



**KATHLEEN JENNINGS**  
ATTORNEY GENERAL

**DEPARTMENT OF JUSTICE**  
NEW CASTLE COUNTY  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

CIVIL DIVISION (302) 577-8400  
FAX: (302) 577-6630  
CRIMINAL DIVISION (302) 577-8500  
FAX: (302) 577-2496  
FRAUD DIVISION (302) 577-8600  
FAX: (302) 577-6499

**OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE**

**Attorney General Opinion No. 20-IB08**

**February 25, 2020**

**VIA EMAIL**

Randall Chase  
[rchase@ap.org](mailto:rchase@ap.org)

**RE: FOIA Petition Regarding the Delaware River and Bay Authority**

Dear Mr. Chase:

We write in response to your correspondence alleging the Delaware River and Bay Authority (“DRBA”) violated Delaware’s Freedom of Information Act, 29 *Del. C.* §§ 10001-10007 (“FOIA”). We treat your correspondence as a Petition for a determination pursuant to 29 *Del. C.* § 10005 regarding whether a violation of FOIA has occurred or is about to occur. As discussed more fully herein, we determine that DRBA is not subject to Delaware’s FOIA law and this Petition is dismissed.

**BACKGROUND**

In 1962, the states of Delaware and New Jersey formed the DRBA, entering an interstate compact agreement approved by Congress.<sup>1</sup> The states adopted the Delaware – New Jersey Compact (“Compact”) for the purposes of “advancing the economic growth and development of those areas in both states which border the Delaware River and Bay by the financing, development, construction, operation and maintenance of crossings, transportation or terminal facilities, and other facilities of commerce, and by providing for overall planning for the future economic development of those areas.”<sup>2</sup> In executing its duties, DRBA held an executive session at a

---

<sup>1</sup> *Int’l Union of Operating Eng’rs, Local 542 v. Del. River & Bay Auth.*, 2014 WL 1882430, at \*2 (D.N.J. May 12, 2014).

<sup>2</sup> 17 *Del. C.* ch. 17; N.J.S.A. 32:11E-1 - 12.

December 17, 2019 Economic Development Committee meeting to discuss long range planning.<sup>3</sup> You filed a Petition with this Office alleging that long range planning was not a proper reason to hold an executive session under Delaware’s FOIA law.

DRBA replied to your Petition on February 5, 2020 (“Response”) stating that the Petition should be dismissed because as a bi-state entity, DRBA is not subject to Delaware’s FOIA. The Compact does not expressly adopt either state’s FOIA law, and DRBA contends that it is not subject to unilateral legislation, as relevant caselaw and the language of the Compact itself do not permit any additional duties or obligations be undertaken by DRBA without the express authorization of both states. DRBA contends that neither state’s FOIA law contains a provision subjecting DRBA to its provisions nor do the FOIA statutes contain a provision demonstrating an intent to amend the Compact. Instead, DRBA states that it has adopted its own FOIA policy, which has been in place since 1990. DRBA enclosed a copy of this policy.

### DISCUSSION

Before considering the merits of your claim under FOIA, we must first determine whether DRBA is subject to Delaware’s FOIA law. Only if DRBA is subject to the Delaware FOIA statute would we determine if DRBA violated the Act. For the reasons set forth below, we conclude that DRBA is not subject to Delaware’s FOIA statute.

DRBA is not considered a state agency of Delaware or New Jersey but instead holds a unique status as a bi-state entity. “Bi-state entities occupy a significantly different position in our federal system than do the States themselves” and “typically are creations of three discrete sovereigns: two States and the Federal Government.”<sup>4</sup> These entities “exist by virtue of compacts between the states involved, entered into by their respective legislatures with approval of Congress.”<sup>5</sup> The purpose of a bi-state entity is take action on common problems of the participating states and to advance the states’ mutual regional interests. Bi-state agencies are not an extension of each state’s authority, but they “become a single agency of government of both

---

<sup>3</sup> Petition.

<sup>4</sup> *Hess v. Port Auth. Trans-Hudson, Corp.*, 513 U.S. 30, 40 (1994).

<sup>5</sup> *Del. River & Bay Auth. v. New Jersey Pub. Emp’t Relations Comm.*, 112 N.J. Super 160, 165 (N.J. App. Div. 1970).

states,”<sup>6</sup> and each state relinquishes a portion of its sovereignty to this entity.<sup>7</sup> As such, bi-state entities are not subject to the unilateral control by either participating state.<sup>8</sup>

The Compact does not adopt either state’s FOIA laws and is clear that “no additional duties or obligations shall be undertaken by the Authority under the law of either state or of Congress without authorization by the law of both states.”<sup>9</sup> New Jersey and Delaware both have enacted FOIA laws addressing public records and public meetings, but the mere passage of similar legislation is not sufficient to amend DRBA’s obligations under the Compact.<sup>10</sup> The states’ legislation must contain an express statement that the participating states intend to amend the Compact.<sup>11</sup> Neither state’s FOIA law contains an express amendment to the Compact to apply one state’s FOIA law to DRBA.<sup>12</sup> Also, we have not been presented with any evidence of other jointly-authorized legislation amending the Compact to adopt Delaware’s FOIA law. Accordingly, we determine that DRBA is not subject to Delaware’s FOIA law.

---

<sup>6</sup> *Id.*

<sup>7</sup> *Del. River & Bay Auth. v. Carello*, 222 A.2d 794, 797 (Del. Ch. 1966) (“By entering into a compact, such as the one here in issue, a state surrenders pro tanto a portion of its own sovereignty. . . .”) (citation omitted).

<sup>8</sup> *Hess*, 513 U.S. at 42.

<sup>9</sup> 17 *Del. C.* § 1701.

<sup>10</sup> *Spence-Parker v. Del. River & Bay Auth.*, 616 F. Supp.2d 509, 520 (D.N.J. 2009).

<sup>11</sup> *Id.* (“In short, the mere passage by New Jersey and Delaware of similar whistle-blower protection laws is not sufficient, under *Local 542* and the language of the Compact at issue in this lawsuit, to apply such laws to the DRBA. Instead, such laws will apply to the Authority only ‘if the states’ legislation contains an express statement that they intend to amend the compact.’”) (quoting *Int’l Union of Operating Eng’rs, Local 542 v. Del. River Joint Toll Bridge Comm’n*, 311 F.3d 273, 276 (3d Cir. 2002)).

<sup>12</sup> 29 *Del. C.* §§ 10001 - 10007, N.J.S.A. 47:1A-1 - 13, N.J.S.A. 10:4-6 - 21.

**CONCLUSION**

As we conclude that DRBA is not subject to Delaware's FOIA law, this Petition is dismissed.<sup>13</sup>

Very truly yours,

/s/ Dorey L. Cole

\_\_\_\_\_  
Dorey L. Cole  
Deputy Attorney General

Approved:

/s/ Aaron R. Goldstein

\_\_\_\_\_  
Aaron R. Goldstein  
State Solicitor

cc: Michelle Warner Hammel, Esq., Delaware River and Bay Authority

<sup>13</sup> This decision is also in accord with Attorney General Opinion No. 05-IB27, which determined that DRBA is not subject to the Delaware Sunshine Act. *Del. Op. Att'y Gen.* 05-IB27, 2005 WL 3991285, \*3 (Sept. 6, 2005) ("No such obligations are expressly authorized in the Compact nor do they result from any joint legislative effort of the Delaware and New Jersey legislatures.").