Metrorail Safety Commission
June 5, 2018

Agenda Item # 3 – Informational

Staff Report

Background	Updates and reports on ongoing activities following the May 22, 2018 Metrorail Safety Commission Board Meeting.
Issues	None
Staff Recommendation	Receive staff report

U.S. Department
of Transportation

**Federal Transit
Administration**

Executive Director

1200 New Jersey Avenue, SE
Washington, DC 20590

MAY 21 2018

The Honorable Muriel Bowser
Mayor of the District of Columbia
1350 Pennsylvania Ave. NW
Washington, DC 20004

The Honorable Larry Hogan
Governor of Maryland
100 State Circle
Annapolis, MD 21401

The Honorable Ralph Northam
Governor of Virginia
P.O. Box 1475
Richmond, VA 23218

Dear Mayor and Governors:

I am writing as a follow-up to my January 30, 2018 letter urging Maryland, Virginia and the District of Columbia to promptly complete the process for establishing a federally compliant State Safety Oversight (SSO) program for the Washington Metropolitan Area Transit Authority (WMATA) Metrorail system. There is now less than one year to the April 15, 2019, deadline to obtain SSO program certification and time is passing quickly.

To date, the three jurisdictions have advanced through three of four stages of the certification process and have additional work to complete. FTA has recommended that States submit applications as early as possible. States should not assume that applications submitted after September 30, 2018, will be certified by the deadline. By law, the deadline cannot be waived or extended.

If the deadline is missed, FTA is prohibited by law from awarding any new federal transit funds to transit agencies within the three jurisdictions until SSO program certification is achieved. In Fiscal Year 2019, FTA is projected to grant approximately $638,233,977 in federal transit program formula funds (49 U.S.C. 5338) to the three jurisdictions. Without a certified SSO program, FTA would be prohibited from obligating these and other federal transit funds until an SSO program certification is complete.

To assist in the jurisdiction's readiness for certification, FTA has been in regular communication with your representatives and representatives of the Metrorail Safety Commission and the Metropolitan Washington Council of Governments (the recipient of the FTA SSO funding for

this effort). Training workshops have been conducted and guidance distributed to SSO program managers on SSO program requirements and the certification process.

The continued safety of the WMATA Metrorail transit system requires the establishment of a federally compliant SSO program. Safety is FTA's top priority, and we are committed to partnering with States to help them fulfill their safety responsibilities and completing this important task.

If you need additional information or assistance, please feel free to contact Henrika Buchanan, FTA's Acting Associate Administrator for the Office of Transit Safety and Oversight, at (202) 366-1783 or henrika.buchanan@dot.gov. She will be happy to assist you.

Sincerely,

Matthew L. Welbes

cc: The Honorable Chris Van Hollen, United States Senator
The Honorable Ben Cardin, United States Senator
The Honorable Mark Warner, United States Senator
The Honorable Tim Kaine, United States Senator
Mr. Christopher Hart, Chair, Metrorail Safety Commission (MSC)
Mr. Mark Rosenker, Vice Chair, MSC
Ms. Debra Farrar-Dyke, Secretary-Treasurer, MSC
Ms. Allison Fultz, MSC Legal Counsel
Mr. Charles Spitulnik, MSC Legal Counsel
Mr. Chuck Bean, Executive Director, Metropolitan Washington Council of Governments (MWCOG)
Mr. Kanathur Srikanth, Director, Department of Transportation Planning, MWCOG
Mr. Nicholas Ramfos, Program Director, Transportation Operations Programs, MWCOG
Ms. Sharmila Samarasinghe, Chair, Tri-State Oversight Committee (TOC)
Mr. Bud Frank, TOC Policy Group Member for the State of Maryland
Mr. Todd McIntyre, TOC Policy Group Member for the District of Columbia
Ms. Jennifer Mitchell, TOC Policy Group Member for the Commonwealth of Virginia

Metrorail Safety Commission

M E M O R A N D U M

To: **Metrorail Safety Commission Board**
From: **Nicholas Ramfos, COG**
Date: **June 5, 2018**
RE: **MSC Office Space and Furniture Status**

COG has been working with both the MSC CEO, David Mayer and CORT Furniture rental on the furniture options for the MSC space. Once the final options are made, the contract will be signed and the furniture will be delivered for the space. The total cost presented at the May 22nd MSC Board meeting is not expected to change ($24,522.97).

Work in the new space has been completed including wall demolition and installation of new carpeting and fresh paint. COG also coordinated with Raffa on conducting a walk-through this past week to determine wiring requirements for the MSC's phone and computer systems.

For the time being, Dr. Mayer will be using office space in COG's offices. It is expected that the MSC's offices should be ready for move in by mid to late June.

Metrorail Safety Commission

M E M O R A N D U M

To: **Metrorail Safety Commission Board**
From: **Nicholas Ramfos, COG**
Date: **June 5, 2018**
RE: **MSC Banking Services RFQ**

An RFQ was released by COG on May 31st to select a reputable financial institution to manage the MSC's core banking services. Once selected, the bank will be used for payroll purposes and once the MSC receives funding from the state funding agencies and is fully certified and can receive federal funding. The deadline for submitting qualifications for the RFQ is June 13th.

Metrorail Safety Commission

M E M O R A N D U M

To: **Metrorail Safety Commission Board**
From: **Nicholas Ramfos, COG**
Date: **June 5, 2018**
RE: **Status of MSC Job Advertisement and RFQ**

All comments have now been received from the Commissioners, the State Policy team members, FTA and Dr. Mayer and have been combined into the two documents for final review and comment and review by Dr. Mayer. The documents have also been reconciled with the most recent workload assessment submitted to the FTA. Once the final documents are ready for release they will be sent to all parties and the ad will be placed and the RFQ will be released.

Metrorail Safety Commission

M E M O R A N D U M

To: **Metrorail Safety Commission Board**
From: **Rob Holt, FOY Insurance**
Date: **June 5, 2018**
RE: **Status of MSC Insurance Policies**

Commercial General Liability - ($1,000,000 limit)

Mid last week a **firm quote** for **Commercial General Liability** was from AIG/Lexington – (**$50,500** (plus tax) for a **$1,000,000** limit). AIG had initially indicated an estimated $25K for $1M however as noted, that figure was subject to final underwriter and management approval and this was after the Indemnity and Tort Limits summation Kaplan Kirsch & Rockwell LLP was submitted. The following response was received, "as often seen (with other public entities) immunity and indemnity tort relief does not play out as the insured would think. You really don't know until there is a claim tested in court. Rail losses are very large and the insured may be dragged into something they inspected. This is a new entity with no loss experience and is tough predict the future".

We marketed this coverage to **40 plus carriers** but only AIG/Lex offered terms. A year from now we will have some history behind us so I fully expect we will have additional, more competitive options.

To bind coverage, we need:

- A completed, signed, and dated application
- Signed "no loss" letter
- Receipt of "TRIA" form noting coverage election

Public Officials Liability - ($3,000,000 limit)

- No changes from the quote we presented on April 24, 2018

Excess Public Officials Liability

- No changes from the quote we presented on April 24, 2018

Professional Errors and Omissions Liability – ($1,000,000)

- No changes from the quote we presented on April 24, 2018

To bind coverage, we need:

- Completed, signed, and dated application
- Confirmation of MSC's "year one" budget*****

*** Note -** Premium quoted was based on an initial estimated "year one" budget provided to FOY of $2.5M. Final premium may be different if MSC's estimated budget has changed.

Open Items:

- **Auto Coverage** – Need to add as soon as a vehicle is secured
- **Property coverage** – AIG is offering general liability only (not a "package policy") so we will need to pick up coverage for MSC's business personal property, (including laptops, furniture, computers, etc.) from loss, damage, or theft.
- **Umbrella** - We can consider Umbrella coverage once MSC finalizes its standard operating procedures and all organization policies.

PREMIUM SUMMARY

Coverage Premium

(Including taxes and fees)

1. Public Officials Liability & Employment Practices (option 1) $12,766.32

2. Excess Public Officials Liability $15,550.00

3. Professional Errors And Omissions $25,595.88

4. Workers' Compensation and Employers Liability $ 7,210.00

5. Commercial General Liability $50,500

Total – All lines proposed $124,388.52

KAPLAN KIRSCH ROCKWELL

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL ATTORNEY WORK PRODUCT

TO: Metrorail Safety Commission

FROM: Kaplan Kirsch & Rockwell LLP

DATE: 6/5/2018 10:29:47 AM; revised June 5, 2018

SUBJECT: What constitutes a "meeting" under the Government in the Sunshine Act, 5 U.S.C. § 552b, and what exceptions exist to the meeting requirements?

You have asked us to advise as to the requirements governing the conduct of meetings of the Metrorail Safety Commission ("MSC"). MSC's enabling statute, the Metrorail Safety Commission Interstate Compact, requires the MSC to adopt the open meeting requirements of the Government in the Sunshine Act, 5 U.S.C. § 552b ("Sunshine Act"), as its policy for conducting meetings. Pub. L. 115-54, Article III.E.21 (Aug. 22, 2017). The Sunshine Act defines what constitutes a "meeting" and requires, subject to certain exemptions, that all meetings of the MSC be open to the public. This memorandum discusses the following facets of the Sunshine Act meeting requirements:

ISSUES PRESENTED

(1) What constitutes a "meeting" that requires public notice and to be open to the public under the Government in the Sunshine Act?

(2) What constitutes an agency gathering that is *not* a "meeting"?

(3) What exceptions exist to the requirement that all meetings be open to the public?

(4) What actions may the MSC take in a meeting that is closed to the public?

The default position is that the MSC is required to deliberate and conduct its business in public EXCEPT when circumstances allow otherwise either because (a) the subject matter permits the MSC to vote to go into closed session or (b) the nature of the gathering is not that of a meeting – for instance, an informational session or technical tour that the MSC attends at the invitation of another organization, or a briefing by FTA to the MSC.

The requirements of the Sunshine Act may vary from restrictions on *ex parte* communications and other open meetings requirements MSC Members and Alternate Members may have encountered in other contexts.

SUMMARY

Meetings

The Sunshine Act mandates that "meetings of an agency" be open to the public. The statute defines "meetings" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. § 552b(a)(2).

If notice of a meeting has been published and the meeting is open to the public, it will be considered a meeting of the agency even if the agency does not take any action during that meeting. Even if the agenda reflects that the MSC will not making any decisions, the default position would be that a quorum of the Commission would be present to conduct agency business unless the subject matter is appropriate for closed session discussion, as described below. So the lack of a vote or other formal action does not convert a publicly-noticed meeting that is open to the public into something other than a "meeting" for Sunshine Act purposes.

Gatherings or communications not categorized as meetings

Not all occasions on which an agency's members assemble satisfy the definition of a meeting under the Sunshine Act. For instance, gatherings outside of an agency's control and where official agency action does not occur, such as "[i]nformal background discussions [that] clarify issues and expose varying views", are a necessary part of an agency's work and are not "meetings" that are subject to the requirements of the Sunshine Act. *FCC v. ITT World Communications*, 104 U.S. 463, 465 (1984) (citing S.Rep. No. 94-354, p. 19 (1975)). Additional exceptions to the meeting criteria are discussed below.

The Sunshine Act does not require agencies to hold meetings and permits them to do business by sequential or notational written voting. The law only mandates that when an agency does hold meetings, they must be open to public. *AMREP Corp. v. F.T.C.*, 768 F.2d 1171, 1178 (10th Cir. 1985). Agencies may permissibly circulate matters for a written vote on a written question without invoking the Sunshine Act's public notice and open meeting requirements. *Railroad Comm'n of Texas v. U.S.*, 765 F.2d 221, 230 (D.C. Cir. 1985). Congress intended to permit agencies to consider and act on agency business by circulating written proposals for sequential approval by individual agency members without formal meetings. *Communications Systems, Inc. v. FCC*, 595 F.2d 797, 800 (D.C. Cir. 1978).

Sunshine Act Exemptions – meetings in closed session

The Sunshine Act also contains ten enumerated exemptions that allow for any portion of a meeting to be closed to the public where the agency determines that at least one of the exemptions applies. However, even if a meeting falls within one of these exemptions, the meeting must remain open to the public if the public interest so requires, 5 U.S.C. § 552b(c), although this "public interest" exception to the Sunshine Act's exemptions is left to the unreviewable discretion of the agency. *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 798 F.2d 499, 504 (D.C. Cir. 1986). When any exemption is claimed, the agency will bear the burden of proof to demonstrate coverage of the particular discussion by the specified exemption. 5 U.S.C. § 552b(h)(1).

Where the Commission is conducting a meeting and the subject matter of such meeting satisfies the criteria for one of the exemptions below,[1] the agency may close the meeting to the public:

- **5 U.S.C. § 552b(c)(2) ("Exemption 2"):** allows an agency to conduct closed meetings to discuss information relating solely to the internal personnel rules and practices of the agency. Although there is little case law interpreting this exemption,[2] cases distinguish between internal agency administrative workings, which may be discussed in closed session, and discussions about the employment of high-ranking personnel, which implicate the public interest and therefore are not within Exemption 2.
- **5 U.S.C. § 552b(c)(3) ("Exemption 3"):** allows agencies to conduct closed meetings if they are discussing subjects that are exempt from disclosure by statute. The onus is on the agency to demonstrate specifically that the subject matter falls under the nondisclosure provisions of such statute; vague and overbroad assertions will not satisfy this burden. The current statutes governing transit system state safety oversight do not contain such provisions.
- **5 U.S.C. § 552b(c)(4) ("Exemption 4"):** allows agencies to conduct closed meetings if they are discussing subjects that are considered trade secrets, or commercial or financial information that is obtained from a person and privileged or confidential. The case law interpreting identical provisions in the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") to Exemption 4 indicate that meetings may be closed under this exemption where the subject matter is a trade secret or financial and/or commercial information, which the courts will interpret broadly, with the subject matter only being required to relate to commerce.
- **5 U.S.C. § 552b(c)(5) ("Exemption 5"):** allows agencies to conduct closed meetings if they are discussing subjects that involves accusing a person of a crime or formally censuring any person. We located no case law construing this exemption.
- **5 U.S.C. § 552b(c)(6) ("Exemption 6"):** allows agencies to conduct closed meetings if they are discussing information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. Mere discussion involving personal information should not be considered exempt, but the agency should engage in a balancing test to determine whether the discussion of such personal information is "clearly unwarranted". Private information entitled to protection need not be intimate or embarrassing, and can include a person's name and address, place and date or birth, date of marriage, employment history and/or medical history.
- **5 U.S.C. § 552b(c)(7) ("Exemption 7"):** allows agencies to conduct closed meetings if they are discussing information that may (a) disclose investigatory records compiled for law enforcement purposes and (b) as a result of the

[1] The exemptions at 5 U.S.C §§ 552b(c)(1), (8) and (9)(A) are not relevant to MSC because they address agencies dealing with national defense, foreign policy, or financial regulation.

[2] Courts often draw an analogy to cases construing the Freedom of Information Act's corresponding provision at 5 U.S.C. § 552(b)(2), which governs what documents an agency can protect from public disclosure.

disclosure, may endanger other interests.[3] There is no requirement that the matter under discussion actually results in civil or criminal enforcement, but the agency has the burden of proving the law enforcement purpose behind the compilation of the records and must provide a sufficient level of detail in order to meet this burden.

- **5 U.S.C. § 552b(c)(9)(B) ("Exemption 9B"):** allows agencies to conduct closed meetings if they are discussing information whose premature disclosure would substantially frustrate an agency action, unless the agency has already disclosed the nature of the action to the public. Although the case law on this exemption is scarce, it appears that the courts will view the language of this exemption extremely narrowly and will require an agency to demonstrate a "reasonable likelihood" of any harm to future agency actions.
- **5 U.S.C. 552b(c)(10) ("Exemption 10"):** allows agencies to conduct closed meetings if they are discussing subjects that include the agency's issuance of a subpoena or the agency's participation in a civil action or proceeding, an arbitration, or the initiation, conduct, or disposition by the agency of a particular case involving a determination on the record after opportunity for a hearing.

Permissible actions in closed meetings

The MSC may take any actions in closed meeting that it would take in a public meeting, including deliberations, decisions and voting. The Sunshine Act requires that a majority of the entire membership of the Commission (i.e., 4 of 6) vote to close a meeting to the public, and the agency's counsel must certify that the meeting is being closed pursuant to one of the available exemptions. The MSC must make a record of a closed meeting that fully reflects the proceedings and the actions taken. Such meeting record may consist of a recording, transcript, or, in the case of meetings closed pursuant to Exemption 10, minutes. 5 U.S.C. § 552(f).

DISCUSSION

Meetings – general requirements

To be subject to the Sunshine Act's open meeting requirements, a meeting must be under agency control and must be a gathering where action could be taken under the agency's statutory authority. A meeting cannot occur without the presence of the power to act. If a quorum of five out of seven agency members must be present, under the enabling statute or agency rule, then the separate discussions of two members in one place and three members in another would not constitute a meeting subject to the Sunshine Act. R. Berg & S. Klitzman, *An Interpretive Guide*

[3] A meeting may be closed to prevent the disclosure of "investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel".
5 U.S.C § 552b(c)(7).

to the Government in the Sunshine Act 4 (1978) (Administrative Conference of the U.S.); S. Rep. No. 94-534 (1975) ("A gathering of less than a quorum under the Act does not ever constitute a 'meeting' under the Act.").

In *ITT World Communications*, the issue was whether the Sunshine Act applies to informal international conferences attended by members of the Federal Communications Commission ("FCC"), where the conference was intended to facilitate joint planning of telecommunication facilities through exchange of regulatory policies. 104 U.S. at 464. ITT opposed the FCC's decision to add to the international meeting agenda the topic of approving entry of new competitors into the market, and alleged that the Sunshine Act required the meetings, as "meetings" of the FCC, to be held in public. *Id.* (citing 5 U.S.C. § 552(b)). The court ultimately held that the FCC's attendance at the conference did not constitute "meetings" as defined by Section 522b(a)(2) nor a meeting "of the agency" as provided by Section 552b(b). *Id.* at 468. First, even though the FCC subdivision that attended the sessions constituted a "quorum" of the Telecommunications Committee that was granted decision-making authority by the FCC, these sessions were not considered "meetings" because they did not "consider or act upon applications for common carrier certification", one of the FCC's authorized actions. *Id.*

> This statutory language contemplates discussions that effectively predetermine official actions. Such discussions must be sufficiently focused on discrete proposals or issues as to cause or to be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.

Id. Instead, the subdivision exchanged views with their international counterparts about how decisions already reached by the FCC could be implemented. *Id.* at 472. Second, the sessions were not meetings "of an agency" because they were "not convened by the FCC, and [their] procedures were not subject to the FCC's unilateral control." *Id.* The court reasoned that the Act only applies to "meetings that the agency has the power to conduct according to these procedures", because to hold otherwise would "restrict the types of meetings that agency members could attend." *Id.*

The holding in *ITT World Communications* demonstrates that, even within the broad mandate to conduct agency business in view of the public, the Sunshine Act permits substantive discussion and exchanges of information without triggering the requirement that such sessions be open to the public.

Participants need not be in the same place at the same time to convene a quorum necessary for a meeting. A meeting may occur by means of telephone conferences, video conferences, meals together, or any other joint session of the quorum with the intent *or* the result that agency business will be discussed. S. Conf. Rep. No. 94-1178 (1976), 10-11. One measures according to the *effect* of the session, not by the presence or absence of some activity that would require a vote on the session's agenda. *Pacific Legal Foundation v. Council on Environmental Quality*, 636 F.2d 1259, 1266 (D.C. Cir. 1980) (invalidating an agency regulation which purportedly exempted certain agency actions from the application of the Sunshine Act on the basis that if agency deliberations have the effect of determining or resulting in the joint conduct or disposition of official agency business, then such deliberations constitute a meeting subject to the Sunshine Act, no matter how the agency characterizes them internally).

Sunshine Act Exemptions

The following discussion provides additional detail, including examples, concerning the Sunshine Act exemptions the MSC may encounter.

Exemption 2

Although an agency may discuss **matters relating solely to its own internal personnel rules and practices** in a closed session, public interest in certain matters may override the agency's discretion to invoke the exemption. In *Department of the Air Force v. Rose,* the Supreme Court interpreted Exemption 2 to include only "minor or trivial matters" and not "those more substantial matters which might be the subject of legitimate public interest." 425 U.S. 352, 365 (1976).

In a case involving the dismissal of an agency's Inspector General, the Federal District Court for the District of Columbia found that "*any* discussion of the employment status of high ranking officials at [an agency] is not a 'minor or trivial' matter", and that the public interest demanded discussions of the employee's dismissal be public. *Wilkinson v. Legal Services Corporation,* 865 F. Supp. 891, 895 (D.D.C. 1994), *rev'd on other grounds,* 80 F.3d 535 (D.C. Cir. 1996). In *Wilkinson*, the Inspector General (Wilkinson) of the Legal Services Corporation ("LSC") brought action against LSC challenging his termination and the closure of a meeting of LSC's Board of Directors to discuss his contract. *Id.* at 891. LSC is a private, non-profit corporation established by the Legal Services Corporation Act of 1974 and subject to the provisions of the Sunshine Act. *Id.* at 892. The LSC Board notified Wilkinson that his employment contract would not be extended and "convened an executive session to meet with the outside counsel and discuss the matter of [Wilkinson's] employment contract. *Id.* at 893. LSC claimed that this meeting was properly closed to the public "pursuant to Exemptions 2, 9 (B) and 10 of the Sunshine Act" (*id.* at 894), and claimed that it is exempt from holding an open meeting under Exemption 2 because "any discussion regarding Wilkinson's position at the LSC is a 'strictly internal matter.'" *Id.* at 894-95. The court first noted that these "exemptions . . . are to be narrowly interpreted." *Id.* at 894. It then stated, "[b]ecause any discussion of the employment status of high ranking officials at the LSC is not a 'minor or trivial matter,' Exemption 2 does not permit closure of any of the LSC meetings at issue." *Id.* at 895. The court ultimately held that there were no applicable exemptions to the Government in the Sunshine Act that would permit closure of this meeting and granted Wilkinson's motion for summary judgment on this count. *Id.* at 892.

Exemption 3

Discussion of **subject matter permitted by statute to be exempt from disclosure** may occur in closed session, although an agency's decision to close a meeting for this purpose must be supported by reference to specific statutory criteria. None of the statutory provisions governing the MSC currently contain such exemptions. The standard for establishing whether an agency is entitled to apply this exemption requires specificity and not vague and expansive assertions. *Elec. Privacy Info. Ctr. v. DOJ,* 511 F. Supp. 2d 56, 69 (D.C. Cir. 2007) (construing FOIA's directly analogous provision at 5 U.S.C. § 552(b)(3)).

Exemption 4

Courts will broadly construe claims that **trade secrets or commercial or financial information** are entitled to protection from public disclosure. Exemption 4 of the Sunshine Act is identical to the trade secrets exemption appearing in FOIA at 5 U.S.C § 552(b)(4), and courts construing these analogous provisions apply the same analysis to both.

Material is confidential for the purposes of Exemption 4 of FOIA if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). For the purposes of Exemption 4, the Court of Appeals for the District of Columbia has adopted a common law definition of the term "trade secret", encompassing virtually any information that provides a competitive advantage. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1289 (D.C. Cir. 1983).

In *Public Citizen* the court held that information may also qualify as a trade secret if it is commercial or financial, obtained from a person, and privileged and confidential. Courts have held that these terms should be given their "ordinary meanings" and rejected the argument that the term "commercial" be confined to records that "reveal basic commercial operations" holding that records are commercial so long as the submitter has a "commercial interest" in them. *Id.* at 1290.

Exemption 5

We located no case law interpreting Exemption 5, which allows an agency to close a meeting to discuss **information whose disclosure is likely to involve accusing any person of a crime, or formally censuring any person**.

Exemption 6

Where discussion of information may involve "a clearly unwarranted invasion of personal privacy", an agency may close a meeting to address such information. Evaluation of whether a person's privacy right outweighs the public interest in keeping a meeting open involves a balancing test to distinguish between a mere discussion involving personal information, which should not be considered exempt, and personal information whose disclosure is "clearly unwarranted". *Rose*, 425 U.S. at 372 ([t]he phase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information).

The Court has opined that the test should be different for public and private persons:

> [A]ny criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public reputation. . . . [But there is a] paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to

> fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.
>
> *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

The Supreme Court has stated that information does not have to "cause embarrassment" to qualify for Exemption 6 protection. *Department of State v. Washington Post Co.*, 456 U.S. 595, 603 (1982). Private information is generally considered to be a person's name and address (*Seized Property Recovery Co. v. U.S. Customs and Border Protection*, 502 F. Supp. 2d 50, 59 (D.D.C. 2007), place and date or birth, date of marriage and employment history (*Department of State*, 456 U.S. at 600) and medical history (*National Security News Service v. U.S. Dept of the Navy*, 584 F. Supp. 2d 94, 94 (D.D.C. 2008)).

In the context of MSC's search for a Chief Executive Officer, the disclosure of the fact that the candidates under consideration had applied for the MSC position would potentially have had an impact on those individuals' employment and reputation, particularly if they had not advised their employers that they were pursuing a job with MSC. Such information goes beyond basic and often publicly available information, such as name and address, that is entitled to protection under Exemption 6, and given the potential for harm that the disclosure of a candidate's job search status might have caused, MSC appropriately conducted its interviews and deliberations in closed session.

Exemption 7

Agencies may discuss **investigatory records compiled for law enforcement purposes** in a closed meeting if one of a series of enumerated harms may result from the disclosure of such records. In a FOIA case construing the directly analogous provision at 5 U.S.C. § 552(b)(7), *Abramson v. FBI*, 456 U.S. 615 (D.C. Cir. 1982), the court held that the "threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared". 456 U.S. 615 at 624. The D.C. Circuit further held in *Lesar v. Department of Justice*, 636 F.2d 472 (D.C. Cir. 1980) that the initial purpose will be the decisive factor and that an item of information originally compiled for this purpose that was subsequently used for another purpose would still be afforded the Exemption 7 protected if the initial purpose satisfies the threshold requirement. 636 F.2d at 480.

Further, there is no requirement that the matter under discussion actually results in civil or criminal enforcement (*Ortiz v. HHS* 70, F.3d 729, 733 (2d Cir. 1995)) but the agency has the burden of proving the law enforcement purpose behind the compilation of the records and must provide a sufficient level of detail in order to meet this burden (*Schoenman v. FBI*, 575 F. Supp. 2d 126, 149 (D.D.C. 2000)).

Exemption 9B

An agency may discuss in closed session **information whose premature disclosure may be likely to significantly frustrate implementation of a proposed agency action** if the agency is able to establish a "reasonable likelihood of any harm" to such future agency actions. *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 921, 923 (D.C. Cir. 1982) (holding discussion of budgets did not satisfy the requirements of this exemption).

In *Public Citizen v. National Economic Committee,* 703 F.Supp. 113 (D.C. Cir. 1989), the court held that this exemption should be constructed narrowly and that draft documents were not entitled to protection from public disclosure simply because they were not yet in final form: "[a]n overly broad construction of Exemption 9(B), which applies to all agencies subject to the Act, would allow agencies to circumvent the spirit of openness which underlies this legislation. *Id.* at 128. The court also criticized the government's reliance on Exemption 9B, describing it as an attempt to "work in secrecy until the final report issues" *Id.* The final holding cautions agencies from using this exemption to keep deliberative processes secret until a final decision is made.

Exemption 10

Agencies are entitled to close a meeting to discuss the **issuance of a subpoena, the agency's participation in a civil action or proceeding, an arbitration, or the initiation, conduct or disposition by the agency of particular case involving a determination on the record after opportunity for a hearing**. In *Philadelphia Newspapers, Inc. v. Nuclear Regulatory Commission,* 727 F.2d 1195 (D.C. Cir. 1984), the court noted that "case law interpreting the exemption is sparse". *Id*. at 1200. In *Clark-Cowlitz*, the court held that "Exemption 10 is not extinguished at the conclusion of the litigation for which it is invoked" 798 F.2d at 503.

Action in closed sessions

An agency may deliberate and take action, including voting, in closed session just as it is permitted to do in a public meeting. However, as set forth at 5 U.S.C. § 552(f), the agency must follow certain procedures to close a meeting and preserve records of the closed session:

- Prior to closing a meeting to the public, a majority of the full membership of the agency, 4 out of 6 in the case of the MSC must vote to close the meeting to the public, and the vote must be recorded. 5 U.S.C. § 552(d)(1).
- The chief legal officer for the agency must publicly certify that, in his or her opinion, the meeting may be closed, and must state each relevant exemption. The agency must preserve a copy of counsel's statement, together with a statement from the presiding officer setting forth the time and place of the meeting and the persons present. 5 U.S.C. § 552(f)(1).
- The agency must maintain a complete transcript or electronic recording sufficient to record fully the proceedings of each meeting, or portion of a meeting, closed to the public. Meetings closed pursuant to Exception 10 may also be memorialized by a set of minutes which fully and clearly describe all matters discussed, a summary of any actions taken, the reasons for such actions, a description of the views expressed on any item, and the record of any rollcall vote reflecting the vote of each member on the question. All documents considered in connection with any action shall be identified in such minutes. 5 U.S.C. § 552(f)(1).
- The agency must make the records of a closed meeting available to the public upon request, and may withhold information the agency determines may be withheld from disclosure under 5 U.S.C. § 552(c). The agency is required to preserve records of a closed meeting for at least two years after the date of the

meeting, or one year after the conclusion of any agency proceeding with respect to which the meeting was held, whichever date is later. 5 U.S.C. § 552(f)(2).

CONCLUSION

The Sunshine Act's requirement that MSC conduct its business in full view of the public is broad but not unlimited. The MSC may participate in sessions hosted by other agencies, receive briefings, and conduct deliberations in writing without invoking the Sunshine Act's public notice and access requirements. If the MSC elects to close a meeting or portion of a meeting to the public in accordance with one of the available exemptions under 5 U.S.C. § 552(c), it must follow the statutory procedures for doing so and must keep a record of the meeting. The MSC may take any action in closed session that it may take in an open meeting as long as it complies with the voting, certification and recordkeeping requirements set forth at 5 U.S.C. §§ 552(d) and (f).

SUMMARY SHEET – IS IT A PUBLIC MEETING?

Introduction. In general, all portions of all meetings of the Metrorail Safety Commission (MSC) must be open to the public. However, not all gatherings or activities of the MSC or subsets of Commissioners are considered "meetings", and those sessions may be conducted without public notice and attendance. The chart below provides a brief summary of whether or not a gathering is a meeting.

The discussion following the chart summarizes the subject matter that can be exempted from the public meeting requirement and discussed in a closed session. A closed session is a meeting that is permitted to be closed to the public.

In short, two categories of sessions permit the MSC to gather without granting public access: (a) sessions that are not meetings and (b) meetings that may be conducted in closed session.

Meeting	NOT a Meeting
• Quorum of officers required to enable MSC to act (i.e., 4 Members or Alternates) • Deliberations determine or result in the joint conduct or disposition of agency business	Gathering of less than a quorum of Commissioners – no agency action can be taken NOTE: A meeting of a committee of the MSC would not be a "meeting" for Sunshine Act purposes as long as the committee is not empowered to act on behalf of the full Commission.
Participation in person, via telephone conference or video conference, constituting a quorum	Deliberations and vote conducted entirely in writing
Session convened by MSC, under MSC control, if a quorum is present	A session (a) NOT under MSC's control (i.e., agenda determined or session hosted by entity other than MSC) and (b) In which MSC will not take action Examples: • Informational briefing to MSC by FTA, FWSO, TOC or WMATA • Informational briefing by MSC to another body • Technical work sessions

Closed sessions. Under specific circumstances, MSC can deliberate and take action (i.e., vote) in closed session if the subject matter being discussed is addressed in one of the exemptions listed below.[1] Closed sessions are meetings that are exempt from being held as public meetings.

Before MSC moves to closed session, counsel for the MSC must publicly state that, in his or her opinion, the meeting may be closed to the public and identify the exemption(s) justifying the closed session.

[1] Exemptions under 5 U.S.C. 552b(c)(1), (8), and (9)(A) apply to circumstances not relevant to MSC's mandate.

The agency must maintain a transcript, electronic recording, or minutes of any closed session. The meeting record must summarize the discussion; record any action, including a vote; and identify any documents considered in connection with any action.

- **5 U.S.C. 552b(c)(2) ("Exemption 2"):** allows agencies to conduct closed meetings if they are discussing **internal personnel rules and practices of an agency**. This exemption allows closed meeting discussion of internal agency policy matters, but not does not protect discussions that affect the public interest, such as the employment of a high-ranking agency official.[2]

- **5 U.S.C. 552b(c)(3) ("Exemption 3"):** allows agencies to conduct closed meetings if they are discussing **subjects that are exempt from disclosure by statute**, if such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. This exemption is very narrow and MSC must demonstrate, with specificity, that the subject matter proposed for closed session falls under the nondisclosure provisions of such statute. The current statutes governing transit system state safety oversight do not contain such provisions.

- **5 U.S.C. 552b(c)(4) ("Exemption 4"):** allows agencies to conduct closed meetings if they are discussing subjects that are considered **trade secrets and commercial or financial information** obtained from a person and privileged or confidential. Meetings may be closed under this exemption where the subject matter is a production or process that has a direct relationship with an innovative end effort. Meetings may also be closed under this exemption where the subject matter is financial and/or commercial, which the courts interpret broadly, with the subject matter only being required to relate to commerce.

- **5 U.S.C. 552b(c)(5) ("Exemption 5"):** allows agencies to conduct closed meetings if they are discussing **information that involves accusing a person of a crime or formally censuring any person**.

- **5 U.S.C. 552b(c)(6) ("Exemption 6"):** allows agencies to conduct closed meetings **if discussions may disclose information of a personal nature where the disclosure would constitute a clearly unwarranted invasion of personal privacy**. Evaluation of whether such information can be discussed in closed session involves a balancing test to determine whether the discussion of such personal information is "clearly unwarranted". Information need not be intimate or embarrassing to qualify for protection under this exemption. Information such as a person's name and address, place and date or birth, date of marriage, employment history and/or medical history is sufficiently personal to support the application of the exemption.

- **5 U.S.C. 552b(c)(7) ("Exemption 7"):** allows agencies to conduct closed meetings if they are discussing **information that discloses investigatory records compiled for law enforcement purposes** if the disclosure of such information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

[2] Issues before the MSC may be subject to more than one exemption. Deliberations concerning the appointment of MSC's CEO would likely not be protected under this exemption alone. However, the potential disclosure of personal information that such discussions entailed was exempt under Exemption 6, discussed below.

- **5 U.S.C. 552b(c)(9)(B) ("Exemption 9B"):** allows agencies to conduct closed meetings if the **premature disclosure of information under discussion would frustrate an agency action**, unless the agency has already disclosed the nature of the action to the public. Courts have interpreted this exemption extremely narrowly and will require government to demonstrate a "reasonable likelihood" of any harm to future agency actions if the agency's decision to disclose such information is challenged.

- **5 U.S.C. 552b(c)(10) ("Exemption 10"):** allows agencies to conduct closed meetings if they are discussing **subjects that include the agency's issuance of a subpoena or the agency's participation in a civil action or proceeding, action in a foreign court, an arbitration, or formal agency adjudication or other action involving a determination on the record after opportunity for a hearing**.

A memorandum discussing open meeting requirements and exemptions in greater detail has been provided to the Commissioners.