

August 3, 2011

Via E-mail to CharleBrow@state.pa.us

Charles Reese Brown, Esquire, Appeals Officer
Commonwealth of Pennsylvania
Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

**RE: *Scott v. Delaware Valley Regional Planning Commission*
OOR Dkt. AP 2011-1014**

Dear Mr. Brown:

I am the Director, Office of Communications and Public Affairs, of the Delaware Valley Regional Planning Commission (“DVRPC”). On July 29, 2011, DVRPC received a copy of the notice of the Office of Open Records (“OOR”) dated July 26, 2011 in this matter. In accordance with the foregoing, DVRPC takes this opportunity to supplement the record in this matter, with a copy to John Scott (the “Requester”).

By way of background, DVRPC is a Metropolitan Planning Organization (“MPO”) 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).

DVRPC serves as an advisory agency only. Although DVRPC’s purpose is to undertake continuing, comprehensive, coordinated planning for the orderly growth and development of the region, DVRPC does not have actual authority for carrying out its planning proposals. Actual authority rests in the governing bodies of the Commonwealth of Pennsylvania, State of New Jersey, its twelve member counties and cities and the three transit operating agencies. *See* 73 P.S. § 701, Part I, Article III, § 2 (Duties of Commission) (“The commission shall serve as an advisory agency, with actual authority for carrying out planning proposals continuing to rest in the governing bodies of the states and counties.”).

Requester seeks records pertaining to an annual retreat, held on the morning of September 23, 2010, which DVRPC staff organized and conducted for the benefit of DVRPC Board members. As I stated in my response to the Requester dated July 7, 2011, copy attached hereto as Exhibit A, “The Annual Board Retreat, unlike the public board meeting, is a private

meeting involving guest speakers, unpublished presentations, and general discussion among the attendees. No formal actions are taken.” I provided to the Requester a copy of the invitation which DVRPC circulated to the invitees prior to the event. I also directed Requester to a link on the DVRPC website pertinent to the regular, publicly noticed Board meeting conducted during the afternoon following the Annual Board Retreat on September 23, 2010.

1. Applicability of Right To Know Law to DVRPC.

In a Final Determination dated July 19, 2011, OOR held that DVRPC is a Commonwealth Agency subject to the Right-to-Know Law. 65 P.S. § 67.102. See *Iverson v. Delaware Valley Regional Planning Commission*, OOR Dkt. AP 2011-0572, 2011 PA O.O.R. D. LEXIS__. Within thirty (30) days of the mailing date of the Final Determination, DVRPC may file a petition for review with the Commonwealth Court. 65 P.S. § 67.1301(a). Thus the period for DVRPC to consider such a filing is open.

In the interim, DVRPC respectfully invites OOR to reconsider whether DVRPC is an independent agency under the Right-to-Know Law and what is required of an independent agency under the Right-to-Know Law.

In *Iverson*, the OOR held that DVRPC is an “independent agency” as defined in the Right-to-Know Law. OOR relied on the Commonwealth Court’s decision in *SAVE, Inc. v. DVRPC*, 819 A.2d 1235 (Pa. Cmwlth. 2003) in making this determination. However, the Commonwealth Court in *SAVE* determined that DVRPC is an independent agency as defined in the Judicial Code, not the old Right to Know Act, which did not contain a definition of “independent agency.”

Although the definition of “independent agency” under the Judicial Code is similar to the definition of “independent agency” under the Right-to-Know Law, the definitions should not be used interchangeably. See *Valentine Co. v. Commonwealth*, 973 A.2d 1101, 1109 (Pa. Cmwlth. 2009) (“as the Pennsylvania Supreme Court has noted, ‘[a]n entity’s status as an agency or instrumentality [of the Commonwealth] varies, depending on the issue for which the determination is being made.’”) citing *Pennsylvania State University v. Derry Township School District*, 731 A.2d 1272, 1274 (Pa. 1999); see also *SAVE, Inc. v. DVRPC*, 819 A.2d 1235, 1238 (Pa. Cmwlth. 2003) (“an entity may be treated as a local agency for one purpose and a Commonwealth agency for another depending on the issue involved. For example, the Southeastern Pennsylvania Transportation Authority is a local agency on the issue of jurisdiction of the court, and an agency of the Commonwealth on the issue of sovereign immunity.”).

Further, the OOR in *Iverson* held that an independent agency (which is a subset of “Commonwealth agency”) need not perform an essential governmental function in order to be subject to the Right-to-Know Law. Specifically, the OOR expressly determined in *Iverson* that the new Right-to-Know Law eliminated the requirement that an entity perform an essential governmental function in order to be considered an agency. However, the *Iverson* decision fails to address the impact of sub-section (iii) of the definition of Commonwealth agency, which states, among other things, that a Commonwealth agency includes an organization established by

statute which performs an essential governmental function. 65 P.S. § 67.102. The *Iverson* decision merely states that an agency need not perform an essential governmental function to be considered a Commonwealth agency. However, that determination results in the language of sub-section (iii) being mere surplusage.

The language in sub-section (iii), which states that the definition of Commonwealth agency includes agencies that “perform an essential governmental function,” must be given some effect. Stated another way, if an agency need not perform an essential governmental function to be considered a Commonwealth agency, then why is the phrase even included in the Right-to-Know Law? The determination that an agency need not perform an essential governmental function to be considered a Commonwealth agency results in mere surplusage in the Right-to-Know Law. The Statutory Construction Act makes it clear that Legislative intent is not to create definitions that result in mere surplusage. 1 Pa. C.S. §1921(a); *UMCO Energy, Inc. v. DEP*, 938 A.2d 530, 535 (Pa. Cmwlth. 2007).

2. DVRPC has responded to the Requester.

DVRPC has been responsive to Requester and others affiliated with Requester in the Pennsylvania Transportation Expansion Coalition (“PA-TEC”). In this matter Requester, by request dated June 30, 2011 attached hereto as Exhibit B, seeks records in five broad categories.

First, Requester seeks “All advertising material or emailed or published content used to advertise, in advance, the time, date, subject and location of the "retreat" on or about 9/23/2010.” As noted in my response dated July 7, 2011, I provided a copy of the event invitation.

Second, Requester seeks:

“All email records sent from, copied to or received by the following individuals, between 6/22/2010 and 10/22/2010, and containing the keyword "retreat" in either the subject, body, or any attachment to an email:

Candy Snyder

Barry Seymour

Donald Shanis

[citizen name redacted]

Candy means Aissia Richardson and Jim Richardson

[citizen name redacted]”

With respect to the two citizens, DVRPC relies on the exemption contained at 65 P.S. § 67.708(b)(6)(i). The two individuals are private citizens who have served on a regional citizens committee and release of information personal to them, such as personal e-mail addresses, is, in our view, prudently excepted from access under the Right-to-Know Law. *Williams v. City of Johnstown*, OOR Dkt. No. AP 2001-0765, 2011 WL 2686473, at *5 (July 5, 2011).

With respect to the e-mail records of the three DVRPC staff, DVRPC relies on the exemption contained at 65 P.S. § 67.708(b)(10)(i)(A). The universe of e-mails examined indicates that all were internal to DVRPC; predecisional and deliberative. The records were internal in that all of the emails of the three DVRPC staff cited during the subject period containing the keyword “Retreat” were either sent to or received from other DVRPC staff or Board members. The records were pre-decisional in that they involved decisions only about the preparation for the Annual Board Retreat; **no public actions or decisions were considered or made at the Annual Board Retreat**; the regular Board meeting which followed was a public meeting and Requester was directed to the notices, agenda and minutes of the Board meeting. The records were deliberative in that they involved the **proposed** Annual Board Retreat but again, no public actions or decisions were considered or made at the Annual Board Retreat.

Both the exemptions cited above were stated in my response to Requester.

Third, Requester seeks “...copies of an agenda for this retreat, if one was created, and agendas for each meeting that was conducted.” Fourth, Requester seeks “copies of attendance records for each meeting that occurred (public and private) during this retreat”. Fifth, Requester seeks “...copies of all estimates, invoices, or contracts relating to this retreat”. DVRPC views those requests as repetitious of both the first request, to which DVRPC responded by providing a record as well as the second request. With respect to Requester’s third, fourth and fifth requests DVRPC relies on the exemption contained at 65 P.S. § 67.506(a), cited in my response to Requester.

Requester and others affiliated with PA-TEC have made numerous requests of DVRPC, chronicled in several matters recently decided at OOR that revolve around the same citizen volunteers and the regional citizens committee. This instant request is, in our view, less about an Annual Board Retreat, a non-public event at which no actions were taken, and more about Requester’s interest in the regional citizens committee and the citizen volunteers whose e-mail records he seeks in the second request dated June 30, 2011.

Section 506(a)(1) states:

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)

In another matter, Requester requested the following records:

“1. E-mail records that originated from, or were sent to the following specific dvrpc.org e-mail addresses:

csnyder@dvrpc.org

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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:

[e-mail addresses of the two citizen volunteer are redacted]"

The record in that matter is summarized in *Scott v. Delaware Valley Regional Planning Commission*, OOR Dkt. AP 2011-0428, 2011 PA O.O.R. D. LEXIS ___, decided July 19, 2011, appeal granted in part, denied in part.

Notwithstanding the holding by OOR in *Iverson*, DVRPC submits that the standards set forth in *Dreyer v. DEP*, OOR Dkt. AP 2009-0453, PA O.O.R.D. LEXIS 97; *Cohen v. Department of Labor & Industry*, OOR Dkt. AP 2009-0296, 2009 PA O.O.R.D. LEXIS 159; and *Dougher v. Scranton*, 2009-0798, 2009 PA O.O.R.D. LEXIS 318, for determining whether repetitive requests impose an unreasonable burden have been met. The Requestor's request is another iteration of previous requests. This request imposes an unreasonable burden on DVRPC because it burdens DVRPC with yet another request for records for which DVRPC has already responded to.

On July 7, 2011 I responded on behalf of DVRPC in this matter, providing a record responsive to the first request and the basis for denial of the other requests.

3. DVRPC requests that OOR deny and dismiss Requester's Appeal.

For the reasons set forth above, DVRPC requests that OOR dismiss and deny the appeal of Requester in this matter and find that DVRPC has been responsive to his requests and that he, by his organization, has engaged in a pattern of repetitive, disruptive conduct.

Respectfully submitted,



Candace Snyder

Director, Office of Communications and Public Affairs

cc: Mr. John Scott
Mr. Barry Seymour