



ROGER KAHN, M.D.
STATE SENATOR

32ND DISTRICT
P.O. BOX 30036
LANSING, MI 48909-7536
PHONE: (517) 373-1760
TOLL-FREE: (866) 305-2132
FAX: (517) 373-3487
www.senate.michigan.gov/kahn

COMMITTEES:
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October 22, 2010

Attorney General Michael Cox
525 W. Ottawa Street
7th Floor
P.O. Box 30212
Lansing, MI 48909

Re: MDOT Withholding Material Facts – Formal Testimony before Relevant
Legislative Oversight Bodies

Dear Attorney General Cox:

Members of the Michigan Legislature, with specific oversight over Departments of state government, should be able to elicit complete, accurate information on matters that impact important fiscal and policy matters. Unfortunately, the Michigan Department of Transportation (MDOT) has time and time again withheld material facts and deceived legislative committees in pursuit of the Detroit River International Crossing (DRIC) project.

Because MDOT has so flagrantly stonewalled the Legislature, we are requesting that your office commence an investigation of MDOT's deliberate deceptions relative to the DRIC project and restore the expectation of integrity as it relates to legitimate legislative oversight.

When testifying before legislative committees or especially when asked directly by legislators for specific information, MDOT (or any department of state government) should have no privilege to withhold material information or provide answers that are plainly false, misleading or knowingly incomplete. The administration, department director and individuals that withhold material information or otherwise provide knowingly false answers to legislative inquiries must not be allowed to impede the statutory oversight of elected members of the Legislature.

This request arises because of the extraordinary efforts of MDOT to pursue and spend state resources on a project that has never been approved by the Legislature and has consistently failed to be justified before the Legislature. The DRIC project has provided many opportunities for information to be presented and evaluated, but MDOT

consistently has ignored the facts in their possession, and instead have presented selective information, even when asked specifically by various members of the House and Senate. Further, after spending nearly \$40 million on the DRIC study, MDOT either knows or should know the grave impact of failure to allow the Legislature to perform its accountable function of due diligence.

It has recently come to our attention, from information obtained through Freedom of Information Act (FOIA) requests and publicly available documents in legal matters, that MDOT has not only withheld material adverse data and conclusions which don't support their departmental preferences but have directly provided patently false and misleading data. The recent examples below are by no means complete or comprehensive, but illustrate the concerns of members of the Legislature. This issue is important not only because of the substantial financial implications but because the honesty and credibility of departments is fundamental to effective policy deliberation. Moreover, timely and accurate information is vital for effective decisions, unfortunately as evidenced below, MDOT has withheld and deceived members of the Legislature.

For example, MDOT provided the following responses to legislative fact finding:

MDOT stated that, "The cost of the DRIC crossing will only be borne by users of the new facility..." and then consistently during hearings through the summer of 2010 that the DRIC crossing would not cost Michigan taxpayers anything because the tolls would cover the cost of the DRIC. (Email dated July 7, 2008, MDOT Responses to Representative Agema's Follow-up Questions)

MDOT withheld a PriceWaterhouseCooper report (apparently dated Jan. 31, 2007 – the report has never been supplied to the legislature) which was summarized in an email among DRIC FHWA & MDOT members dated January 31, 2007 "Subject: Public Oversight Meeting and PWC Draft Final Report":

There is a large understated "pink elephant" in this room that should be driving every element of the decision making: Namely, the fact that real tolls will not raise sufficient funds to build the project and therefore some kind of public subsidy from both countries will be necessary. Shadow tolls and availability payments are forms of public subsidies. If this is true, it seems to me, that it will require legislative action on both sides to implement the subsidy.

MDOT cited several travel demand forecasts, including "Existing and Future Travel Demand Working Paper (January 2004)" to support their traffic projections that led to the DRIC study. They stated that the documents were "independently reviewed." (Email dated July 7, 2008, MDOT Responses to Representative Agema's Follow-up Questions)

MDOT deceived the legislature because apparently internal discussions, as evidenced by internal MDOT notes of a meeting entitled, MDOT Air Quality Community Enhancements, Dec. 12, 2008 at p. 5 which exclaim, "...*Corradino has had to pump up*

the modeling numbers to make a worst case scenario, because the traffic numbers just aren't there otherwise.” And further to this point: **MDOT intentionally omitted** the reports of the independent review, specifically “An Independent Review and Assessment of the Forecasts and Capacity Analysis Conducted by URS, Inc. and Provision of Supplemental Information” (July 14, 2004) which significantly undermines the prior report provided. The recently obtained documents state:

The other major conclusion of the URS, Inc. study is *that existing border backups and delays are a function of inadequate border processing infrastructure and staffing and not a result of bridge roadbed capacity problems. ... This is a critical point, because it means there is time to carefully evaluate alternatives and select the best approach to solving border traffic problems.* (Executive Summary, p. ii) The primary conclusion of the original report was that a new or expanded crossing would be needed within the 30 year time horizon of the needs assessment study (p. 27)...This use of a 2000 base was appropriate given the project timeline and data availability at the time. *However, for purposes of the analysis in this report it seemed appropriate to consider more recent 2002 and 2003 traffic data and their impact on the 30 year forecasts, as well as the impact of recent additions to capacity such as at the U.S. primary truck processing at the Ambassador Bridge...This report...suggests there may be somewhat more time available than originally envisioned...*(p. 27-28) [T]he original forecast growth rates to the new 2003 base auto traffic levels would not result in traffic reaching the 2000 levels until after 2030 at the Detroit crossings...(p. 28) *Current delays are in fact primarily due to customs processing issues and not roadbed capacity.* Based on my prior research, it is my professional opinion that most queues are due to available customs processing booths not being fully staffed, or not being opened in a timely manner when queues begin developing...Current delays at other crossings, such as for truck entry to Canada at the Ambassador Bridge...are due to a lack of staffing of available booths in most cases. (p. 29) *(Emphasis supplied. Note: Border traffic has diminished each year since 1999; the 2000 vs. 2002 or 2003 “base year” numbers have only gone down FURTHER from 2000 to 20010, yet MDOT has never acknowledged greatly the reduced urgency.)*

MDOT stated that “...no decision on governance has been made at this time, and that since the investment grade study initiated by Transport Canada is just one of the tools they are using to inform their choice, it is not necessary for that study to be specifically identified in our DEIS.” (Email dated July 7, 2008, MDOT Responses to Representative Agema’s Follow-up Questions) MDOT previously testified in 2006 legislative hearings as well that there were no predetermined results as far as ownership or governance of the DRIC crossing. (Note: Governance is apparently a euphemism for government ownership.)

MDOT withheld material information that governance discussions had, at least since 2004, always assumed public ownership and rejected private ownership. A recently revealed email from Transport Canada states a predetermined conclusion on governance and MDOT either knowingly or unknowingly went along with Canada's desires. The email addresses concerns raised in a conference call between Fred Leech (Ministry of Transport Ontario) and Kris Wisniewski (MDOT):

The principle implicitly precludes the Ambassador Bridge from owning/operating a new or expanded international crossing. They also noted that it would not be practically feasible for another bridge owner/operator to own/operate a twinned Ambassador Bridge, therefore this principle would effectively eliminate the twinning of the Ambassador Bridge from the environmental assessment process prior to the process determining the preferred corridor. This Action would, in their words, "fatally flaws [sic] the EA process" and puts the entire project in jeopardy... What this principle means, is that regardless of where the new crossing is located, the incumbent owner will not be controlling the crossing... The principles are in place as a guide to decision-making and the intention is not to publicly release the principles until EA is complete... Can Government decision-making principles really jeopardize the outcome of an environmental assessment?" (Email Dec. 13, 2004 Andrew Shea, Ministry of Transport Ontario, to various parties – Emphasis Supplied.)

MDOT stated numerous times before House and Senate committees during the summer of 2010 that the DRIC had nothing to do with the existing crossing, and that MDOT was proceeding with the DRIC independent of the current crossing improvements.

MDOT withheld information that Canada, since at least 2004, had been actively working to restrict, confine and extort the current crossing so Canada could "capture" the border traffic, as stated in an email among DRIC partners:

I would suggest the real option is to buy interests in both crossings [the Ambassador Bridge and DRIC], not just one of the two...[which results in] a reduction in the costs of financing for the new crossing given the reduction of the competitive risks; a better ability to manage tolls...potentially less obstructions and legal/political challenges on the part of the existing owners (if we buy their interests now or and not later)... That being said, we might be in a much stronger position to negotiate a reasonable price if the new crossing is operational and captured a substantial share of the market of the existing operator..." (Email dated Oct. 13, 2004 Email from Blanchard to various parties in Canada – Emphasis Supplied.)

MDOT stated that DRIC “wouldn’t cost Michigan taxpayers one dime” because Canada has offered to pay the state’s share with \$550 Million loan/advance/inducement.

MDOT has never advised whether the offer from Canada to loan Michigan \$550 million in return for votes in favor of DRIC authorizing legislation and the personal lobbying effort of Canadian Cabinet Minister and Minister of Transport Canada John Baird was an illegal solicitation of votes for payment. On its face, the Canadian letter/offer (originally announced as a *loan*, and then inexplicably was characterized by MDOT as an advance *to be repaid by tolls*) stated quite clearly that,

Upon the Michigan Legislature adopting all of the authorizing legislation for the implementation of the DRIC project...Canada would be prepared to offer to increase its financial participation up to a maximum of US \$550 million, for project components in Michigan that would not be funded by the public-private partnership or the United States Government...Canada would expect repayment from the anticipated toll revenues to be derived from the operation of the new bridge. (April 29, 2010 letter from Minister John Baird, Transport Canada, to Gov. Granholm, dramatically delivered moments before the House Transportation Committee voted HB 4961 out of committee.)


Furthermore, **MDOT has never advised** whether the *subsequent adoption of the legislation constitutes an illegal or unenforceable disenfranchisement of the voters of Michigan by improperly avoiding a vote of the electorate pursuant to Article IX, § 15 of the Michigan Constitution* that provides in pertinent part: “The state may borrow money for specific purposes in amounts as may be provided by acts of the legislature adopted by a vote of two-thirds of the members elected to and serving in each house, and approved by a majority of the electors voting thereon at any general election.” (Since a Canadian loan must be repaid by Michigan and if toll revenues are insufficient to meet acquisition, development, engineering, construction, and operating costs of the DRIC bridge, repayment will be based upon the full faith and credit of the State. Any bonds that are supported by the full faith and credit of the State must be approved under this provision. See *Schureman v. State Highway Comm’n*, 141 N.W.2d 62, 63 (Mich. 1966). House Bill 4961 is an ill fated attempt to skirt the requirements of the Michigan Constitution.)

Being confident that these are but representative samples of departmental malfeasance, it is important to the balance of power among the branches of government and the credibility of all involved that decisions be based on the best available information, and not just selective data that supports departmental preferences. This is important on matters of fiscal policy as well as issues of public policy. While the DRIC currently has no legislative approval to proceed beyond the completed study, and the 2011 budget prevents further spending beyond existing contracts, the ability of a department to manipulate information must be curtailed. (The potential fiscal implications of this project are staggering – in the billions of dollars – and the appearance of impropriety is something our state cannot afford.)

Specifically regarding the DRIC in which the legislature has clearly signaled restraint with multiple budget amendments and numerous legislative hearings over the years, it is absolutely unconscionable that MDOT would blatantly withhold material information that defies specific legislative inquiries. It not only undermines the credibility of the department, but it undermines the confidence of citizens who expect elected officials and civil servants to offer their best effort in addressing public policy. A thorough investigation by independent attorneys in your office will help restore confidence and send a clear message to state government that deception will not be tolerated. Thank you for your attention to this very important matter.



Sen. Roger Kahn



Rep. Dave Agema

Sincerely,



Sen. John Pappageorge



Rep. Paul Opsommer