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WRITER'S DIRECT DIAL NO.

October 4, 2007

The Honorable Joan Carter Conway  
Chair, Senate Education, Health, and  
Environmental Affairs Committee  
Suite 2 West, Miller Senate Office Building  
11 Bladen Street  
Annapolis, Maryland 21401

SB 911

Dear Senator Conway:

I am responding to your request to the Attorney General earlier in the summer in connection with the interim study of Senate Bill 911 - *Higher Education – University of Maryland Medical System – Subject to State Access to Public Records Law* by the Senate Education, Health, and Environmental Affairs Committee (“Committee”). You stated that the Committee wished to examine the merits of subjecting the University of Maryland Medical System (“UMMS”) to open government laws in the context of the status of other quasi-governmental agencies under those laws.

You indicated that the Intergovernmental Matters and Public Administration Workgroup of the Office of Policy Analysis in the Department of Legislative Services (“DLS”) would conduct research on the questions posed by the Committee and suggested that we coordinate with DLS. As you suggested, we have contacted Josh Loh of DLS and have reviewed the report recently produced by DLS on this subject. *See Application of the State Open Meetings Act and the Public Information Act to the University of Maryland Medical System* (August 2007) (“DLS Report”). This letter provides our comments and analysis on the questions you have posed, in light of the DLS Report.

*Application of Open Government Laws - DLS Report*

The DLS Report accurately describes the key questions in determining whether the Open Meetings Act, Annotated Code of Maryland, State Government Article (“SG”), §10-501 *et seq.*, and Public Information Act (“PIA”), SG §10-611 *et seq.*, apply to quasi-governmental entities in the State. Specifically, the Open Meetings Act applies to the governing body of an entity if it fits the definition of “public body” in the Open Meetings Act. *See* Open Meetings Act Manual (6<sup>th</sup> ed. 2006) at pp. 3-6. The term “public body” is defined generally as an entity that consists of at least two individuals and is created by the State constitution, a State statute, a county charter, an ordinance, rule, resolution or bylaw, or executive order. SG §10-502(h)(1). The phrase also includes certain multi-member boards and commissions appointed by the Governor, the chief executive of a political subdivision, or a policy subordinate. SG §10-502(h)(2). In addition, the General Assembly can also specify whether it intends for a particular quasi-governmental entity to be treated as a “public body” – as it has done in the legislation governing UMMS. *See, e.g.*, SG §10-502(h)(2)(ii) (Maryland School for the Blind is a public body); SG §10-502(h)(3)(v) (Appalachian States Low Level Radioactive Waste Commission not a public body).

As the DLS Report indicates, the application of the PIA to an entity depends on whether the entity is considered a “unit or instrumentality” of State or local government. *See also* Public Information Act Manual (10<sup>th</sup> ed. 2007) at pp. 2-4. The courts look to a number of factors to determine whether there is a sufficient nexus between an entity and the government to make it a “unit or instrumentality” for purposes of the PIA. *Id.* The primary factors concern the degree to which the entity is controlled by the State or local government and the extent to which the entity performs what would otherwise be governmental functions. Again, the General Assembly can make clear in an entity’s enabling legislation whether the particular entity is a unit or instrumentality subject to the PIA. *See, e.g.*, Annotated Code of Maryland, Article 83A, §5-214(b) (Maryland Economic Development Corporation subject to the PIA); Human Services Article (“HS”), §11-202(c) (Maryland Legal Services Corporation is not an instrumentality of the State).

*Application to UMMS*

We agree with the general analysis set forth in the DLS Report as to application of the Open Meetings Act and Public Information Act to the UMMS. In essence, because the statute creating UMMS specifies that it is *not* a “public body,” it is not subject to the Open Meetings Act. *See* Annotated Code of Maryland, Education Article (“ED”), §13-303(a)(2). Moreover, the Open Meetings Act itself exempts the governing bodies of hospitals from its

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purview. SG §10-502(h)(3)(x). On the other hand, it is likely that UMMS would be considered a “unit or instrumentality” of the State and therefore subject to the PIA. *See* Letter of Assistant Attorney General Kathryn M. Rowe to Senator Verna Jones (March 21, 2007) (copy attached).

### *Application to Other Selected Quasi-Governmental Entities*

With respect to the application of open government laws to other “quasi-governmental agencies” in the State, it is difficult to provide a simple answer as there is no precise definition of that phrase. Nor can one easily find a catalog of such entities. The DLS Report identified six other entities, in addition to UMMS, that might be characterized as quasi-governmental in nature. While there are numerous other entities affiliated with the State that are not entirely governmental in character and might be characterized as “quasi-governmental”, the entities identified in the DLS Report provide an illustrative sample. I discuss each of them below.

(1) *Maryland School for the Blind*. The DLS report states:

The Maryland School for the Blind was incorporated in 1853 as the Maryland Institution for the Instruction of the Blind and adopted its present name in 1868. A private, nonprofit school, it educates blind or visually impaired children and youth, including those with multiple disabilities, from infancy to age 21.

To govern the school, the board of directors was created in 1998. The board consists of 25 members, 5 of whom are appointed jointly by the Governor and State Superintendent of Schools. The remaining 20 are elected by the board of directors.

DLS Report at p. 2 (footnotes omitted).

As noted earlier, the Open Meetings Act explicitly states that the Maryland School for the Blind is a public body subject to the Act – in sharp contrast to the statute governing UMMS. The statutes concerning the Maryland School for the Blind do not specify its status under the PIA. However, its operations are subject to substantial oversight by the State, including the Maryland State Department of Education (“MSDE”), and it is funded by the State and counties. *See, e.g.*, ED §§8-306, 8-307 (standards for admission and dismissal

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subject to review by MSDE; actual admission and dismissal decisions subject to review by Office of Administrative Hearings); ED §8-309 (salaries of teachers to be at least equal to those of public school teachers); ED §§8-310, 8-317 (funding of school by counties and State); ED §8-316 (monitoring and review of school by MSDE); ED §8-318 (operating and administrative budget of school to appear in State budget). Given that the Maryland School for the Blind is a "public body" for purposes of the Open Meetings Act and that the State exercises substantial control over its decisionmaking and budget, a court would likely hold that it is subject to the PIA.

(2) *Blind Industries and Services of Maryland*. The DLS Report states:

Blind Industries and Services of Maryland originated in 1908 as the Maryland Workshop for the Blind. It adopted its present name in 1973. Blind Industries and Services of Maryland provide employment, vocational training, rehabilitation, and education to blind adult Marylanders. The agency is open for the labor and manufactures of all blind citizens of Maryland over 18 years of age who can give satisfactory evidence of character and ability to do the work required.

An 11 member board of trustees, appointed by the Governor, governs the agency. At least 4 of the members must be blind.

DLS Report at p. 2 (footnotes omitted).

A State statute specifies that the Board of Trustees of Blind Industries and Services of Maryland ("Blind Industries") is a "body corporate" and that the 11 members appointed by the Governor serve staggered three-year terms. HS §7-703(a)-(e). Blind Industries carries out the State policy "to encourage and enable blind [and] visually impaired ... individuals to participate fully in the social and economic life of the State and to be employed." HS §7-702(a). Trustees are entitled to per diem compensation in accordance with the State budget and expense reimbursement in accordance with the State travel regulations. HS §7-703. The statute also sets forth the powers of the entity (*e.g.*, establish employment and training centers) and imposes various recordkeeping, reporting, and audit requirements. HS §7-703(h)-(j).

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The statute governing Blind Industries does not specify its status under the Open Meetings Act or PIA. However, its board satisfies the definition of "public body" under the Open Meetings Act, given that it is governed by a statute and the Governor appoints all of the members. See Letter of Assistant Attorney General Jack Schwartz to Frederick L. Dewberry, President, Blind Industries and Services of Maryland (January 19, 1988) (Board of Trustees of Blind Industries is a public body subject to Open Meetings Act). While the question is not free from doubt, it may also be aptly characterized as a unit or instrumentality of State government and thus subject to the PIA. Cf. Letter of Attorney General Francis Burch to Governor Blair Lee III (May 5, 1978) (members of the Board of Trustees are "public officers"); Letter of Assistant Attorney General Robert A. Zarnoch to Stuart Yael Gordon (January 25, 1988) (as State officers, Board members are subject to the jurisdiction of the AELR Committee).

(3) *Maryland Humanities Council*. The DLS Report states:

The Maryland Humanities Council was formed in 1974 in response to the federal law creating the National Endowment for the Humanities. The council is a private, nonprofit Maryland corporation funded by the federal government, the Division of Historical and Cultural Programs of the Department of Planning, and by foundations, corporations, and individuals. An independent 501(c)(3) organization, the council is the Maryland statewide programming arm of the National Endowment for the Humanities.

The Governor appoints up to 6 of the council's 26 volunteer members, with the remainder chosen by the council.

DLS Report at p. 3 (footnote omitted).

Although the Governor appoints a minority of the Council's board, presumably in accordance with its private corporate charter, the Council was apparently not created by any of the formal mechanisms listed in the definition of "public body" in the Open Meetings Act. Nor, to my knowledge, does the State exercise control over the Council or its budget. Rather, it appears to be a private entity created to help distribute federal funds for promotion of the humanities. In creating a mechanism for this federal funding to be distributed in Maryland, the State had the option of designating a State agency or a private entity that met certain criteria. See 20 U.S.C. §956(f)(2)(A)-(B). Maryland chose the latter course. Thus, the

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Council does not appear to be the type of quasi-governmental agency that would be subject to the Open Meetings Act or PIA. *See* Letter of Assistant Attorney General Richard E. Israel to Naomi F. Collins, Executive Director, Maryland Humanities Council (February 12, 1985) (Council is not subject to Open Meetings Act).

(4) *Maryland Legal Services Corporation*. The DLS Report states:

The Maryland Legal Services Corporation was established in 1982 and receives and distributes funds to nonprofit groups that provide civil legal assistance to low-income people in noncriminal proceedings or matters. The corporation endeavors to ensure that grants and contracts are made in a manner that provides the most stable, economical and effective delivery of legal assistance. It also ensures that eligible clients in all areas of the State have access to the corporation's services.

The corporation establishes maximum income levels for client eligibility and bases assistance on a client's financial inability to pay for competent private counsel and other necessary expenses of representation. Maximum income levels for eligibility set by the corporation may not exceed 50 percent of the median family income for Maryland, as certified annually by the U.S. Department of Health and Human Services.

Ten members constitute the corporation's board of directors. Five are lawyers and four are not lawyers. Members are appointed to three-year terms by the Governor. The executive director is appointed by the board and serves *ex officio* as a nonvoting board member.

DLS Report at p. 3 (footnotes omitted).

As indicated earlier, the enabling legislation for the Maryland Legal Services Corporation ("MLSC") specifies that it is not a unit or instrumentality of the State; therefore, it is not subject to the PIA. HS §11-202(c); *see also* Letter of Assistant Attorney General Jack Schwartz to Susan M. Ehrlichman, Deputy Director, MLSC (September 8, 1998); *cf.* 67 Opinions of the Attorney General 244 (1982) (MLSC, its board, officers, and employees

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not subject to the Public Ethics Law). That legislation also specifies that the meetings of MLSC board are to be open to the public, except that they may be closed for the same purposes that a meeting may be closed under the Open Meetings Act. HS §11-304(b).

(5) *MdBIO, Inc.* The DLS Report states:

MdBIO, Inc., began in 1991 as the Maryland Bioprocessing Center, Inc. Its original board of directors was appointed by the Governor in December 1991. The board renamed the center as MdBIO, Inc. in July 1997.

MdBIO is a private, nonprofit organization created by industry leaders from across Maryland in conjunction with The Johns Hopkins University, the University System of Maryland, and State government. MdBIO supports and promotes the manufacturing and commercial development of biotechnology in Maryland.

MdBIO's board of directors is self-perpetuating. It consists of 15 members, 3 of whom serve ex officio.

DLS Report at pp. 3-4.

On its website, MdBIO identifies itself as a division of the Tech Council of Maryland, which in turn indicates that it is related to the State Department of Business and Economic Development, as well as several counties, on its website. To the best of my knowledge, neither the Tech Council nor MdBIO was created by any of the formal mechanisms listed in the Open Meetings Act definition of "public body." No statute governs the conduct of MdBIO or the Tech Council. The fact that its board of directors is self-perpetuating suggests that it is independent of the government entities with which it is associated and militates against a finding that it is a unit or instrumentality of government. *See A.S. Abell Publishing Co. v. Mezzanotte*, 297 Md. 26, 38 (1983). To the extent that the University of Maryland was involved in the creation of MdBIO, that participation appears to fall within the University's authorization to promote the economic development of the State through collaboration with private industry. ED §15-107. It would not thereby make the entity a public body or instrumentality of government. Unless there are other factors by which a government agency exercises significant control over MdBIO, a court would likely hold that its board is not subject to the Open Meetings Act and the entity itself is not subject to the PIA.

(6) *University of Maryland Medical Systems Corporation*. The DLS Report states:

The University of Maryland Medical System was established in 1984 as a private, nonprofit corporation. It received its present name in 1996.

UMMSC provides inpatient and outpatient care, medical education, community health services, and emergency medical treatment in Baltimore and the surrounding area. Components of the system encompass the University of Maryland Medical Center (including R Adams Cowley Shock Trauma Center; Marlene and Stewart Greenebaum Cancer Center; and University of Maryland Hospital for Children); the Baltimore-Washington Medical System (including Mt. Washington Pediatric Hospital); Kernan Hospital; Maryland General Health Systems and Hospital; and University Specialty Hospital.

UMMSC is governed by a board of directors, consisting of between 22 and 27 voting members appointed to five-year terms by the Governor. In addition, there are 6 *ex officio* nonvoting members. The board elects the chief executive officer fo the corporation to manage its day-to-day operations.

DLS Report at p. 4 (footnote omitted).

As indicated earlier in this letter, we agree with the analysis set forth in the DLS Report. The Legislature has specified that UMMS is not a public body and therefore not subject to the Open Meetings Act. However, there is a substantial basis for concluding that it is a unit or instrumentality of State government and therefore subject to the PIA. Legislation could resolve any uncertainty about the latter issue.

(7) *Washington College*. The DLS Report states:

Washington College is a coeducational liberal arts and sciences college in historic Chestertown. The college offers 24 majors in the liberal arts and sciences and supplements it core curriculum with internships and research projects, diplomacy programs, and special programs in environmental science and



public affairs. The college also has a literary press, a forum for guest speakers, and lecture series that bring noted writers and other public figures to campus.

The college is governed by a board of 37 members named the Visitors and Governors of Washington College in the State of Maryland. The Governor appoints 12 members; alumni of the college elect 12 additional members; and the Board of Visitors and Governors itself chooses another 12. Elected by the board, the final member is the college president. Members serve six-year terms.

DLS Report at p. 4 (footnotes omitted).

While the College was originally chartered 225 years ago by an act of the General Assembly – which has been amended from time to time in the interim – its board is not necessarily a “public body” by virtue of that act. At the time that the school was chartered, there was no general incorporation law and special incorporation of private entities was common. See *Moberly v. Herboldsheimer*, 276 Md. 211, 216-17 and 220-21 (1975). The Open Meetings Compliance Board has noted that “it is possible that an entity might be private despite legislation chartering the entity.” Compliance Board Opinion 97-3, 1 OMCB Opinions 212, 214 (1997). In addition, while the Governor appoints slightly less than one-third of the College’s governing body, the State does not control the College or its budget or exercise the sort of oversight or control that would distinguish the College from other private institutions of higher education in the State. Against this background, Attorney General Burch concluded that the College is a “private” college. 63 *Opinions of the Attorney General* 106, 109 (1978). Thus, in my view, the College’s governing body is not subject to the Open Meetings Act. For similar reasons, it also appears very unlikely that the College would be considered a unit or instrumentality of the State subject to the PIA.

### *Summary*

Thus, in some instances, the affiliated entity performs what essentially are governmental functions with a degree of independence from other State agencies (e.g., Maryland School for the Blind). In some instances, the entity, though somewhat independent, carries out an important State policy (e.g., Blind Industries). In some instances, the entity is a creature of a federal policy and one must look to federal law to determine how it is related to the State (e.g., Maryland Humanities Council). In other instances, the

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affiliation between the State and the entity is a relic of an older legal system in place at the time the entity was created and the entity in fact is a private entity (*e.g.*, Washington College). Or the entity was created by the State with the intention that it function as a private enterprise (*e.g.*, MdBIO). In some of these examples, the Legislature has carefully considered and specified the application of open government laws to the entity (*e.g.*, MLSC, UMMS as to Open Meetings Act). However, in most instances, the Legislature has not been so explicit and there remains some question as to whether the General Assembly intended for the statute to apply (*e.g.*, UMMS as to PIA).

Whether a particular entity should be subject to the Open Meetings Act or the Public Information Act is a policy decision entrusted to the Legislature. In providing advice on whether those laws apply to a particular entity, we attempt to ascertain legislative intent. Of course, that task is easier to the extent that the enabling legislation for the particular entity explicitly addresses whether it is a public body or a unit or instrumentality of government. Both the Public Information Act and the Open Meetings Act express a general public policy that government should be transparent and, that its records and deliberations should be open to the citizenry unless there is an important reason for keeping them confidential.

In assessing whether quasi-governmental entities are subject to these open government laws, we would apply a similar presumption. An entity closely related to the government – particularly one that is essentially controlled by the government and performs governmental functions – should be considered subject to those laws unless the Legislature has specifically provided otherwise or the application of those laws would frustrate an essential function of the entity.

I hope that this information is responsive to your inquiry.

Very truly yours,



Robert N. McDonald

Chief Counsel

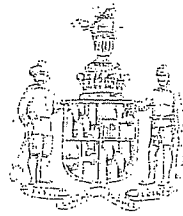
Opinions and Advice

cc: Members of Education, Health and Environmental Affairs Committee  
Joshua Loh

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THE ATTORNEY GENERAL OF MARYLAND  
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March 21, 2007

The Honorable Verna Jones  
420 Miller Senate Building  
Annapolis, Maryland 21401-1991

Dear Senator Jones:

You have asked for advice concerning Senate Bill 910, "University of Maryland Medical System - Minority Business Enterprise Procurement Activities," and Senate Bill 911, "Higher Education - University of Maryland Medical System - Subject to State Access to Public Records Law." Specifically, you have asked whether there is any legal objection to either bill. It is my view that there is no legal objection to either bill.

House Bill 910 amends Education Article § 13-303 to clarify the existing requirement that the Board of Directors conduct procurement activities consistent with the MBE program applicable to State agencies, requires that the Board of Directors submit a statute of its policies and procedures for the conduct of procurement activities, including its MBE policies and procedures, to the Board of Public Works for approval, and further requires that the annual report submitted to the Governor the Joint Audit Committee and the Board of Regents, include information about MBE purchasing activities. It is my view that there is no legal objection to these provisions.

House Bill 911 amends Education Article § 13-303 to provide that the "Medical System Corporation shall be subject to the provisions of the Maryland Public Information Act under Title 10, Subtitle 6, Part III of the State Government Article." The Maryland Public Information Act provides that, unless otherwise provided by law, a custodian shall permit a person or governmental unit to inspect any public record at any reasonable time. State Government Article § 10-613(a)(1). A "public record" is the original or any copy of any documentary material that is "made by a unit or instrumentality of the State government or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business." State Government Article § 10-611(g)(i).

The term "instrumentality of State government" is not defined, but courts have given it a broad interpretation. *Andy's Ice Cream v. Salisbury*, 125 Md.App. 125 (1999) (Salisbury Zoo Commission); *A.S. Abell Publishing Company v. Mezzanote*, 297 Md. 26 (1983) (Maryland Insurance Guarantee Fund); *Moberly v. Herboldsheimer*, 276 Md. 211 (1976) (Memorial Hospital of Cumberland). Among the factors that could lead to a conclusion that the University of Maryland

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Medical System is an instrumentality of State government are that it was initially created by State law, that its articles of incorporation were subject to the approval of the Board of Public Works, that it serves governmental purposes related to the operation of medical services connected to public universities, that it is required to submit audited financial statements to government agencies and to report to government agencies on other activities, that it needs the approval of the Board of Regents to request grants from the General Assembly, that the composition of the Board of Directors is set by State law and that many are government officials and all are appointed by the Governor. This combination of factors is probably adequate to make the University of Maryland Medical System subject to the Public Information Act.<sup>1</sup> However, by expressly providing that the University of Maryland Medical System is subject to the Act, Senate Bill 911 makes this completely clear, and also prevents a situation where a person requesting documents would have to litigate the issue before the documents would be produced. It is my view that there is also no legal objection to this bill.

Sincerely,



Kathryn M. Rowe  
Assistant Attorney General

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<sup>1</sup> It is true that Education Article § 13-303(a)(2) provides that the University of Maryland Medical System “is not subject to any provisions of law affecting only governmental or public entities.” However, the fact that the Public Information Act has been applied to some entities that are not either governmental or public entities makes the application of this provision unclear.