



Local governments working together for a better metropolitan region

January 18, 2011

District of Columbia
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Bowie
College Park
Frederick
Frederick County
Gaithersburg
Greenbelt
Montgomery County
Prince George's County
Rockville
Takoma Park
Alexandria
Arlington County
Fairfax
Fairfax County
Falls Church
Loudoun County
Manassas
Manassas Park
Prince William County

*Adjunct member

TO: CHAIR HARRISON AND MEMBERS OF COG BOARD

FROM: SHARON E. PANDAK
General Counsel

RE: REGION FORWARD COALITION BYLAWS

This is to respond further to the question posed at the last Board meeting by Supervisor Covington and Chairman Bulova regarding the "Voting Members" for the Region Forward Coalition. The specific question was why the voting members included (among other categories) "a representative of the Executive Branch of the District of Columbia, and the Counties of Montgomery and Prince George's" (Category 2) in addition to "an elected official serving on each of the legislative bodies of COG participating Jurisdictions." (Category 1)

Pursuant to Section 3.01 of the COG By-Laws, the membership in the Council of Governments is

(a) The members of the governing body of each participating government...For the purpose of this Section 3.01(a), the term 'governing body' shall include the *elected executive or his or her appointee, of any participating government.*

(b) The members of the General Assemblies of Maryland and Virginia and the Congress of the United States who represent portions of the geographical area of the Washington Metropolitan Statistical Area. [Emphasis added.].

Unlike in Maryland and the District of Columbia, the at-large, elected Chairman of the Boards of Supervisors in Prince William County and Fairfax County, respectively, are not "executives."

Please let me know if you have any additional questions. As a relatively new member of the COG team myself, this was new information to me.

cc: David Robertson, Executive Director




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November 10, 2010

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Prince William County

TO: DAVE ROBERTSON
Executive Director

FROM: SHARON PANDAK 
General Counsel¹

RE: COG'S EXEMPTION FROM FREEDOM OF
INFORMATION ACT REQUIREMENTS WHICH BIND
GOVERNMENTS

Both generally and in response to specific questions raised by persons regarding meetings of the COG-Board of Trade WMATA Governance Task Force, you have asked whether COG must comply with what are commonly known as Freedom of Information Act requirements that bind local, state and federal governments in varying ways.² This memorandum responds to your inquiry.

Summary

The Council of Governments ("COG") is exempt from the Virginia Freedom of Information Act ("VFOIA"), the District of Columbia Freedom of Information Act ("DCFOIA"), and the Maryland Public Records Act ("MPRA") because it is not a "public body" or "agency" within the meaning of those statutes.

VFOIA might be applicable to any meeting where three (3) or more Virginia elected officials meet to discuss specific votes or transact business related to their "primary" public body. However, so long as they are meeting to discuss more general policy matters or COG matters, VFOIA is not applicable.

¹ The research and initial drafting of this memorandum were done by Associate Michael Lockaby.

² Former General Counsel Lee Ruck told me that he opined on this issue several years ago. He indicated that both he and his predecessor John Bosley had concluded that COG was not constrained by such requirements. However, he could not locate any written advice in this regard. Lee stated that it was his conclusion that COG was only subject to its Rules of Procedure, and other law relating specifically to entities of its ilk. I concur with that conclusion.

Legal Analysis

Virginia Law

VFOIA defines itself as applying only to “public records,” which are records kept by “public bodies.” Va. Code § 2.2-3701. Therefore, the issue is whether COG is a “public body.” A public body is:

any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth . . . and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.

Virginia has built up a fairly substantial body of case law and administrative opinions interpreting this statutory language. The basic principles were enunciated by the Virginia Supreme Court in *RF & P Corp. v. Little*, 247 Va. 309, 440 S.E.2d 908 (1994). In that case, the Virginia Retirement System was the sole shareholder of a corporation, RF & P, which existed to manage the pension funds of Virginia state employees. The issue was raised: is this a public body? The analysis turned on whether it was “created as a committee or subcommittee” of the Virginia Retirement System “to perform delegated functions.” *Id.* at 316, 440 S.E.2d at 913. It was not; its independent corporate identity made it legally distinct.³

For similar reasons, the Attorney General of Virginia has concluded that legislative caucuses are not “public bodies.” See Opinion to the Hon. Clifton A. Woodrum, Op. Va. Att’y Gen. 03-063 (Jan. 6, 2004). First, they are not created by any public agency. However, any time three (3) or more legislators meet to discuss legislation, they are holding a “public meeting” within the meaning of VFOIA, so a meeting to discuss specific votes would be a “public meeting;” however, a caucus meeting that deals with general issues of policy, rather than specific votes, would not be a “public meeting.”

Finally, an essentially private entity, such as a corporation or a caucus, might become a “public body” by virtue of being entirely or principally funded by the public. See Opinion to Ms. Maureen Kelley Corum, Op. Va. Tax Comm’r AO-36-01 (July 26, 2001). The general guideline is that at least two-thirds of its funding must come from the public, although it can also be a fact-specific inquiry.

Most instructive is the decision in *Wigand v. Wilkes*, 65 Va. Cir. 437 (City of Norfolk Cir. Ct. 2004). That case dealt with whether the Hampton Roads Education Television Association (“HRETA”), a public television station created by a consortium of local governments in Virginia Tidewater, was a “public body” subject to VFOIA. The answer was no. The Court found that (1) it was a separate corporation, not an agency created by the Commonwealth or one of its arms; (2) it only got around 25% of its funding from the public; and (3) the Board of Directors, though nominated by local governments, performed essentially independently in the best interests of HRETA.

³ This decision was legislatively overturned by an act of the General Assembly, as the Court recognized in the case itself. However, the analysis remains applicable.

I conclude that COG is similar to HRETA in all relevant respects, and exempt from VFOIA, except to the extent that three (3) or more Virginia legislators are present discussing specific votes on legislative matters.

Maryland Law

MPRA does not define whom it covers. However, Maryland's Court of Appeals laid down principles for determining whether a corporation is a state agency within the meaning of MPRA in *A.S. Asbell Publishing Co. v. Mezzanote*, 297 Md. 26, 464 A.2d 1068 (1983). The Court analyzed the status of the Maryland Insurance Guaranty Association ("MIGA"), a semi-public insurer created as a "backstop" to provide insurance when Maryland insurers suffered insolvency. The Court wrote that MIGA was an agency of the state, because:

MIGA's existence depends on the General Assembly; it serves a public purpose, its management is selected by the [State Insurance] Commissioner, and is not self-perpetuating; it does not independently manage its affairs or enforce its regulations; its decisions may be reversed by the Commissioner; and it enjoys special tax and liability status [i.e., tax exemption as a public body and sovereign immunity in tort].

Id. at 38, 464 A.2d at 1074. In other words, MIGA differed in a number of important respects from COG: COG, on the other hand, operates as independent nonprofit entity, with no outside veto over its corporate decisions; it has no more tax or liability protection than any other nonprofit corporation; and it is self-perpetuating.

Therefore, I conclude that COG is not a public agency under Maryland law, either.

District of Columbia Law

Because COG is physically and legally located in the District of Columbia, D.C. law is the most legally relevant.

District of Columbia law is significantly less illuminating than Virginia or Maryland law on this point. DCFOIA defines a "public record" open to inspection as a document "prepared, owned, used, in the possession of, or retained by a public body," which is in turn defined as "the Mayor, an agency, or the Council of the District of Columbia." D.C. Stat. § 2-502. No more specific definition of "public body" exists in D.C. law. However, compliance with the more well-defined and stringent requirements of Virginia and Maryland law should ensure that meetings do not become "public meetings" of a "public body" within the meaning of D.C. law.

As you know, Freedom of Information Acts relate to documents in the possession of the public entity as well as meetings. Again we conclude that the law operative to the COG members does not bind COG.

Current COG Provisions

Even though COG is not bound by FOIA, each of its member jurisdictions is. Former

General Counsel Lee Ruck advises me that the COG Rules of Procedure have been drafted with such member confidence in mind. As you know Rules 4.06 and 4.07 address when COG Board, Policy and Technical Committee meetings are to be opened or closed:

- COG Board and Policy Committee meetings are open to the public unless they are closed by the Chairman for a specific reason. Rules 4.06 and 4.07.
- COG Technical Committee meetings are generally closed unless the Committee Chairman designates them as open because it is more likely that the various discussions will be sensitive. Rule 4.07(d).

As you also know, the Rules also address Access to Official Records and Records Withheld from Public Disclosure. See various sections to Rule 4.00 Meetings and Access to Information.

I reviewed these conclusions generally with the members of the COG Attorneys Committee who attended the last meeting. Although it was a small group and not all jurisdictions were represented, none of the attorneys expressed concern about the current COG Bylaws or proceedings, including specifically the WMATA Task Force process.⁴

Please let me know if you want me to do anything more in this regard.

⁴ I also mentioned in passing that COG does not follow Virginia, Maryland or the District of Columbia purchasing laws unless they are applicable to a particular procurement. After being advised that COG does have a procurement policy requiring competitive procurements, except in specific instances, like sole source, no concern was expressed by the COG Attorneys Committee members who were present.