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April 20, 2018

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 432 – “Public Safety – Grant Programs and Funding (Public Safety and Violence Prevention Act of 2018)”

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 432, “Public Safety – Grant Programs and Funding (Public Safety and Violence Prevention Act of 2018),” which establishes the Maryland Violence Intervention and Prevention Program Fund and an Advisory Council within the Governor’s Office of Crime Control and Prevention (“GOCCP”). We write to address a concern regarding the constitutionality of the membership of the Council, which includes members of the General Assembly. This legislative membership raises a separation of powers concern under Article 8 of the Maryland Declaration of Rights and raises additional concerns under the prohibition against dual offices held by legislators contained in Article III, § 11 of the Maryland Constitution. These concerns will not be implicated, however, if the Council serves a truly advisory role whose recommendations are not binding on the Executive Director of GOCCP.

House Bill 432 establishes the Maryland Violence Intervention and Prevention Program Fund. The fund is administered by the Executive Director of GOCCP in consultation with the Maryland Violence Intervention and Prevention Advisory Council. The purpose of the fund is to (1) support effective violence reduction strategies by providing competitive grants to local governments and nonprofit organizations to fund evidence-based health programs or evidence-informed health programs and (2) evaluate the efficacy of the programs funded as a result of the bill. Public Safety Article (“PS”), § 4-804. The Council has 13 members, including one member of the Senate, appointed by

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the President of the Senate, and one member of the House of Delegates, appointed by the Speaker of the House. PS § 4-803(b)(2) and (3).

House Bill 432 directs the Council to “advise the Executive Director on the allocation of funds for the evaluation of the efficacy of the evidence-based health programs or evidence-informed health programs that receive funding”; “provide input” about the “administration of the Fund”; “assist the Executive Director in establishing procedures” related to applications for funding; “create guidelines for funding eligibility”; “review and publish reports”; and, “advise the Governor and the Executive Director on the implementation of gun violence programs in the State.” PS § 4-803(d)(1). The Council is also to select a researcher to conduct a specified evaluation. PS § 4-803(d)(2). In addition, the Executive Director is to establish procedures for the distribution of funds “in consultation with the Council.” PS § 4-805(a).

The Maryland Constitution does not prohibit the service of members of the General Assembly on boards, councils, and task forces undertaking fundamentally advisory roles, and, indeed, there are dozens of such advisory bodies and task forces established in State law. At the same time, Article 8 of the Declaration of Rights provides “[t]hat the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.” In addition, Article III, § 11 of the Constitution states that “[n]o person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate.”

In 1976, Attorney General Burch opined that Article 8 of the Declaration of Rights and Article III, § 11 would be infringed by the service of members of the General Assembly on the Washington Suburban Transit Commission. 61 *Opinions of the Attorney General* 152, 159-62 (1976). Also, in 2009, we advised your predecessor, in a letter discussing legislation reestablishing the Commission on the Establishment of a Maryland Women in Military Service Monument, that because the legislation empowered the Commission, the membership of which included members of the General Assembly, to enter into contracts regarding “the funding, design, construction, or placement of an appropriate monument,” and not merely to give advice regarding a monument, the exercise by the Commission of those executive powers could infringe these two provisions. See Bill Review Letter on House Bill 944 and Senate Bill 367 (May 15, 2009).

It is our view, however, that service on the Council is not an “office of profit” for purposes of Article III, § 11 as there is no compensation for Council members. Nor do we

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believe that service on the Council meets the test to be considered an "office of trust." See *Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 439 (1967); *Duncan v. Koustenis*, 260 Md. 98, 105 (1970). While advice and input from Council members will no doubt serve an important function and provide valuable guidance to the Executive Director in administering and distributing funds, the role for the Council is an advisory one. The Council does not exercise any portion of the sovereign power of the State.

Keeping the role as a purely advisory one will also address the Article 8 separation of powers concern. Thus, the Council should not direct the activities of the Executive Director regarding the awarding of funds. If Council's recommendations regarding procedures and guidelines are binding on the Executive Director, there would be a problem with legislators serving on the Council. On the other hand, if the Council is simply advisory, we see no problem. We note that the Executive Director of GOCCP is not selected by the Council but by the Governor. Thus, a purely advisory body that includes legislators and simply provides recommendations and reports to the head of GOCCP does not present any separation of powers problem. We would recommend, however, that legislators not participate in the vote to select the third-party researcher contemplated by PS § 4-803(d)(2). In addition, to the extent PS § 4-802(e)(2) is meant to limit the amount that the Governor can appropriate to the special fund each year ("The Governor may annually appropriate up to \$10,000,000 to the Fund"), we would advise that limit is not binding on the Governor.

Sincerely,



Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber