



WEST CHESTER UNIVERSITY
FOUNDATION
— Student Success Is Our Mission —

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March 4, 2016

Hon. Daryl D. Metcalfe
144 Main Capitol Building
PO Box 202012
Harrisburg, PA 17120-2012

Dear Honorable Metcalfe:

On behalf of the members of the House PASSHE Caucus I am writing to you in support of the private, non-profit University Foundations that support the 14 public universities that comprise the Pennsylvania State System of Higher Education (PASSHE) and the more than 100,000 students enrolled at a PASSHE University. Specifically, I am writing to you to explain how the current Right-To-Know Law (RTKL), and certain Pennsylvania Court decisions, have negatively impacted the ability of the Foundations to perform the work that they undertake to provide an affordable college education; and to seek your assistance in clarifying the current law as it applies to University Foundations and other private entities that contract with an agency covered by the law.

The purpose of the RTKL is, and has always been, to promote transparency in the use of taxpayer dollars and promoting access to official government information. This is an important goal and we must ensure that public officials continue to be held accountable when spending the hard earned dollars of taxpayers.

The University Foundations, such as the West Chester University Foundation, were created to provide a private vehicle to solicit and manage donations from the private sector for the direct benefit of PASSHE Universities. Like all non-profit corporations, the Foundations have a specific purpose as outlined in their bylaws and articles of incorporation. While the charitable purpose of the Foundations is to benefit Pennsylvania's public universities, they are not part of the University and are separate legal entities providing a private function. As private corporations, Foundations also maintain their own business records which reflect the daily operations of the Foundations. These business records include board of director's meeting minutes, executive committee meeting minutes, tax records, internal policies and procedures and correspondence with vendors directly hired by a Foundation.

As a result of appeals made by individuals seeking access to certain documents, Pennsylvania Courts have expansively interpreted Section 506 of the Right-To-Know Law to allow access to an unlimited number of Foundation documents. In these limited instances, Pennsylvania Courts have ruled that the Foundations perform a "governmental function" and therefore all

documents directly relating to that function are public. Based on this interpretation, internal business documents, such as board of directors' meeting minutes, to donor files, are open to disclosure. As such, the critical distinction between the management of public funds versus the use and management of private Foundation funds has been lost in the current interpretation of the RTKL.

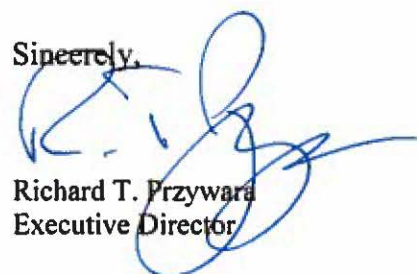
For University Foundations, the current interpretation of the RTKL has the effect of making the Foundations de facto public entities without ever being defined by the Legislature as an "agency" and, therefore, subject to the provisions of the law. In crafting the law the Legislature developed a comprehensive list of entities, including the State System of Higher Education, which are considered a "state-affiliated" entity and thereby are subject to the provisions of the RTKL. That comprehensive list does not include University Foundations based on the Legislature's recognition, at that time, that University Foundations are not state-affiliated entities, do not receive public support, and do not perform a governmental function. We do not believe that the intent of Section 506 was to open wide the doors of every private contractor that happens to contract with the government. These Court decisions have essentially redefined what a public agency is and have come to the conclusion that any private entity contracting with an agency to provide a good or service would be performing a "governmental function" and therefore would be subject to the RTKL. Would we require Staples office products to share all of its internal business documents because it sold pencils to a covered agency.. .if not, why should the Foundations be treated any differently just because its corporate mission is to support an agency that is specifically covered under the RTKL? Would our banking relationship for all our deposits be faced with having their business records open to the public?

There is special component of our work which makes the RTKL interpretation very critical. Many donors include the Foundation in their estate plans and share those documents with us. It would be devastating to have the Last Will and Testament of a donor subject to RTKL, and frankly, if that was the case, many donors would cease this practice. A critical component of higher education fundraising is planned giving and testamentary gifts.

It is my hope that the foregoing information sheds some light on the important role that private University Foundations play in this State and how the expansive language and interpretation of the RTKL, have negatively impacted the University Foundations. The Foundations are not trying to limit the public's access to public information; rather, the Foundations only wish to protect the integrity of their operations and preserve the interests of these important private vehicles that ultimately support the public good.

Thank you for your consideration.

Sincerely,



Richard T. Przywara
Executive Director

**TESTIMONY OF THE
PENNSYLVANIA FOUNDATIONS ASSOCIATION
TO THE HOUSE STATE GOVERNMENT COMMITTEE**

March 22, 2016

Chairman Metcalfe, Chairman Cohen, and members of the House State Government Committee, my name is Rich Przywara and I am the Executive Director of the West Chester University Foundation. On behalf of the my colleagues who are joining me today, and those who were unable to attend today's hearing on this important issue, I would like to thank you for providing the Pennsylvania Foundations Association ("PFA"), the opportunity to provide the Committee with the PFA's concerns with the currently enacted Right to Know Law, 65 P.S. 67.101 *et seq.* ("RTKL") and the legislation that is currently before the House State Government Committee, Senate Bill 411.

Background on the Pennsylvania Foundations Association

The PFA is an association of the private, non-profit charitable Foundations supporting the public universities that comprise the Pennsylvania State System of High Education ("PASSHE").

The University Foundations were created to provide a *private* vehicle to solicit and manage *private* donations for the direct benefit of PASSHE Universities. Like all non-profit corporations, the Foundations have a specific purpose as outlined in their bylaws and articles of incorporation. For University Foundations, that purpose is to raise money for the benefit of Pennsylvania's public universities. While the Foundations work for the benefit of their designated public University, the Foundations are not part of the University -- they are separate legal entities providing a private function. University Foundations do not receive taxpayer assistance.

Each University Foundation is managed by an independent Board of Directors and some Foundations have additional managerial committees, such as audit committees and investment committees. The day to day management of the Foundation is typically handled by the Foundations' Executive Director and staff. The Foundations are represented by their own privately retained counsel and not by state-paid PASSHE attorneys. The University Foundations also hire, and pay for, their own employees.

The legal relationship between University Foundations and PASSHE Universities is defined as that of independent contractors pursuant to written contractual agreements such as a "Memorandum of Understanding." These Memoranda of Understanding and other agreements entered into between a University Foundation and a PASSHE University to provide a service are public documents and can be obtained by any party interested in the legal contract outlining the types of services the Foundation will provide to an individual University, much like any contract for the purchase of goods and services is a public document.

The Memorandum of Understanding does not dictate how the Foundations operate; to the contrary, the Foundations manage and control their own day to day operations. The University typically pays the Foundation a negotiated fee for its fundraising and other services. Likewise, the Memorandum of Understanding requires the Foundation to provide the University with annually audited financial statements, by an independent auditing firm selected by the Foundation.

The Foundations are private businesses, they also maintain their own business records which reflect the daily operations of the Foundation. These business records include board of director's meeting minutes, executive committee meeting minutes, tax records, internal policies and procedures and correspondence with vendors directly hired by the Foundation.

Because the Foundations are private, they can offer the following attractive options to donors, which ultimately benefit the University and its students:

- Foundations can invest beyond the low risk, low return strategies often maintained by the State, thereby increasing the opportunity for greater investment return, and consequently, the revenue available to the primary institution;
- Donors often feel more comfortable making a donation to a Foundation governed by individuals with extensive legal, business and financial management skills.

The Impact of Pennsylvania's Right-To-Know Law (RTKL) on the Private University Foundations and Their Mission to Support Pennsylvania's 14 Public Universities and the More than 100,000 Students Enrolled in a PASSHE University

The purpose of the RTKL is, and has always been, to promote transparency in the use of taxpayer dollars and promoting access to official government information by creating an openness and a transparency of government operations. This is an important goal and we must ensure that public officials and entities continue to be held accountable when spending the hard earned dollars of taxpayers. But, the RTKL was not intended to apply to private businesses and certainly not intended to be used as a tool to obtain internal information of private businesses that happen to contract to provide a good or service to an agency that this subject to the RTKL.

The current language of the RTKL, and more specifically, the interpretation by the Pennsylvania Courts, has adversely and disproportionately affected University Foundations. Rather than promoting transparency in government, the current language and interpretation of the RTKL, as applied to private University Foundations, has negatively impacted the public's ability to a secure low-cost higher education. This is an unintended and damaging consequence of the current law. The purpose of this testimony is to explain these unintended consequences and to provide recommendations on how to remedy the impact to the PFA and other governmental contractors.

The University Foundations have two primary concerns with how the RTKL has been interpreted through various Court decisions:

1. Disclosure Obligations of Private Contractors- Section 506(d)(1) of the RTKL

Under the currently enacted version of Section 506, Pennsylvania courts have expansively interpreted this section as allowing access to an unlimited number of Foundation documents. The Pennsylvania Courts have ruled that the Foundations perform a “governmental function” and all documents directly relating to that function are public. Based on this interpretation, the courts have ruled that everything from internal business documents, such as board of directors’ meeting minutes, to donor files, are open to disclosure. The distinction between management of public funds versus the use and management of private Foundation funds has been lost in light of the current interpretation of the RTKL.

By way of example, East Stroudsburg University Foundation, a member of PFA, was involved in a landmark case under Section 506 of the RTKL, and was ultimately ordered by the Commonwealth Court to disclose thousands of pages from donor files, in addition to the minutes of its board of directors’ meetings--documents demonstrating the day to day business of the Foundation. East Stroudsburg University Foundation expended tens of thousands of dollars opposing, and ultimately responding to this RTK request. To be sure, East Stroudsburg University Foundation’s response was not funded by “State dollars;” it came from its private, general operating fund; monies that would have otherwise inured to the benefit of ESU students in accordance with the corporate and charitable mission of the Foundation. Additionally, this request covered documents beyond those the Foundation was contractually obligated to turn over to the University and went directly to the Foundation’s internal business.

Most recently, in the case of West Chester University v. Schackner, the Court alarmingly concluded that the Foundations “in large part are alter egos of the member universities to carry out activities that those universities want to undertake.”

In other words, as highlighted by both the West Chester University and East Stroudsburg cases, for University Foundations, the current interpretation of the RTKL arguably has the effect of making the Foundations, which are private businesses, de facto public entities without ever being defined by the Legislature in the law as an “agency” and, therefore, subject to the provisions of the RTKL.

In fact, in crafting the RTKL the Legislature developed a comprehensive list of entities that are subject to the law. One of the categories created in the law covered “state affiliated” entities and listed specific entities, including the Pennsylvania State System of Higher Education, deemed to be a state affiliated entity and therefore

subject to the RTKL. If the Legislature intended to include the private University Foundations in the law, it could have added the University Foundations, or any entity affiliated with a PASSHE University, to this list. The reason that the University Foundations were not included in this list is because of the work of the Pennsylvania Foundations Association at that time to explain the private nature of the University Foundations. But, the Courts have chosen to interpret the Legislature's intent differently.

PFA does not believe that the purpose of Section 506 was to open wide the doors of every private contractor that happens to contract with the government. Would we require Staples office products to share all of its internal business documents because it sold pencils to a covered agency? Why should the University Foundations be treated any differently just because its corporate mission is to support an agency that is specifically covered under the RTKL?

The overriding purpose of the RTKL is, and has always been, to promote transparency in the use of taxpayer dollars and promoting access to official government information in order to prohibit secrets, scrutinize actions of public officials, and make public officials accountable for their actions. In the case of PASSHE and the private University Foundations, this is occurring because all of the legal agreements between the two, as well as any agreements for services are public documents. It is submitted that as drafted, §506(d)(1) casts a net over private entities that reaches much more than their receipt of public funds by a State agency and their performance of government contracts.

PFA suggests that the overbreadth of §506(d)(1) can be remedied by limiting the disclosure obligations of University Foundations to those documents relating to the contract by delineating specific types of documents that would allow for transparency of the use of public funds, without making every Foundation a governmental entity under the RTKL.

We have attached PFA's proposed amendatory language for consideration by the Committee to resolve this matter.

2. Confidentiality of Donor Information

Under the currently enacted version of Section 708(b)(13), a covered agency (in this case a PASSHE University) may withhold or redact records that would reveal the identity of a donor who lawfully makes a donation to a covered agency, an exemption which the members of PFA support.

However, the current law DOES NOT provide the very same protection to donations that are made on behalf of a covered agency, such as donations that are made to the University Foundations.

Senate Bill 411, PN 1335, which is currently before the House State Government Committee, does address this issue through the following amendments to the current law:

Section 708. Exceptions for Public Records.

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

The PFA supports these proposed changes in Senate Bill 411 that are designed to address how these donations are to be treated. Absent this correction, the University Foundations are concerned that donors will be reluctant to donate to the Foundations, which will negatively impact PASSHE Universities and the financial support that is provided to PASSHE students.

Let me provide some examples of why this is important:

- Many donors prefer to make a gift to a private rather than a state entity and that is why they contribute to the Foundation. The University Foundations assure that a donor's gift will be invested profitably, distributed for the intended purpose, and not become confused with state appropriation or other funds. If the law is not changed donors, may be reluctant to donate to the Foundations if they are considered an arm of the State;
- Foundations can serve to safeguard the privacy of donors who may not want the details of their personal financial information to become a matter of public record, especially when donors make their philanthropic donation a part of their estate planning. Donors do not want to run the risk that their personal financial details, and the details of their estate, may appear in the local newspaper.

It is my hope that the foregoing information sheds some light on the important role that private University Foundations play in this State and how the expansive language and interpretation of the RTKL, have negatively impacted the University Foundations.

The Foundations are not trying to limit the public's access to public information; rather, the Foundations only wish to protect the integrity of their operations and preserve the interests of these important private vehicles that ultimately support the public good.