



require an agency to provide access to records relating to the construction of private student housing by a non-governmental party under a contract with a state university.

Edinboro University of Pennsylvania (Edinboro) is part of the State System of Higher Education and part of the Commonwealth government. *See* Section 2002-A of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, added by the Act of November 12, 1982, P.L. 660, *as amended*, 24 P.S. §20-2002-A. On February 1, 2008, Edinboro entered into a ground lease (Lease) with the Edinboro University Foundation (Foundation).<sup>1</sup> The purpose of the Lease was to construct privatized student housing. The Foundation was to finance and develop the housing project and, after its completion, to collect rent to pay off the Foundation's creditors. The Lease further provided that Edinboro would have "certain control" over the project. The Lease between Edinboro and the Foundation consists of 40 pages in addition to numerous exhibits. R.R. 27-142. Some examples of the "control" retained by Edinboro included:

Compliance by lessee and its contractors and subcontractors with "all applicable Governmental Rules," including payment of prevailing wage rates as would be required under the Pennsylvania Prevailing Wage Act and compliance with the Steel Products Procurement Act. §10.2(d) of the Lease, R.R. at 39.

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<sup>1</sup> In a companion adjudication at Docket No. AP 2010-0577, the Office of Open Records (OOR) denied a request seeking the identical information from the Foundation, concluding that the Foundation was not a "Commonwealth Agency." The OOR noted that the Foundation "is a private non-profit not under the control of any governmental entity and upon dissolution its assets are distributed to exempt organizations as determined by the Board of Directors which is comprised of 17 voting members and one nonvoting member who represents the Council of Trustees of Edinboro University ("University')." The OOR further noted that "the Foundation was not established by any law of the Commonwealth, does not perform an essential government function and is not controlled by any governmental entity. The Foundation pays its own staff from its own assets." R.R. at 11-15.

Approval by Edinboro of the design of the project as well as all proposed plans and specifications. §10.3 of the Lease, R.R. at 39-40.

Limitation of occupants of the Student Housing to students of Edinboro or people attending camps, conferences and similar events at Edinboro, as well as a requirement that all occupants be required to purchase a meal plan from Edinboro. §11.1 of the Lease, R.R. at 47.

A requirement that the Foundation, during the term of the Lease, keep and maintain the premises in good condition and repair, including, without limitation, the repair and replacement of all exterior and interior supporting walls, foundations, roofs, rain gutters and spouting. The Foundation was also required to keep the interior non-structural portions in good condition and was required to replace equipment and fixtures, including HVAC, plumbing, electrical and life safety systems. Article 14 of the Lease, R.R. at 51.

On June 10, 2010, Felix Folletti, on behalf of the Greater PA Regional Council of Carpenters, submitted a request under the RTKL to Edinboro seeking

all copies, pictures or documentation in [Edinboro's] possession or control concerning the construction and repairs of the first phase of the student housing project on Edinboro University campus. Specifically, I would request any documentation that is related to foundation repairs, water/sprinkler pipes that have broken or electrical work that was done incorrectly. Also any documentation that documents construction work not performed to specifications or building codes.

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Edinboro denied the request on July 9, 2010, stating that it did not possess such records because the construction project was not controlled by Edinboro, but rather by the Foundation, which “is not an agency subject to the Right-to-Know

Law.” Edinboro denial of RTKL request, R.R. at 2.<sup>2</sup> Folletti appealed the denial to the Office of Open Records (OOR), which reversed. The OOR concluded that by entering into the ground Lease with Edinboro, the Foundation was performing a “government function” based on this Court’s reasoning in East Stroudsburg. The OOR further found the RTKL request “directly related” to this government function.

Edinboro argues that the information sought is not a “public record” pursuant to the RTKL and further argues that the requested records are not “directly related” to a “government function.” Because all parties agree that the information sought is in the possession of the Foundation and not Edinboro, we must begin our analysis with the language of Section 506(d)(1):<sup>3</sup>

A public record that is not in the possession of an agency but is in the possession of a party with whom the agency has contracted to perform a ‘government function’ on behalf of the agency, and which directly relates to the government function and is not exempt under this act, shall be considered a public record of the agency for purposes of this act.

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<sup>2</sup> Folletti also requested the same information from the Foundation, which denied the request for the same reason as that expressed by Edinboro. Folletti also appealed the Foundation’s denial to the OOR, which affirmed the denial, finding, seemingly in direct contradiction to the Edinboro matter, that the Foundation was not an agency subject to the RTKL and did not perform “an essential government function.” No further appeal was taken from this determination. R.R. at 11-14.

<sup>3</sup> Our scope of review, set forth in Section 1301(a) of the RTKL, 65 P.S. §67.1301(a), allows this Court to make an independent review of the evidence and to substitute our fact-finding for that of the agency. East Stroudsburg, 995 A.2d at 502, n.10.

In East Stroudsburg, a reporter sought records of the East Stroudsburg University Foundation (ESU Foundation) regarding donor information and minutes of meetings held by the ESU Foundation. Like Edinboro, East Stroudsburg University (ESU) is part of the State System of Higher Education and part of the Commonwealth government. Similar to the Foundation here, the ESU Foundation is a private non-profit corporation. ESU denied the request because the ESU Foundation is not an agency subject to the RTKL and was not performing “essential governmental functions.” The OOR reversed, and the Commonwealth Court, in an opinion authored by Judge Pellegrini in which Judges McGinley, Simpson and Butler joined, affirmed.

The East Stroudsburg majority concluded that because Section 506(d)(1) used the term “government function,” it applied to all contracts entered into by a governmental agency and a private party. East Stroudsburg, 995 A.2d at 504. The majority noted that the relationship between ESU and the ESU Foundation was governed by a “memorandum of understanding” (MOU), and that “there is no dispute that the Foundation, under the MOU, carries out fundraising on behalf of the University ....” Id. at 505. Furthermore, the East Stroudsburg court noted a decision of the Supreme Court of Iowa, which concluded that the public university in essence “contracted away” one of its functions – the ability to raise money and manage its finances.” Id. at 505, n.15 (citing Gannon v. Board of Regents, 692 N.W. 2d 31 (Iowa 2005)).

President Judge Leadbetter and Judge McCullough authored separate concurring opinions, agreeing that the request should be granted, but opining that the majority's interpretation was overly broad.<sup>4</sup>

Upon careful consideration of the parties' arguments and this Court's *en banc* opinion in East Stroudsburg, we affirm the decision of the OOR. Like East Stroudsburg, this matter involves a state university and its related non-profit foundation. A contract, in this case, The Lease, exists between the parties. There, however, the similarities end.

Unlike the fundraising in East Stroudsburg, providing housing for state university students would certainly be a "government function" if carried out by a state university itself. Conversely, a private entity could clearly engage in the construction and operation of private student housing completely free of governmental control. The mere fact that the occupants of the student housing attended a state university would not convert this "private function" into a "government function." Where the housing at issue is provided by the private

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<sup>4</sup> The present case comes close to a hypothetical posed by President Judge Leadbetter in her concurring opinion, which sought to illustrate that all contracts entered into by the government may not involve government functions. She stated:

"If a prison contracts with a private company to provide food service in one of its institutions, that would appear likely to encompass a government function, because prisoners must be fed. On the other hand, if [the state] contracts with a company to operate the cafeteria in the Capitol for the convenience of the general public and state employees, is that a government function?"

East Stroudsburg, 995 A.2d a5 508 (Leadbetter, P.J. concurring).

entity under contract with a state university, the terms of the contract must be examined to determine whether the private entity is engaging in a “government” or a “private” function.

The Lease here is a lengthy and detailed document consisting of 42 pages and multiple exhibits. R.R. 27-142. Had Edinboro merely leased the ground and allowed the foundation to construct and manage the housing, it is quite possible that the only “public record” might be the lease itself. This Lease, however, governs in considerable detail what can be built and how it must be built. Edinboro maintains considerable control over the entire project, including details of its design, construction and maintenance, and upon termination of the lease, it becomes the owner of the building. Accordingly, we agree with OOR that construction of the housing project by the Foundation is a “government function.”<sup>5</sup>

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<sup>5</sup> Section 506(d)(1) of the RTKL only requires disclosure of records that are “directly related” to the government function. In Allegheny Department of Administrative Services v. A Second Chance, Inc., 13 A.3d 1025 (Pa. Cmwlth. 2011), the Commonwealth Court remanded a similar request involving a non-governmental entity found to be performing a “government function” for a determination of whether the information sought was “directly related” to the government function. Here, no party has argued that the information sought is not “directly related” to the government function at issue. Comparing the request with the Lease, however, it is clear that all of the material requested is directly related to a term of the Lease and, therefore, is “directly related” to the “government function.” See Buehl v. Office of Open Records, 6 A.3d 27 (Pa. Cmwlth. 2010)(records beyond the parameters of the contract not accessible under Section 506(d)).

Additionally, having found that the material requested is “directly related to a government function,” we find no merit to Edinboro’s argument that the information is not a “public record.”

Accordingly, the order of the Office of Open Records is affirmed.

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Barry F. Feudale, Senior Judge



