

BRIAN E. FROSH
ATTORNEY GENERAL



SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 4, 2017

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

RE: House Bill 152, "Budget Reconciliation and Financing Act of 2017"

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 152, "Budget Reconciliation and Financing Act of 2017" ("BRFA").¹ In reviewing the bill, we have considered whether it violates the one subject requirement under the Maryland Constitution. Although there are two severable provisions that we believe are of doubtful constitutional validity, at least in part, it is our view that the balance of the BRFA is constitutional and legally sufficient. We also note that Section 11 of the bill, which purports to transfer a portion of an appropriation in the fiscal year 2017 budget, must be construed as authorizing, not requiring, the transfer.

The One Subject Requirement

Article III, § 29 of the Maryland Constitution provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject." This provision traditionally has been given a "liberal" reading so as not to interfere with or impede

¹ We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (1986).

legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). As the Court of Appeals explained:

That liberal approach is intended to accommodate a significant range and degree of political compromise that necessarily attends the legislative process in a healthy, robust democracy. It has sufficient fluidity to accommodate, as well, the fact that many of the issues facing the General Assembly today are far more complex than those coming before it in earlier times and that the legislation needed to address the problems underlying those issues often must be multifaceted.

MCEA, 346 Md. at 14. At the same time, the Court's liberal approach to the one subject requirement was "never intended to render the Constitutional requirement meaningless" *Delmarva Power v. PSC*, 371 Md. 356, 369 (2002).

An act meets the one subject requirement if its provisions are "germane" to the same subject matter. *Migdal v. State*, 358 Md. 308, 317 (2000); *Porten Sullivan Corp. v. State*, 318 Md. 387, 407 (1990). "Germane" means "in close relationship, appropriate, relative, [or] pertinent." *Id.* Two matters can be regarded as a single subject because of a direct connection between them or because they each have a direct connection to a broader common subject. For purposes of assessing how closely connected and interdependent the provisions of a bill may be, the "notions of connection and interdependence may vary with the scope of the legislation involved." *MCEA*, 346 Md. at 14 (quoting *Porten Sullivan*, 318 Md. at 407). Moreover, "a measure that begins life as a comprehensive one, and then has additional details inserted may survive a § 29 attack more readily than an originally narrow bill which becomes a very broad one." *Porten Sullivan*, 318 Md. at 407.

Prior Advice

When one subject questions have arisen in the context of the BRFA, this Office has generally considered whether the various provisions of the bill deal with the single subject of balancing the budget and adjusting the finances of State and local government, though the specific language we have used to describe the BRFA's purpose has varied. *See* Bill Review Letter on Senate Bill 172 of 2014 (the purpose of the BRFA is "to balance the State operating budget and provide for the financing of State and local government"); Letter to William S. Ratchford, II from AAG Richard E. Israel, dated April 1, 1993 ("one-subject of adjusting the finances of State and local government"); and Letter to the

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Honorable Christopher Van Hollen, Jr. from AAG Robert A. Zarnoch, dated October 11, 1991 (the single subject of “budget balancing”).

The BRFA typically includes provisions that enhance revenues and reduce current and future year expenditures. These provisions often take the form of fund transfers, the elimination, reduction, or suspension of mandated spending, and revenue raising measures. In our Bill Review Letter on the 2005 BRFA, we stated that “[a]n argument can be made that the genesis of [the BRFA] was to help bring the State’s budget into balance during a time of fiscal crisis, and funding mandates have no place in such legislation.” Bill Review Letter on House Bill 147 of 2005 at 5-6. Such provisions, we noted, are the hardest to defend, and thus we have repeatedly advised that funding mandates typically are not an appropriate subject for the BRFA. *See, e.g.*, Letter to the Honorable Thomas V. Mike Miller, Jr. from AAG Bonnie A. Kirkland, dated April 1, 2009 (advising that a change to the disparity grant formula that would increase State expenditures “would be inconsistent with the primary purpose of the BRFA and should be addressed in separate legislation”); Bill Review Letter on Senate Bill 172 of 2014 at 4-5 (amendments to the BRFA mandating funding for Park Service operations and State Police “likely violate[] the one-subject rule”). This position, moreover, is consistent with one of the underlying purposes of the one subject requirement – to protect the Governor’s veto power.

Nonetheless, we have recognized that funding mandates in the BRFA that are legislative reactions to budget action taken by the Executive, in either the Budget Bill or BRFA, are “more defensible.” Bill Review Letter on House Bill 147 of 2005 at 6. In reviewing the 2005 BRFA for constitutionality and legal sufficiency, we noted the following:

More than just a mere aid to Executive budget decisions, a budget reconciliation and financing act is both substantive legislation to be construed in *pari materia* with the budget bill and a legislative response to Executive or Judicial Branch budget decisions proposed there and in other legislation. For example, in this year’s bill, in response to a substantial pay raise for judges included in the budget bill, the Legislature responded in the BRFA by precluding recommendations of such increases for a four year period. ...

Id. at 3. In the 2005 Session, the Governor's budget eliminated funding for prevailing wage enforcement, and the BRFA, as submitted by the Governor, would have repealed the Prevailing Wage Law. The General Assembly responded by amending the BRFA to mandate funding for prevailing wage enforcement in future years. We stated that such legislative responses to budget action by the Governor arguably are "a legitimate exercise of policy making power granted to the legislature" and that "[r]easonable arguments can be made to both support or challenge these types of actions." Bill Review Letter on House Bill 147 of 2005 at 6. Conversely, we advised that an amendment to the 2013 BRFA that would alter the local disparity grant formula so as to increase the amount of mandated funding "should not be included in the BRFA." The amendment, we noted, was unrelated to any other actions included in the BRFA. There were no provisions, for example, that reduced funding for the counties, to which the amendment might be viewed as an appropriate legislative response, or, as stated in the letter, "a 'take,' for which the amendment could be considered a 'put.'" Letter to the Honorable Norman H. Conway from AAG Bonnie A. Kirkland, dated March 26, 2013.

Provisions in the 2017 BRFA

In reviewing the BRFA, we have identified a number of provisions that raise questions under the one subject requirement. Of particular concern is a provision that increases mandated funding to support the transition to the new Prince George's County Regional Medical Center. It is our view that, while the increases in mandated funding in fiscal years 2019 and 2020 raise legitimate single subject concerns, they are not clearly unconstitutional because a reasonable argument can be made that they constitute a legitimate legislative response to Executive budget action. We have significant doubt, however, about the constitutionality of the increased grant funding beyond fiscal year 2020. We also believe a provision that increases the annual award for senatorial scholarships violates the one subject requirement.²

² While this letter does not identify every provision that raises some concern under the one subject requirement, it identifies the provisions we think are of significant constitutional concern.

Prince George's County Regional Medical Center

As enacted by Chapter 13 *Laws of Maryland* 2016, Health-General Article (“HG”), § 19-2401 requires that the State and Prince George’s County (1) provide specific amounts of operating support to the University of Maryland Medical System Corporation (“UMMS”) in fiscal years 2018 through 2021 to support the transition of the Prince George’s County Regional Medical Center from operation under the Dimensions Health Care System to operation as a participating institution under UMMS and (2) provide funds for the construction of the new Prince George’s County Regional Medical Center.³

The Governor’s operating and capital budget proposals effectively delayed the State funding for operating and construction support but preserved the total amount of funding.⁴ The BRFA provision at issue amends HG § 19-2401 to restore all but \$2 million of the operating grant amount for fiscal year 2018 and to increase the fiscal year 2019 grant amount by the same \$2 million. In addition, it further increases the grant amounts in 2019 through 2021 by \$10 million and adds a new grant requirement of \$10 million a year for fiscal years 2022 through 2028. Finally, the provision amends HG § 19-2401(c) to reflect

³ Chapter 13 was made contingent on UMMS “becoming the sole corporate member of Dimensions Health Care Corporation” and “assuming responsibility of the governance structure of the entity.” It is our understanding that this contingency has not yet been satisfied and, therefore, the funding mandates are not yet effective.

⁴ The State’s fiscal year 2017 budget included a \$15 million appropriation to provide an operating grant to UMMS. Ch. 143 *Laws of Maryland* 2016. The fiscal year 2018 budget bill (House Bill 150), as submitted by the Governor, reduced the fiscal year 2017 appropriation for the operating grant by \$7.5 million and reduced the fiscal year 2018 appropriation by \$15 million “contingent upon the enactment of legislation reducing the operating grant for the Prince George’s County Regional Medical Center.” House Bill 150, Item M00F03.04. The BRFA, as introduced, modified the State’s obligation to provide annual operating grants under HG § 19-2401 by decreasing the fiscal year 2018 grant amount by \$15 million and by increasing the grant amounts in future years to offset – dollar for dollar – the proposed \$22.5 million in total reductions in fiscal years 2017 and 2018. In addition to the delay in operating support, the Governor’s capital plan delays until fiscal year 2020 \$56.2 million of capital support for construction of the new Regional Medical Center. The Governor’s capital plan provides funding for construction in the amounts of \$11.3 million in fiscal year 2018, \$48 million in fiscal year 2019, and \$56.2 million in fiscal year 2020.

the Governor's capital plan that delays \$56.2 million of the fiscal year 2018 construction funding support until fiscal year 2020.

It has been suggested that the increase to the grant amounts, beyond the aggregate amounts currently specified in HG §19-2401, is a legislative response to the decision to delay construction funding in the capital budget. We are aware of no instance in which we have suggested that funding mandates in the BRFA may be an appropriate legislative response to the Governor's decisions in the *capital* budget bill. In fact, given the purpose of the BRFA – to balance the operating budget and adjust the finances of State and local government – there is a strong argument that a legislative reaction to a funding decision in the capital budget bill is not within the subject of the BRFA. However, because of the somewhat unique set of circumstances here, an argument could be made that the decision to delay \$56.2 million of construction funding is akin to a “budget action” in the budget bill.⁵

Accordingly, it is our view that the portion of the amendment that restores \$28 million of the \$30 million in operating grant funding for fiscal year 2018 and shifts the \$2 million in savings to fiscal year 2019 is not clearly unconstitutional. The further increases to the grant amounts in fiscal years 2019 and 2020 are a much closer call but could be viewed as a legislative response to the two-year delay in construction funding. If seen in that light, they are not clearly unconstitutional. Much more difficult to defend, however, are the provisions of the amendment that increase or establish new operating grant requirements after fiscal year 2020. The nexus between these provisions and the delay in construction funding is much weaker, and that nexus grows weaker with each passing year. SB 1198, which we approved for constitutionality and legal sufficiency by letter dated April 3, 2017, if signed or allowed to go into effect without your signature, would resolve these concerns. But if not, it is our view that these out-year funding increases are likely unconstitutional.

⁵ HG § 19-2401 is most accurately characterized as embodying the State's commitment to provide State funding support to UMMS in the form of annual operating grants and construction funding for the new Regional Medical Center. Both the operating grants and construction funding are to be funded in the budget bill, i.e., the operating budget, though the General Assembly authorized the Governor to use State general obligation (GO) bond proceeds to provide the construction funding as an alternative to using money in the General Fund. That the Governor exercised his discretion to use GO bond proceeds – which are appropriated in the capital budget bill – does not, in this instance, seem to make the funding decision any less of a “budget action.”

Senatorial Scholarships

An amendment to Education Article (“ED”), § 18-404 modifies the maximum annual award for senatorial scholarships beginning in fiscal year 2020 by tying the amount to increases in the cost of undergraduate tuition and fees at four-year institutions in the University System of Maryland. The effect of the provision, which is unrelated to any other provisions in the BRFA, is to increase State expenditures, thus running counter to the primary purpose of the BRFA. For this reason, it is our view that this provision violates the one subject requirement of Article III, § 29. Accordingly, we recommend that the General Assembly readopt this provision through stand-alone legislation next session.

Maryland Park Service

The BRFA also amends Natural Resources Article (“NR”), § 5-212(g)(3) to modify the wording of a funding mandate for the Maryland Park Service. That provision was first enacted by the 2014 BRFA, and in our Bill Review Letter that year we concluded that its inclusion in the BRFA likely violated the one subject rule because funding mandates typically are not appropriate subjects of the BRFA. We recommended that the provision be treated as an expression of legislative intent, not binding on the Governor. Bill Review Letter on Senate Bill 172 of 2014 at 4. The following year, the General Assembly cured that constitutional deficiency by passing legislation reenacting that section with a minor modification. The operating budget for fiscal year 2018, however, did not include the full level of funding required by § 5-212(g)(3), and it is our understanding that the Department of Natural Resources (“DNR”) expressed concern that the mandate interfered with its ability to maintain a sufficient fund balance. The provision in this year’s BRFA appears to clarify the funding mandate and address DNR’s concerns about preserving the fund balance. We believe that this type of modification of an existing funding mandate, the purpose of which is not to create a new mandate or increase the amount of an existing mandate, is likely defensible under the one subject requirement.

Rainy Day Fund

We also have considered whether a provision that amends State Finance and Procurement Article (“SFP”), § 7-314 to mandate that the Governor appropriate a total of \$15 million from the Rainy Day Fund for fiscal years 2019 through 2021 violates the one subject requirement. The Governor’s budget proposal included a \$20 million General Fund deficiency appropriation to the Sunny Day Program to “supplement the appropriation for fiscal 2017 to provide funds for the agreement with Marriott International, Inc.” HB 150, Item Y01A03.01. The General Assembly reduced the appropriation by \$15 million and

amended the BRFA to mandate that the same amount be included in the State budget for this purpose over the next three fiscal years. We believe that this provision, which is related to a comparable reduction in the budget bill and provides some certainty that the funding cut from this year's budget bill will be included in future budget bills, is consistent with the one subject of balancing the budget and adjusting the finances of State and local government.⁶

Section 11 – Transfer of Appropriation

Section 11 of the BRFA purports to transfer \$187,500 of a fiscal year 2017 special fund appropriation in the budget of the Department of Housing and Community

⁶ It has been suggested that this provision is an unconstitutional special law under Article III, § 33 of the Maryland Constitution. It is our view that it is not. Article III, § 33 provides, in relevant part, that “the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law.” A special law is one that relates to particular persons or things of a class, as distinguished from a general law, which applies to all persons or all things of a class. *Cities Service Co. v. Governor*, 290 Md. 553 (1981). In the *Cities Service* case, the Maryland Court of Appeals conducted a two-part inquiry to determine if the law was an impermissible special law. First, the Court asked whether invalidating the legislation will effectuate the historical purpose of preventing influential persons from gaining an undue advantage through the enactment of private acts. Second, the Court undertook a close analysis of the bill and its legislative history, including the bill's actual purpose, whether the beneficiaries are identified by name, whether the beneficiaries sought and persuaded the legislature to pass the bill, whether the public need and the public good are served by the bill, and whether the classifications contained in the bill are reasonable or arbitrary. *Cities Service Co.*, 290 Md. at 568-70. Of these factors, “no one is conclusive in all cases.” *Id.* at 570. Moreover, Attorney General Sachs has observed that it is within the unique province of the General Assembly to determine whether the public need and the public good are served by the bill. 66 *Opinions of the Attorney General* 207, 209 (1981).

The BRFA provision is designed to uniquely address the restructuring of the State support provided to Marriott by providing a certain level of assurance that the funds cut from this year's budget bill will be included in the budget in future fiscal years. It does not reflect any special treatment by the legislature but instead reflects a budget accommodation that likely is contrary to Marriott's interests; it serves the important public purpose of retaining jobs in the State; and its purpose could not be well served through a public general law.

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Development to the Department of Commerce for the Small, Minority, and Women-Owned Businesses Account. So as not to interfere with the Governor's authority under Md. Const. Art. III, § 52 to initiate appropriations in the budget bill, this provision must be construed as authorizing, not requiring, the transfer of funds.

Conclusion

Although HB 152 contains two provisions that are of doubtful constitutional validity, at least in part, we believe these provisions are severable and the bill is constitutional and legally sufficient. HB 152, § 26; General Provisions Article, § 1-210.

Sincerely,

A handwritten signature in cursive script that reads "Brian E. Frosh".

Brian E. Frosh
Attorney General

BEF/DS/kk

cc: The Honorable John C. Wobensmith
Chris Shank
Warren Deschenaux