

Delaware Valley Regional Planning Commission

Public Participation Plan

Appendix B: Access to Records Policy

Public Comment Period from

April 4, 2018 to 5:00 PM on May 21, 2018.

Public Comments & Responses

Draft Prepared 7/11/2018



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Public Comment Period Overview

DVRPC held a 45+ day public comment period for proposed changes to Appendix B of DVRPC's Public Participation Plan -- Draft Access to Records Policy. The public comment period ran from April 4, 2018 to May 21, 2018 at 5 PM local time.

A legal notice for the public comment period was sent to DVRPC's public participation email list that includes over 3,500 active email subscribers around the region, and was published in five newspapers:

- Philadelphia Inquirer - the region's paper of record;
- Philadelphia Tribune - a historic African American publication;
- Al Dia - a weekly publication that reaches nearly all of the region's hispanic population;
- Trenton Times - to reach Mercer County; and
- Courier-Post - to reach readers in Burlington, Camden, and Gloucester counties.

The draft policy and legal notice were also sent to 32 regional libraries and eight tribal governments. The document was available for review on DVRPC's website and at DVRPC's Resource Center. DVRPC's Office of Communications & Engagement (OCE) wrote a feature story on the Commission's three overlapping public comment periods in its April 2018 newsletter. OCE staff also executed a social media campaign about the comment period.

Written comments could be submitted by email, fax or US Postal Service. DVRPC received three comments during this time period. A response from DVRPC follows each of the comments.

**Public Comments Received for “Draft Access to Records Policy”
Public Comment Period from 4/4/2018 to 5/21/2018**

From: Rodney Richards <rodrichards62@gmail.com>
To: public_affairs@dvrpc.org
Date: Tues. April 10, 2018 at 8:51 AM
Subject: new Public records access policy proposal

Comment:

This is good, updating the policy that is. I don't disagree with anything stated, it all seems reasonable.

comments:

1. There should be a reasonable time period to respond to requests, like 7 to 14 days, one way or the other. 30 days seems too long.
2. DVRPC should charge for photocopied records but not PDF documents, as they are electronic. Unless of course DVRPC needs to supplement the salary of its Public Records Officer, then there should be a deminimis charge for PDF's also, or access to online documents thru links etc. Credit card payments or PayPal payments should be acceptable for any charges.
3. if a record is denied, a reasonable explanation must be given.

It should be impressed on any requester that searching takes staff time, and sometimes extensions may be necessary to fulfill a request.

DVRPC Response:

Thank you for submitting public comments on the Draft Access to Records Policy. DVRPC's response to your specific comments are below.

#1 - The proposed Records Policy states that “the Records Officer shall respond to a request as soon as possible, but not later than 30 calendar days after the day of receiving the request.” This is in recognition that DVRPC is a small organization, does not receive that many requests, and does not have an office of several people to fulfill those requests. Larger organizations typically receive more requests and usually have more staff members able to fulfill requests in a shorter amount of time. The proposed 30 calendar days is reasonable, given staffing constraints and ongoing responsibilities.

#2 - PDFs and weblinks are the preferred formats for the Commission to transmit electronic documents (see Section IV), and would not incur any costs. However, if the information is not available in those formats or is requested in another format, the Commission is able to charge a fee for reproducing the information. Fees are outlined in Section IX. Fees would be charged for hard copy information or for reproduction in other formats at the actual cost, such as the cost of an external hard drive for exceptionally large electronic requests. Fees are not meant to cover any Commission staff member's salary. Additionally, the policy proposed that the Records Officer has the discretion to

waive fees ten dollars or less. A payment process would follow the Commission's processes at the time the request is made. As of May 2018, DVRPC's Accounting Department can generate invoices and take credit card payments through Square, Inc.

#3 - If a request is denied, the Records Officer will cite the applicable exemption(s) (see Section V). If the Commission requires additional time to respond to the initial request or to grant/fulfill a request, an explanation for that additional time will be given. Please see Section VII. E.

Again, thank you for your comments.

From: Ken Boyle
To: public_affairs@dvrpc.org
Date: Thu, May 17, 2018 at 2:11 PM
Subject: Comments on changes to DVRPC's Public Participation Plan

Comment:

May 17, 2018

Delaware Valley Regional Planning Commission
Office of Communications & Engagement
ACP Building, 8th Floor
190 N. Independence Mall West
Philadelphia, PA 19106

RE: Comments on proposed changes to Public Participation Plan, Appendix B: Access to Records Policy, Open Public Comment Period until May 21st

I strongly object to the extreme measures being proposed by the executive leadership of DVRPC to further restrict taxpayer access to the information, processes and procedures of the commission that make allocation decisions on millions of taxpayer transportation dollars per year. On behalf of taxpayers, it is unacceptable.

Since this is a change to the Public Participation Plan, let me first state that in my 2+ years as a PPTF member, it is not understood how PPTF members are able to participate or observe publicly any real decision making processes at DVRPC. This proposed action on the Access to Records is a further attempt to severely restrict that participation by all public taxpayers.

Please consider that if a county or municipal Right to Know request would be granted for funding requests information, which has proven to be true, by definition this information should be proactively available to the public and the place it is aggregated best is at DVRPC.

I write to you as a member of the Public Participation Task Force at the Delaware Valley Regional Planning Commission in Philadelphia and as a taxpayer citizen in this nine county region.

Over the last two years I have become increasingly concerned by what appears to be the extremely limited access by taxpayers to the spending decisions regarding their money by and through the processes of DVRPC. As you know, many many millions of dollars in transportation funding decisions are made through the commission each year. By definition, these processes also undertake the critical decisions on which projects will not be funded. ***The allocation of scarce resources is one of the most important decisions made by our county and regional government.***

I personally have contributed many volunteer hours on this issue. Initially, I spent seven months on quiet internal discussions with DVRPC staff to understand why the Access to Records policy was so restrictive and to ask them to revise it. After a verbal denial by the executive director, I filed a formal

request and then appealed the denial to the Board of the Commission asking them to change the policy and was denied.

After realizing the Access to Records policy specifically exempts “factual materials” from the exemption, I filed for public access just for the facts of grant applications and was denied. Again I appealed to the Commission Board asking not for a change but a proper interpretation of the existing Access to Records policy and my appeal was denied again.

Now DVRPC has proposed changes to the Access to Records policy that are far more restrictive than before specifically removing the prior clause exempting factual materials and greatly expanding the types of exemptions from public disclosure including specifically the applications themselves. (See included below specific comments on the changes)

As the Board of DVRPC has no citizen representation and has no independent governance as it is comprised of only the government agencies whose organizations receive the tax dollars through DVRPC processes, it is critical that each Board member remember that they work for taxpayers and **vote not** to implement these changes which are intended to more fully restrict citizen access to critical information.

As a member of the public I request these changes be rejected and additional changes be made to require all written requests and justification for taxpayer money through DVRPC processes be made public information.

Sometimes you just have to do the right thing! Why?

1. Taxpayers deserve transparency on the facts and the justification for requests for their tax money.
2. It is supposed to be “government of the people, for the people and by the people”, not government for the government executive employees. DVRPC executive leadership appears to demonstrate extreme overreach.
3. Executive leadership at DVRPC continues to spend our tax dollars on \$1000 per hour type private sector self proclaimed super lawyers to contrive obscure strategies to eliminate access by the public to the critical allocation decisions of the commission. This is an unacceptable abuse of taxpayer money.
4. Public entities requesting taxpayer money do not deserve secrecy of their applications. Only the deliberations about one project versus another should be kept confidential.
5. DVRPC uses the exemptions clauses to restrict access by citizens and this is an extreme over reach. Their claim that every document or note in an application process is an “ internal pre-decisional deliberation” is ridiculously broad and ***more importantly is not necessary.***
6. A county or municipality does not deserve confidentiality of its request for public tax dollars.
7. Businesses seeking public tax dollars funding do not deserve confidentiality of their request.
8. Commercial or financial information provided as justification for receiving public tax dollars does not deserve confidentiality.

9. Information submitted to request public money should not be kept confidential just because it shows an advantage of one project over another. This is the basic function of the application and processes to decide on scarce resource allocation.
10. The proposed policy change seeks to specifically exempt application materials and any financial information in that application. This is the basis of the request for public money and should ABSOLUTELY not be exempt from the public.

Please. Do the right thing and represent the citizens that elected you.

Thank you for your consideration,

Ken Boyle, Bucks County Resident
Public Participation Task Force Member
DVRPC
% Ken Boyle,
1686 Barnswallow Road
Yardley, PA 19067
Email: kenmboyle@comcast.net

Comments to the proposed changes:

- I. **Overview** (In October 2012, the Pennsylvania Commonwealth Court ruled that DVRPC is not subject to the Pennsylvania Right-to-Know Law, 56 A.3d 40 (Pa. Cmwlth. 2012).

[#1] KB Comment: I wanted to remind the Commission Board of the basis for court ruling used by DVRPC to state it is exempt from Right to Know laws in Pennsylvania. As written in the court decision, "This Court agrees with DVRPC that it is not a "commonwealth agency" under the Law because it does not perform an essential governmental function". That is what Mr. Andrew Bockus, DVRPC outside counsel and super lawyer argued successfully on behalf of DVRPC leadership to ensure citizens can't learn what is being done with their money. Is this a decision and restrictions that each Commission Board member is proud of?

- I. **Overview** (This Policy is intended to balance the benefits of general public access to Commission records with other considerations of privacy, confidentiality, informed decision-making, and security.)

[#2] *KB Comment:* Even before these more severe proposed changes limiting public access, DVRPC makes it near impossible for the public to have access to the facts and/or basis for the allocation of taxpayer dollars. From the taxpayers viewpoint, it is not believed that employees, businesses, or any entity asking for public funding deserves confidentiality of their request or justification for that funding.

V. Exemptions (C. Trade secrets, proprietary, commercial, or financial information obtained from any source, and considered privileged or confidential at the time it was obtained.)

[#3] *KB Comment:* Any person or entity requesting taxpayer funding from DVRPC does not deserve confidentiality for any portions of their request or justification for approval. Only the deliberations on the merit of the application deserve confidentiality.

V. Exemptions (D. Confidential business information obtained from a person requesting confidentiality.)

[#4] *KB Comment:* Any person or entity requesting taxpayer funding from DVRPC does not deserve confidentiality for any portions of their request or justification for approval. Only the deliberations on the merit of the application deserve confidentiality.

V. Exemptions (E. Any record subject to privilege, including medical files, attorney-client documents, and/or attorney-client work products.)

[#5] *KB Comment:* An exemption from this exemption is required if that information is used to submit or justify a request for public taxpayer dollar funding. Otherwise an attorney could submit the applications for municipalities or business and claim privilege to prevent taxpayer access to the applications.

V. Exemptions (F. The internal pre-decisional deliberations of the Commission, its members, alternates, officers, legal counsel, committee members, contractors, employees, and the like, or such pre-decisional deliberations with another agency, its officers, legal counsel, employees, and the like relating to any recommendations including, but not limited to, research, memos, budget, funding, procurement, contract, or contemplated or proposed policy or course of action used in pre-decisional deliberations.)

[#6] *KB Comment:* The clause “other than purely factual materials” has been removed. This clause has been used in the past to prohibit access to all applications for funding. It should be amended to specifically protect the deliberations of the merits of funding applications but NOT protect the application materials and the justification for approval from public access.

V. Exemptions (G. Information which, if disclosed, could give an advantage to competing applicants, competitors, or bidders, including the identity of procurement, review, and selection committee members, and their notes.)

[#7] *KB Comment:* This should be removed. The specific purpose of a competitive grant process is to weigh the merits of one application to others. Public access should be specifically granted to the basis, facts, and justification of the request for taxpayer funds.

V. Exemptions (H. Records and data that would impair present or imminent contract awards or negotiations, including records relating to contracts with independent contractors providing personal or professional services to the Commission.)

[#8] *KB Comment:* This is a new clause added to the policy and is fine unless these records or data are a significant justification for approval of a funding request. If so, public access should be granted to that information. In most cases this should not be a problem.

V. Exemptions (L. Application materials, and any financial information of an applicant. It is the policy of the Commission that application materials shared with members of the Board or review or selection committees as part of carrying out Commission business shall not be subject to public access. Persons interested in obtaining applications or proposals submitted to DVRPC are encouraged to contact applicants directly.)

[#9] *KB Comment:* This newly added clause should be eliminated and replaced with a specific clause that requires the facts, financials, and the justification of all funding requests to DVRPC be available to the taxpayers providing the funding.

V. Exemptions (M. In the event a record involves the privacy rights of an individual, those rights shall be balanced against the public right to access in order to determine whether the record should be made public or declared exempt.)

[#10] *KB Comment:* This newly added clause should be revised or eliminated as it is not clear and too broad. In general, if information is justification for a request for public taxpayer funding, it should not be confidential or protected.

DVRPC Response:

Thank you for submitting public comments on the Draft Access to Records Policy. DVRPC is limiting its responses to only your comments that pertain to the content of the records policy.

Comment #1 (Overview) - DVRPC includes these overview statements to provide context to individuals about the Commission's initial creation through bi-state compact law. DVRPC references two judgements - the first by Pennsylvania's Commonwealth Court, and the second by the New Jersey Government Records Council - to provide as much contextual information to readers as possible. Since DVRPC is not subject to Pennsylvania's Right-to-Know Law or New Jersey's Open Records Act, the Commission is not in the best position to make judgments under those laws about what may or may not be released.

Comment #2 (Overview) - The quoted statement in the proposed policy is very similar to an opening statement in the Commission's current policy (adopted in March 2014). It has been updated in the proposed policy to recognize that DVRPC is a commission, not an agency, and that access to records must also take into account the Commission's responsibility to make unbiased decisions to best allocate regional transportation dollars. DVRPC's Executive Committee directed staff to review and update records policy because a member of the public - Ken Boyle - brought up concerns about disclosure and interpretation of exemptions. DVRPC staff, with advice from co-counsel, found that the current policy is too broad, not specific enough, and does not adequately explain the request, access to records, and appeal processes. The proposed policy closely follows the records policies adopted by the Delaware River Port Authority (DRPA) and Delaware River Basin Commission (DRBC) - organizations that were also formed by interstate compacts.

Comment #3 (Section V. C.) - Based on staff's review of other records policies and other organization's practices, it is a common practice to withhold or redact information that is considered

privileged or confidential at the time it was obtained. In the matter of a public entity applying for a competitive funding program, please see Section V.L. DVRPC has further revised Section V. L. to provide more clarity on releasing information.

Comment #4 (Section V. D.) - See response above.

Comment #5 (Section V. E.) - The proposed records policy covers *all* records that the Commission may create or house and not *just* records related to budget and funding recommendations as the original comment implies. Other records may include human resource documents, worker compensation claims, and other records deemed confidential and privileged.

Comment #6 (Section V. F.) - Staff removed “factual materials” from this proposed exemption as staff found it created confusion with different requestors. Staff interpreted factual materials to mean facts about a place or a population, not proposed projects or budget estimates. When DVRPC’s Executive Committee reviewed appeals of denials under the current Records Policy, the Executive Committee confirmed staff’s interpretation of “factual materials.” The term “factual materials” does not appear in DRPA’s Open Records Policy, and does not appear in Pennsylvania’s Right-to-Know Law.

To the latter comment about “justification for approval” - if the matter is related to a funding recommendation that goes before the DVRPC Board, justification is already publicly accessible through DVRPC’s website and at DVRPC’s Board meetings. Staff draft presentation and board packet materials to substantiate all recommendations presented to the Board, which makes the decision or advances the recommendation to another entity such as PennDOT or FHWA. Please see <https://www.dvrpc.org/Committees/BOARD/> and click on any meeting agenda. Action items are linked to background materials that the board reviews in advance of the meeting. Additionally, DVRPC practices “enhanced public participation” making all board action items open for public comment. DVRPC releases the agenda and accompanying materials to public review 10 days before the scheduled Board meeting. Further, full minutes of all DVRPC Board meetings and records of decisions are posted on the DVRPC website.

Comment #7 (Section V. G.) - Again, the proposed records policy covers *all* records that the Commission may create or house and not *just* records related to competitive grant programs.

Comment #8 (Section V. H.) – This provision is similar to provisions in records policies of other interstate compacts.

Comment #9 (Section V. L.) - DVRPC has further revised this exemption to provide more clarity. Application materials are not to be released prior to a final Board action. DVRPC encourages potential requesters to directly contact the original applicants to request materials as each applicant may have to follow different policies or laws depending on its jurisdiction. If requested, DVRPC will provide assistance to acquire and distribute information as determined by the applicant for release. However, if such information is not made available to the Commission, the Requester will be directed to the original applicant. If that applicant is a local government, its state’s public records law or act will be applicable. The original applicant can best determine what is deemed confidential and proprietary..

This comment also references “financials.” Exempting financial information of an applicant is consistent with Pennsylvania’s Right-to-Know Law, which exempts from public access the financial information of an applicant requested in an invitation for bid or request for proposals. As noted, DVRPC will enable each applicant to determine what information can be released.

To the latter comment about “justification for approval” - please see response to Comment #6.

Comment #10 - (Section V. M.) - Again, the proposed records policy covers *all* records that the Commission may create or house and not *just* records related to competitive grant programs.

From: Sadie Francis
To: public_affairs@dvrpc.org
Date: Mon, May 21, 2018 at 10:14 AM
Subject: public comment on Public Participation Plan

Hi Public Affairs,

In addition to echoing ALL of my fellow PPTF member's comments and concerns below, I also want to state on public record my surprise that, during my two plus years serving on the task force, the subject of the public participation plan or a discussion of any edits to the plan has NEVER been put raised before the PPTF. This seemed like the perfect opportunity/ role for such a task force to "be part of the decision-making process" (your organization's words) and provide guidance, as citizens, for how to effectively engage other citizens in the very important work DVRPC oversees.

If you were not going to involve us in the evolution of the plan and its strategies, you could at the very least kept up appearances and presented it and its implications at a PPTF meeting. The fact that you didn't further illustrates the disconnect between what you state is PPTF's mission, and how DVRPC actually uses us.

Respectfully,

Sarah (Sadie) Francis
Ex-Chair, PPTF

RE: Comments on proposed changes to Public Participation Plan, Appendix B: Access to Records Policy, Open Public Comment Period until May 21st

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Please. Do the right thing and represent the citizens that elected you.

Thank you for your consideration,

Ken Boyle, Bucks County Resident
Public Participation Task Force Member
DVRPC
% Ken Boyle,
1686 Barnswallow Road
Yardley, PA 19067
Email: kenmboyle@comcast.net

Comments to the proposed changes:

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KB Comment: The clause “other than purely factual materials” has been removed. This clause has been used in the past to prohibit access to all applications for funding. It should be amended to specifically protect the deliberations of the merits of funding applications but NOT protect the application materials and the justification for approval from public access.

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KB Comment: This newly added clause should be revised or eliminated as it is not clear and too broad. In general, if information is justification for a request for public taxpayer funding, it should not be confidential or protected.

Ken Boyle

Email: kenmboyle@comcast.net

Phone: +1 215 369 1033

Mobile: +1 215 932 3516

DVRPC Response:

Thank you for submitting public comments on the Draft Access to Records Policy.

The Access to Records Policy is an appendix to the Public Participation Plan; this Public Comment Period pertained to the particular appendix, and did not include an update to the body of the Plan.

The PPTF was notified of the opening of the Public Comment Period for the proposed Access to Records Policy via an HTML email sent on April 4, 2018 and an HTML email newsletter sent on April

30, 2018. The proposed Access to Records Policy is a legal mechanism, and if adopted by DVRPC's board, is binding. As it involved significant legal research, DVRPC did not present it to the PPTF for informal input outside of the public comment period. As a result of the comments DVRPC received during the public comment period, staff presented the proposed policy at the next regularly scheduled PPTF meeting, which was on Tuesday, 6/26.

As your public comment included Mr. Boyle's original public comment, please see DVRPC's responses to Mr. Boyle's comments found on pages 8 through 10 of this document.

DVRPC maintains two documents related to Public Participation: the Public Participation Plan, available here: <https://www.dvrpc.org/Products/TM14046/>; and the Planner's Methodology, available here: <https://www.dvrpc.org/Products/TM14005/>. When DVRPC updates or revises these documents, PPTF members, stakeholders, advocates, and the general public will be involved. The Public Participation Plan will also require a 45+ day public comment period.

Aside from Appendix B, the Public Participation Plan's substantive content - how the Commission meets federal mandates - is not scheduled for significant revision. However, the compendium document - *Planner's Methodology* - is scheduled to be significantly updated and revised in Fiscal Year 2019 (starting July 1, 2018). While the Public Participation Plan lays out internal processes to document compliance, the *Planner's Methodology* is designed to provide more in-depth guidance and best practices to DVRPC staff, and other interested stakeholders, in meeting Title VI of the Civil Rights Act and other nondiscrimination mandates, and creating public participation plans for local plans and studies. It includes a "toolkit" of strategies and offers guidance on how to incorporate DVRPC's Indicators of Potential Disadvantage (IPD) into local plans and studies. The *Planner's Methodology* update will greatly benefit from the PPTF's input and expertise. A PPTF meeting will be held in Fiscal Year 2019 to collect feedback and seek input from PPTF members and other members of the public.

Thank you for your feedback and continued engagement.

Public Comments Received for “Draft Access to Records Policy” After Public Comment Period

From: Valerie Arkoosh, MD, MPH, Chair, Montgomery County Board of Commissioners
To: Barry Seymour, Executive Director, DVRPC
Date: June 12, 2018
Subject: Not Applicable

Comment:

For original letter, please see attached.

DVRPC Response:

Thank you for your letter concerning DVRPC’s Draft Access to Records Policy.

Your letter references proposed Section V. Exemptions, subsection L. Application materials. This section has now been further revised. In regards to access to applications for competitive funding programs, the Commission regards application materials to be pre-decisional, and therefore are confidential until after the Board makes its final decision.

You note that many of DVRPC’s member governments are subject to records laws, and that DVRPC if directs interested persons to contact the applicants directly, this would shift the burden of providing applications to participating member governments. DVRPC is not subject to the PA Right-to-Know Law or the NJ Open Records Act and is not in a position to make judgments under those laws. DVRPC staff has revised Section V.L. in response to public comments we received as well as feedback from the Regional Technical Committee (RTC) at its July 10, 2018 meeting. The revised section states that application materials or proposals are not available prior to final Board action. After final Board action, persons interested in obtaining the applications or proposals may submit a request to DVRPC. The Commission will provide assistance in acquiring and distributing the information as determined by the applicant for release. The applicant is best able to determine what is confidential and proprietary. In the instance when the applicant does not respond to DVRPC’s request, the Requester will be directed to the applicant to acquire the requested information.