



# COMMONWEALTH of VIRGINIA

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August 16, 2019

The Honorable Thomas K. Norment Jr.  
Member, Senate of Virginia  
Post Office Box 6205  
Williamsburg, Virginia 23188

Dear Senator Norment:

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 ask three questions relating to the Tourism Council of the Greater Williamsburg Chamber and Tourism Alliance (the "Tourism Council") and the Historic Triangle Office of Marketing and Promotion (the "Office"): (1) whether the Tourism Council is a "public body" as defined by the Virginia Freedom of Information Act such that the Tourism Council and Office are subject to the Act; (2) whether the Tourism Council and the Office are subject to the Virginia Public Procurement Act; and (3) whether the Tourism Council is subject to the Virginia State and Local Government Conflict of Interests Act, the Virginia Investment of Public Funds Act, the Virginia Security for Public Deposits Act, and the Virginia Government Data Collection and Dissemination Practices Act.

## Background

In 2018, the General Assembly enacted § 58.1-603.2 to establish a special retail sales and use tax of one percent in the Historic Triangle, which includes James City County, York County, and the City of Williamsburg. The statute requires that the State Comptroller distribute one-half of the revenues generated from the tax to the localities in which the tax was collected, and one-half into a special state fund known as the Historic Triangle Marketing Fund (the "Fund").<sup>1</sup> The Fund consists of tax revenues

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<sup>1</sup> VA. CODE ANN. § 58.1-603.2(D) (Supp. 2019).

collected in the Historic Triangle area<sup>2</sup> and is required by statute to be used to promote tourism within the area.<sup>3</sup>

The statute also created the Tourism Council of the Greater Williamsburg Chamber and Tourism Alliance (“Tourism Council”), which consists of one member from each of the governing bodies of the Historic Triangle, as well as representatives from the Colonial Williamsburg Foundation, the Jamestown-Yorktown Foundation, Busch Gardens Williamsburg, Historic Jamestowne, the Williamsburg Hotel and Motel Association, and the Williamsburg Area Restaurant Association.<sup>4</sup> In addition, the Chief Executive Officer of the Virginia Tourism Alliance and the Chief Executive Officer of the Virginia Tourism Corporation serve as ex-officio, non-voting members. The Tourism Council is tasked with developing strategic plans for the promotion of tourism in the Historic Triangle and with creating the Office to help develop and administer such plans. The Office is statutorily tasked with duties such as developing and implementing plans for the advertisement and promotion of the Historic Triangle as a travel destination, coordinating certain advertising and marketing efforts between tourism venues in the Historic Triangle, and “performing any other function related to the promotion of the Historic Triangle region as may be identified by the Council.”<sup>5</sup> The Tourism Council is required under the statute to use monies in the Fund to pay for necessary expenses of the Office and to fund the activities of the Office.<sup>6</sup> The Tourism Council is required to report annually on its and the Office’s activities and use of the Fund.<sup>7</sup> The annual report is submitted not only to the managers or chief executive officers of the localities within the Historic Triangle, but also the respective chairs of the House Committee on Finance and Appropriations and the Senate Committee on Finance.<sup>8</sup>

Although they carry out public functions, the Tourism Council and the Office operate within the Greater Williamsburg Chamber and Tourism Alliance (“Alliance”), which you indicate is a private non-profit chamber of commerce,<sup>9</sup> giving rise to the questions you ask regarding the application of the various government administration statutes to their operations and governance.

### **Applicable Law and Discussion**

#### **1. Whether the Tourism Council Constitutes a “Public Body” as Defined by the Virginia Freedom Of Information Act Such that the Tourism Council and Office are Subject to the Act.**

The Virginia Freedom of Information Act (FOIA) defines a “public body” in relevant part as

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<sup>2</sup> In addition to revenue from the special sales and use tax enacted pursuant to § 58.1-603.2, the Fund contains a portion of the revenues derived from transient occupancy taxes assessed in James City County and York County pursuant to § 58.1-3823(C). *See* VA. CODE ANN. § 58.1-3823(C) (Supp. 2019).

<sup>3</sup> Specifically, the statute provides that “[m]oneys in the Fund shall be used solely for the purposes of marketing, advertising, and promoting the Historic Triangle area as an overnight tourism destination, with the intent to attract visitors from a sufficient distance so as to require an overnight stay of at least one night . . . .” VA. CODE ANN. § 58.1-603.2(E)(1).

<sup>4</sup> *Id.* at subsection D.

<sup>5</sup> *Id.* at subsection E(3).

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

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The Greater Williamsburg Chamber and Tourism Alliance is the registered fictitious name of the Williamsburg Area Chamber of Commerce.

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; governing boards of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. It shall include . . . any committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or to advise the public body. It shall not exclude any such committee, subcommittee or entity because it has private sector or citizen members.<sup>[10]</sup>

The Code directs that “[t]he provisions of [FOIA] shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.”<sup>11</sup> As noted above, the Tourism Council is a body created by statute to perform public functions while operating within a private non-profit corporation.<sup>12</sup> Notwithstanding this unconventional structure, the Tourism Council is a separate entity from the Alliance, and was especially created by the General Assembly to carry out the public purpose of promoting tourism in the Historic Triangle.<sup>13</sup> In addition to this statutory duty, other indicia that the Tourism Council is a “public body” (more precisely, a “board”<sup>14</sup>) of the Commonwealth include the use of public funds appropriated by the General Assembly and disbursed by the State Treasurer, and the requirement for submittal of annual reports regarding short-term and long-term plans and expenditures to the General Assembly and other public officials. Additionally, the General Assembly has provided that the legal authority creating the Tourism Council will expire by operation of law in the event any of the localities in the Historic Triangle adopts an additional food and beverage tax, admissions tax, or transient occupancy tax not in effect on January 1, 2018.<sup>15</sup> Thus, the creation, membership, function, and termination of the Tourism Council are controlled by the General Assembly.<sup>16</sup> For these reasons, it is my opinion that the

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<sup>10</sup> VA. CODE ANN. § 2.2-3701 (Supp. 2019) (definition of “public body”).

<sup>11</sup> VA. CODE ANN. § 2.2-3700 (2017).

<sup>12</sup> See VA. CODE ANN. § 58.1-603.2(E)(2) (referring to “[t]he Tourism Council of the Greater Williamsburg Chamber and Tourism Alliance”). This opinion does not address the authority under which the General Assembly may establish the Tourism Council as an arm of the Greater Williamsburg Chamber and Tourism Alliance.

<sup>13</sup> In enacting § 58.1-603.2, the General Assembly found that “maintaining a robust tourism industry in the Historic Triangle area, the birthplace of not only the Commonwealth but of our nation, is of the utmost economic importance to the Commonwealth as a whole.” 2018 Va. Acts ch. 850, enacting clause 5. It is well established under Virginia law that economic development is a valid public purpose. See 1990 Va. Op. Att’y Gen. 51. See also *Mayor & Members of City Council v. Industrial Development Authority*, 221 Va. 865, 868, 275 S.E.2d 888, 889 (1981) (stating that “the [Industrial Development and Revenue Bond] Act is designed to induce new industries to locate in the Commonwealth and thereby ‘serves primarily a public purpose and thus constitutes a proper function of government’”) (quoting *Fairfax County Industrial Development Authority v. Coyner*, 207 Va. 351, 358, 150 S.E.2d 87, 94 (1966)).

<sup>14</sup> The Tourism Council functions as a board with voting and non-voting members. See VA. CODE ANN. § 58.1-603.2(E)(2); *Bylaws of Tourism Council of the Greater Williamsburg Chamber and Tourism Alliance*, adopted March 19, 2019.

<sup>15</sup> 2018 Va. Acts ch. 850, enacting clause 4. This provision, however, expires January 1, 2026.

<sup>16</sup> See *Town of Burlington v. Hosp. Admin. Dist. No. 1*, 769 A.2d 861, 862-863 (Maine 2001); Va. FOIA Council Op. No. AO-07-12 (concluding that a public instrumentality exercising public and essential governmental functions is a “public body” subject to FOIA).

Tourism Council functions as a board of the Commonwealth within the definition of “public body” under FOIA.<sup>17</sup>

It is further my opinion that as a component of the Tourism Council, the Office is a public body subject to FOIA as a “committee, subcommittee, or other entity however designated, of the public body created to perform delegated functions of the public body or advise the public body.”<sup>18</sup> The Office functions as the administrative arm of a public body, i.e., the Tourism Council,<sup>19</sup> and is charged with the performance of statutorily-delegated duties.<sup>20</sup> Therefore, the Office also falls within the definition of a “public body” in § 2.2-3701.<sup>21</sup>

2. Whether the Tourism Council and Office are “public bodies” subject to the Virginia Public Procurement Act

The Virginia Public Procurement Act (VPPA)<sup>22</sup> defines a “public body” as

any legislative, executive or judicial body, agency, office, department, authority, post, commission, committee, institution, board or political subdivision created by law to exercise some sovereign power or to perform some governmental duty, and empowered by law to undertake the activities described in this chapter. “Public body” shall include (i) any independent agency of the Commonwealth, and (ii) any metropolitan planning organization or planning district commission which operates exclusively within the Commonwealth of Virginia.<sup>[23]</sup>

To constitute a public body for purposes of the VPPA, therefore, an entity falling under one of the classifications set out above must be created by law to exercise a sovereign power or perform a governmental duty, and must be empowered to carry out the activities set forth in the VPPA.

As previously discussed, the Tourism Council is a board created by law to perform the duty of promoting tourism within the Historic Triangle, and for purposes of VPPA, the Office is an “office” created by law to fulfill statutorily prescribed duties relating to this public purpose. Therefore, the Tourism Council and Office satisfy the first prong of the definition of “public body” in § 2.2-4301.

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<sup>17</sup> Even if the Tourism Council were not a board of the Commonwealth, it would alternatively meet FOIA’s definition of a public body as an “organization . . . supported wholly or principally by public funds.” According to your request, the Tourism Council is “wholly funded by tax revenue.”

<sup>18</sup> VA. CODE ANN. § 2.2-3701 (definition of “public body”).

<sup>19</sup> According to Article VI of the Bylaws of the Tourism Council, the Office is subject to “policies adopted and approved by the Council.” Article VI also provides that the Executive Director of the Tourism Council “shall have direct control, subject to the oversight and authority of the Council, of the management of the day-to-day administrative affairs of the Office.”

<sup>20</sup> VA. CODE ANN. § 58.1-603.2(E). *See also* *Transparent GMU v. George Mason Univ.*, 97 Va. Cir. 212 ( Nov. 29, 2017), in which the Fairfax County Circuit Court determined that a private company conducting fundraising for a public university was not a public body under FOIA because it was not wholly or principally supported by public funds, or an entity of a public body created to perform delegated functions of the public body or to advise the public body. In contrast, the Office meets all of these tests.

<sup>21</sup> Even if the Office did not qualify as a “committee, subcommittee, or other entity however designated, of [a] public body,” it would alternatively qualify as an “organization . . . supported wholly or principally by public funds.” *See* VA. CODE ANN. § 58.1-603.2(E).

<sup>22</sup> VA. CODE ANN. § 2.2-4300 to 4377 (2017 & Supp. 2019).

<sup>23</sup> VA. CODE ANN. § 2.2-4301 (2017) (definition of “public body”).

Next, to come within the VPPA's definition of "public body," the Tourism Council and the Office must be "empowered by law" to carry out the activities set forth in the VPPA. Section 58.1-603.2 does not expressly empower the Tourism Council or the Office, as its administrative component, to enter into contracts; however, they possess such power as may be "fairly implied from the language used, or which is necessary to enable [them] to exercise the powers expressly granted."<sup>24</sup> The Tourism Council, with the assistance of the Office, is charged with developing and executing short-term and long-term plans to market and promote the facilities, venues, and attractions in the Historic Triangle.<sup>25</sup> To the extent the Tourism Council or the Office must procure goods and services from a nongovernmental source to accomplish these duties, the power to contract "may [be] reasonably implied as a necessary incident"<sup>26</sup> to the powers expressly granted to the Tourism Council and statutorily delegated to the Office.

Accordingly, the Tourism Council and the Office satisfy both prongs of the definition of "public body" for purposes of the VPPA. Further, none of the transactions exempted from the VPPA's application by § 2.2-4343 relate to the Tourism Council or the Office. Thus, it is my opinion that the Tourism Council and the Office are "public bodies" as defined in the VPPA and are therefore subject to the Act.

### 3. Whether the Tourism Council is Subject to Certain Other Government Administration Legislation

You have also asked whether the Tourism Council is subject to the Virginia State and Local Government Conflict of Interests Act, the Virginia Investment of Public Funds Act, the Virginia Security for Public Deposits Act, and the Virginia Government Data Collection and Dissemination Practices Act.<sup>27</sup>

#### A. Virginia State and Local Government Conflict of Interests Act

The Virginia State and Local Government Conflict of Interests Act<sup>28</sup> applies to all state and local government officers and employees and "prohibits inappropriate conflicts and requires disclosure of economic interests."<sup>29</sup> The phrase "state and local government officers and employees" is defined only to the extent of excluding members of the General Assembly.<sup>30</sup> The term "employee," however, is defined as any "person[] employed by a governmental or advisory agency," and "officer" is defined as "any person appointed or elected to any governmental or advisory agency . . . , whether or not he receives compensation or other emolument of office."<sup>31</sup> In turn, "governmental agency" is defined broadly 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."<sup>32</sup>

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<sup>24</sup> *City of Hampton v. Newport News & Hampton Ry., Gas & Elec. Co.*, 144 Va. 24, 27, 131 S.E. 330, 331 (1926); *see also Bader v. Norfolk Redevelopment & Housing Authority*, 10 Va. App. 697, 702, 396 S.E.2d 141, 144 (1990).

<sup>25</sup> VA. CODE ANN. § 58.1-603.2(E)(3).

<sup>26</sup> *Bader*, 10 Va. App. at 702, 396 S.E.2d at 144.

<sup>27</sup> Although your request references "other applicable legislation," this opinion is limited to the four Acts expressly listed in your letter.

<sup>28</sup> VA. CODE ANN. §§ 2.2-3100 to -3132 (2017 & Supp. 2019).

<sup>29</sup> VA. CODE ANN. § 2.2-3100 (Supp. 2019).

<sup>30</sup> VA. CODE ANN. § 2.2-3101 (2017) (definition of "state and local government officers and employees"). The General Assembly Conflicts of Interests Act, VA. CODE ANN. §§ 30-100 to -129.3 (2018), governs the members of the General Assembly.

<sup>31</sup> VA. CODE ANN. § 2.2-3101 (definitions of "employee" and "officer").

<sup>32</sup> *Id.* (definition of "governmental agency").

Again, the Tourism Council is, in my view, a board created by the General Assembly under § 58.1-603.2 to manage and administer the use of public funds to be used solely to market, advertise, and promote the Historic Triangle area as an overnight tourist destination.<sup>33</sup> In light of this public function established by law, it is my opinion that the Tourism Council meets the definition of “governmental agency” under the Virginia State and Local Government Conflict of Interests Act, and its officers and employees are therefore subject to applicable prohibitions and requirements of that Act.<sup>34</sup>

*B. Virginia Investment of Public Funds Act*

The Virginia Investment of Public Funds Act<sup>35</sup> governs the investment of sinking funds and other public funds “by the Commonwealth, all public officers, municipal corporations, other political subdivisions and all other public bodies of the Commonwealth.”<sup>36</sup> The relevant question for purposes of this Act is whether the Tourism Council is a “public body.” The Tourism Council is created by the General Assembly for purposes of performing public duties assigned by statute; uses public tax revenues to carry out its purposes; and makes annual reports concerning the use of these public funds to the managers or chief executive officers of the City of Williamsburg and the Counties of James City and York and to the Chairmen of the House Committees on Finance and Appropriations and the Senate Committee on Finance.<sup>37</sup> In addition, all expenditures and disbursements from the Historic Triangle Marketing Fund “shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Secretary of Finance.”<sup>38</sup> For these reasons, to the extent the Tourism Council invests public funds, it is my opinion that it would do so as a public body within the meaning of and in accordance with the Virginia Investment of Public Funds Act.

*C. Virginia Security for Public Deposits Act*

The Virginia Security for Public Deposits Act<sup>39</sup> establishes uniform methods to secure all public deposits held in financial institutions.<sup>40</sup> A “public deposit” is defined in the Act as “moneys held by a public depositor who is charged with the duty to receive or administer such moneys while acting in an official capacity, such moneys being deposited in any of the following types of accounts: nonnegotiable time deposits, demand deposits, savings deposits, or any other transaction accounts.”<sup>41</sup> A “public depositor” is defined in the Act as “the Commonwealth or any county, city, town or other political subdivision thereof, including any commission, institution, committee, board, or officer of the foregoing and any state court.”<sup>42</sup>

As discussed above, the Tourism Council is a board of the Commonwealth that functions as a public body in using, and accounting for the use of, funds in the Historic Triangle Marketing Fund, and

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<sup>33</sup> VA. CODE ANN. § 58.1-603.2(D).

<sup>34</sup> Section 58.1-603.2(E)(2) sets out the members of the Council, and § 58.1-603.2 (E)(3) provides that the Council shall establish the Historic Triangle Office of Marketing and Promotion to be overseen by a professional with experience in marketing or advertising and the tourism industry.

<sup>35</sup> VA. CODE ANN. §§ 2.2-4500 – 4519 (2017).

<sup>36</sup> VA. CODE ANN. §§ 2.2-4500 - 4501.

<sup>37</sup> VA. CODE ANN. § 58.1-603.2.

<sup>38</sup> VA. CODE ANN. § 58.1-603.2(E).

<sup>39</sup> VA. CODE ANN. §§ 2.2-4400 - 4411 (2017).

<sup>40</sup> See VA. CODE ANN. § 2.2-1815; § 2.2-4400(C); 1 VA. ADMIN. CODE § 75-20-10.

<sup>41</sup> VA. CODE ANN. § 2.2-4401 (definition of “public deposit”).

<sup>42</sup> *Id.* (definition of “public depositor”).

the disbursement of such funds to the Tourism Council is fulfilled by the Secretary of Finance, the Comptroller, and the State Treasurer.<sup>43</sup> Thus, it is my opinion that any public deposits made by the Tourism Council of such disbursements must be secured pursuant to the Virginia Security for Public Deposits Act.<sup>44</sup>

*D. Virginia Government Data Collection and Dissemination Practices Act*

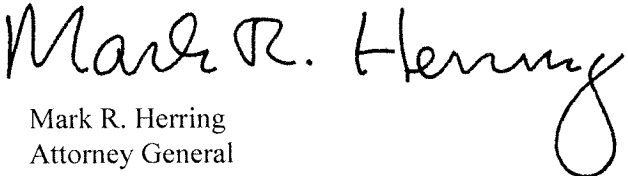
The Virginia Government Data Collection and Dissemination Practices Act<sup>45</sup> governs the collection, protection, correction, and dissemination of personal information by “agencies” in the Commonwealth.<sup>46</sup> The term “agency” is defined in relevant part as “any agency, authority, board, department, division, commission, institution, bureau, or like governmental entity of the Commonwealth.”<sup>47</sup> As discussed in this opinion, the Tourism Council functions as a board of the Commonwealth in carrying out its statutory duties and using public funds to fulfill the public purpose of promoting tourism in the Historic Triangle. To the extent the Tourism Council has any legitimate reason to collect, maintain, or disseminate personal information,<sup>48</sup> it is my opinion that in doing so the Tourism Council acts as a governmental agent of the Commonwealth and would be subject to the Virginia Government Data Collection and Dissemination Practices Act.

**Conclusion**

Accordingly, it is my opinion that the Tourism Council of the Greater Williamsburg Chamber and its administrative arm, the Historic Triangle Office of Marketing and Promotion, are public bodies as defined by the Virginia Freedom of Information Act and the Virginia Public Procurement Act and consequently, are subject to the provisions of both Acts. In addition, the Tourism Council, including its officers and employees, are subject to the Virginia State and Local Government Conflict of Interests Act, and the Tourism Council is subject to the Virginia Investment of Public Funds Act, the Virginia Security for Public Deposits Act and the Virginia Government Data Collection and Dissemination Practices Act.

With kindest regards, I am,

Very truly yours,

  
Mark R. Herring  
Attorney General

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<sup>43</sup> VA. CODE ANN. § 58.1-603.2.

<sup>44</sup> This includes a requirement that such funds be deposited into a “qualified public depository.” See VA. CODE ANN. § 2.2-4407.

<sup>45</sup> VA. CODE ANN. §§ 2.2-3800 – 3809 (2017 & Supp. 2019).

<sup>46</sup> VA. CODE ANN. §§ 2.2-3800 (Supp. 2019).

<sup>47</sup> VA. CODE ANN. § 2.2-3801 (Supp. 2019) (definition of “agency”).

<sup>48</sup> See VA. CODE ANN. § 2.2-3800(C)(10) (stating that “[t]he Commonwealth or any agency . . . thereof shall not collect personal information except as explicitly or implicitly authorized by law”); see also generally VA. CODE ANN. § 2.2-3801 (defining “personal information”).