

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1289-11T1

VESSELIN DITTRICH,

Plaintiff-Appellant,

v.

THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY
and DANIEL D. DUFFY in
his official capacity
as Freedom of Information
Officer of the Port Authority
of New York and New Jersey,

Defendants-Respondents.

Argued September 24, 2012 - Decided October 4, 2012

Before Judges Espinosa and Guadagno.

On appeal from Superior Court of New Jersey,
Law Division, Hudson County, Docket No. L-
3670-11.

Walter M. Luers argued the cause for
appellant.

Jonathan P. Meinen argued the cause for
respondents (Mr. Meinen and Margaret Taylor
Finucane, on the brief).

PER CURIAM

This appeal presents the question whether the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, applies to the Port Authority of New York and New Jersey (Port Authority). Plaintiff appeals from an order that dismissed his complaint and order to show cause, in which he alleged that the Port Authority had violated OPRA and the common law right of access to public documents. We agree with the trial court that OPRA does not apply to the Port Authority and affirm.

Following his arrest by Port Authority Police at the Hoboken PATH station in August 2010, plaintiff made the first of a series of requests for documents to the Port Authority. The Port Authority responded, informing him that his request was being processed pursuant to the Port Authority's Freedom of Information Policy (the Policy) and provided him with a copy of the Policy. It is unnecessary for us to recount the ensuing exchange of requests and responses. As of June 2011, Daniel Duffy, the Port Authority's Freedom of Information Administrator, advised plaintiff's counsel that certain requested records were exempt from disclosure pursuant to specific exemptions in the Policy, and also advised him of the fees for retrieving and copying other requests, which would require an upfront payment of \$3891. Plaintiff did not submit the payment or file a written appeal pursuant to the Port

Authority's appeal process to challenge the denial of access to any records.¹ Instead, he chose to initiate this litigation and now appeals from the trial court's order, arguing that OPRA should be applied to the Port Authority.

To implement its purpose "to promote transparency in the operation of government," Sussex Commons Assocs., LLC v. Rutgers, 210 N.J. 531, 540-41 (2012), OPRA requires that "government records shall be readily accessible" to the public "with certain exceptions, for the protection of the public interest." N.J.S.A. 47:1A-1.

The statute defines "government records" broadly as:

[any record] made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

"In short, any document kept on file or received in the course of the official business of an 'agency' of a political

¹ The Port Authority's Policy does not require the exhaustion of its appeal process before suit is filed.

subdivision is a government document." Fair Share Hous. Ctr., Inc. v. N.J. State League of Municipalities, 207 N.J. 489, 508 (2011). OPRA defines "public agency" or "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 threshold question here is whether the Port Authority is an agency within the definition of N.J.S.A. 47:1A-1.1.

The Port Authority was created in 1921 by an interstate compact between New York and New Jersey, the New York-New Jersey Port Authority Compact of 1921 (the Compact), and with the consent of Congress, pursuant to the Compact Clause. U.S. Const. art. I, § 10, cl. 3. As a bi-state entity, the Port Authority is to "be regarded as the municipal corporate instrumentality of the two states for the purpose of developing

the port" N.J.S.A. 32:1-33 (emphasis added); see also Bunk v. Port Auth. of N.Y. & N.J., 144 N.J. 176, 184 (1996) ("The Port Authority is not the agency of a single state but rather a public corporate instrumentality of New Jersey and New York.").

In Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994), the Supreme Court discussed the difference between a state and a bi-state entity:

Bistate entities occupy a significantly different position in our federal system than do the States themselves. The States, as separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three discrete sovereigns: two States and the Federal Government.

. . . .

Because Compact Clause entities owe their existence to state and federal sovereigns acting cooperatively, and not to any one of the United States, their political accountability is diffuse; they lack the tight tie to the people of one State that an instrument of a single State has: An interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact. In sum, within any single State in our representative democracy, voters may exercise their political will to direct state policy; bistate entities created by compact, however, are not subject to the unilateral control of any one of the States that compose the federal system.

[Id., 513 U.S. at 40-42, 115 S. Ct. at 400-02, 130 L. Ed. 2d at 255-57 (emphasis added) (internal citations and quotation marks omitted).]

See also Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 314-16, 110 S. Ct. 1868, 1877-78 (1990), 109 L. Ed. 2d 264, 278-79 (Brennan, J., concurring in part and concurring in judgment) (observing that no single State has dominion over an entity created by interstate compact and that state/federal shared power is the essential attribute of such an entity); E. Paralyzed Veterans Ass'n. v. Camden, 111 N.J. 389, 398 (1988) (hereinafter EPVA) (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." (internal citations and quotation marks omitted)).

The State's intention to surrender sovereignty over the Port Authority is well established:

[T]here is no question the states intended to create the Authority, and such surrender has already been recognized by numerous courts, including the United States Supreme Court in Hess. By expressly creating the bi-state entity, New York and New Jersey relinquished all control over the Authority unless otherwise stated in the compact [T]hat autonomous entity cannot be unilaterally regulated by New Jersey.

[HIP Heightened Independence & Progress, Inc. v. Port Auth. of N.Y. & N.J., No. 11-3673, No 11-3799 (3d Cir. Sept. 11, 2012) (slip op. at 30).]

Our Supreme Court recognized 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), (citing Int'l Union of Operating Eng'rs, Local 68, AFL-CIO v. Del. River & Bay Auth., 147 N.J. 433, 445-46, cert. denied, 522 U.S. 861, 118 S. Ct. 165, 139 L. Ed. 2d 108 (1997)).

Addressing the first of these grounds, the Compact does not explicitly provide for unilateral state action. To the contrary, the Compact prohibits unilateral state action without the concurrence of the sister state. N.J.S.A. 32:1-8; see King v. Port Auth. of N.Y. & N.J., 909 F. Supp. 938, 944 (D.N.J. 1995), aff'd 106 F.3d 385 (3d Cir. 1996).

Plaintiff also argues that OPRA is complementary and parallel to New York's Freedom of Information Law (FOIL), N.Y. Pub. Off. Law § § 84 to 90. In addition, plaintiff argues that, in its bylaws, the Port Authority consented to OPRA's application. Neither of these arguments has merit.

The fact that similarities exist in the New York and New Jersey laws does not satisfy the criterion for the application of unilateral state action by New Jersey. We need not explore the similarities or determine whether the statutes are "substantially similar" in scope and purpose, EPVA, supra, 111 N.J. at 401, because there must also be some agreement by both states that the law of one state will apply. Id. at 402. Indeed, even though the Uniform Construction Code reviewed in EPVA stated that it applied to all bi-state agencies, our Supreme Court found the expression of such intent by one legislature to be insufficient in the absence of laws specifying that both states intended that local law would govern an area relevant to their compact. Id. at 401-02; see also Del. River & Bay Auth. v. N.J. Pub. Emp't Relations Comm'n, 112 N.J. Super. 160, 165-66 (App. Div. 1970), aff'd, 58 N.J. 388 (1971); Fraternal Order of Police, Penn-Jersey Lodge 30 v. Del. River Port Auth., 323 N.J. Super. 444, 454 (App. Div.), certif. denied, 162 N.J. 663 (1999); King, supra, 909 F. Supp. at 945.

Moreover, the definitions contained in OPRA do not suggest any intent on the part of the Legislature to extend its application to bi-state agencies. In Del. River, we declined to interpret the term "any authority" in the New Jersey Employer-Employee Relations Act to include the Delaware River & Bay

Authority, a bi-state entity: "If such were the legislative intent it would have specifically provided for bi-state authorities. Its failure to do so evidences an intent not to include them because it realized that bi-state agencies are controlled by the compacts entered into, and it could not act unilaterally." Id., 112 N.J. Super. at 164. Similarly, OPRA fails to reflect any intent to exercise unilateral control over a bi-state agency's procedures to provide public access to its records.

Finally, plaintiff argues that the Port Authority has consented to OPRA's application because its bylaws state it "shall follow a Freedom of Information Policy consistent with the freedom of information laws of the two States." The stated goal of following a policy that is consistent with that of the creator states does not equate with consent to submit to the jurisdiction of either state.

We are therefore satisfied that OPRA does not apply to the Port Authority.

Plaintiff also argues that he should be entitled to access to the requested records pursuant to the right of access granted by the common law. For this argument to prevail, we would have to conclude that, although the Port Authority is not subject to unilateral state regulation based upon our statutory law, it is

subject to regulation under our common law. No legal authority has been presented to support this premise. We are satisfied that it lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION