



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring  
Attorney General

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900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

The Honorable Frank W. Wagner  
Member, Senate of Virginia  
Post Office Box 68008  
Virginia Beach, Virginia 23471

Dear Senator Wagner:

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 present the following inquiries relating to the application of the State and Local Government Conflict of Interests Act (“COIA”)<sup>1</sup> to the Hampton Roads Transportation Accountability Commission (the “Commission”):

- 1) You inquire whether the Commission is a state or local agency for purposes of COIA;
- 2) You inquire as to how COIA’s “savings clause”<sup>2</sup> applies to the specific voting requirements of the Commission;
- 3) You inquire whether the savings clause applies to the disqualifications described in § 2.2-3110(A)(4) and (6) (personal interest being only income and not ownership interest; contract between governmental agency and public service corporation, financial institution, or public utility);
- 4) You inquire whether the savings clause applies to disqualifications that occur under § 2.2-4369 of the Virginia Public Procurement Act;<sup>3</sup> and
- 5) With respect to members of the Commission who also are legislators, you inquire whether the General Assembly Conflicts of Interests Act affects the ability of these members to participate in transactions of the Commission, and the Commission’s ability to meet its voting requirements.

## Background

The General Assembly created the Commission in its 2014 Regular Session.<sup>4</sup> Pursuant to its enabling legislation, the Commission is responsible for selecting new regional highway construction

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<sup>1</sup> VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2014).

<sup>2</sup> See § 2.2-3112(C), discussed *infra*.

<sup>3</sup> VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2014).

<sup>4</sup> See 2014 Va. Acts. cc. 545, 678.

projects to be financed primarily with monies from the Hampton Roads Transportation Fund.<sup>5</sup> In addition, it is responsible for ensuring that all monies in the Fund are used for such construction purposes. One of the chief goals of the Commission is to reduce traffic congestion in the Hampton Roads region through its selection of highway construction projects.<sup>6</sup> In order to facilitate its mission, the General Assembly has established detailed requirements governing the composition, authority, and voting procedures of the Commission.<sup>7</sup>

### Applicable Law and Discussion

COIA sets minimum standards for ethical conduct for both state and local officers. It defines certain conduct that generally is prohibited, as well as other prohibited or restricted interests in contracts that are entered into and transactions that are considered by state and local governmental agencies in the course of public business. As a threshold matter, I note that appointees of the Commission are “officers” of a “governmental agency” as defined in COIA.<sup>8</sup> I now will address your inquiries regarding the application of COIA to the Commission *seriatim*.

#### I. Whether the Commission is a State or Local Agency for Purposes of COIA

You first inquire whether the Commission is a state or local agency for purposes of COIA.<sup>9</sup> COIA defines the term “governmental agency” as

each component part of the legislative, executive, or judicial branches of state and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties.<sup>10</sup>

COIA provides no specific guidance for determining whether a governmental agency is “state” or “local” for its purposes. Generally, in determining whether an agency should be classified as “state” or “local” under state law, the following factors should be examined:

- 1) Whether the agency was created by an act of the General Assembly or a local governing body;
- 2) Whether the agency fulfills a state or local purpose;

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<sup>5</sup> VA. CODE ANN. § 33.2-2600 (2014).

<sup>6</sup> *Id.*

<sup>7</sup> See §§ 33.2-2600 through 33.2-2611 (2014).

<sup>8</sup> See § 2.2-3101 (defining the terms “officer” and “governmental agency”).

<sup>9</sup> The purpose of your inquiry is to determine whether members of the Commission may rely on advisory opinions of the Attorney General with regard to their obligations under COIA. Pursuant to § 2.2-3121(A) & (B), officers of state agencies may rely on advisory opinions of the Attorney General, whereas officers of local agencies may rely on advisory opinions issued by their local Commonwealth’s Attorney. (Both state and local officers, however, also may rely on advisory opinions issued by the Virginia Conflict of Interest and Ethics Advisory Council.)

In addition to these provisions creating separate avenues for state and local officers to obtain advisory opinions, other provisions of COIA apply differently to state and local officers. See Article 2 of COIA (§§ 2.2-3105 through 2.2-3110) (establishing separate requirements for state and local officers with personal interests in contracts); Article 5 of COIA (§§ 2.2-3113 through 2.2-3118.1) (establishing separate disclosure requirements for state and local officers); § 2.2-3127 (establishing separate venues for the enforcement of state and local level violations of COIA).

<sup>10</sup> Section 2.2-3101.

- 3) Whether the General Assembly or a local governing body maintains control over the agency; and
- 4) Whether the agency is funded primarily with state or local funds.<sup>11</sup>

Applying these factors to the Commission, I first note that it was created by an act of the General Assembly, rather than a local governing body.<sup>12</sup> Next, because the development of the state highway system is fundamentally a state purpose,<sup>13</sup> the Commission fulfills a state purpose in selecting new highway construction projects for the Hampton Roads region. Although the Commission is a regionally-focused entity, and neither the General Assembly nor any local governing body maintains direct control over it, the General Assembly has closely circumscribed the reach of the Commission's authority by statute. In particular, the General Assembly, through the Commission's enabling legislation, has determined how Commission members shall be selected, what voting procedures the Commission shall follow, and the scope of the Commission's control over regional transportation.<sup>14</sup> Finally, the Commission is funded primarily with state revenues from the Hampton Roads Transportation Fund.<sup>15</sup>

Based on the foregoing, I conclude that the Commission is a "state agency" for purposes of COIA, and members of the Commission are to be deemed state officers.<sup>16</sup>

## *II. Application of the "Savings Clause" to Commission Voting Requirements*

One section of COIA contains what is commonly known as the "savings clause." Its purpose is to preserve the functioning of state and local agencies when disqualifications under COIA (i) render a required quorum impossible, or (ii) leave less than the number of members required by law to act.<sup>17</sup> You ask how the savings clause applies to the specific voting requirements of the Commission. Section 33.2-2604 sets forth these voting requirements as follows:

A majority of the Commission, which majority shall include at least a majority of the chief elected officers of the counties and cities embraced by the Commission, shall constitute a quorum. Decisions of the Commission shall require a quorum and shall be in accordance with voting procedures established by the Commission. In all cases, decisions of the Commission shall require the affirmative vote of two-thirds of the members of the Commission present and voting, and two-thirds of the chief elected

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<sup>11</sup> Cf. *Prendergast v. N. Va. Reg'l Park Auth.*, 227 Va. 190, 194 (1984) (holding that park authority created and controlled by a locality was a "local" entity for purposes of determining tort liability); *Va. Elec. & Power Co. v. Hampton Redev. & Hous. Auth.*, 217 Va. 30, 32-33 (1976) (holding that a housing authority created and controlled by a locality was a "local" entity for purposes of determining tort liability); 1987-88 Op. Va. Att'y Gen. 84, 85-86 (establishing various factors for differentiating between state agencies, local agencies, and independent political subdivisions).

<sup>12</sup> See *supra* note 4.

<sup>13</sup> See generally Chapter 2, Title 33.2 of the *Code of Virginia* (establishing governmental entities to manage the Commonwealth's transportation system); Chapters 15 to 18, Title 33.2 of the *Code* (establishing avenues for the funding, development, and improvement of the Commonwealth's transportation system).

<sup>14</sup> See §§ 33.2-2600 through 33.2-2611; *supra* note 7 and accompanying text.

<sup>15</sup> See § 33.2-2600. The Hampton Roads Transportation Fund contains state revenues collected through the Motor Vehicle Fuels Sales Tax. See VA. CODE ANN. § 58.1-2299.20 (2013).

<sup>16</sup> This conclusion is limited to classifying the Commission as a "state agency" for the narrow purposes of COIA and is not intended to affect the Commission's classification for financial control or any other purposes.

<sup>17</sup> See § 2.2-3112(C); *Jackabin v. Town of Front Royal*, 271 Va. 660, 668 (2006) (support for second prong of proposition).

officers of the counties and cities embraced by Planning District 23 who are present and voting and whose counties and cities include at least two-thirds of the population embraced by the Commission . . . .

Thus, for Commission actions, the General Assembly has imposed two distinct voting requirements. In construing the mechanics of these voting provisions, it is helpful to note that the Commission comprises twenty-three members: fourteen chief elected officers of the governing bodies of the localities embraced by the Commission, three members of the House of Delegates, two members of the Senate of Virginia, and four nonvoting *ex officio* members.<sup>18</sup> Therefore, in order to achieve a quorum, at least twelve members of the Commission must be present, at least eight of whom must be chief elected officers of the counties and cities embraced by the Commission. In order to pass a measure, two-thirds of the Commission members present and voting must affirm, including two-thirds of the chief elected officers present and voting whose counties and cities include at least two-thirds of the population embraced by the Commission.

The savings clause, as set forth in § 2.2-3112(C), provides that

*notwithstanding any other provision of law*, if disqualifications of officers or employees in accordance with this section leave less than the number required by law to act, the remaining member or members shall constitute a quorum for the conduct of business and have authority to act for the agency by majority vote, unless a unanimous vote of all members is required by law, in which case authority to act shall require a unanimous vote of remaining members.<sup>19]</sup>

Disqualifications under § 2.2-3112 could affect the Commission's ability to meet its voting requirements in two ways. First, disqualifications could leave fewer than the number required under § 33.2-2604 to constitute a quorum. Second, disqualifications could leave fewer than the number of chief elected officers sufficient to represent at least two-thirds of the population embraced by the Commission. In either case, the savings clause would apply to preserve the functioning of the Commission. I reach this conclusion because the savings clause applies "notwithstanding any other provision of law." It is not required that the savings clause be specifically mentioned in the enabling legislation creating the Commission.<sup>20</sup>

The savings clause applies to each of these circumstances in the following manner: if disqualifications leave fewer than the number required to constitute a quorum under § 33.2-2604, the remaining voting members should be considered a quorum and shall have the authority to act by majority vote. If, on the other hand, a quorum under § 33.2-2604 has been achieved, but disqualifications leave fewer than the number of chief elected officers sufficient to represent two-thirds of the population, the remaining voting members of the Commission have the authority to act by majority vote (rather than overall two-thirds vote). Although this result effectively eliminates the population requirement in

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<sup>18</sup> Section 33.2-2602.

<sup>19</sup> Emphasis added.

<sup>20</sup> See *Green v. Commonwealth*, 28 Va. App. 567, 570 (1998) (finding that inclusion of the phrase "notwithstanding any other provision of law" in a statute means that its provisions shall prevail over other incongruous law); see also *Alger v. Commonwealth*, 267 Va. 255, 261 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)) ("We 'assume that the legislature chose, with care, the words it used when it enacted the relevant statute.'").

applicable scenarios, it preserves the ability of the Commission to function, in keeping with the purposes of the savings clause.

*III. The Savings Clause and Disqualifications Described in § 2.2-3110(A)(4) and (6) (personal interest being only income and not ownership interest; contract between governmental agency and public service corporation, financial institution, or public utility)*

You further inquire whether the savings clause applies when governmental officers or employees disqualify themselves in circumstances described in § 2.2-3110 (personal interest comprised of income but not ownership interest; contract with public service corporation, financial institution or public utility).

Disqualification applies to transactions, which are governed by Article 4 of COIA. Subject to certain exceptions, if a governmental officer or employee has a personal interest in a transaction, he must disqualify himself from participating in the transaction. The savings clause applies only when an officer or employee disqualifies himself from participating in a transaction. Section 2.2-3110, about which you inquire, is not in Article 4. It is in Article 3, which governs contracts, not transactions. It does not in any way modify the circumstances under which an officer or employee must disqualify himself under Article 4 from participating in a transaction. Instead, it provides that certain contracts which might otherwise be prohibited are permissible under certain circumstances. One of those circumstances is if an officer disqualifies himself from a transaction involving certain types of contracts. Section 2.2-3110 does not establish its own disqualification procedures.<sup>21</sup> When an officer disqualifies himself for the purposes of § 2.2-3110, which is within Article 3, he is required to follow the disclosure and abstention procedures established in § 2.2-3112(A)(1), which is within Article 4.<sup>22</sup> Therefore, there is no disqualification *per se* under § 2.2-3110, as suggested by your question. That section merely specifies the *consequences* of certain disqualifications made under § 2.2-3112. Therefore, the savings clause would apply to any such disqualification.

*IV. The Savings Clause and Nonparticipation Under the Procurement Act*<sup>23</sup>

Next, you ask whether the savings clause applies when the number of members prohibited from participating under § 2.2-4369 of the Virginia Public Procurement Act (the “Procurement Act”) leave less than the number required by law to act.<sup>24</sup> Similar to your preceding inquiry, the essence of this inquiry is

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<sup>21</sup> The negotiation and approval of a contract on behalf of an agency constitute “transactions” under COIA. See § 2.2-3101 (defining the term “transaction” as “[a]ny matter considered by any governmental . . . agency, whether in a committee, subcommittee, or other entity of that agency or before the agency itself, on which official action is taken or contemplated”).

<sup>22</sup> This is true regardless of whether the officer might otherwise be permitted to participate in the transaction pursuant to an applicable exception in § 2.2-3112(A). Subsections § 2.2-3110(4)-(6) require that an officer who avails himself of the relevant provisions in order to retain his personal interest in a contract must disqualify himself “as a matter of public record.” No exceptions to such disqualification apply. Section 2.2-3112(A)(1) establishes the relevant procedures for disqualification as a matter of public record that the officer must follow. Specifically, the officer is required to disclose his personal interest as required by § 2.2-3114(E) or § 2.2-3115(F); he is prohibited from attending any closed meeting in which the matter is discussed; and he also is prohibited from discussing the matter with any government officers or employees at any time.

<sup>23</sup> VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2014). I note that the Procurement Act does not use the term “disqualification” or any variation of it, as COIA does. Instead, it discusses the circumstances under which public employees and officials may not “participate” in transactions.

<sup>24</sup> In addition to being subject to provisions of COIA, members of the Commission are subject to the ethics requirements of the Procurement Act. In particular, members of the Commission are considered “employees” of a

whether nonparticipation pursuant to § 2.2-4369 should be considered a disqualification under § 2.2-3112 for purposes of applying the savings clause.

By its terms, the savings clause is not triggered by mandated nonparticipation under the Procurement Act: it applies only where there are “disqualifications of officers or employees *in accordance with this section*,” and the section in question – § 2.2-3112 – is a part of COIA and not a part of the Procurement Act. Further, the Procurement Act does not use any variation of the term “disqualification.” Instead, it refers to mandated nonparticipation under certain circumstances. Section 2.2-4369 of the Procurement Act generally prohibits a public employee from participating in a procurement transaction when he is employed by, or has certain other types of interest in, a bidder, contractor, or offeror who is involved in the transaction.<sup>25</sup>

As a practical matter, the facts that give rise to disqualification under COIA would in almost all cases require nonparticipation under the Procurement Act. However, it is possible that there could be a rare procurement transaction when an official is barred by the Procurement Act from participating, but he is not disqualified under COIA. If such a circumstance ever arises, the savings clause would not be invoked, and the government agency’s quorum and voting requirements would remain in effect.

#### *V. Potential Impact of the General Assembly Conflicts of Interests Act on Member Participation and the Ability of the Commission to Meet Voting Requirements*

Your final inquiry concerns those members of the Commission who serve as members of the General Assembly. You ask whether the General Assembly Conflicts of Interests Act (the “General Assembly Conflicts Act”)<sup>26</sup> applies to these members in a manner that may affect their ability to participate in the Commission or affect the Commission’s ability to meet its voting requirements.

Members of the Commission who are legislators are subject to all applicable provisions of the General Assembly Conflicts Act in their service on the Commission.<sup>27</sup> Among other things, the General Assembly Conflicts Act governs the ethical conduct of legislators with respect to their financial interests in transactions of the General Assembly and contracts with state and local governmental agencies.<sup>28</sup> These requirements are separate from and independent of the requirements of COIA.

Although the General Assembly Conflicts Act requires a legislator to disqualify himself from participating in transactions in which the legislator has a personal interest,<sup>29</sup> this requirement applies only to transactions before the General Assembly.<sup>30</sup> Accordingly, transactions before the Commission that a legislator considers in his role as a Commission member are not implicated under the General Assembly Conflicts Act. A legislator who serves as a Commission member is subject to COIA in his role as a

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“public body” as defined by the Procurement Act. *See* § 2.2-4301 (defining the term “public body”); § 2.2-4368 (defining the term “public employee”).

<sup>25</sup> *See* § 2.2-4369.

<sup>26</sup> VA. CODE ANN. §§ 30-100 through 30-129.3 (2011 & Supp. 2014).

<sup>27</sup> *See* § 30-100 (Supp. 2014) (“This chapter shall apply to members of the General Assembly.”).

<sup>28</sup> *See* §§ 30-105 through 30-108 (2011 & Supp. 2014). In addition, the General Assembly Conflicts Act describes conduct which generally is prohibited. *See* § 30-103 (2011).

<sup>29</sup> Section 30-109 (2011).

<sup>30</sup> *See* § 30-101 (Supp. 2014) (defining a “transaction” for purposes of the General Assembly Conflicts Act as “any matter considered by the General Assembly, whether in a committee, subcommittee, or other entity of the General Assembly or before the General Assembly itself, on which official action is taken or contemplated”).

Commission member, and COIA may require him to disqualify himself from certain transactions in which he has a personal interest. If that occurs, the savings clause would apply. However, disqualification and the savings clause would be applicable only because of COIA, not because of the General Assembly Conflicts Act.

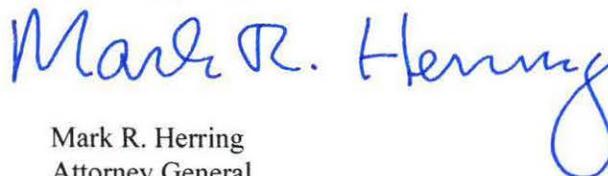
### Conclusion<sup>31</sup>

Accordingly, it is my opinion, based on the facts presented, that

- 1) The Commission is a state agency for purposes of COIA;
- 2) If disqualifications under §2.2-3112 of COIA leave the Commission with fewer than the number required to constitute a quorum, the remaining voting members shall constitute a quorum and shall have authority to act by majority vote. If a quorum has been achieved, but disqualifications leave fewer than the number of chief elected officers sufficient to represent two-thirds of the population, the remaining voting members of the Commission have the authority to act by majority vote, rather than overall two-thirds vote;
- 3) Section 2.2-3110 does not set forth a different type of disqualification from §2.2-3112. It merely specifies certain consequences for certain contracts where there has been a disqualification under §2.2-3112. The savings clause applies to all disqualifications under §2.2-3112, regardless of whether or not they come into play under §2.2-3110.
- 4) The savings clause does not apply to mandated nonparticipation under § 2.2-4369 of the Procurement Act, but as a practical matter such mandated nonparticipation will probably also require disqualification under COIA, thus invoking the savings clause;
- 5) Members of the Commission who also are legislators are subject to all applicable provisions of the General Assembly Conflicts Act in their service on the Commission. However, the only transactions for which this Act requires disqualification are transactions with the General Assembly. Thus, the General Assembly Conflicts Act will not come into play for transactions of the Commission, and it will not require any legislator to disqualify himself from transactions of the Commission. A legislator does remain subject to COIA in his capacity as a member of the Commission, and if COIA requires him to disqualify himself from a transaction, the savings clause would apply.

With kindest regards, I am

Very truly yours,



Mark R. Herring  
Attorney General

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<sup>31</sup> Because the interaction of the different laws discussed in this opinion is so complex, it is conceivable that a particular set of facts could arise in which a different legal conclusion results. Thus, this Opinion should be viewed as providing only general guidance. If questions about future, specific factual situations arise, you are free to seek additional guidance from this Office.