



pennsylvania
OFFICE OF OPEN RECORDS

FINAL DETERMINATION

IN THE MATTER OF	:	
	:	
PAUL IVERSON AND PENNSYLVANIA	:	
TRANSPORTATION EXPANSION	:	
COALITION,,	:	
Complainant	:	
	:	Docket No.: AP 2011-0572
v.	:	
	:	
DELAWARE VALLEY REGIONAL	:	
PLANNING COMMISSION,	:	
Respondent	:	

INTRODUCTION

Paul Iverson, on behalf of the Pennsylvania Transportation Expansion Coalition (“PA-TEC”) (collectively, the “Requester”) submitted a 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 as disruptive and seeking records that 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** and the Commission is required to take further action.

FACTUAL BACKGROUND

On April 13, 2011, the Request was filed, seeking

all email records in the possession of [Commission] that meet the following criteria:

1. Drafted, sent or received from mailboxes in use by the following employees:
 - Joseph Hacker
 - Barry Seymour
 - Candice Snyder
2. Email records that contain the following subject term in the subject line or body: Jenkintown
3. Date Range: January 14, 2010 to July 26, 2010

(“Request”). On April 19, 2011, the Department denied the Request, stating that it was disruptive under 65 P.S. § 67.506(a) and that the records are exempt pursuant to 65 P.S. § 67.708(b)(10).

On May 5, 2011, the Requester appealed to the OOR, alleging the records are public as communications regarding projects involving the Commission in the municipality and that the records were not previously requested. The OOR invited both parties to supplement the record.

On May 17, 2011, the Commission provided a position statement asserting — for the first time on appeal — that it is not an agency subject to the RTKL. The Commission contends it is a Metropolitan Planning Organization (“MPO”) established by federal law, 23 U.S.C. § 134, and the Delaware Valley Urban Area Compact between Pennsylvania and New Jersey, 73 P.S. § 701, and is an advisory agency only. The Commission asserts it is not a Commonwealth agency under the RTKL, citing *SAVE, Inc. v. DVRPC*, 819 A.2d 1235 (Pa. Commw. Ct. 2003). It admits that *SAVE* was decided under the former Right-to-Know Law, 65 P.S. §§ 66.1 *et seq.* (“Old Law”) but contends the holding supports a finding that the Commission is not a Commonwealth agency under the current RTKL because the Commission is not “of the executive branch” and

does not perform an “essential governmental function.” Further, the Commission argues it is not a Local agency, either because a Local agency, as defined in the RTKL, cannot be a multistate commission.

The Requester responded, challenging the Commission’s contention that it was neither a Commonwealth nor Local agency and asserting the Commission is an Independent agency. The Commission responded, asserting the OOR has determined that an Independent agency must perform an “essential government function,” citing *Baker v. PEBFT*, OOR Dkt. AP 2009-0608, 2009 PA O.O.R.D LEXIS 82 which, as determined by Commonwealth Court in *SAVE*, the Commission does not.

As to its grounds for denial, the Commission reiterated its position that the Request should be considered disruptive under 65 P.S. § 67.506(a) because the same or similar records had been previously and repeatedly requested by representatives of PA-TEC and denied as protected by the predecisional deliberations exemption. The Commission provided an Affidavit of Candace Snyder, Director, Office of Communications and Public Affairs for the Commission, stating that the Requester submitted a request on November 15, 2010 seeking

All records between [the Commission] and [the citizen volunteer] of the [Commission’s] Regional Citizens Committee, between 06/01/2010 and 11/15/2010. Records shall include, but not be limited to E-mail records, pertaining to communications or meetings of said parties...

She attests that, on December 7, 2010, the Requester filed another request seeking

all email records between DVRPC staff and/or Board and [citizen volunteer] on matters related to the Jenkintown-Wyncote parking garages, the Fox Chase-Newtown Line (R8), actions from the Regional Citizens Committee that recommend a moratorium on parking garages, and a recommendation from the RCC to adopt a study of transportation improvements in the Northern Philadelphia suburbs as part of the Work Program.

Ms. Snyder attests that PA-TEC (through John Scott) requested copies of records on the same subject matter on March 8, 2011. She states that, on April 1, 2011, Mr. Scott, on behalf of PA-TEC, also sought email correspondence from April 15, 2010 to March 1, 2011 among a number of Commission staff including the three staff whose records are sought in the instant Request with identified RCC citizen volunteers (“April 1 Request”), which was denied and subsequently appealed to the OOR at docket AP 2011-0428. Ms. Snyder attests that on April 13, 2011, Mr. Iverson, also on behalf of PA-TEC, filed the instant Request, which allegedly is a subset of the information sought in the April 1 Request. The Commission’s position is that Mr. Iverson and Mr. Scott are affiliated with the same organization and making the repeated requests on behalf of PA-TEC, citing *Slate v. DEP*, OOR Dkt. 2010-1143, 2010 PA O.O.R.D. LEXIS 97. She contends the various requests deal with the same records and are therefore repeated requests.

Ms. Snyder further attests that the repeated requests are disruptive because the Commission has responded in similar fashion to the requests over the past seven months, citing *Dreyer v. DEP*, OOR Dkt. AP 2009-0453, PA O.O.R.D. LEXIS 97; *Cohen v. Dept. of Labor and Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 169 and *Dougher v. Scranton*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318. Ms. Snyder states that the repeated requests have had a “chilling effect on the citizen volunteers” who are the subject of the requests. She expressed concern that “[i]f the result of the repetitive, disruptive requests, targeting communications with citizens who are not employed by [the Commission] is to drive informed, hard working, conscientious volunteers away, then an enormous injustice will have been done” because the Commission relies on participation of citizen volunteers to formulate policy recommendations.

The OOR confirmed the Requester's agreement to permit the OOR additional time for the issuance of a Final Determination pursuant to 65 P.S. § 67.1101(b) in order to allow further development of the record relative to the Commission's status under the RTKL.

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.

The threshold issue in this case is whether the Commission should be considered an 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 an agency 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) and alleged that the Request should be considered disruptive under 65 P.S. § 67.506(a). On appeal, the Commission alleged that it is not an agency subject to the RTKL. 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.

The issue of whether the Commission should be considered an agency, however, is a jurisdictional question, as the OOR only retains authority to review decisions of Commonwealth and local agencies. *See* 65 P.S. § 67.503(a). The issue of whether the OOR may properly adjudicate a denial of access by particular entity is a matter of subject matter jurisdiction, and, accordingly, may be raised at any time. *See Commonwealth v. Locust Twp.*, 968 A.2d 1263,

1269 (Pa. 2009) (quoting *Mazur v. Trinity Area School Dist.*, 961 A.2d 96, 101 (Pa. 2008)). As a result, the OOR must assess whether the Commission is an agency subject to the RTKL.

1. The Commission is a Commonwealth agency

The Commission argues that the Commonwealth Court determined that the Commission is not an agency subject to the former Right-to-Know Law, 65 P.S. §§ 66.1 *et seq.* (“Old Law”). See *SAVE, Inc. v. Commission*, 819 A.2d 1235 (Pa. Commw. Ct. 2003). In that case, the court conducted an analysis of whether, as a threshold matter, the case was properly within the court’s jurisdiction. *Id.* at 1237-41. The court concluded that, for jurisdictional purposes,

[o]ur review of the [Delaware Valley Urban Area Compact, 73 P.S. § 701] ... demonstrates the legislative intent to create the Commission as an integral part of the Commonwealth. The Commission, however, does not fall within the definition of “an executive agency” under *Section 102* of the Judicial Code because the Commission is not subject to the direct policy supervision or control of the Governor. The Commissioners include not only two legislative members and the representatives from the participating counties and the cities. The Commission makes its own bylaws, rules and regulations and makes its own personnel decisions. The Commission is therefore “an independent agency.” Hence, the Commission falls within the definition of a Commonwealth agency...

Id. at 1240.

While the court found that the Commission was a Commonwealth agency for jurisdictional purposes, it determined that the Commission was not “an agency” as defined by the Old Law. The Old Law defined an agency, among other things, as an “organization created by or pursuant to a statute which declares in substance that such organization performs or has its purpose the performance of an essential governmental function.” 65 P.S. § 66.1 (repealed). Accordingly, the court concluded that “[b]ecause the [Commission] performs its duties only in an advisory capacity under its enabling statute, it cannot be considered an organization performing ‘essential’ services,” and, as a result, held that Commission “is not an organization

performing an essential governmental function to qualify as ‘an agency subject to the disclosure requirement of the [Old Law].’ *Id.* at 1242.

The current RTKL “is significantly different” than the Old Law in a number of important aspects. *Bowling*, 990 A.2d at 823. Among other revisions, the RTKL eliminated the requirement that an entity perform an essential governmental function in order to be considered an agency. *Compare* 65 P.S. § 67.102, *with* 65 P.S. § 66.1 (repealed). The RTKL defines a Commonwealth agency as “Any office, department, authority, board, **multistate agency or commission of the executive branch; an independent agency**; and a State-affiliated entity.” 65 P.S. § 67.102 (emphasis added). The Commission provided a position statement, supported by affidavit, that it is not “of the executive branch.” Based on the court’s holding in *SAVE* and the materials provided by the Commission, the OOR finds that the Commission is not “of the executive branch” due to the Governor’s lack of control and supervision over the Commission’s activities.

The Commonwealth Court, however, held that the Commission is an “independent agency” pursuant to 42 Pa.C.S. § 102. This section of the Judicial Code defines an “independent agency” as

Boards, commissions, authorities and other agencies and officers of the Commonwealth government which are not subject to the policy supervision and control of the Governor, but the term does not include any court or other officer or agency of the unified judicial system or the General Assembly and its officers and agencies.

42 Pa.C.S. § 102. The RTKL defines an “independent agency,” in relevant part, as “Any board, commission or other agency or officer of the Commonwealth, that is not subject to the policy supervision and control of the Governor.” 65 P.S. § 67.102. The OOR finds these two definitions essentially indistinguishable. Because the RTKL has expanded the definition of

agencies to include entities that may not perform an “essential governmental function,” the OOR finds that the Commission is an independent agency. Because independent agencies are defined as being Commonwealth agencies under 65 P.S. § 67.102, the OOR finds that the Commission is a Commonwealth agency subject to the RTKL.¹

2. The Request is Not Disruptive

“An agency may deny a requester access to a record if the requester has made repeated requests for that same record and the repeated requests have placed an unreasonable burden on the agency.” 65 P.S. § 67.506(a)(1). “Under this section ... an agency must demonstrate that (1) ‘the requester has made repeated requests for th[e] same record[(s)]’ and (2) ‘the repeated requests have placed an unreasonable burden on the agency.’” *Office of the Governor v. Bari*, 20 A.3d 634, *27 (Pa. Commw. Ct. 2011); see *Slate v. DEP*, OOR Dkt. AP 2009-1143, 2010 PA O.O.R.D. LEXIS 97 (“A repeated request alone is not enough to satisfy § 506(a)(1)”). The OOR has held that repeated requests for the same records, although phrased differently, may be denied as disruptive. See *Cohen v. Dept. of Labor & Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; *Dougher v. Scranton*, OOR Dkt. AP 2009-0798, 2009 PA O.O.R.D. LEXIS 318 (“Slight differences in phraseology do not preclude application of [Section 506(a)]”).

Here, the Request was made by a representative of PA-TEC seeking emails of three Commission employees with the term “Jenkintown” in the subject or body drafted, sent or received between January 14, 2010 and July 26, 2010. “When an employee makes a request on

¹ Further, the OOR notes that *Baker* did not find that an agency must perform an essential governmental function in order to be considered an independent agency. Rather, *Baker*, relying on precedential case law as to a PEBTF’s status, found that PEBTF was not a Commonwealth agency, independent agency or State-Affiliated agency for a variety of reasons, including the fact that it did not perform an essential governmental function. Further, *Baker* is not applicable to the present case because, unlike PEBTF, the Commission has already been held to be an Independent agency as that term has been interpreted by the Commonwealth Court.

behalf of an employer, a subsequent request for the same records by a different employee of that employer is a repeated request under the RTKL.” *Slate*, 2010 PA O.O.R.D. LEXIS 97. The Commission provides evidence that a number of previous requests made by the same or a different representative of PA-TEC on behalf of PA-TEC seek similar records during similar time frames. Therefore, the OOR finds that the requests were made by the same requester. However, none of the previous requests seek emails with the term Jenkintown. While it is conceivable that some of the records requested in the instant Request may also be those sought in the prior requests for emails between Commission employees and citizen volunteers, there is no evidence that all of the responsive emails containing the term Jenkintown are those that were sent between Commission employees and citizen volunteers that were previously denied. In the cases cited by the Commission, the requests were deemed disruptive where the requester had repeatedly made the same request (with a minor variation in language) for the same records, not just records related to the same subject.

Here, the requests are sufficiently different to find that they are not seeking the same records despite the similarity in subject. To find that a requester is making a repeat request simply because he is seeking records that pertain to a similar subject as those previously requested would place an unreasonable burden on a requester to have first-hand knowledge as to the existence of all responsive records prior to making a request. Because the Commission did not establish that the Request seeks the same records as those previously sought by the Requester, the Commission did not establish that the Request was “repeated.” Further, based on the materials provided, the Commission also did not establish that the Request was “unreasonably burdensome.” *Office of the Governor*, 20 A.3d 634 at *27-28. Consequently, the OOR finds that the Request was not disruptive under 65 P.S. § 67.506(a).

3. The Commission does not establish that the Predecisional Deliberations Exemption applies

Pursuant to Section 708(b)(10)(i)(A), a record reflecting the

internal, predecisional deliberations of an agency ... or predecisional deliberations between agency members, employees or officials ... including predecisional deliberations relating to a ... contemplated or proposed policy or course of action ... or other documents used in the predecisional deliberations

are protected from disclosure. 65 P.S. § 67.708(b)(10)(i)(A). The OOR consistently holds that an agency must show three elements to substantiate this exception: (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 and/or policy-making. *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 its initial denial, the Commission asserts the Request is “too broad” and that it must therefore “assume that the emails referenced in [the Request] are pre-decisional.” While the Request may encompass a large number of records, the number of responsive records is not grounds to deny a request or fail to process the request. *Carter v. Philadelphia Sheriff’s Office*, OOR Dkt. AP 2009-0175, 2009 PA O.O.R.D. LEXIS 23. The Commission provides no evidence to support the assertion that the responsive emails are predecisional. Rather, on appeal, it relies solely on its assertion that the Request is disruptive. Therefore, the OOR cannot find that the Commission has met its burden to prove the emails containing the word Jenkintown are protected by the predecisional deliberations exemption.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted** and the Commission is required to provide responsive e-mails to the Requester within thirty (30) days. 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 19, 2011



APPEALS OFFICER
AUDREY BUGLIONE, ESQ.

Sent to: Paul Iverson; Candice Snyder