

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Scott, :
 :
 Petitioner :
 :
 v. :
 :
 Delaware Valley Regional Planning :
 Commission, : No. 1765 C.D. 2011
 Respondent : Argued: May 16, 2012

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: October 3, 2012

John Scott (Scott) challenges the order of the Office of Open Records (OOR) which granted in part and denied in part his request for records from the Delaware Valley Regional Planning Commission (DVRPC).

On June 30, 2011, Scott submitted a request to the DVRPC and sought all advertising material or emailed or published content used to advertise in advance the time, date, subject, and location of a DVRPC retreat on or about September 23, 2010; all email records between June 22, 2010, and October 22, 2010, containing the keyword “retreat” for emails from or to Candace Snyder (Snyder), Barry Seymour (Seymour), Donald Shanis (Shanis), Jim Richardson, and Aissis Richardson; copies of the agenda for the retreat; copies of attendance

records for each meeting that occurred (public and private) during the retreat; and copies of all estimates, invoices, or contracts relating to the retreat.

On July 7, 2011, Snyder, director of the DVRPC's Office of Communications and Public Affairs, granted access to certain records but denied access to the rest because the request was overly broad and exempt at a minimum under Section 708(b)(6) and (10) of the Right to Know Law (Law),¹ Snyder also

¹ Act of February 14, 2008, P.L. 6. Under section 708(b)(10) of the Law, 65 P.S. §67.708(b)(6) and (10), the following records are exempt from the Law:

(6)(i) The following personal identification information:

(A) A record containing all or part of a person's Social Security number, driver's license number, personal financial information, home, cellular or personal telephone numbers, personal e-mail addresses, employee number or other confidential personal identification number.

(B) A spouse's name, marital status or beneficiary or dependent information.

(C) The home address of a law enforcement officer or judge.

....

(10)(i) A record reflects:

(A) the internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, legislative proposal, legislative amendment, contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations.

(B) The strategy to be used to develop or achieve the successful adoption of a budget, legislative proposal or regulation.

(ii) Subparagraph (i)(A) shall apply to agencies subject to 65 Pa.C.S. Ch. 7 (relating to open meetings) in a manner consistent with 65 Pa.C.S. Ch. 7. A record which is not otherwise exempt from access under this act and which is presented to a quorum for deliberation in accordance with 65 Pa.C.S. Ch. 7 shall be a public record.

(Footnote continued on next page...)

found the request disruptive under Section 506(a) of the Law, 65 P.S. §67.506(a).² Snyder asserted that DVRPC was not subject to the Law.

Scott appealed to the OOR. On August 19, 2011, the OOR issued a Final Determination and dismissed DVRPC's objections as the request was not disruptive or exempt. However, OOR also concluded that Scott could not collaterally challenge the Final Determination issued in OOR Docket AP2011-0428 with respect to emails from the DVRPC staff.³ OOR effectively upheld the denial of emails concerning the retreat from or to Snyder, Seymour, and Shanis:

The Request also seeks e-mails from the e-mail account of DVRPC staff members Candace Snyder, Barry Seymour and Donald Shanis regarding the 2010 Annual Board Retreat for the time period June 22, 2010 through October 22, 2010. This request falls squarely within the request litigated in *Scott v. Delaware Valley Regional Planning Commission*, OOR Docket no. AP2011-0428. . . wherein the OOR issued a Final Determination with respect to a request for all e-mail records from the

(continued...)

(iii) This paragraph shall not apply to a written or Internet application or other document that has been submitted to request Commonwealth funds.

(iv) This paragraph shall not apply to the results of public opinion surveys, polls, focus groups, marketing research or similar effort designed to measure public opinion.

² Section 506(a) of the Law, 65 P.S. §67.506(a), provides in pertinent part, “[a]n 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.”

³ Both Scott and the DVRPC appealed the determination of the OOR to this Court. After hearing oral argument, this Court determined that the Law did not apply to the DVRPC and vacated the order of the OOR. *Scott v. Delaware Valley Regional Planning Commission*, No. 1553 C.D. 2011 and *Delaware Valley Regional Planning Commission v. Scott*, No. 1666 C.D. 2011, Filed October 3, 2012.

following e-mail accounts: csnyder@dvrpc.org, bseymour@dvrpc.org, and dshanis@dvrpc.org for the time period April 15, 2010 through March 31, 2011. As these e-mail accounts appear to correspond exactly with the staff members identified in the Request, the instant request is, therefore, denied, to the extent it seeks e-mail records from Candace Snyder, Barry Seymour and Donald Shanis; these records having been previously litigated. . . . The Requestor [Scott] cannot collaterally challenge the above-mentioned Final Determination; Requestor's [Scott] sole recourse is through a petition for review to the Commonwealth Court. (Footnote and citations omitted).

Final Determination, August 19, 2011, at 4-5; Reproduced Record (R.R.) at 38a-39a.

Scott contends that the facts of the two cases are not identical for the purposes of collateral estoppel because the status of responsive records changes with the passage of time and the OOR never examined the records in these cases to see if they were still exempt. Scott further contends that this Court should not find Scott collaterally estopped in the present case because Scott had little or no incentive to litigate the issue of responsiveness in the prior case due to the lack of formal procedure by the OOR and the conduct of the DVRPC, and the OOR neither held a hearing nor formal discovery, and there was never a chance for sufficient adversarial testing of DVRPC's self-serving affidavits and evidence.⁴

⁴ A reviewing court in its appellate jurisdiction independently reviews the OOR's orders and may substitute its own findings for that of the agency. Bowling v. Office of Open Records, 990 A.2d 813, 818 (Pa. Cmwlth. 2010), *petition for allowance of appeal granted*, 609 Pa. 265, 15 A.3d 427 (2011). In reviewing a final determination of the OOR, a decision of the reviewing court shall contain findings and conclusions based on the evidence as a whole. Section 1301(a) of the Law, 65 P.S. §67.1301(a).

As an initial matter, the DVRPC asserts that it is not subject to the Law. In Scott v. Delaware Valley Regional Planning Commission, No. 1553 C.D. 2011 and Delaware Valley Regional Planning Commission v. Scott, No. 1666 C.D. 2011, Filed October 3, 2012, this Court determined that the Law did not apply to the DVRPC. On the basis of that decision, this Court agrees with the DVRPC and determines that the Law does not apply to the DVRPC here.

Because the DVRPC does not come under the Law, the OOR lacked the authority to rule on Scott's request for the disclosure of records. Accordingly, the order of the OOR is vacated and this case is remanded to the OOR so that the OOR can quash the appeal to it.⁵

BERNARD L. MCGINLEY, Judge

⁵ This Court need not address the merits of Scott's challenge.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Scott, :
 :
 Petitioner :
 :
 :
 v. :
 :
 :
 Delaware Valley Regional Planning :
 Commission, : No. 1765 C.D. 2011
 Respondent :

ORDER

AND NOW, this 3rd day of October, 2012, the order of the Office of Open Records in the above-captioned matter is vacated and the case is remanded to the Office of Open Records for the Office of Open Records to quash John Scott's appeal to it.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John Scott, :
 :
 : Petitioner :
 : :
 : No. 1765 C.D. 2011 :
 : v. :
 : :
 : Argued: May 16, 2012 :
 Delaware Valley Regional Planning :
 Commission, :
 :
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McCULLOUGH

FILED: October 3, 2012

I respectfully dissent for the reasons set forth in my dissenting opinion in Scott v. Delaware Valley Regional Planning Commission and Delaware Valley Regional Planning Commission v. Scott (Pa. Cmwlth., Nos. 1553 and 1666 C.D. 2011, filed October 3, 2012). I incorporate that opinion by reference and reach the same conclusions in this case.

PATRICIA A. McCULLOUGH, Judge