



August 17, 2016

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
1350 Pennsylvania Avenue NW
Suite 504
Washington, DC 20004
Email: pmendelson@dccouncil.us

The Honorable Thomas V. Mike Miller, Jr.
President of the Senate
State House H-107
Annapolis, MD 21401-1991
Email: thomas.v.mike.miller@senate.state.md.us

The Honorable Tommy Norment
Majority Leader
Senate of Virginia
4801 Courthouse Street
Ste 300
Williamsburg, VA
Email: Senator@SenatorNorment.com

The Honorable Michael Erin Busch
Speaker of the House
State House H-101
Annapolis, MD 21401-1991
Email: Michael.busch@house.state.md.us

The Honorable William J. Howell
Speaker
Virginia House of Delegates
PO Box 8296
Fredericksburg, VA 22404
Email: DelWHowell@house.virginia.gov

Dear Chairman Mendelson, Senator Miller, Delegate Busch, Senator Norment and Delegate Howell,

The undersigned organizations jointly write to express our concerns with the “Metro Safety Commission Interstate Compact Establishment Act of 2016,” the legislation recently introduced in the District of Columbia as Bill Number 21-828 which we expect to be introduced in Maryland and Virginia in advance of those jurisdictions’ 2017 legislative sessions. We also wish to offer our assistance in amending the legislation to ensure the intended oversight goals are met.

This bill would create a state safety oversight authority (to be known as the “Metrorail Safety Commission”) for the Washington Metropolitan Area Transit Authority (“WMATA” or “Metro”) pursuant to an amendment to the United States Code. But, while it is clear that WMATA needs more oversight, it is equally clear that the public should be able to participate in that oversight. Unfortunately, the legislation as currently written does not guarantee public participation in the oversight process.

Our main concerns lie in paragraphs 18-24, which are found in Article III, Section E (“Organization and Procedure”). This section addresses access to meetings of and records held by the Metrorail Safety Commission. Our concern is that it is largely permissive in nature. There is no mandatory right of access to meetings or records, nor is there any meaningful enforcement mechanism. To the extent a right of access exists, it appears to be a matter of policy, not law; to the extent the Metrorail Safety Commission fails to follow that policy, no repercussions are included in the legislation as drafted. We are concerned that the result would be transparency only when it suits the Commission, not when it is necessary to serve the public interest. This carries the potential for continued safety issues, and a lack of public confidence in the process.

Rather than stating that “Meetings of the Board shall be open to the public unless closed pursuant to adopted Board policy, and Commission documents shall be available to the public unless deemed confidential pursuant to adopted Commission policy” and allowing the Commission to “adopt open meeting and freedom of information policies based on the principles of transparency and public access” (Article III, Section E, Paragraph 21), the open meetings and freedom of information policies should be subject to the actual laws of each jurisdiction or, in the alternative, the federal Government in the Sunshine Act and Freedom of Information Act.

We have researched similar Interstate Compacts from around the country, including, among others, those governing the Port Authority of New York and New Jersey, the Delaware River Port Authority, the Delaware River and Bay Authority, the Metropolitan Washington Airports Authority, the Kansas City Area Transportation Authority and the Bi-State Development Agency. These compacts vary in terms of their treatment of the bodies’ meetings and records but offer useful guidance in terms of granting a strong public right of access.

We believe that it would be very easy to improve this bill with a few simple revisions including: (1) applying the applicable open meetings and open records laws (and the exemptions thereto) of at least one (preferably the most transparent) or all of the states, (2) in the alternative, applying federal law (which would be appropriate given the legislation provides for jurisdiction of federal courts to hear disputes arising from the Compact), and (3) providing for a clear right of appeal to a higher body within one of the jurisdictions, followed by a right to judicial review in federal court of a continued adverse decision.

The lack of mandated and enforceable transparency is necessary given that the Metrorail Safety Commission is, for all intents and purposes, a public body. The Metrorail Safety Commission is described as “an instrumentality of each Signatory” (Article III, Section A, Paragraph 4), and “a state safety oversight authority” that is created “pursuant to the mandate of federal law, as a common agency of each Signatory (Article II, Paragraph 3), with the signatories being represented by leaders of the governments of Maryland, Virginia and the District of Columbia. Even if the Metrorail Safety Commission were not considered an actual government agency, it has been given powers associated with some agencies, as Article II, Paragraph 2 states it “shall have safety regulatory and enforcement authority over the WMATA Rail System and shall act as the state safety oversight authority for WMATA.” Given the clear intention for the Metrorail Safety Commission to act as a government agency, it should be treated as a government agency for all legal purposes, including open meetings and access to records purposes.

A strong right of access is necessary now, more than ever, since this legislation was mandated by Congress because the previous iteration of an oversight Commission, the Tri-State Oversight Commission, was not successful in ensuring that the Metro system is safe.

Public input – ideally from riders themselves – is going to be necessary to paint the real picture regarding the Metrorail system and any specific incidents being investigated. Beyond that, however, is the public’s perception of the Commission’s findings and actions, which will be shaped by their perception of whether the process is fair or not; yet the default starting point for public perception will be negative if the public feels it is being shut out.

We hope that you will consider our suggestions and would be eager to meet with you to discuss these concerns and suggestions in more detail. We are also happy to assist you in drafting language that will strengthen public oversight of WMATA which, in turn, should make Metro safer.

Please do not hesitate to contact any of the undersigned.

Thank you,

Kevin M. Goldberg
President
DC Open Government Coalition
Email: goldberg@fhhlaw.com
Phone: 703-346-0473

Rebecca Snyder
Executive Director
Maryland-Delaware-D.C. Press Association
Email: rsnyder@mddcpress.com
Phone: 443-768-3281

Megan Rhyne
Executive Director
Virginia Coalition for Open Government
Email: mrhyne@opengovva.org
Phone: 540-353-8264

Cc: Muriel Bowser, Mayor, District of Columbia
Larry Hogan, Governor, State of Maryland
Terry McAuliffe, Governor, Commonwealth of Virginia