

Comments on the Proposed Amendments to the Rules of Practice and Procedure

I am writing to express my concerns and suggestions regarding the proposed rulemaking on the Rules of Practice and Procedure, which includes changes to the regulations on requesting records from the Delaware River Basin Commission (DRBC). I appreciate the DRBC's efforts to update and clarify its rules, but I believe that some of the proposed changes might undermine the public's right to access information from the Commission.

The DRBC is a federal-interstate compact agency that manages the water resources of the Delaware River Basin, which affects millions of people and ecosystems in four states. The DRBC's decisions and actions have significant impacts on the public health, safety, environment, and economy of the region. Therefore, it is essential that the DRBC operates with transparency and openness, and that the public has the opportunity to obtain and evaluate information about the DRBC's operations and activities.

The DRBC states that it is not subject to the Freedom of Information Act (FOIA), but rather to its own compact and regulations. I am not objecting to that assertion.

However, for nearly a half century, the DRBC has followed the FOIA guidelines in responding to records requests, and has stated that its intent is to "essentially reflect" the FOIA process. The FOIA was enacted to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The law provides the public with the right to receive records and information from the government in order to further democratic principles and allow for independent evaluation of government action.

However, some of the proposed changes to the regulations on requesting records might deviate from this intent and create barriers for the public to access information from the DRBC. Here are some of the specific areas that I would like to address:

- **Fees:** The proposed rule change would allow the DRBC to charge search fees for all requesters, regardless of their status, and eliminate the waiver of search fees for noncommercial requesters for the first quarter hour of search time. This might increase the cost of requesting records from the DRBC, especially for noncommercial requesters who seek large or complex records. This might discourage or prevent some requesters from obtaining information that is in the public interest or that might reveal problems or issues with the DRBC's actions. The FOIA provides that noncommercial requesters are not charged for search fees or for the first two hours of search time, which reduces the financial burden on requesters who seek information for a scholarly, scientific, or public interest purpose, or for some other noncommercial purpose (for example, a private individual asking for records for their own reasons). I suggest that the DRBC

should adopt a similar fee structure as the FOIA, waiving search fees for noncommercial requesters for the two hours of search time.

- **Fee Threshold:** Most federal agencies impose a fee threshold, typically \$50 (but sometimes more), below which fees are not charged because the cost of collecting the fee would exceed the revenue collected. I suggest that the Commission include a fee threshold of that type to reduce administrative burden.
- **Exemptions:** The proposed rule change would add a new provision that allows the DRBC to withhold any information that is exempt from disclosure under any other federal or state law. This might broaden the scope of information that the DRBC can withhold from requesters, depending on what other laws apply to the DRBC. This might create confusion or inconsistency in how the DRBC applies its exemptions, and might allow the DRBC to withhold information that is relevant or important for public understanding or oversight. The FOIA contains nine exemptions that authorize agencies to withhold information from disclosure, such as classified information, trade secrets, personal privacy, law enforcement records, etc. These exemptions are narrowly construed and subject to judicial review. I suggest that the DRBC should limit its exemptions to those that are similar to or consistent with the FOIA exemptions, or at least provide a clear list of what other laws it relies on to withhold information.
- **Appeals:** The proposed rule change would reduce the time limit for requesters to file an administrative appeal from 30 days to 15 days after receiving an adverse determination by the DRBC. This might shorten the window for requesters to challenge the DRBC's decisions on records requests, especially if there are delays in the mail or other communication methods. This might also limit the opportunity for requesters to consult with a lawyer or an expert on public records laws before filing an appeal. Notably, the FOIA provides that requesters have 90 days to file an administrative appeal after receiving an adverse determination by an agency, which gives requesters more time and flexibility to pursue their rights. I suggest that the DRBC should extend its appeal time limit to match or approximate the FOIA appeal time limit, and certainly should not shorten its current appeal deadline.
- **Fee waivers:** The proposed rule change would remove the provision that allows fee waivers or reductions for records requests that meet the same criteria as the FOIA, and state that the DRBC may waive or reduce fees at its discretion, but only in exceptional circumstances. This might make it harder for requesters to obtain fee waivers or reductions from the DRBC, especially for noncommercial requesters who demonstrably seek information in the public interest. The FOIA provides that agencies shall waive or reduce fees for records requests if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the

government and is not primarily in the commercial interest of the requester. This encourages agencies to facilitate public access to information that is important for democratic participation and accountability. I suggest that the DRBC should reinstate its fee waiver or reduction provision that mirrors or follows the FOIA criteria, or at least provide clear and reasonable guidelines for requesting and granting fee waivers or reductions.

- **News media requests:** The proposed rule change would not explicitly mention news media requesters, but would define noncommercial requesters as those who seek information for a non-profit educational, scientific, or public interest purpose. This might exclude some news media requesters from being considered as noncommercial requesters, and affect their fee treatment by the DRBC. The FOIA provides that news media requesters are not charged for search fees or review fees, and are only charged for duplication fees after the first 100 pages. This recognizes the role of news media in disseminating information to the public and informing public opinion and debate. I suggest that the DRBC should explicitly include news media requesters in its definition of noncommercial requesters, or at least provide a separate category for news media requesters that grants them favorable fee treatment as the FOIA does.
- **Duplication Fees:** The proposed rule does not but should make it explicitly clear that providing electronic copies of records does not trigger per-page fees for paper duplication.

These are the specific areas that I believe need improvement or revision in the proposed rule change on the regulations on requesting records from the DRBC. I urge the DRBC to reconsider some of its proposed changes and align its rules more closely with the FOIA guidelines, which reflect the principles and values of transparency and openness in government. I hope that the DRBC will listen to the public's comments and suggestions, and adopt a modern and fair records disclosure rule that does not limit public access unnecessarily.

Thank you for your attention and consideration.

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