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**Application of the State Open Meetings  
Act and the Public Information Act to the  
University of Maryland Medical System  
Corporation**

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**Department of Legislative Services  
Office of Policy Analysis  
Annapolis, Maryland**

**August 2007**



# Application of the State Open Meetings Act and the Public Information Act to the University of Maryland Medical System Corporation

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## Introduction

During the 2007 session, the General Assembly considered legislation that would have subjected the University of Maryland Medical System Corporation (UMMSC) to the provisions of the Maryland Public Information Act (PIA). The legislation was introduced in response to concerns expressed by the Maryland Minority Contractors Association, Inc. that UMMSC had violated the State minority business enterprise program regulations by not extending bids to minority-owned businesses and by restricting bidding to nonminority-owned businesses. Further, proponents of the legislation suggested, subjecting UMMSC to the PIA would promote more transparency in the bidding process.<sup>1</sup>

In a similar vein, other legislation before the General Assembly during the 2007 session sought to apply more directly the requirements of the State minority business enterprise program to UMMSC.<sup>2</sup>

To assist the General Assembly as it examines the propriety of subjecting quasi-governmental entities such as UMMSC to laws that generally apply to all purely governmental entities, including the State Open Meetings Act (OMA) and the PIA, this report provides (1) an overview of the type and range of quasi-governmental entities created by State law; and (2) the extent to which these entities are or are not subject to the OMA and the PIA.

The explicit statement under State law that UMMSC is *not* a public body as well as the exemption of the governing boards of hospitals from the OMA leads to the conclusion that UMMSC is not a “public body” for purposes of the OMA.<sup>3</sup> With regard to the PIA, no similar explicit exemption exists. The PIA requires that an entity be “an instrumentality of State government” to fall within its ambit. In general, courts have given a broad interpretation to that standard, thereby subjecting many government-like entities to coverage under the PIA. Consequently, given the significant State interaction with UMMSC and the broad scope of the PIA, it is probable that UMMSC is subject to the PIA.

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<sup>1</sup> See Senate Bill 911 and House Bill 1373 of 2007.

<sup>2</sup> See Senate Bill 910 and House Bill 1375.

<sup>3</sup> See Education Article, § 13-303(a)(2) and State Government Article, § 10-502(h)(3)(x).

## State-created Quasi-governmental Entities – General Overview

According to the Maryland Manual, UMMSC is classified as a private agency with a government board. In total, there are seven similar State-created private entities with governmental boards. (See **Exhibit 1**.) They include entities across a broad spectrum ranging from the arts, education, legal services, health, and commercial and economic development. A brief summary of the history, mission, and governance structure of each of the entities follows.

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### Exhibit 1 Private Agencies with a Government Board

Maryland School for the Blind  
Blind Industries and Services of Maryland  
Maryland Humanities Council  
Maryland Legal Services Corporation  
MdBIO, Inc.  
University of Maryland Medical System Corporation  
Washington College

Source: All information regarding private agencies with government boards obtained from the Maryland Manual, available at: <http://www.msa.md.gov/msa/mdmanual/25ind/priv/html/00priv.html>

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*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.<sup>4</sup> 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.<sup>5</sup>

*Blind Industries and Services of Maryland* originated in 1908 as the Maryland Workshop for the Blind.<sup>6</sup> It adopted its present name in 1973.<sup>7</sup> 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.

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<sup>4</sup> See Chapter 617 of the Acts of the General Assembly of 1998.

<sup>5</sup> See Education Article § 8-314.

<sup>6</sup> See Chapter 566 of the Acts of the General Assembly of 1908.

<sup>7</sup> See Chapter 164 of the Acts of the General Assembly of 1973.

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

*The Maryland Humanities Council* was formed in 1974 in response to the federal law creating the National Endowment for the Humanities.<sup>8</sup> 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.

*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.<sup>9</sup> 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.<sup>10</sup>

*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.

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<sup>8</sup> See P. L. 94-462.

<sup>9</sup> See Chapter 829 of the Acts of the General Assembly of 1982.

<sup>10</sup> See Art. 10 of the Code of 1957, §§ 45A through 45-O.

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

*The University of Maryland Medical System* was established in 1984 as a private, nonprofit corporation.<sup>11</sup> 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 of the corporation to manage its day-to-day operations.

*Washington College* is a coeducational liberal arts and sciences college in historic Chestertown.<sup>12</sup> The college offers 24 majors in the liberal arts and sciences and supplements its 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.<sup>13</sup>

## Legal Framework

In determining whether UMMSC is subject to either the OMA or the PIA, two threshold questions must be addressed: (1) is UMMSC a "public body" for the purposes of the Open Meetings Act?; or (2) is UMMSC an "instrumentality" of the State for purposes of the Public Information Act?

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<sup>11</sup> See Chapter 288, Acts of the General Assembly of 1984.

<sup>12</sup> See Chapter 8, Acts of the General Assembly of April Session 1782.

<sup>13</sup> See Chapter 594, Acts of the General Assembly of 1986.

The OMA defines “public body” as an entity that, *inter alia*, consists of more than two individuals and is created by a State statute, criteria that are obviously satisfied by the UMMSC board of directors.<sup>14</sup> In other contexts, the OMA has been applied to ostensibly private corporations that fulfill public functions and are controlled by public officials.<sup>15</sup> However, the language of the statute that creates UMMSC specifically states that UMMSC is *not* a public body.<sup>16</sup> Furthermore, under the OMA the definition of “public body” does not include the governing body of a hospital.<sup>17</sup> The OMA, is therefore, inapplicable to UMMSC.

The question of the applicability of the PIA is less certain. The PIA applies to any entity that is a “unit or instrumentality” of State government or a political subdivision.<sup>18</sup> Although UMMSC is not a public agency but a corporation, a nonprofit entity incorporated under the State’s general corporation law may be considered a unit or instrumentality of a political subdivision for purposes of the PIA if there is a sufficient nexus linking the entity to the State.<sup>19</sup>

There is, however, no specific factor that will automatically identify a corporation as an instrumentality of the State. Rather, courts will engage in a general analysis of the nature of the relationship between the entity and the State or local government. The courts will apply the PIA if the links between the State or local government and the entity make clear that the entity “was established, and is maintained, as an agent or tool of [the entity] to accomplish [the entity’s] ends or purposes.”<sup>20</sup>

In this context, UMMSC occupies an ambiguous position that does not correlate exactly with any previous case. Factors exist that point to the State’s intent to relinquish control over UMMSC, as well as factors that indicate that the State still controls UMMSC. Given the broad remedial purpose of the statute, including the requirement that the PIA “shall be construed in favor of permitting inspection of a public record,” it is probable, though by no means certain, that the PIA applies to UMMSC.<sup>21</sup>

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<sup>14</sup> See State Government Article § 10-502(h).

<sup>15</sup> See, e.g., *Baltimore Development Corporation v. Carmel Realty Associates*, 395 Md. 299, 910 A.2d 406 (2006) (in which a nonprofit corporation formed to plan and implement long range development strategies in Baltimore City was nonetheless subject to substantial Mayoral control over its board of directors, including sole power to make nominations, appointments, and removals).

<sup>16</sup> See Education Article § 13-303(a)(2).

<sup>17</sup> See State Government Article § 10-502(h)(3)(x).

<sup>18</sup> See State Government Article § 10-611(g)(1)(i).

<sup>19</sup> See Office of the Attorney General, Maryland Public Information Act Manual 3 (10th ed., 2007) (citing *Baltimore Development Corporation v. Carmel Realty Associates*, 395 Md. 299, 910 A.2d 406 (2006) (nonprofit corporation subject to substantial control by city and was thus an instrumentality of the city subject to the PIA), *Andy’s Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125, 724 A.2d 717, cert. denied, 353 Md. 473, 727 A.2d 382 (1999) (Salisbury Zoo Commission subject to PIA, given the Mayor and City Council’s role in the appointment of commission members, authority over budget and by-laws, and power to dissolve commission).

<sup>20</sup> *Baltimore Development Corp.* at 334, 427.

<sup>21</sup> See Letter of Assistant Attorney General Kathryn M. Rowe to Senator Verna Jones (March 21, 2007) (concluding that UMMSC is probably subject to the PIA); State Government Article § 10-612(b).

## Application of the Open Meetings Act

### In General

Is UMMSC a “public body”? The OMA applies only to a “public body”, which is defined as an entity that consists of at least two individuals, and is created by:

- the Maryland Constitution;
- a State statute;
- a county charter;
- an ordinance;
- a rule, resolution, or bylaw;
- an executive order of the Governor; or
- an executive order of the chief executive authority of a political subdivision of the State.<sup>22</sup>

Further, the definition of “public body” includes “any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least two individuals not employed by the State or the political subdivision.”<sup>23</sup> In this case, the board of directors of UMMSC is a multimember group created by a State statute and, but for one *ex officio* member, with all of its voting members appointed by the Governor.

Nonetheless, UMMSC is not a public body subject to the provisions of the OMA. Section 13-303(a)(2) of the Education Article provides that UMMSC “may not be a State agency, political subdivision, public body, public corporation, or municipal corporation and is not subject to any provisions of law affecting only governmental or public entities.” Furthermore, the OMA specifies entities that are excluded from the definition of “public body” and that, therefore, are not subject to the OMA. Included in the exclusion from the scope of the OMA under § 10-502(h)(3)(x) of the State Government Article is the governing body of a hospital as defined in § 19-301(g) of the Health – General Article.

Due to legislative error, however, § 19-301(g) of the Health – General Article currently defines the term “license” rather than “hospital.” The relevant section previously was altered from subsection (f) to be subsection (g), and seems to have reverted in the printing process

<sup>22</sup> See State Government Article, § 10-502(h).

<sup>23</sup> See State Government Article, § 10-502(h)(2)(i).

without apparent action in the legislative history.<sup>24</sup> Thus, the definition for “hospital” in the relevant section encompasses an institution that “[h]as a group of at least five physicians who are organized as a medical staff for the institution”, that “[m]aintains facilities to provide, under the supervision of the medical staff, diagnostic and treatment services for two or more unrelated individuals,” and that “[a]dmits or retains the individuals for overnight care.”<sup>25</sup> The UMMSC governs several hospitals and medical institutions, employs numerous physicians, and retains multiple patients for overnight care.<sup>26</sup>

### **Other Considerations**

When analyzing whether the OMA applies to a particular meeting of a public body, it must be determined whether the public body is holding a “meeting” as defined in § 10-502(g) of the State Government Article: i.e., “... conven[ing] a quorum of a public body for the consideration or transaction of public business.” Further, public access will depend on the type of function the public body is engaged in at the meeting, *e.g.* whether the function is “advisory,” “legislative,” or “quasi-legislative,” in which case the OMA applies.<sup>27</sup> UMMSC controversy arose out of a dispute over the proper award of contracts and, it should be noted, approving, disapproving, or amending a contract is a quasi-legislative function; therefore, a meeting pertaining to that action would be subject to the OMA if UMMSC was deemed a public body.<sup>28</sup>

### **Conclusion as to the Application of the OMA to UMMSC**

Only “public bodies” are subject to the OMA. Given the statutory language’s explicit statement that UMMSC is not a “public body,” and the exclusion of hospital governing bodies from the definition of “public body,” UMMSC is not a “public body.” Therefore, UMMSC is not subject to the OMA.

## **Application of the Public Information Act**

### **In General**

Is UMMSC an instrumentality of the State? The PIA grants the public a broad right of access to records kept by all public agencies or officials in the State, or any unit or instrumentality of the State, or a political subdivision of the State.<sup>29</sup> Even entities that receive no

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<sup>24</sup> See Health – General Article, § 19-301(g); Chapter 432 of the Acts of the General Assembly, 2006; Ch. 25 § 6 (2004); Ch. 678 (1999).

<sup>25</sup> See Health – General Article, § 19-301(f).

<sup>26</sup> See Department of Legislative Services Budget Document R55Q00: Aid to University of Maryland Medical System (2006).

<sup>27</sup> See Office of the Attorney General, Open Meetings Act Manual 12-13 (6th ed.).

<sup>28</sup> *Id.*, citing State Government Article § 10-502(j).

<sup>29</sup> See Office of the Attorney General, Maryland Public Information Act Manual, Chapter 1, citing SG § 10-611(g)(1)(i) (10th ed., January 2007).

public funds but have a sufficiently close relationship to the State may be subject to the PIA.<sup>30</sup> The scope of the PIA encompasses not only public agencies but also private organizations with a sufficiently close relationship to the State. Thus, the PIA's scope places it outside UMMSC's statutory exemption from laws affecting only governmental or public entities.<sup>31</sup>

When determining whether an entity is subject to the PIA, courts engage in detailed examinations of the State's relationship to the entity.<sup>32</sup> While there is no one factor that definitively subjects an entity under scrutiny to the PIA, courts generally list a number of factors, including whether the entity was established by a statute; the number of members of the board of directors appointed by State or local officials; whether property owned by the entity reverts to the State or local government in the event of the entity's failure; whether the State or local government grants special tax status to the entity; and delegation of traditional government functions to the entity.<sup>33</sup>

With respect to UMMSC, the relevant factors are compelling. UMMSC was established by statute.<sup>34</sup> The members of the board of directors are also specified under State law.<sup>35</sup> Many of the members of the board of directors are government officials.<sup>36</sup> The Governor appoints the voting members of the board of directors who do not serve *ex officio*.<sup>37</sup> UMMSC's articles of incorporation were subject to the approval of the Board of Public Works.<sup>38</sup> The legislative findings and declaration of purpose codified at § 13-302 of the Education Article indicate that the purposes of UMMSC are to "serve the highest public interest," and to operate medical services associated with public universities. UMMSC is required to submit audited financial statements to government agencies and to report to government agencies on other activities.<sup>39</sup> The UMMSC needs the approval of the Board of Regents to request grants from the General

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<sup>30</sup> *Id.*

<sup>31</sup> See Education Article § 13-303(a)(2).

<sup>32</sup> See, e.g., *Baltimore Development Corp.*, 395 Md. 299, 910 A.2d 406 (2006); *Andy's Ice Cream v. Salisbury*, 125 Md. App. 125 (1999) (holding that Salisbury Zoo Commission, a charitable corporation, was instrumentality of the town of Salisbury due to, *inter alia*, public purpose of corporation and city's control over Commission); *A.S. Abell Publishing Company v. Mezzanote*, 276 Md. 211 (1976) (holding that an insurance association established by statute was an instrumentality of the State due to, *inter alia*, legislative control over association, public purpose of association); *Moberly v. Herboldsheimer*, 276 Md. 211 (1976) (holding that hospital was an agency of the City of Cumberland because legislative actions affecting the City also applied to the hospital).

<sup>33</sup> See *Id.* at 332-36, 426-28.

<sup>34</sup> See Chapter 288 of the Acts of the General Assembly of 1984.

<sup>35</sup> See Education Article, § 13-304.

<sup>36</sup> The current gubernatorial appointee board members of the UMMSC are: William M. Passano, Jr.; Catherine E. Pugh; Michael E. Busch; Ulysses Currie; Atwood (Woody) Collins III; John W. Dillon; Samuel F. Heffner, Jr.; Gary Jobson; Stephen B. Phillips; Clifford M. Kendall; Robert L. Pevenstein; Wilbert H. Sirota, Esq.; W. Moorhead Vermilye; Marilyn M. Carp; Charles J. Daley, Jr.; Kathryn B. Freeland; Barbara A. Gehrig; Lysbeth K. Courtney; Joseph S. Hoffman, Esq.; J. Marshall Reid; Leonard Stoler; Melvin L. Kelly; James F. Pitts; and Morton B. Plant.

<sup>37</sup> *Id.*

<sup>38</sup> See Education Article § 13-303(a)(1).

<sup>39</sup> See Education Article § 13-303.

Assembly.<sup>40</sup> In the event of the termination of the UMMSC, its rights and properties revert back to the State.<sup>41</sup> As a non-profit corporation, the UMMSC has a tax exempt status.

On the other hand, the level of financial interaction between the UMMSC and the State is rather limited. UMMSC is not dependent on State funds. Projected State aid to UMMSC in fiscal 2008 is \$9,819,000 – a small contribution weighed against UMMSC’s nearly \$1.6 billion in yearly economic activity.<sup>42</sup> Lastly, the State Attorney General is under no obligation to defend UMMSC.<sup>43</sup> Nevertheless, examination of the relationship between UMMSC and the State reveals significant interaction.

### **Other consideration**

It should be noted that the PIA only covers “public records”; *i.e.* records made by, or received by, a covered public agency in connection with the transaction of public business.<sup>44</sup> The scope is broad, and all records possessed by an entity generally fall within the definition of “public records.”<sup>45</sup> However, certain records may not qualify as public records, including the records of a private contractor if the entity does not possess them.<sup>46</sup>

### **Conclusion as to the Application of the PIA to UMMSC**

The case-by-case nature of judicial interpretation of the PIA makes it difficult to determine with certainty whether UMMSC must comply with the PIA. To be sure, UMMSC displays many of the characteristics that have led courts to determine that the PIA applied to corporations in previous cases. On the other hand, no case is directly on point with the specific circumstances presented. Examining the totality of the circumstances, it is probable that the various elements of the relationship between the State and UMMSC are sufficient to warrant application of the PIA to UMMSC.

## **Overall Assessment**

The explicit statement that UMMSC is not a public body as well as the exemption of the governing boards of hospitals from the OMA leads to the conclusion that UMMSC is not a “public body” for purposes of the OMA. With regard to the PIA, no similar explicit exemption exists. The PIA’s requirement that an entity be “an instrumentality of State government” has

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

<sup>41</sup> See Education Article, § 13-311.

<sup>42</sup> See Department of Legislative Services Budget Document R55Q00: Aid to University of Maryland Medical System (2006) and UMMSC budget information available at <http://www.umms.org/statistics/impact.html>.

<sup>43</sup> See Education Article § 13-309(d).

<sup>44</sup> See State Government § 10-611(g) and Maryland Public Information Act Manual 4 (10th ed., 2007).

<sup>45</sup> See Maryland Public Information Act Manual 4.

<sup>46</sup> *Id.*

been construed liberally. Given the significant State interaction with UMMSC and the broad scope of the PIA, it is probable that UMMSC is subject to the PIA.

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