



**pennsylvania**  
OFFICE OF OPEN RECORDS

**FINAL DETERMINATION**

<b>IN THE MATTER OF</b>	:	
	:	
<b>JON FREY,</b>	:	
<b>Complainant</b>	:	
	:	<b>Docket No.: AP 2011-0709</b>
<b>v.</b>	:	
	:	
<b>DELAWARE VALLEY REGIONAL</b>	:	
<b>PLANNING COMMISSION,</b>	:	
<b>Respondent</b>	:	

**INTRODUCTION**

Jon Frey (the “Requester”) submitted a request (the “Request”) to the Delaware Valley Regional Planning Commission (“Commission”) seeking records related to a Public Participation Plan pursuant to the Right-to-Know Law, 65 P.S. §§ 67.101 *et seq.*, (“RTKL”). The Commission responded to the Request by directing the Requester to its website. 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 as directed.

**FACTUAL BACKGROUND**

On May 16, 2011, the Request was filed, stating

Public Participation Plan

1. Records of the original submission of the Public Participation Plan (PPP) to any outside agencies.

2. Records of the publication of the PPP to the [Commission's] website, including all communications with the webmaster.
3. All revisions to the PPP.
4. All communications notifying outside agencies that the PPP is no longer in force.
5. The RCC by-laws mentioned on the [Commission's] website, as of 5/15/2011

On May 16, 2011, the Commission acknowledged receipt of the Request and, on May 19, 2011, responded by directing the Requester to its website.

On May 24, 2011, the Requester appealed to the OOR, alleging that the Commission's website did not contain any responsive records and stating grounds for disclosure. The Requester also argued that the Commission is a Commonwealth agency subject to the RTKL. The OOR invited both parties to supplement the record. On June 6, 2011, the Commission provided a position statement, along with an affidavit signed under penalty of perjury from the Commission's Director of the Office of Communications and Public Affairs as to the factual content of its position statement. The position statement alleged that the Commission is not an agency subject to the RTKL and that the Commission "responded [to the Request] to the best of our ability."<sup>1</sup> The Commission also attached its submissions made in various other appeals. On June 6, 2011, the Requester also submitted additional correspondence.

On June 20, 2011, the confirmed the Requester's agreement to allow the OOR an extension of time for the issuance of a Final Determination in this appeal.

### **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

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<sup>1</sup> The Commission also alleged that the Requester failed to provide a copy of the Commission's response as part of his appeal. The OOR, however, received a copy of the Commission's response in the Requester's initial appeal filing.

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, neither party requested a hearing and 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).

In the present case, the Requester alleges that he did not receive any responsive records to his Request and that the Commission’s website did not contain any responsive records. In its verified position statement, the Commission alleges that the records on its website “represent the documents determined to be available at this time” and that it has “responded to the best of our ability.” The OOR finds that the Commission’s statement does not address the Request as to the particular records sought, nor does it demonstrate that all responsive records have been provided. As a result, the OOR holds that the Commission must provide all responsive records to the Requester.

### CONCLUSION

For the foregoing reasons, Requester’s appeal is **granted** and the Commission is required to provide all responsive records 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(a). 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

A handwritten signature in black ink, appearing to read "J. Schnee", written in a cursive style.

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APPEALS OFFICER  
J. CHADWICK SCHNEE, ESQ.

Sent to: Jon Frey; Candace Snyder