purpose. The harm caused by disclosure of the alleged “trade

secrets” in Envirotest was borne by a private company alone. Likewise, in Hoffman, the agency did not need to protect its mailing list to compete in an industry for the benefit of the Commonwealth. PHEAA is unique. Any harm the disclosure of its “trade secrets” causes to PHEAA will be borne by the citizens of the Commonwealth (particularly Pennsylvania students).

Additionally, PHEAA’s enabling statute itself recognizes that PHEAA possesses sensitive business information. 24 P.S. § 5104(1.1)(iii). It exempts contracts relating to PHEAA’s servicing of student loans from the RTKA because, among other things, PHEAA could lose revenue if such information were publicized. Any person seeking this information must apply to the attorney general for access to it upon receipt of such an application, the attorney general, shall cause a review of the contract to determine if the disclosure of the contents of the contract could cause a loss of revenue to any commonwealth fund were to PHEAA. Id. The rationale behind this exception indicates that PHEAA must refuse to produce its trade secrets in response to the Requests.

Disclosure of any PHEAA’s trade secrets to a competitor, such as Sallie Mae, would likely cause PHEAA to lose the competitive advantage its trade secrets provide. Disclosure would cause PHEAA to lose revenue. PHEAA’s enabling statute clearly prohibits public disclosure of documents if disclosure is likely to cause loss of revenue because PHEAA’s competitors could use the information to more effectively compete with PHEAA. For example, among the information in the Requested Documents is the identity of potential customers with whom PHEAA met to solicit business and the purpose of the meeting. Moreover, in the aggregate, the information in the Requested Documents would permit a competitor to see where PHEAA is concentrating its marketing efforts, by geography, type of customer and product line. If this information were public, PHEAA’s competitors would be able to target individual

customers, customers in a geographic region, a type of customer or product lines to take business from PHEAA. Of course, PHEAA would not have the same opportunity vis a vis its competitors because they are private companies who, for good reason, do not make this type of information public.

Public access to information about PHEAA's business development activities also will hurt PHEAA in other ways. First, this year, PHEAA will market approximately \$2.75 billion of public debt offerings, which are an important part of funding its overall operations. The terms available to PHEAA on the capital markets for these offerings are in large part dependent on PHEAA's credit rating. The consequence of the public release of the information in the Requested Documents is that PHEAA will be less competitive and its financial health will decline. This, in turn, will cause its credit rating to decline, causing its cost of capital to increase and further eroding the profits available to fund higher education programs.

Second, if public access to the information in the Requested Documents is permitted, many of PHEAA's competitors undoubtedly will take advantage of this golden opportunity and frequently issue RTKA requests which will permit them free access to all of PHEAA's competitively valuable information and causing PHEAA to devote substantial resources to gathering documents and otherwise responding to RTKA requests. No longer would PHEAA be competing on a level playing field.

For these reasons, there is little doubt that public disclosure of PHEAA's trade secrets will cause irreparable harm to PHEAA and ultimately Pennsylvania students and Pennsylvania's economy.

After reviewing the Requested Documents, it is very clear that PHEAA's trade secrets pervade the Requested Documents. The trade secret information in the Requested Documents includes: PHEAA's business initiatives, customers called on, purposes of marketing calls, sales and marketing methods, geographic marketing efforts, and new product development. In fact, the sole purpose of most of the Requested Documents is to reflect PHEAA's business development activities and all of the information in these documents relates to those activities. In private industry, no business is required to permit its competitors free access to this type of competitive information. To the contrary, such access is prohibited by statutes such as the UTSA and the federal Economic Espionage Act. Thus, PHEAA has concluded that the Requested Documents which contain information relating to PHEAA's business development and strategic activities are exempt from the RTKA. Additionally, providing public access to these documents would be a severe blow to PHEAA's ability to compete and accomplish its mission of providing Pennsylvania students access to higher education.

**D. SOME OF THE REQUESTED DOCUMENTS ARE NOT SUBJECT TO THE RTKA BECAUSE THEY INVOLVE LEGISLATIVE ACTIVITIES**

In Pennsylvania, there is no right to public access to legislative records. Uniontown Newspapers, Inc. v. Roberts, 576 Pa. 231, 247-48, 839 A.2d 185 (Pa. 2003). At issue in Uniontown was a reporter's request to access to a state legislator's telephone records. These records were not deemed to be within the Speech and Debate Clause of the Pennsylvania or United States Constitutions. Nonetheless, even though the legislator sought reimbursement from state funds for the phone costs associated with those records, the Supreme Court held that there was not right to access to the records under the RTKA or the Pennsylvania or the United States Constitutions. In reaching its conclusion, the Court noted that "any right of access under the common law was supplanted when the General Assembly defined the term "agency" [in the

Right To Know Act]; it did not include members of the General Assembly. 576 Pa. at 240, 839 A.2d at 190. “To conclude such access exists would be tantamount to rewriting the definition of “Agency” in the Act.” Id. Accordingly, “legislative records” are not “public records” within the meaning of the RTKA. We have determined that some of the Requested Documents are legislative records because, like the telephone records at issue in Uniontown, they relate directly to activities by legislators acting in legislative capacities.

Sixteen of PHEAA’s 20-member Board of Directors are current legislators. These 16 legislators control the PHEAA Board, acting as agents of the General Assembly. The 16 legislative Board members include four from the House Republican caucus, four from the House Democratic caucus, four from the Senate Republican caucus, and four from the Senate Democratic caucus. Each party’s caucus appoints its PHEAA Board representatives for six-year terms. These Board members serve only because they are legislators. If an appointee’s term in the Senate or House ends before his or her six-year Board term, that appointee immediately loses his or her seat on the Board, and the seat is vacant until either the President Pro Tem of the Senate or the Speaker of the House reappoints a member of the same party to serve the remainder of the departing member’s Board term. Similarly, a vacancy occurs when a Board appointee switches party affiliation, and appointment authority secures a replacement from the switching party’s original caucus.

As representatives of the General Assembly, the PHEAA Board expends hundreds of millions of dollars a year at its discretion. 24 P.S. § 5104(3). “All accrued and future earnings from funds invested by the Board of Directors and such other accrued and future non-appropriated funds including but not limited to those funds obtained from the Federal government, insurance premiums, charges assessed by the Agency, loan servicing

revenues . . . shall be available to the Agency . . . and may be utilized at the discretion of the Board of Directors for carrying out any of the corporate purposes of [PHEAA].” Id.

PHEAA board members are the Legislature’s agents entrusted with governing a multi-billion dollar agency that is the lynchpin of the higher education industry in Pennsylvania. They not only attend board and committee meetings, but also are responsible for a wide range of activities involving the exercise of legislative discretion, such as appointing corporate officers, 24 P.S. Sec. 5103(c), establishing the list of approved institutions of higher learning, 24 P.S. Sec. 5104, and determining the amounts to be awarded per student under the grant programs. Members of the Pennsylvania Legislature control the PHEAA board, as they hold sixteen of the twenty seats on the board.

Underscoring the fact that PHEAA’s legislative board members act on behalf of PHEAA as part of their legislative duties is the fact that they receive no compensation in addition to their legislative compensation for their PHEAA service. Membership in the Legislature is a condition precedent to their service. When their terms in the General Assembly end, so does their membership on PHEAA’s board. They can be replaced only with another legislator, from the same party caucus, maintaining a constant majority of legislative appointees on the board, and an equal number from each caucus. Moreover, if a PHEAA board member switches his party, he relinquishes his board position and must be replaced by member of his original party. See PHEAA v. Honorable John A. Lawless, et. al. The members represent their party’s caucus and when they act officially on behalf of PHEAA, they act in their legislative capacities. These undisputed facts compel the conclusion that the legislative members on PHEAA’s board are acting as an arm of the General Assembly when they engage in PHEAA activities. Therefore,

documents relating to their activities as PHEAA board members, including the documents requested relating to the board retreats, are legislative records and not subject to the RTKA.

Just because the travel expense vouchers are being sought from an agency, not an individual legislator or the House or Senate itself, does not diminish the uniquely legislative character of the PHEAA board and the documents, or somehow make these documents subject to the RTKA. As Pennsylvania courts held in Pa State University, supra, and LaValle, supra, it is the character of the record, rather than the custodian, that is critical to determining whether it is subject to the RTKA.

All records that directly or indirectly reference activities of the legislators on the board on behalf of PHEAA are legislative records. When the legislators on PHEAA's board act officially on behalf of PHEAA, they act in their legislative capacities. All of the Requests seek legislative records about retreat attendance by legislators and their activities. These retreat and conference activities promote PHEAA's corporate purposes. In fact, the only reason for the board retreats is to conduct PHEAA business. Thus, all records in PHEAA's possession that refer to them or their retreat activities on behalf of PHEAA are legislative records, which PHEAA need not disclose.

It should be noted that PHEAA has previously made publicly available the total costs of the PHEAA Board retreats. However, PHEAA will not provide access to the retreat documents themselves because they are records of legislative activities not subject to the RTKA.

**E. PHEAA NEED NOT DISCLOSE RECORDS PROTECTED BY THE RIGHT TO PRIVACY BECAUSE THEY ARE EXEMPT FROM THE RTKA.**

Under the RTKA's personal security exception, public records "shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to or the publication of which ... would operate to the prejudice or impairment of a person's

reputation or personal security... .” 65 P.S. § 66.1. The Commonwealth Court interprets the personal security and reputation exceptions as creating a privacy exception to the RTKA. Rowland v. Public School Employees’ Retirement System, 885 A.2d 621, 627 (Pa. Commw. 2005). Indeed, this personal security exception is equivalent to Pennsylvania’s Constitutional right to privacy. See Sapp Roofing Co. v. The Sheet Metal Workers’ Int’l Ass’n, Local Union, 713 A.2d 627, 630 (Pa. 1998); Tribune-Review Publishing Co. v. Bodack, 875 A.2d 402, 407 (Pa. Commw. 2005). Contrary to Requestors’ assertion in their Exceptions, the Commonwealth Court does not define this right to privacy narrowly as “freedom from harm, danger, fear or anxiety.” Exceptions, p. 8 ¶ 47. Under the personal security exception, PHEAA may redact any information from documents responsive to the Requests, which, if disclosed, would cause harm to a private citizen’s right to privacy (including, without limitation, a private citizen’s reputation and security) that outweighs the public benefit of its disclosure. Bodack, supra, at 407.

In Bodack, supra, the City contended the cell phone bills fit within the personal security exception because disclosing the identities of the private citizens identified on the cell phone bills (by telephone number) would cause impermissible harm to the private citizens’ right to privacy. Id. The Court determined the private citizens had a legitimate expectation that their telephone numbers (and their identities) would remain private when they called or were called by the council members. Id. Additionally, the citizens never consented to the disclosure of their telephone numbers and/or identities. Id. Furthermore, public disclosure of this information could impair the citizens’ reputations and/or endanger their security by, among other things, exposing them to public harassment. Id. This potential harm to the citizens’ right to privacy “outweighed any public benefit that would be derived from disclosure of the information in the [cell phone bills] which would disclose the identity” of the private citizens. Id. at \*18.

Therefore, the Court ordered the City to redact their telephone numbers from the cell phone bills before disclosure under the RTKA. Id.

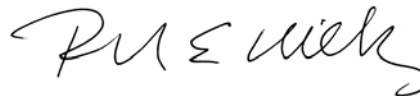
In this case, some information in Requested Documents must be redacted because it is protected by a right to privacy that outweighs the public benefit of its disclosure. See Hartman v. Dept. of Conservation, 892 A. 2d 897, 2006 Pa. Commw. LEXIS 74 at \*23 (Pa. Commw. 2006). For example, phone numbers that appear in any Requested Documents must be redacted prior to disclosure. Additionally, several Requested Documents responsive to the Requests contain the names of private citizens who met with PHEAA officials or attended PHEAA. These individuals have not consented to the disclosure of their identities or meetings with PHEAA officials, and they had a reasonable expectation that such information would be kept confidential. The disclosure of this information could impair their reputations or endanger their security by exposing them to, among other things, public harassment. It also will damage PHEAA's relationship with its business partners, which is a critical component to PHEAA's success. Requestors have not identified any public benefit to be derived from providing access to the identities of these individuals. See Rowland, supra, at 629 n. 12. Lack of a specific public benefit to balance their privacy interest requires non-disclosure of the requested information.

Because the disclosure of identity and phone numbers would likely cause harm to these citizens' rights to privacy that outweighs any public benefit derived from its disclosure, the personal security exception allows PHEAA to redact this information from any responsive documents before producing them. However, all of the Requested Documents which contain information subject to the personal security exemption also are not subject to the RTKA under either the statutory exception or because they are records of legislative activities.

### **III. SUMMARY**

In summary, PHEAA will permit access to items (c), (d) and the financial audits in item (g) of the Parsons Request and deny access to the remainder of the Requested Documents.

PENNSYLVANIA HIGHER EDUCATION  
ASSISTANCE AGENCY



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Richard Willey  
President and Chief Executive Officer

