



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Glenn Youngkin
Governor of Virginia
Patrick Henry Building, Third Floor
1111 East Broad Street
Richmond, Virginia 23219

Dear Governor Youngkin:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*

Issue Presented

You inquire regarding the role of the board of visitors of a Virginia public institution of higher learning. You more specifically ask whether Virginia law imposes upon such boards a duty to serve the interests of the university or college only, or the Commonwealth more broadly.

Response

It is my opinion that, in fulfilling its responsibilities to the specific institution it serves, the primary duty of the board of visitors of each Virginia institution of higher education is to the Commonwealth.

Applicable Law and Discussion

Virginia is home to some of the nation's finest public institutions of higher education. Those conferring bachelor's degrees are defined by statute.¹ As this Office previously has recognized, these institutions "are state agencies; they are statutory corporations created and empowered by acts of the General Assembly."² Although they extend services to non-residents, Virginia's institutions of higher education exist to "fulfill[] the Commonwealth's commitment to provide education to the students of Virginia."³

¹ These institutions include Christopher Newport University (CNU), George Mason University (GMU), James Madison University (JMU), Longwood University (Longwood), the University of Mary Washington (UMW), Norfolk State University (NSU), Old Dominion University (ODU), Radford University (Radford), the University of Virginia (UVA), the University of Virginia's College at Wise as a division of the University of Virginia, Virginia Commonwealth University (VCU), Virginia Military Institute (VMI), Virginia Polytechnic Institute and State University (Virginia Tech), Virginia State University (VSU), and The College of William and Mary in Virginia (William & Mary). VA. CODE ANN. § 23.1-100 (2021).

² 2006 Op. Va. Att'y Gen. 5, 6 n.2; accord 2007 Op. Va. Att'y Gen. 95, 96 n.6.

³ 2007 Op. Va. Att'y Gen. at 96. See also 1981-82 Op. Va. Att'y Gen. 66, 67 ("These institutions exist for the singular purpose of providing higher education opportunities to the people of Virginia.").

The General Assembly has vested the management of Virginia's colleges and universities in their respective boards of visitors.⁴ These boards constitute corporations, and in addition to possessing those powers generally affiliated with corporate status,⁵ the boards of visitors further enjoy broad statutory powers to regulate the academic and financial affairs of the institutions they serve.⁶

Although the General Assembly has conferred corporate powers upon the governing boards of the Commonwealth's institutions of higher education, each of Virginia's colleges and universities remains "a department of government"⁷ and has long-standing recognition as a *public* corporation.⁸ Moreover, each institution, and its respective governing board, "is part and parcel of the Commonwealth's higher education system," as established by law in Title 23.1 of the *Code of Virginia*.⁹ In serving on the governing board of such a public corporation, each visitor "hold[s] under an act of the legislature a public office or employment[.]"¹⁰

One of the defining features of a public corporation, including an educational institution, is that its benefits are enjoyed by the public generally.¹¹ As traditionally understood, a public corporation is "created specially for public purposes as instruments or agencies to increase the efficiency of government, supply public wants, and promote the public welfare."¹² Regardless of the specific mission of a particular public corporation, all such entities are "instituted by the Legislature, on the call of the people generally, for great public and *State* purposes[.]"¹³ Their "very essence is public use"¹⁴

The law recognizes that although a public corporation generally may benefit and thus "involve some private interests[,] strictly speaking, public corporations are such only as are founded by the

⁴ For specific baccalaureate institutions, see §§ 23.1-1400 (2021) (CNU); 23.1-1500 (2021) (GMU); 23.1-1600 (2021) (JMU); 23.1-1700 (2021) (Longwood); 23.1-1800 (2021) (UMW); 23.1-1900 (2021) (NSU); 23.1-2000 (2021) (ODU); 23.1-2100 (2021) (Radford); 23.1-2200 (2021) (UVA); 23.1-2300 (2021) (VCU); 23.1-2500 (2021) (VMI); 23.1-2600 (2021) (Virginia Tech); 23.1-2700 (2021) (VSU); 23.1-2800 (2021) (William & Mary).

⁵ See Code sections cited in note 4 *supra*. These enabling statutes nonetheless further provide that such powers do not include "those powers that are confined to corporations created pursuant to Title 13.1[.]" accordingly, although boards of visitors constitute corporations, they are legally distinct from corporations created pursuant to Title 13.1.

⁶ Sections 23.1-1301 (Supp. 2023); 23.1-2209 (2021). A state college or university, "through its board of visitors, 'has not only the powers expressly conferred upon it, but it also has the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted.'" 2008 Op. Va. Att'y Gen. 90, 90 (some quotation marks omitted) (quoting *Goodreau v. Rector & Visitors*, 116 F. Supp. 2d 694, 703 (W.D. Va. 2000)).

⁷ *Batcheller v. Commonwealth ex rel. Rector & Visitors of Univ. of Va.*, 176 Va. 109, 123 (1940).

⁸ *Phillips v. Rector & Visitors of Univ. of Va.*, 97 Va. 472, 475 (1899). See also *Fac. for Responsible Change v. The Visitors of James Madison Univ.*, 38 Va. Cir. 159, 160 (Rockingham Cnty. Cir. Ct. Oct. 5, 1995); 1981-82 Op. Va. Att'y Gen. at 67 (concluding that "the several public institutions of higher education in the Commonwealth of Virginia are public corporations").

⁹ *Fac. for Responsible Change*, 38 Va. Cir. at 165 (emphasis added).

¹⁰ *Lewis v. Whittle*, 77 Va. 415, 419 (1883).

¹¹ See *Bd. of Tr. of Vincennes Univ. v. Indiana*, 55 U.S. 268, 277 (1852) (emphasis added) (explaining that a public purpose is a necessary, yet insufficient, condition of having public corporation status).

¹² *Bliss v. Pathfinder Irr. Dist.*, 240 N.W. 291, 292 (Neb. 1932) (quoting 43 C.J. 72).

¹³ *Stribbling v. Bank of the Valley*, 26 Va. 132, 170 (1827) (emphasis added). They "have no inherent jurisdiction[.]" *Town of Danville v. Shelton*, 76 Va. 325, 327 (1882) (quoting *Ould & Carrington v. City of Richmond*, 64 Va. (23 Gratt.) 464, 467 (1873)).

¹⁴ *Jones v. Commonwealth*, 267 Va. 218, 223 (2004) (finding state universities to be "governmental entities" for purposes of applying the Virginia Workers' Compensation Act).

government for public purposes, where the *whole interests* belong to the government.”¹⁵ Accordingly, “private individuals have no interest in or control over” any of Virginia’s public colleges and universities.¹⁶ Because “the interest of the public constitutes [the] ends and aims” of each public institution of higher education,¹⁷ it is clear that the boards of visitors serving them, as public officers of the state, have a duty to the Commonwealth as a whole.¹⁸

That a board of visitors, through its service to a particular institution, ultimately serves the Commonwealth is reflected in how they otherwise are treated under law. Corporate status does not alter each institution’s essential nature as a state agency that constitutes “an arm of the Commonwealth.”¹⁹ The operations of public corporations, including state universities and colleges, generally are cloaked with sovereign immunity and exempt from statutes of general applicability.²⁰ Legal services are provided by the Office of the Attorney General.²¹ The governing boards of public institutions of higher education are public bodies subject to the open records and open meetings requirements of the Virginia Freedom of Information

¹⁵ *Vincennes Univ.*, 55 U.S. at 276 (quoting *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 668-69 (1819)); *accord Lewis*, 77 Va. at 419 (“Strictly speaking, public corporations are such only as are founded by the government for public purposes – where the whole interest belong also to the [Commonwealth.]”); *Khoury v. Cmty. Mem’l Hosp., Inc.*, 203 Va. 236, 244 (1962). With respect to “[a] public corporation, instituted for purposes connected with the administration of the government, . . . there is, in reality, but one party, and the trustees or governors of the corporation are merely trustees for the public.” *City of Covington v. Kentucky*, 173 U.S. 231, 242 (1899) (quoting 2 KENT’S COMM. at 306 (12th ed.)).

¹⁶ *Phillips*, 97 Va. at 475. The Supreme Court of Tennessee offers the following description:

Private corporations are those created for the immediate benefit and advantage of the individuals constituting them, and the franchises conferred are to be exercised for their advantage. The corporation stands to them in the relation of trustee holding the property owned by it for, and dividing the profits arising from its management and the employment of its franchises for, these individuals as *cestuis que trust*. Upon the other hand, public corporations are created for public purposes, and the property controlled by them is devoted to the objects for which they are created. The corporators have no private beneficial interest either in the franchises granted or the property controlled. The only private right which an individual can have in such a corporation is the right of being and acting as a corporator. So far as the property of the corporation is concerned, the interest which the corporators have as individuals is that common interest which all citizens have in property belonging to the State. Nor is the character of this interest affected by the source from which the property comes. A purchase by or a gift of property to the corporation is in reality a purchase by or a gift to the public, and is to be administered by the corporation as an agency of the State.

Trs. of Carrick Acad. v. Clark, 80 S.W. 64, 67 (Tenn. 1903).

¹⁷ *Phillips*, 97 Va. at 476.

¹⁸ In holding public office, this duty falls upon each member of the board individually. *See Frazier v. Va. Mil. Inst.*, 81 Va. 59, 61 (1885) (“A corporation is an inanimate, artificial being, having no power to act except through living agents. ‘It cannot write, and therefore it can record nothing except through its agents, who act for it and express its will. Usually this is done by a body called the board of directors.’ [Here,] the legislature has seen fit to invest a body of [persons] called, ‘The Board of Visitors,’ with the control of the affairs of this institution, and have authorized them to act for it.”).

¹⁹ *See, e.g., Jacobs v. Coll. of William & Mary*, 495 F. Supp. 183, 190 (E.D. Va. 1980), *aff’d*, 661 F.2d 922 (4th Cir. 1981) (concluding that William & Mary constitutes an “arm of the state”); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 583 (E.D. Va. 1996) (highlighting that “VCU is an arm of the Commonwealth of Virginia”). *See also* 2007 Op. Va. Att’y Gen. at 96 (explaining that “colleges and universities are state agencies, *i.e.* arms of the Commonwealth”).

²⁰ *See Cuccinelli v. Rector & Visitors of Univ. of Va.*, 283 Va. 420, 427 (2012).

²¹ VA. CODE ANN. § 2.2-507(A) (2022).

Act.²² More specifically, although each institution is distinct, the General Assembly has charged each public institution of higher education with advancing particular overarching state goals, which are to be reflected in a statewide strategic plan developed by another state entity.²³

The duty of each board of visitors to the Commonwealth is further reflected in the oversight that the Commonwealth, especially through the General Assembly, maintains over the boards and the state institutions they serve. Virginia law expressly provides that each “board shall at all times be under the control of the General Assembly.”²⁴ Board composition is defined by statute,²⁵ and members are subject to removal by the Governor.²⁶ As this Office previously has explained, “the broad authority of Virginia colleges and universities does not supersede statutory or case law, public policy, or explicit statements of the General Assembly regarding specific topics.”²⁷ Nor does it negate the overall public nature of the institutions’ aims.²⁸

In furtherance of the public purpose of these educational institutions and their boards, the General Assembly has enacted numerous transparency requirements that serve all Virginians. Each board must publish on its website its bylaws, its organizational makeup, meeting information, and contact information by which to “receive public communications.”²⁹ For each regular legislative session, the board of visitors must prepare and “make publicly available on the institution’s website an annual executive summary of its interim activity.”³⁰ Retention rates, graduation rates, and post-graduation employment data must be posted on the institution’s website.³¹

As it is the “public policy of the Commonwealth” that public institutions of higher education be funded by state appropriations,³² other statutory provisions relate to financial accountability to the public at large. Every institution must publish public reports regarding the institution’s budget, tuition increases, and student fees.³³ The institutions must keep records pertaining to the state property it oversees, its transactions

²² See §§ 2.2-3701 (2022); 2.2-3704 (Supp. 2023); 2.2-3707 (Supp. 2023).

²³ See §§ 23.1-203 (Supp. 2023); 23.1-1002 (2021). Notably, this entity, the State Council of Higher Education for Virginia (SCHEV), was created “to promote the development and operation of [a] . . . coordinated system of higher education in the Commonwealth.” Section 23.1-200(A) (2021). Public colleges and universities must submit proposed changes to their mission statements and new academic programs to the Council for approval. Section 23.1-203.

²⁴ See Code sections cited in note 4 *supra*.

²⁵ Sections 23.1-1300 (2021) (governing boards generally); 23.1-1401 (2021) (CNU); 23.1-1501 (2021) (GMU); 23.1-1601 (2021) (JMU); 23.1-1701 (2021) (Longwood); 23.1-1801 (2021) (UMW); 23.1-1901 (2021) (NSU); 23.1-2001 (Supp. 2023) (ODU); 23.1-2101 (2021) (Radford); 23.1-2201 (2021) (UVA); 23.1-2303 (2021) (VCU); 23.1-2501 (Supp. 2023) (VMI); 23.1-2601 (2021) (Virginia Tech); 23.1-2701 (2021) (VSU); 23.1-2801 (2021) (William & Mary).

²⁶ Section 23.1-1300.

²⁷ 2007 Op. Va. Att’y Gen. at 96; *accord* 2008 Op. Va. Att’y Gen. at 90.

²⁸ *Phillips*, 97 Va. at 476.

²⁹ Section 23.1-1303(B)(1) & (2) (Supp. 2023).

³⁰ Section 23.1-1303(B)(13).

³¹ Section 23.1-409 (Supp. 2023).

³² Section 23.1-101 (2021) (providing that, although the institutions are to be “encouraged in their attempts to increase their endowment funds and unrestricted gifts from private sources[,]” the availability of such private funds “shall neither be taken into consideration in nor used to reduce state appropriations”).

³³ Section 23.1-409.

related to intellectual property, and its administration of funds associated with athletic programs.³⁴ To allow for additional oversight, each board must publish annually its financial statements and report the value of and cash earnings on its investments.³⁵ Boards also must report “the salary by position of any executive officer of such institution that exceeds for the previous fiscal year the salary limit for the chief executive officer for such institution set forth in the general appropriation act.”³⁶ In addition, individual board members can be held personally liable for the incurrence of unauthorized spending deficits.³⁷

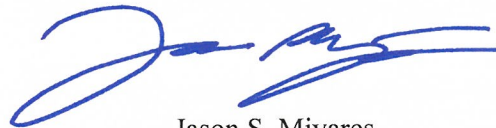
In light of the foregoing context, it is evident that a board of visitors simply serves as the vehicle by which the General Assembly has chosen to exercise the Commonwealth’s control over its colleges and universities.³⁸ In choosing to create boards of visitors to execute its governmental function of providing higher education to Virginia students, the Commonwealth imposes a primary duty to the Commonwealth on such public corporations in fulfilling their responsibilities to the institutions they serve.³⁹ The General Assembly has made this duty clear: in requiring board members to participate in regular educational programs “designed to address the role, duties, and responsibilities of the governing boards[,]” the General Assembly explicitly has directed that such programs “include presentations relating to[] ***1. Board members’ primary duty to the citizens of the Commonwealth***[.]”⁴⁰ Consequently, “the[ir] separate corporate status notwithstanding,” boards of visitors do not exist for their own sake or that of any particular institution but for “the benefit of the public at large.”⁴¹

Conclusion

Accordingly, it is my opinion that the primary duty of the board of visitors of each Virginia public institution of higher education is to the Commonwealth.

With kindest regards, I am,

Very truly yours,



Jason S. Miyares
Attorney General

³⁴ Section 23.1-102 (2021).

³⁵ Section 23.1-1303(B)(11) & (12).

³⁶ Section 23.1-102.1 (2021).

³⁷ See 2022 Va. Acts ch. 2, Item 4-3.01(b) (Spec. Sess. I); accord 2023 Va. Acts ch. 1, Item 4-3.01(b) (Spec. Sess. I).

³⁸ *Phillips*, 97 Va. at 475 (“[UVA], from its foundation, has been wholly governed, managed, and controlled by the State through a corporation created for the purpose, under the style and title of ‘The Rector and Visitors of [UVA].’”). As public corporations, the existence of these boards of visitors is wholly dependent on the will of the Commonwealth. See *Wade v. City of Richmond*, 59 Va. 583, 587 (1868) (“Public corporations created and existing only by law, may be changed, and, if purely public, even destroyed by law.”).

³⁹ Cf. *Biden v. Nebraska*, 600 U.S. ___, ___, 143 S. Ct. 2355, 2367-68 (holding that a State’s choice to exercise its authority and carry out its responsibilities through a public corporation it created and controls does not affect the State’s rights to protect its interests).

⁴⁰ Section 23.1-1304 (2021) (emphasis added).

⁴¹ 1981-82 Op. Va. Att’y Gen. at 66 & 67.