

JOHN SCOTT.

V.

No. 1553 C.D. 2011

Respondent/Cross Petitioner

V.

Cross Respondent

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CROSS PETITION FOR REVIEW

1. Pursuant to Section 1301 of the Pennsylvania Right to Know Law (“RTKL”), 65 P.S. § 1301, and Pa. R.A.P. 1512(a)(2), Cross Petitioner Delaware Valley Regional Planning Commission (“DVRPC”) hereby petitions this Court to review the Final Determination of the Office of Open Records, dated July 20, 2011.

STATEMENT OF JURISDICTION

2. This Court has appellate jurisdiction over this matter pursuant to 65 P.S. § 67.1301(a).

PARTIES

3. Cross Petitioner, DVRPC is a Metropolitan Planning Organization established by federal law. 23 U.S.C. § 134. Specifically, DVRPC is an interstate compact between the Commonwealth of Pennsylvania and the State of New Jersey. *See* 73 P.S. § 701 (Delaware Valley Urban Area Compact).

4. Petitioner and Cross Petition Respondent John Scott is a citizen of the Commonwealth of Pennsylvania who resides in Southampton, Bucks County, Pennsylvania, and who is member and representative of the Pennsylvania Transit Expansion Coalition (PA-TEC)

GOVERNMENTAL UNIT WHICH MADE THE ORDER SOUGHT TO BE REVIEWED

5. The Office of Open Records (“OOR”), a quasi-judicial agency of the Commonwealth of Pennsylvania, 65 P.S. § 67.1310, is the governmental unit which made the final determination sought to be reviewed.

ORDER SOUGHT TO BE REVIEWED

6. On July 20, 2011, the Office of Open Records issued a final determination which, *inter alia*, required DVRPC to produce certain records to Scott, in reliance on OOR's finding that DVRPC is a Commonwealth Agency. *Scott v. DVRPC*, Docket No. AP 2011-0428, 2011 WL 3020628. Pursuant to Pa. R.A.P. 1513(d), OOR's final determination is attached to this petition for review as "Exhibit 1."

7. By way of relevant background, on April 1, 2011, Scott submitted a request to DVRPC, which sought:

All email records in the possession of Commission meeting the following specific criteria:

1. E-mail records that originated from, or were sent to the following specific dvrpc.org e-mail addresses:
csnyder@dvrpc.org
bseymour@dvrpc.org
jhacker@dvrpc.org
rbickel@dvrpc.org
dshanis@dvrpc.org
2. E-mail records that were received from or sent to the following specific e-mail addresses:
[personal e-mail address redacted]
[personal e-mail address redacted]

Date Range: April 15, 2010 to March 31, 2011.

8. On April 4, 2011, DVRPC denied the April 1, 2011 request, based on the grounds that the request was overly broad and the requested records were exempt from the RTKL pursuant to 65 P.S. §708(b)(10).

9. Scott appealed DVRPC's denial of the April 1, 2011 request.

10. DVRPC defended its denial on appeal, based in relevant part on its belief that DVRPC is not an agency subject to the RTKL. On appeal, DVRPC also asserted that Scott's

request was overly broad, repetitive and disruptive, and sought records that were exempt as predecisional under 65 P.S. § 67.708(b)(10).

11. In the course of the appeal proceedings, DVRPC submitted thirty-eight (38) records consisting of all potentially responsive e-mail communications within its possession for *in-camera* inspection by OOR.

12. On July 20, 2011, OOR issued a Final Determination on Mr. Scott's appeal, holding that eight of the records submitted for *in camera* inspection were to be disclosed (with portions of one record redacted), and the remainder were exempt from disclosure as predecisional deliberations.

13. DVRPC delivered copies of the eight records to Mr. Scott as directed by the Final Determination.

14. The OOR specifically held that DVRPC did not need to take any further action with regard to the April 1 request.

15. OOR required DVRPC to produce records based on its finding that DVRPC is a "Commonwealth agency," subject to the RTKL. *See* Exhibit 1, Final Determination at 4. (citing *Iverson v. DVRPC*, OOR Dkt. AP 2011-0572, 2011 WL ____).

OBJECTIONS TO THE DETERMINATION

16. The OOR erred as a matter of law by determining that the DVRPC is a Commonwealth Agency subject to the RTKL.

17. The question of whether DVRPC is subject to the requirements of the RTKL is a jurisdictional issue that turns purely on the construction of the statutory definitions of "Commonwealth Agency" and "Local Agency" in the Right-to-Know-Law, 65 P.S. § 67.102, which this Court has plenary power to review.

18. DVRPC asserts that it is neither a Commonwealth Agency nor a Local Agency as those terms are defined by the RTKL, 65 P.S. § 67.102, and it is therefore, not subject to the provisions of the RTKL.

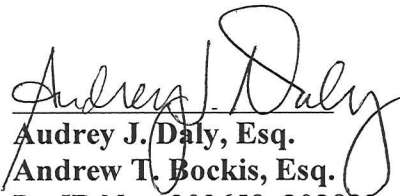
19. DVRPC is not a Commonwealth Agency because it serves only in an advisory capacity and performs no essential government function. See 65 P.S. § 67.102; *see also SAVE, Inc. v. DVRPC*, 819 A.2d 1235 (Pa. Cmwlth. 2003) (holding that DVRPC performs no essential government function and was, therefore, not subject to the provisions of the former Right to Know Act).

20. DVRPC is a metropolitan planning organization, created by federal law, 23 U.S.C. § 134, and a multi-state commission, and it does not meet the definition of a “Local Agency” under the RTKL. *See* 65 P.S. § 67.102

RELIEF SOUGHT

Wherefore, DVRPC prays the Court to reverse the final determination of the Office of Open Records to the extent that it requires DVRPC to produce records in its possession, and enter an order holding that DVRPC is not an agency as defined by 65 P.S. § 67.102, and is therefore, not required to disclose records in response to requests under the Right to Know Law.

Respectfully submitted,



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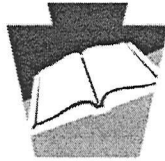
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DATED: September 6, 2011

EXHIBIT A



pennsylvania

OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF

JOHN SCOTT,
Complainant

v.

DELAWARE VALLEY REGIONAL
PLANNING COMMISSION,
Respondent

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Docket No.: AP 2011-0428

INTRODUCTION

John Scott (the "Requester") submitted a request (the "Request") to the Delaware Valley Regional Planning Commission ("Commission") seeking e-mails pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, ("RTKL"). The Commission denied the Request, stating the records are predecisional. The Requester appealed to the Office of Open Records ("OOR"). For the reasons set forth in this Final Determination, the appeal is **granted in part** and **denied in part** and the Commission is not required to take any further action.

FACTUAL BACKGROUND

On April 1, 2011, the Request was filed, seeking

all email records in the possession of Commission meeting the following specific criteria:

1. E-mail records that originated from, or were sent to the following specific dvrpc.org e-mail addresses:
csnyder@dvrpc.org
bseymour@dvrpc.org
jhacker@dvrpc.org
rbickel@dvrpc.org
dshanis@dvrpc.org
2. E-mail records that were received from or sent to the following specific e-mail addresses:
jim663@live.com
jim_663@msn.com
aissia.richardson@gmail.com

Date Range: April 15, 2010 to March 31, 2011.

On April 4, 2011, the Department denied the Request, stating that the Request was “overly broad” and that the records are exempt pursuant to 65 P.S. § 67.708(b)(10).

On April 11, 2011, the Requester appealed to the OOR, alleging that communications between the Commission and the public should be considered public records. The OOR invited both parties to supplement the record. On April 21, 2011, the Commission provided a position statement, along with a supporting notarized affidavit from its Director affirming her transmission of the correspondence to the Requester and her familiarity with the factual background underlying the appeal. The Commission – for the first time on appeal – alleged that it is not an agency subject to the RTKL and that the Request should be considered disruptive under 65 P.S. § 67.506(a). The Requester also supplemented the record on April 21, 2011 with an unsworn letter challenging the reasons for denying access to responsive records.

On May 11, 2011, the OOR confirmed the Requester’s agreement to allow the OOR additional time for the issuance of a Final Determination pursuant to 65 P.S. § 67.1101(b). In accordance with Section IV(D) of the OOR Interim Guidelines, the OOR, *sua sponte*, directed the Commission to provide all withheld records for *in camera*

inspection. On June 9, 2011, the Commission identified thirty-eight (38) withheld records through an In Camera Inspection Index, and provided a notarized affidavit regarding the truthfulness of the provided records and transmission of a copy of the In Camera Inspection Index to the Requester. The Commission submitted all withheld records for *in camera* inspection. On June 10, 2011, the Requester submitted an additional statement objecting to the wording of the Commission's cover letter and requesting a hearing.

On June 16, 2011, the OOR provided a certificate of nondisclosure to the Commission and sought additional information regarding the asserted exemption. On June 23, 2011, the Commission submitted an additional affidavit and an index identifying the senders, recipients and affiliation of individuals. On June 28, 2011, the OOR denied the Requester's request for a hearing.

LEGAL ANALYSIS

The RTKL is "designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials and make public officials accountable for their actions." *Bowling v. OOR*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010). The OOR is authorized to hear appeals for all Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). An appeals officer is required "to review all information filed relating to the request." 65 P.S. § 67.1102(a)(2). An appeals officer may conduct a hearing to resolve an appeal. The decision to hold a hearing or not hold a hearing is discretionary and non-appealable. *Id.* The law also states that an appeals officer may admit into evidence testimony, evidence and documents that the appeals officer believes to be reasonably probative and relevant to an issue in dispute. *Id.* Here,

the OOR has the necessary, requisite information and evidence before it to properly adjudicate the matter.

In *Iverson v. DVRPC*, OOR Dkt. AP 2011-0572, 2011 PA O.O.R.D. LEXIS ___, the OOR determined that the Commission is a Commonwealth agency subject to the RTKL. Local and Commonwealth agencies are required to disclose public records. *See* 65 P.S. §§ 67.301-67.302. Records in possession of such agencies are presumed public unless exempt under the RTKL or other law or protected by a privilege, judicial order or decree. *See* 65 P.S. § 67.305. An agency bears the burden of proving the applicability of any cited exemptions. *See* 65 P.S. § 67.708(b).

Section 708 of the RTKL clearly places the burden of proof on the public body to demonstrate that a record is exempt. In pertinent part, Section 708(a) states: “(1) The burden of proving that a record of a Commonwealth agency or local agency is exempt from public access shall be on the Commonwealth agency or local agency receiving a request by a preponderance of the evidence.” 65 P.S. § 67.708(a). Preponderance of the evidence has been defined as “evidence which as a whole shows that the fact sought to be proved is more probable than not.” BLACK’S LAW DICTIONARY 1064 (8th ed.); *see also Commonwealth v. Williams*, 567 Pa. 272, 786 A.2d 961 (2001).

As a threshold matter, the Commission initially denied the Request on the basis of 65 P.S. § 67.708(b)(10), but, on appeal, also alleged that it is not an agency subject to the RTKL and, even if is an agency, the Request should be considered disruptive under 65 P.S. § 67.506(a). In *Signature Information Solutions, LLC v. Aston Township*, an agency gave an initial reason for denying access to responsive records in its timely response, but, on appeal to the OOR, offered additional grounds. 995 A.2d 510 (Pa. Commw. Ct.

2010). In analyzing whether an agency may raise new grounds on appeal, the Commonwealth Court held that “section 1102(a) of the Law does not permit an agency that has given a specific reason for a denial to assert a different reason on appeal. Section 1102(a) of the Law permitted the [agency] only to submit documents in support of its stated position.” 995 A.2d at 514.

Therefore, the OOR finds that the Commission is precluded from arguing on appeal that the Request was disruptive, as it did not raise this reason in its initial response. While the issue of whether the Commission should be considered an agency, is a jurisdictional question, the OOR has previously determined that the Commission is an Commonwealth agency subject to the RTKL in *Iverson v. DVRPC*, OOR Dkt. AP 2011-0572, 2011 PA O.O.R.D. LEXIS ___. As such, the OOR need not address the Commission’s assertions regarding its status as a non-agency here.

1. Certain e-mail communications constitute records under the RTKL

The RTKL provides that records reflecting the “internal, predecisional deliberations” of an agency may be withheld from public access. *See* 65 P.S. § 67.708(b)(10). In order for this exemption to apply, three elements must be satisfied: 1) the deliberations reflected are “internal” to the agency; 2) the deliberations reflected are predecisional, i.e., before a decision on an action; and 3) the contents are deliberative in character, i.e., pertaining to proposed action. *See Martin v. Warren City Sch. Dist.*, OOR Dkt. AP 2010-0251, 2010 PA O.O.R.D. LEXIS 285; *PHFA v. Sansoni*, OOR Dkt. AP 2010-0405, 2010 PA O.O.R.D. LEXIS 375; *Kyle v. DCED*, OOR Dkt. AP 2009-0801, 2009 PA O.O.R.D. LEXIS 310.

In the present case, the OOR conducted an *in camera* review of all withheld records. Based on a review of the materials provided, the Commission did not establish that Records 1, 3 and 4 are “internal” to the Commission. Because the OOR finds that these records are not internal, they must be available for public access. The OOR finds that the remaining records are internal to the Commission.

The following records, however, do not meet either of the remaining two elements: Records 17, 18, 25 and 27. As a result, the OOR finds that these records are subject to public access in their entirety. Additionally, the OOR finds that the portion of Record 34 sent by Richard Weidner is subject to public access but that the remainder may be redacted pursuant to 65 P.S. § 67.706.

An *in camera* review of the remaining records reveals that each of these records meet all three elements as required by 65 P.S. § 67.708(b)(10). As a result, the OOR finds that the Commission has established that the remaining records may be withheld from public access.

CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted in part** and **denied in part** and the Commission is required to provide Requester with Records 1, 3, 4, 17, 18, 25, 27 and 34 within thirty (30) days. Portions of Record 34 may be redacted as described above. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may appeal to the Commonwealth Court. 65 P.S. § 67.1301. All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond

according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

FINAL DETERMINATION ISSUED AND MAILED: July 20, 2011

A handwritten signature in black ink, appearing to read 'J. Schnee', written over a horizontal line.

APPEALS OFFICER
J. CHADWICK SCHNEE, ESQ.

Sent to: John Scott; Candice Snyder

PROOF OF SERVICE

The undersigned hereby certifies that on September 6, 2011, the forgoing Petition for Review was served by certified mail, in compliance with the requirements of Pa. R.A.P. 121 and 1514(c), upon the following:

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