



# COMMONWEALTH of VIRGINIA

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The Honorable Robert G. Marshall  
Member, Virginia House of Delegates  
Post Office Box 421  
Manassas, Virginia 20108-0421

Dear Delegate Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You raise a number of issues in connection with the Dulles Toll Road and the extension of Metrorail. Specifically, you ask what authority allowed the Governor to divest the Commonwealth of its interest in the Dulles Toll Road and “grant it” to the Metropolitan Washington Airports Authority (“MWAA”). You further ask whether such a conveyance was lawful in the absence of concurrence by the General Assembly. You also inquire whether Virginia can regain control over the Dulles Toll Road and the Dulles Rail project and void the Memorandum of Understanding (“MOU”). You further ask whether all parties to the MWAA Compact must approve the MWAA “takeover” of the toll road. You also inquire whether Virginia would have any liability for payment of the extension of Metrorail should MWAA default on its bond payments. You further ask whether Loudoun County bears any obligation to pay for all or part of a Metrorail station that is constructed in the County. Finally, you ask whether MWAA is exempt from state and federal freedom of information statutes.

## Response

It is my opinion that, although the issue has not been conclusively resolved, under the only available precedent, the Governor was authorized to divest the Commonwealth of its interest in the Dulles Toll Road as part of the overall project to extend Metrorail. The agreements between various parties control the circumstances under which Virginia can regain control over the project and void the MOU. It is further my opinion that the assent of all parties to the MWAA Compact was not required for MWAA to operate the Dulles Toll Road. I also conclude that the agreements signed by Loudoun County detail the scope of its obligation in connection with this project. Finally, it is my opinion that neither the state nor the federal freedom of information statute applies to MWAA under the plain terms of those statutes.<sup>1</sup>

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<sup>1</sup> You pose a number of other questions. Those questions are currently at issue in pending litigation. Under longstanding principles, this Office will decline to opine on matters that are in pending litigation.

## Background

The extension of Metrorail to Dulles Airport and its financing, in part, through tolls paid by users of the Dulles Toll Road, has attracted controversy on various grounds, including the cost of the project relative to alternatives. Policy questions aside, the Supreme Court of Virginia's decision in *Gray v. Virginia Secretary of Transportation* provides the following background:<sup>2</sup>

The MWAA is a regional public entity established by an interstate compact, which was approved by the United States Congress in 1986. *See* 49 U.S.C. § 49101 *et seq.* The General Assembly and the City Council of the District of Columbia enacted legislation to establish the MWAA. Code § 5.1-152 *et seq.*; D.C. Code § 9-901 *et seq.* According to . . . § 5.1-153, the MWAA is “a public body corporate and politic and independent of all other bodies,” *see also* 42 U.S.C. § 49106(a)(2); D.C. Code § 9-902, created for the purpose of “acquiring, operating, maintaining, developing, promoting and protecting Ronald Reagan Washington National Airport and Washington Dulles International Airport.” Code § 5.1-156. . . .

On September 7, 1950, the United States Congress enacted legislation authorizing “the construction, protection, operation, and maintenance of a public airport in or in the vicinity of the District of Columbia.” Pub. L. 81-762, 64 Stat. 770. Construction for the airport commenced in 1958, and the airport was dedicated on November 17, 1962, as Dulles International Airport. In 1984, it was renamed Washington Dulles International Airport (Dulles Airport). As part of the overall project, the Dulles Airport Access Highway (DAAH) was constructed to connect the airport to Interstate 495 (the Beltway) and Interstate 66. The entire road is limited to airport traffic only and has no exits west of the Beltway, other than direct access to the airport. Due to public demand for local access routes off of the DAAH, the United States Department of Transportation and the Director of the then existing Metropolitan Washington Airports entered into an agreement with the Commonwealth, dated July 6, 1981 (“the 1981 Agreement”), to construct a new road in the existing right-of-way for the DAAH. This new road, which has access for local traffic, is known as the Dulles Toll Road. VDOT constructed the Dulles Toll Road in the early 1980's and has maintained and operated the highway since it was opened to public use. By deed of easement dated January 9, 1990, the MWAA conveyed to the Commonwealth the right to use additional land within the DAAH right-of-way to widen the Dulles Toll Road.

On March 24, 2006, the Secretary of Transportation executed a Memorandum of Understanding (MOU) between the Commonwealth of Virginia and the MWAA concerning the Dulles Corridor Metrorail Project<sup>[3]</sup> (Metrorail Project) and the Dulles Toll Road. The MOU recites that the Dulles Toll Road was “constructed upon property owned by the federal government and leased to [the MWAA], pursuant to several deeds of easement to the Commonwealth of Virginia for the construction of the Dulles Toll Road.” In the MOU, the parties agreed that the Commonwealth, acting through VDOT and the Commonwealth Transportation Board, “will transfer possession and control over

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<sup>2</sup> *Gray v. Va. Sec’y of Transp.*, 276 Va. 93, 98-99, 662 S.E.2d 66, 68-69 (2008). In *Gray*, the Court held that the doctrine of sovereign immunity did not apply because the constitutional provisions at issue were “self-executing.” *Id.* at 106-07, 662 S.E.2d at 73.

<sup>3</sup> “The Metrorail project is for the purpose of expanding the existing metrorail system to Dulles Airport.” *Id.* at 99 n.2, 662 S.E.2d at 69 n.2.

the Dulles Toll Road right-of-way and all improvements thereto to the [MWAA],” that the MWAA will assume all operational, maintenance, toll-setting, toll-collection, debt, and financial responsibility for the Dulles Toll Road, and that the MWAA will construct certain phases of the Metrorail Project. Pursuant to the MOU, the Commonwealth agreed to transfer to the MWAA funds dedicated for the design and construction of the Metrorail Project and revenues collected from operation of the Dulles Toll Road. Finally, the MOU provides that “[r]evenues collected from the Dulles Toll Road shall be used for any and all costs related to the operation, maintenance and debt service of the Dulles Toll Road, and the design, construction and financing of the Dulles Corridor Metrorail Project.”

On December 29, 2006, the VDOT and the MWAA entered into the first of several agreements contemplated by the MOU. Among other things, the agreement transferred to the MWAA the authority to set toll rates for the Dulles Toll Road.

### Applicable Law and Discussion

Your first question addresses the authority of the Governor to divest the Commonwealth of its interest in the Dulles Toll Road and “grant it” to MWAA. You further ask whether such a conveyance was lawful in the absence of concurrence by the General Assembly. While there is no express authority authorizing the Governor to alienate the Commonwealth’s limited interest in the Toll Road, a variety of statutes provide broad flexibility to the executive branch to provide for roads and public transportation.

The General Assembly has provided that departments, including the Department of Transportation (“VDOT”), have the power to “[m]ake and enter into contracts and agreements necessary or incidental to the performance of its duties and execution of its powers under this title.”<sup>4</sup> Departments also have the power to “[d]o all acts necessary or convenient to carry out the respective purposes for which the department was created.”<sup>5</sup> This authority extends to the Secretary of Transportation, who is responsible to the Governor for, among other things, the “Department of Transportation [and the] Department of Rail and Public Transportation.”<sup>6</sup>

The Commonwealth Transportation Board (CTB) is given the power to monitor and “approve actions taken by the Department of Rail and Public Transportation . . . in order to ensure the efficient and economical development of public transportation, the enhancement of rail transportation and the coordination of such rail and public transportation plans with highway programs.”<sup>7</sup> The CTB also can “enter into contracts with local districts, commissions, agencies or other entities created for transportation purposes.”<sup>8</sup> In turn, the Director of the Department of Rail and Public Transportation is vested with “the power to *do all acts necessary or convenient* for establishing, maintaining, improving, and promoting public transportation, transportation demand management, ridesharing, and passenger and freight rail transportation in the Commonwealth.”<sup>9</sup>

Similarly, the Commissioner of Transportation is given the power to “to *do all acts necessary or convenient* for constructing, improving, maintaining, and preserving the efficient operation of the roads

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<sup>4</sup> VA. CODE ANN. § 2.2-601(2) (2011).

<sup>5</sup> *Id.*

<sup>6</sup> Section 2.2-228 (2011).

<sup>7</sup> VA. CODE ANN. § 33.1-12(9)(a) (2011).

<sup>8</sup> Section 33.1-12(9)(d) (2011).

<sup>9</sup> Section 33.1-391.3 (2011) (emphasis added).

embraced in the systems of state highways and to further the interests of the Commonwealth in the areas of public transportation, railways, seaports, and airports.”<sup>10</sup>

When the General Assembly wishes to limit this broad discretion, it knows how to do so. For example, the General Assembly provided in § 2.2-1150 that

[p]rior to entering into any negotiations for the conveyance or transfer of any portion of Camp Pendleton or any military property that has been or may be conveyed to the Commonwealth pursuant to a recommendation by the Defense Base closure Realignment Commission, the Department shall give written notice to all members of the General Assembly within the planning district in which the property is located.

Finally, specifically in connection with this project, the General Assembly has authorized the CTB to “provide for the additional improvements to the Dulles Toll Road and Dulles Access Road corridor . . . including but not limited to, mass transit, including rail . . . .”<sup>11</sup>

In *Gray*, the Commonwealth argued that the authority outlined above is broad enough to permit Executive Branch officials to negotiate the MOU described above, which transfers the Commonwealth’s right of way over the Dulles Toll Road to MWAA. I note that the only court to consider this question concluded that the transfer of the Commonwealth’s interest pursuant to the MOU was permissible.<sup>12</sup> Therefore, although there is no precedent from the Supreme Court of Virginia delineating the precise authority of the Governor in this context, the Governor’s actions were upheld in a court of law.

You further ask whether Virginia can void the MOU that Governor Kaine reached, and regain control over the Toll Road and the Dulles Rail project. In addition, you inquire whether Virginia can seek federal aid to provide relief to the motorists who are asked to shoulder the burden of financing the extension of Metrorail.

Various complex and detailed agreements address whether and how Virginia can regain control over the Dulles Toll Road and Metrorail project, including agreements relating to and/or governing assignment of the Metrorail Project to MWAA and granting a permit to MWAA to operate the Dulles Toll Road. Key agreements that govern these transactions include Dulles Toll Road Permit and Operating Agreement between VDOT and MWAA, entered on December 29, 2006 and amended on July 9, 2007 and November 1, 2008 (“Operating Agreement”); Assignment and Assumption Agreement between the Virginia Department of Rail and Public Transportation (“DRPT”) and MWAA, entered on June 28, 2007; and the Further Assurances Agreement between VDOT, DRPT and MWAA, entered on November 1, 2008.<sup>13</sup> These agreements list certain factual situations in which the agreements may be terminated;<sup>14</sup>

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<sup>10</sup> Section 33.1-13 (emphasis added).

<sup>11</sup> 1995 Va. Acts ch. 560 § 14.

<sup>12</sup> See *Gray v. Va. Sec’y of Transp.*, Case No. CL07-203-4 (Richmond Cir. Ct. Oct. 17, 2008) (unpublished order).

<sup>13</sup> Some of these documents are available on MWAA’s website, <http://www.mwaa.com/tollroad/2469.htm>. See also <http://www.metwashairports.com/dulles/2548.htm>.

<sup>14</sup> See Dulles Toll Road Permit & Operating Agreement, arts. 14 & 15, as amended by First and Second Amends. to the Dulles Toll Road Permit & Operating Agreement.

provide remedies for noncompliance and termination;<sup>15</sup> and govern the rights, responsibilities and remedies associated with the bond financing of the Dulles Toll Road and Metrorail Project.<sup>16</sup>

For instance, the Operating Agreement provides for its termination by either party 1) if any Terminating Order is issued or entered prior to Final Acceptance of the Metrorail Project that prevents, prohibits or invalidates the transfer to MWAA of operational control over the Toll Road, prevents or prohibits MWAA from being able to obtain or maintain the financing permitted by the Operating Agreement, or prevents or prohibits MWAA from being able to construct the Metrorail Project; or 2) after Final Acceptance of the Metrorail Project if any Termination Order is issued or entered that prevents, prohibits or invalidates the transfer to MWAA of operational control over the Toll Road.<sup>17</sup> The Operating Agreement further provides for termination and/or other remedies if there is a material Non-Compliance by MWAA<sup>18</sup> (as defined in those sections). In addition, the Assignment and Assumption Agreement provides that either MWAA or DRPT may require the other party to enter into a reassignment agreement, under which the Metrorail Project can be transferred back to DRPT. Such transfer results upon the occurrence of any one or more of the Non-Compliance events specified in § 14.01(c) of the Operating Agreement when such event either 1) prevents, prohibits or invalidates the transfer to MWAA of operational control over the Toll Road; 2) prevents or prohibits MWAA from being able to obtain or maintain the financing permitted by the Operating Agreement; or 3) prevents or prohibits MWAA from being able to construct the Metrorail project.

You also ask whether the Commonwealth may apply for federal aid in order to reduce the liability that motorists will have to shoulder to finance the Metrorail Project.<sup>19</sup> Whether or not the Commonwealth may apply for federal aid and further, the more critical question of whether the Commonwealth is eligible to receive such aid, are essentially questions of fact and any response would be entirely speculative and outside the purview of an official opinion.

You next ask whether all the parties to the MWAA Compact would have to approve the takeover of the Dulles Toll Road by MWAA. It is my opinion that the agreement of all the parties to the Compact governing MWAA would not be required to approve MWAA's takeover of the Dulles Toll Road. Instead, the approval of MWAA's Board would be sufficient to confer upon MWAA the authority and responsibility to operate and maintain the Dulles Toll Road.

The MWAA Compact and enabling legislation is set out in Chapter 10 of Title 5.1 of the *Code of Virginia*. Section 5.1-155(A) establishes the membership of MWAA, providing that the Authority shall consist of 13 members: five appointed by the Governor of the Commonwealth of Virginia; three appointed by the Mayor of the District of Columbia; two appointed by the Governor of the State of

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<sup>15</sup> *Id.*

<sup>16</sup> *See id.* art. 5.

<sup>17</sup> Second Amend. to the Dulles Toll Road Permit & Operating Agreement § 3 (amending § 14.01(c) of the Operating Agreement). Included in the term "Terminating Order" is "any valid law or any final and non-appealable judgment, directive, order, award, decree or final decision of any federal, state, local or other court or tribunal or any federal or state agency or other body exercising adjudicative, regulatory, judicial or quasi-judicial powers and any final and non-appealable award in any arbitration proceeding." *Id.* § 6 (amending Exhibit A of the Operating Agreement).

<sup>18</sup> Operating Agreement §§ 15.01 & 15.02.

<sup>19</sup> For purposes of this opinion, I interpret "liability that motorists will have to shoulder" to mean tolls.

Maryland; and three appointed by the President of the United States. It also provides that for the purposes of doing business, seven members shall constitute a quorum.<sup>20</sup>

The MWAA Compact further provides that the Authority has the power to plan, establish, operate develop, construct, enlarge, maintain, equip and protect the airports;<sup>21</sup> and to make and enter into all contracts and agreements necessary or desirable to the performance of its duties and the furnishing of services to the travelling public and airport users;<sup>22</sup> and to do all acts and things necessary or convenient to carry out the powers expressly granted in the act.<sup>23</sup> Moreover, § 5.1-175 requires the Compact to be “liberally construed to affect the purposes thereof.” The overarching purpose of the agreements in question is to extend Metrorail to the airport for the convenience of passengers. Given this broad language and the purpose behind the agreements, it is my opinion that the Compact bestows upon the Authority the power to enter into the agreements relating to the Dulles Rail Project and the transfer and operation of the Dulles Toll Road.<sup>24</sup>

You next inquire whether Virginia would have any liability for the extension of the Metrorail in the event MWAA were to default on its bond payments. The financing of, and liability for, the Dulles Metrorail Project are addressed by the various agreements relating to and/or governing assignment of the Metrorail Project to MWAA and granting a permit to MWAA to operate the Dulles Toll Road. Those agreements include various terms and provisions that address financing relating to the Dulles Toll Road and the Metrorail Project.

Article 5 of the Operating Agreement addresses financing terms. Section 5.01(a) provides that MWAA is “solely responsible for obtaining and repaying all financing, at its own cost and risk and without recourse to [VDOT], necessary to maintain, improve, equip, modify, repair and operate the Toll Road and any Capital Improvements throughout the Term and necessary to develop and construct the Dulles Corridor Metrorail Project.” Section 5.01(b) further provides that neither the Commonwealth, or VDOT, the CTB nor any other agency, instrumentality or political subdivision of the Commonwealth “has any liability whatsoever for payment of the principal sum of any Toll Revenue Bonds, any other obligations issued or incurred by [MWAA] in connection with [the Operating] Agreement, the Toll Road or the Dulles Corridor Metrorail Project, or any interest accrued thereon or any other sum secured by or accruing under any Toll Road Financing Document.” Except for a violation by the Department of its express obligations to a Trustee, Toll Road Financing Documents are prohibited from containing any provisions under which a Trustee would be entitled to seek damages or other amounts from VDOT due to VDOT’s breach of the Operating Agreement. Further, other provisions in § 5.02 require that Indentures associated with the sale of bonds contain statements prohibiting Trustees and bondholders from naming or joining VDOT, the Commonwealth Transportation Board, the Commonwealth or any officer thereof in any legal proceeding regarding collection of the debt associated with the subject bonds, nor seek damages

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<sup>20</sup> Steps have been taken to amend the MWAA Compact to increase the membership of the Authority to 17 members and to make other governance changes. *See Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 191, 125 Stat. 552, 671 (2011); 2012 Va. Acts chs. 549, 712.*

<sup>21</sup> VA. CODE ANN. § 5.1-156(A)(2) (2010).

<sup>22</sup> Section 5.1-156(A)(13).

<sup>23</sup> Section 5.1-156(A)(16).

<sup>24</sup> I note that by resolution dated December 20, 2006, the MWAA Board voted to approve execution of the Master Transfer Agreement and the Operating Agreement and that the Board continues to take actions, on occasion, to address and approve other issues and matters associated with the Dulles Toll Road. *See* <http://www.mwaa.com/tollroad/2469.htm>.

from VDOT, other than damages for violation by VDOT of its express obligations to bondholders set forth in Article 5 of the Operating Agreement.

The Operating Agreement, however, upon its termination based on specified grounds, requires VDOT to take one of several actions.<sup>25</sup> Generally, VDOT either may enter into a new agreement with the Trustee named in the Indenture to continue to collect tolls on the Toll Road and remit them to the Trustee for the benefit of the bondholders or, in the alternative, VDOT can provide sufficient funds to MWAA to pay, purchase, redeem, defease, or otherwise satisfy any outstanding Toll Revenue Bonds.<sup>26</sup> Any such action on the part of VDOT, however, would be “subject to General Assembly approval, as required, and subject to appropriation by the General Assembly.”<sup>27</sup>

Your next question centers on the construction of a Metrorail station in Loudoun County. You ask whether the County would bear any obligation to pay for all or part of such a facility. Fairfax County, Loudoun County and MWAA (the “Funding Partners”) have entered into the Agreement to Fund the Capital Cost of Construction of Metrorail in the Dulles Corridor, dated July 19, 2007 (the “Funding Partners Agreement”), which addresses local funding options for the Metrorail. In the Funding Partners Agreement, Loudoun County has committed to a share of the Phase 2 Cost of the Metrorail project in an amount which, when added to any amount contributed by Loudoun towards the Phase 1 Cost (although no such contribution is anticipated by the Funding Partners), totals 4.8 percent of the entire Dulles Rail Project Cost.<sup>28</sup> The commitment is subject to all conditions set forth in the Funding Partners Agreement, including, in particular, “the approval by Fairfax and Loudoun of the terms and conditions of the 100% preliminary engineering cost estimate for Phase 2,”<sup>29</sup> as well as appropriation and allocation of the funding. Loudoun may also be responsible for in-kind contributions, such as real property needed to permit the Washington Metropolitan Area Transit Authority to operate and maintain the Metrorail Project.<sup>30</sup> Therefore, Loudoun County has obligated itself to bear some of the cost of the project, but not for any one particular station.

Loudoun County, nonetheless, has committed to use best efforts to secure additional funding sources to fund the cost of design and construction for the parking facilities at the Phase 2 planned Metrorail stations in Loudoun County at Route 606 and Route 772, respectively.<sup>31</sup> Loudoun County also intends to apply with Fairfax County and/or MWAA for credit assistance from the U.S. Department of

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<sup>25</sup> Second Amend. to the Operating Agreement § 4 (amending § 14.01(d) of the Operating Agreement).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Agreement to Fund the Capital Cost of Constr. of Metrorail in the Dulles Corridor § 2.2 (b)(3), *available at* [https://docs.google.com/viewer?a=v&q=cache:EHJfa807v9IJ:www.loudoun.gov/controls/speerio/resources/RenderContent.aspx?data%3D2fc19a32291149848f8ab29844ca15b4%26tabid%3D326+Agreement+to+Fund+the+Capital+Cost+of+Constr.+of+Metrorail+in+the+Dulles+Corridor&hl=en&gl=us&pid=bl&srcid=ADGEESg2wB2JqezaVNndFJdoaWmXrd9Pbf3uxQYZkzEbJE7wFJ3CgWjYqmJd3KVwGSwSZmyR37lsDEYZFwIEN4SsiWnXXnJiXvy5qmApHZHIz9IRXJkCvxCkeifYr13DojRSRvHQsdw&sig=AHIEtbSf3VDoSgHu\\_NSLZji56heSD6N9dw](https://docs.google.com/viewer?a=v&q=cache:EHJfa807v9IJ:www.loudoun.gov/controls/speerio/resources/RenderContent.aspx?data%3D2fc19a32291149848f8ab29844ca15b4%26tabid%3D326+Agreement+to+Fund+the+Capital+Cost+of+Constr.+of+Metrorail+in+the+Dulles+Corridor&hl=en&gl=us&pid=bl&srcid=ADGEESg2wB2JqezaVNndFJdoaWmXrd9Pbf3uxQYZkzEbJE7wFJ3CgWjYqmJd3KVwGSwSZmyR37lsDEYZFwIEN4SsiWnXXnJiXvy5qmApHZHIz9IRXJkCvxCkeifYr13DojRSRvHQsdw&sig=AHIEtbSf3VDoSgHu_NSLZji56heSD6N9dw) (last visited May 17, 2012).

<sup>29</sup> *Id.* § 2.3(b).

<sup>30</sup> *Id.* § 2.5.

<sup>31</sup> See Memorandum of Agreement Among United States Department of Transportation, Commonwealth of Virginia, Fairfax County, Loudoun County, The Washington Metropolitan Area Transit Authority, and The Metropolitan Washington Airports Authority § 3.2(b) (effective December 30, 2011), *available at* <http://www.dot.gov/affairs/2011/FTADulles.pdf>.

Transportation through the federal Transportation Infrastructure Finance and Innovation Act (“TIFIA”) program, Loudoun’s portion of any TIFIA loan to be applied to the cost of the Phase 2 Loudoun parking facilities.<sup>32</sup> If Loudoun County is unable to secure sufficient additional funding for the design and construction of the Phase 2 parking facilities, despite its best efforts, the amount of any funding shortfall shall be considered to be part of the total Metrorail Project cost and funded as provided for in the Funding Partners Agreement.<sup>33</sup>

Your final question concerns the applicability of state and federal freedom of information laws to MWAA. The Virginia Freedom of Information Act applies to “public bod[ies],” which are defined as

any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.<sup>[34]</sup>

When statutory language is clear and unambiguous, the plain meaning of the language used should determine the legislative intent.<sup>35</sup> MWAA does not fit within the definition of “public body.” MWAA is not an authority of a “district or agency of the Commonwealth,” or of “any political subdivision of the Commonwealth.” Instead, Virginia and the District of Columbia, through a compact, have created the authority.<sup>36</sup> Moreover, the U.S. Court of Appeals for the Fourth Circuit has determined that MWAA is not subject to Virginia’s FOIA.<sup>37</sup>

A United States District Court in Maryland similarly rejected the application of Maryland’s freedom of information law to a regional transit authority created by interstate compact.<sup>38</sup> The court reasoned that

Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law.<sup>[39]</sup>

Notably, the MWAA Compact does not specify that one or both of the freedom of information statutes applies to MWAA. The Maryland federal court further noted that the mere fact that signatories to an interstate compact have adopted separate freedom of information statutes does not mean that the body

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<sup>32</sup> *Id.* Exhibit One.

<sup>33</sup> *Id.* § 3.2(d). Loudoun County committed to making best efforts to secure additional funding sources as one of several steps by the parties to this agreement to reduce the total Metrorail Project cost that otherwise will be funded through the Funding Partners Agreement that relies in large part on Dulles Toll Road revenues.

<sup>34</sup> VA. CODE ANN. § 2.2-3701 (2011).

<sup>35</sup> *See Wright v. Commonwealth*, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009).

<sup>36</sup> 49 U.S.C. § 49103; VA. CODE ANN. § 5.1-153 (2010).

<sup>37</sup> *Parkridge 6 LLC v. U.S. Dep’t of Transp.*, 420 F. App’x 265, 268 (4th Cir. 2011) (MWAA “exists ‘independent of Virginia and its local governments, the District of Columbia, and the United States Government.’” 49 U.S.C. § 49106(a)(2)-(3) (2006). As such, it is not subject to Virginia’s FOIA”). The Fourth Circuit declined to address whether MWAA is subject to the federal FOIA because that issue had not been presented in the lower court.

<sup>38</sup> *C.T. Hellmuth & Assocs., Inc. v. Wash. Metro. Area Transit Auth.*, 414 F. Supp. 408, 410 (D. Md. 1976).

<sup>39</sup> *Id.* at 409.

created by the compact is subject to those freedom of information laws.<sup>40</sup> Finally, the fact that MWAA is subject to suit in Virginia<sup>41</sup> does not mean that MWAA is also subject to the Freedom of Information Act.

Finally, the federal Freedom of Information Act applies to an “agency” of the United States.<sup>42</sup> The term “agency” does not include entities created pursuant to an interstate compact.<sup>43</sup> Therefore, MWAA is not subject to the federal Freedom of Information Act.

### Conclusion

Accordingly, it is my opinion that although the issue has not been conclusively resolved, under the only available precedent, the Governor was authorized to divest the Commonwealth of its interest in the Dulles Toll Road as part of the overall project to extend Metrorail. The agreements between various parties control the circumstances under which Virginia can regain control over the project and void the MOU. It is further my opinion that the assent of all parties to the MWAA Compact was not required for MWAA to operate the Dulles Toll Road. I also conclude that the agreements signed by Loudoun County detail the scope of its obligation in connection with this project. Finally, it is my opinion that neither the state nor the federal freedom of information statute applies to MWAA under the plain terms of those statutes.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>40</sup> *Id.* at 409.

<sup>41</sup> VA. CODE ANN. § 5.1-173(A); D.C. CODE § 9-922(a).

<sup>42</sup> 5 U.S.C. § 551(1).

<sup>43</sup> 5 U.S.C. § 552.