



**State of New Jersey**  
**GOVERNMENT RECORDS COUNCIL**

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TRENTON, NJ 08625-0819

**CHRIS CHRISTIE**  
*Governor*

**KIM GUADAGNO**  
*Lt. Governor*

**RICHARD E. CONSTABLE, III**  
*Commissioner*

**FINAL DECISION**

**June 25, 2013 Government Records Council Meeting**

Jon Frey  
Complainant

Complaint No. 2012-139

v.

Delaware Valley Regional Planning Commission  
Custodian of Record

At the June 25, 2013 public meeting, the Government Records Council (“Council”) considered the June 18, 2013 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that no unlawful denial of access occurred because the Delaware Valley Regional Planning Commission is a bi-state agency that is not subject to the provisions of OPRA. N.J.S.A. 47:1A-1.1.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the  
Government Records Council  
On The 25<sup>th</sup> Day of June, 2013

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Acting Chair  
Government Records Council

**Decision Distribution Date: June 27, 2013**



**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
June 25, 2013 Council Meeting**

**Jon Frey<sup>1</sup>  
Complainant**

**GRC Complaint No. 2012-139**

**v.**

**Delaware Valley Regional Planning Commission<sup>2</sup>  
Custodian of Records**

**Records Relevant to Complaint:** Electronic copies via e-mail of all e-mails sent from or received by six (6) employees and three (3) public members between April 15, 2010 and March 31, 2012.

**Request Made:** April 19, 2012

**Response Made:** April 27, 2012

**GRC Complaint Filed:** May 7, 2012<sup>3</sup>

**Background<sup>4</sup>**

**Request and Response:**

On April 19, 2012, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Delaware Valley Regional Planning Commission (“DVRPC”). On April 27, 2012, the Custodian responded in writing stating that the Complainant’s OPRA request is denied for the following:

1. The DVRPC was created by an inter-state compact and is not obligated to comply with OPRA. International Union of Operating Engineers, Local 542 v. Delaware River Joint Toll Bridge Commission, 311 F.3d 273 (3d. Cir. 2002);
2. The Complainant’s request is invalid because it fails to identify a subject for the requested e-mails and thus constitutes research not required under OPRA. MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005); New Jersey Builders Association v. New Jersey Council of Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007); Schuler v. Borough of Bloomsbury,

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<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Candace Snyder, Custodian of Records. Represented by Douglas L. Heinold, Esq., of Raymond, Coleman, Heinold & Norman, LLP (Moorestown, NJ).

<sup>3</sup> The GRC received the Denial of Access Complaint on said date.

<sup>4</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

GRC Complaint No. 2007-151 (March 2008); Wolosky v. Township of East Hanover (Morris), GRC Complaint No. 2010-259 (February 2012). Thus, the Complainant should either submit a new request or clarify the current OPRA request to include subject; and

3. There is a question as to whether the Complainant, who is not a resident of New Jersey, can utilize OPRA. Thus, the DVRPC takes the position that the Complainant is barred from using OPRA and should instead pursue his request under Pennsylvania's records law.

#### Denial of Access Complaint:

On May 7, 2012, the Complainant filed this complaint with the Government Records Council ("GRC") disputing the Custodian's denial of access, however, providing no additional arguments.

#### Statement of Information:

On May 23, 2012, the Custodian submitted a Statement of Information ("SOI"). The Custodian certifies that she received the Complainant's OPRA request on April 19, 2012, and responded in writing on April 26, 2012, denying access for a number of reasons, including that the DVRPC is not a public agency subject to the provisions of OPRA. The Custodian certifies that the DVRPC is a bi-state agency formed by New Jersey and Pennsylvania under an inter-state compact and is not subject to OPRA. International Union, *supra*. The Custodian notes that the Complainant is currently challenging a DVRPC denial of access under Pennsylvania's public records law. *See Scott v. DVRPC*, Appeal No. 1765 C.D. 2011.

The Custodian certifies that notwithstanding its initial denial of access, the DVRPC consulted with both New Jersey and Pennsylvania Counsel to determine the appropriate response. The Custodian certifies that each individual account for the six (6) identified employees was searched because the DVRPC does not maintain a centralized location for all e-mails. The Custodian further certifies that 192 responsive e-mails were located.

The Custodian further argues that aside from the DVRPC not being subject to OPRA, the Complainant's OPRA request was invalid according to precedential GRC case law. The Custodian notes that the Complainant was asked to identify a subject for responsive e-mails and the Complainant did not respond.

### Analysis<sup>5</sup>

#### Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request

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<sup>5</sup> There may be other OPRA issues in this matter; however, the Council's analysis is based solely on the claims made in the Complainant's Denial of Access Complaint.

“with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

OPRA defines a “public agency” as:

“... any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department; the Legislature of the State and any office, board, bureau or commission within or created by the Legislative Branch; and any independent State authority, commission, instrumentality or agency. The terms also mean any political subdivision of the State or combination of political subdivisions, and any division, board, bureau, office, commission or other instrumentality within or created by a political subdivision of the State or combination of political subdivisions, and any independent authority, commission, instrumentality or agency created by a political subdivision or combination of political subdivisions.” N.J.S.A. 47:1A-1.1.

The United States Supreme Court has held that bi-state entities created by compact, “are not subject to the unilateral control of any one of the states that compose the federal system.” Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 42 (1994). *See also* E. Paralyzed Veterans Ass’n v. Camden, 11 N.J. 389, 398 (1988)(Because the Delaware River Port Authority “is not the agency of a single state, but rather a public corporate instrumentality of both New Jersey and Pennsylvania[,] ... neither creator state can unilaterally impose additional duties, powers or responsibilities upon the Authority.” There are three scenarios in which a bi-state agency may be subject to New Jersey law: (1) the compact explicitly provides for unilateral state action; (2) both states have complementary or parallel legislation; or (3) the bi-state agency impliedly consented to a single-state’s jurisdiction. Ballinger v. Del. River Port Auth., 311 N.J. Super. 317, 324 (App. Div. 1998), *aff’d*, 172 N.J. 586 (2002)).

In Del. River & Bay Auth. v. N.J. Pub. Emp’t Relations Comm’n, 112 N.J. Super. 160 (App. Div. 1970), *aff’d*, 58 N.J. 388 (1971), the Del. River & Bay Authority (“DRPA”), a bi-state agency created by compact between New Jersey and Delaware, appealed from the judgment of a New Jersey superior court affirming the Public Employment Relations Commission’s order to DRPA to hold elections under a New Jersey statute, the New Jersey Employer-Employee Relations Act. In reversing the superior court decision, the Court held that if the term “any authority” in N.J.S.A. 34:13A-3(c) applied to bi-state agencies, “...it would have specifically provided for ...” same: “[i]ts failure to do so evidences an intent not to include them because it realized bi-state agencies are controlled by the compacts entered into ...” *Id.* at 164. *See also* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 115 S.Ct 394, 130 L.Ed 2d 245 (1994).

In Dittrich v. Port Authority of NY and NJ, 2012 N.J. Super. Unpub. LEXIS 2254 (October 4, 2012), the Appellate Division considered whether the Port Authority of NY and NJ was subject to OPRA. The Court, relying on Del. River & Bay Auth. V. N.J. Pub. Emp’t Relations Comm’n, held that:

“... the definitions contained in OPRA do not suggest any intent on the part of the Legislature to extend its application to bi-state agencies ... OPRA fails to reflect any intent to exercise unilateral control over a bi-state agency’s procedures to provide public access to its records.” *Id.* at 9.

Here, the threshold question is whether the DVRPC is an agency within the definition of OPRA. N.J.S.A. 47:1A-1.1.

In 1966, the State of New Jersey entered into the “Delaware Valley Urban Area Compact,” which created the DVRPC. N.J.S.A. 32:27-2. In enacting this legislation, the State joined into an agreement with Pennsylvania, the City of Philadelphia and several counties in both states bordering the Delaware River. N.J.S.A. 32:27-2(b). The DVRPC henceforth became “... a agency and instrumentality of the governments of the respective signatory parties.” N.J.S.A. 32:27-8. In other words, the DVRPC is a bi-state agency.

The aforementioned cases show that New Jersey courts have consistently determined that bi-state agencies are not subject to a single-state’s jurisdiction. Furthermore, an analysis of the Ballinger factors does not lend itself to a determination that DVRPC should be subject to New Jersey law. First, the “Delaware Valley Urban Area Compact” does not explicitly provide for unilateral state action. Second, there is no complementary or parallel legislation since the definitions contained in OPRA do not suggest any intent on the part of the Legislature to extend its application to bi-state agencies. OPRA fails to reflect any intent to exercise unilateral control over a bi-state agency’s procedures to provide public access to its records. Had the Legislature intended for OPRA to apply to bi-state agencies, it would have reflected this intent within the law. Del. River & Bay Auth., supra. Finally, there is no indication that DVRPC has impliedly consented to be subject to New Jersey’s OPRA law.

Therefore, no unlawful denial of access occurred because the DVRPC is a bi-state agency that is not subject to the provisions of OPRA. N.J.S.A. 47:1A-1.1.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that no unlawful denial of access occurred because the Delaware Valley Regional Planning Commission is a bi-state agency that is not subject to the provisions of OPRA. N.J.S.A. 47:1A-1.1.

Prepared By: Frank F. Caruso  
Senior Case Manager

Approved By: Brandon D. Minde, Esq.  
Executive Director

June 18, 2013