

CITY OF BALTIMORE

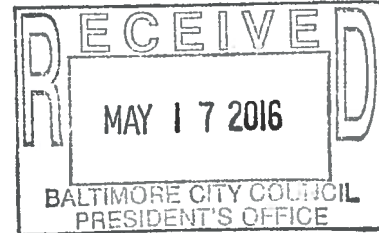
STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall, 100 N. Holliday Street
Baltimore, Maryland 21202



Re: City Council Bill 16-0661 – Adult Entertainment Businesses – National
Human Trafficking Resource Center Hotline Information Sign Posting

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 16-0661 for form and legal sufficiency. The bill would add Section 1-26 to Article 15 of the City Code in the Subtitle on licensing and regulation of Adult-Entertainment Business. This new section would require owners of the businesses defined elsewhere in that Subtitle to post in particular locations in each restroom a sign with text concerning reporting human trafficking in English, Spanish and other languages required by the Federal Voting Rights Act. It also requires the phone number of the National Human Traffic Resource Center to be in bold.

Alternatively, the business may comply by posting the same sign concerning human trafficking that state law requires for certain lodging establishments. *See* Md. Code, Bus. Reg., §15-207. In 2016, Maryland's General Assembly considered amending this state law to include the required posting in adult entertainment businesses. *See* 2016 S.B. 1084. The bill to amend state law was never voted out of committee.

When the state law requiring posting in certain lodging establishments was enacted in 2010 (2010 Laws of Md. chs. 576, 577), it was the subject of an Attorney General's letter. *See* May 18, 2010 Letter of the Attorney General to the Honorable Martin O'Malley (hereinafter "Letter"), attached. The Letter explained the tenuous constitutional nature of requiring a business to post factual information when the business had no past history of being associated with the conduct that the government sought to prevent. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)(Some of the Supreme "Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say.")(cited in Letter)).

The Attorney General went on to explain that "compelled speech has been upheld in the commercial context, however, where the state required inclusion of 'purely factual and uncontroversial information' in connection with commercial enterprises." Letter, p. 2 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)(holding that "rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.")). As the Attorney General has noted:

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In similar situations, courts have generally required that the required speech be reasonably related to the government interest for which it is imposed. Specifically, where businesses have been found to have engaged in deceptive or misleading speech, courts have held that they may be required to make disclosures designed to prevent the public from being deceived or misled, but have stated the requirements must be no broader than necessary to service this purpose.

Letter, p. 3. (citations omitted).

Federal Courts have applied this test to arguably commercial disclosures even though no consumer deception was at issue. *See New York State Restaurant Ass'n v. New York City Bd. of Health*, 2008 WL 1752455, at *8, *9 (S.D. N.Y. 2008) (“Of course, it would be possible to recast any disclosure requirement as a compelled “message” in support of the policy views that motivated the enactment of that requirement. However, as discussed above, the mandatory disclosure of “factual and uncontroversial” information is not the same, for First Amendment purposes, as the compelled endorsement of a viewpoint.”), *affirmed*, 556 F.3d 114 (2nd Cir.2009); *Nat. Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2nd Cir.2001)(purpose of required disclosure was to increase awareness), *cert. denied*, 536 U.S. 905 (2002); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 310 n.8 (1st Cir.2005), *cert. denied*, 547 U.S. 1179 (2006) (“[W]e have found no cases limiting *Zauderer* [to ‘potentially deceptive advertising directed at consumers’].”).

Although the Attorney General’s letter about these types of human trafficking disclosure requirements presumes that the speech at issue in these laws is commercial, courts have recognized the difficulty in deciding if speech is commercial, professional or neither. *See, e.g., Centro Tepeyac v. Montgomery County*, 722 F. 3d. 184, 189 (4th 2013). The task is especially difficult where the compelled speech is entwined with a licensing scheme. *Id.* If the speech is not commercial, then the standard is strict scrutiny: is the compelled speech narrowly tailored to promote a compelling government interest. *Id.* (citations omitted). Under either the strict scrutiny or rational basis standard, the questions are similar: whether there is sufficient nexus between adult entertainment establishments and the required factual disclosure and whether that disclosure requirement is too broad.

Maryland’s law that requires posting in certain lodging establishments was aimed at “protecting victims of human trafficking in the places where it occurs.” Although this City Council bill has no wherefore clause providing any connection between adult entertainment establishments and human trafficking, the Uniform Act on Prevention and Remedies for Human Trafficking recommends a similar posting requirement for any “strip club or other sexually-oriented business.” Uniform Act on Prevention of Human Trafficking §20. That law also recommends posting in other locations like “a business entity found to be a nuisance for prostitution,” as well as hospitals, emergency care providers and job recruitment centers. *Id.* Similarly, other states have made laws requiring this type of posting in adult entertainment businesses. *See, e.g.,* Mich. Comp. Laws §752.1033; Ohio Rev. Code Ann, §5502.63; Ga. Code Ann., §16-5-47; Del. Code Ann., 11, §787; Ind. Code §7.1-3-23-20.5; Fla. Stat. Ann. §787.29;

Wis. Stat. Ann. §165.71; 775 Ill. Comp. Stat. Ann. 50/5; P.A.; 46 Pa. Cons. Stat. Ann. §1493; Cal. Civ. Code §52.6;

Additionally, Maryland requires similar posting at “each restroom at a rest area within the right-of-way of an interstate or State highway.” Md. Code, Transp., §8-655(a). When this restroom posting law was enacted, the General Assembly’s Fiscal and Policy note provided background information from the U.S. State Department’s 2010 Trafficking in Persons Report. See U.S. Department of State, *2010 Trafficking in Persons Report, 10th Edition* (June 2010) <<http://www.state.gov/documents/organization/142979.pdf>> (cited in 2012 S.B. 352, Fiscal & Policy Note, p. 2). The most recent Trafficking in Persons Report notes that some people in the adult entertainment business can be victims of human trafficking. See U.S. Department of State, *2015 Trafficking in Persons Report, 10th Edition*, ps. 75, 86, 220, 257 (July 2015) <<http://www.state.gov/documents/organization/245365.pdf>>.

Thus, a court may find a sufficient connection between adult entertainment businesses and human trafficking to satisfy any standard for not violating the First Amendment. Nevertheless, no cases could be found that have yet challenged or upheld these notice requirements.

However, as Maryland’s Attorney General opined, the law’s application may be too broad if the disclosure requirement is enforced on establishments that have no connection to human trafficking. Letter, pp. 2, n.2, 3 (citing, e.g., *Commodity Trend Service, Inc. v. Commodity Futures Trading Com’n*, 233 F.3d 981 (2000)); see also *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 792 (1988). The Attorney General recommended for the original state law that some sort of hearing process be enacted before citations were issued. However, this City Council bill does not impose civil or criminal citation for failure to comply, but rather license revocation. The fact that this bill places no discretion in license officials as to when to deny the license is likely better than having some sort of appellate scheme. See, e.g., *Applestein v. Osborne*, 156 Md. 40 (1928)(“the limitations by which the Mayor and City Council so carefully restricted and confined the powers of the [licensing body] would be wholly nugatory and ineffectual, if that body were allowed to set them aside and disregard them at will, whenever, for reasons not recognized by the ordinance, the exigencies of a given case in their judgment made it inexpedient to recognize them”). Moreover, having such a sign as a condition of a license is a requirement in at least one other jurisdiction. Ind. Code §7.1-3-23-20.5. In Indiana, failure to display the sign can result in the suspension or revocation of the adult entertainment license. *Id.* Thus, a court may find the law’s application in Baltimore is not too broad.

Assuming a court would uphold the scheme as Constitutional, the Mayor and City Council would have the general police and welfare powers to legislate in this area. See City Charter, Art. II, §§ 11, 27, 47; *Bourgeois v. Live Nation Entertainment, Inc.*, 3 F.Supp.3d 423, 445 (D.Md.2014)(quoting *Tighe v. Osborne*, 149 Md. 349, 356 (1925))(The City may “prescribe, within the limits of the federal and state Constitutions, reasonable regulations necessary to preserve the public order, health, safety, or morals.”).

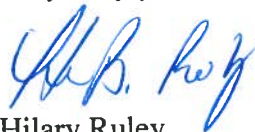
Finally, the bill notes that the sign must be in “English, Spanish and any other language required by the Federal Voting Rights Act.” In many places, signs like the one contemplated in the bill must be in English and Spanish. *See, e.g., Fla. Stat. Ann. §787.29.*

Many, however, require additional languages. In Georgia, the posting must be in English, Spanish and “any other language deemed appropriate by the director of the Georgia Bureau of Investigation.” Ga. Code Ann., §16-5-47(b). In Illinois and California, the sign must be posted in English, Spanish “and in one other language that is the most widely spoken language in the county where the establishment is located and for which translation is mandated by the federal Voting Rights Act, as applicable.” 775 Ill. Comp. Stat. Ann. 50/10(b); Cal. Civ. Code §52.6(c). In Pennsylvania, the sign must be in English, Spanish and “any other language mandated by the Voting Rights Act of 1965 (Public Law 89-110, 42 U.S.C. § 1973 *et seq.*) in the county where the sign will be posted.” 46 Pa. Cons. Stat. Ann. §1493(c)(4). In Ohio and Wisconsin, the posting must be in English, Spanish and “any other language required for voting materials in that county.” Ohio Rev. Code Ann, §5502.63(B)(1); Wis. Stat. Ann. §165.71(1).

Thus, to be clear that the City is requiring the sign be posted in the languages that the Federal Voting Rights Act requires for materials in Baltimore City, the following amendment should be inserted on page 2 in line 20 before the period: “for voting materials in Baltimore City.” This should avoid any challenges for vagueness. *See, e.g., A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-239 (1925); *see also Johnson v. U.S.*, 135 S.Ct. 2551, 2561, 2570 (2015)(Thomas, J., concurring)(discussing how the Supreme “Court’s application of its vagueness doctrine has largely mirrored its application of substantive due process” and even if there may be “some conduct that clearly falls within the provision’s grasp” that alone does not cure an otherwise vague law).

With the recommended amendment, the Law Department approves this bill for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Chief Solicitor

Attachment: 5/18/10 Letter of AG to Governor

cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor’s Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Jennifer Landis, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 16-0661
(1st Reader Copy)

Amendment No. 1

On page 2, in line 20, before the period, insert "for voting materials in Baltimore City"

DOUGLAS F. GANSLER
ATTORNEY GENERAL

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Assistant Attorneys General

JOHN B. HOWARD, JR.
Deputy Attorney General



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

May 18, 2010

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 542 and House Bill 1322

Dear Governor O'Malley:

We have reviewed Senate Bill 542 and House Bill 1322, identical bills entitled "Business Regulation - Lodging Establishments - National Human Trafficking Resource Center Hotline Information," for constitutionality and legal sufficiency. While we approve the bills, we recommend that they be administered carefully to avoid constitutional issues.

Senate Bill 542 and House Bill 1322 permit a State, county, or municipal law enforcement agency to issue a civil citation to a lodging establishment requiring it to post a sign in each guest room for one year. The sign is to be developed by the Department of Labor, Licensing, and Regulation and will provide information about reporting human trafficking and contain the telephone number for the National Human Trafficking Resource Center. A citation may be issued if "the lodging establishment is located on property where an arrest leading to convictions of prostitution, solicitation of a minor, or human trafficking" has occurred. The law enforcement agency must consider any assistance it receives from a lodging establishment in an investigation leading to a conviction in determining whether to issue a citation. No other factor, including whether the owners or managers knew of, or had any connection with, the offenses is mentioned, but other factors clearly could be considered in the exercise of the law enforcement agency's discretion in deciding whether to issue a citation.¹ An establishment that fails to post the signs as required by the citation is subject to a civil penalty not exceeding \$1,000.

¹ As introduced, House Bill 1322 would have required that a lodging establishment post the signs for a year if the lodging establishment was found to keep a common nuisance under Criminal Law Article § 5-605 or was the location of an arrest of an individual for prostitution, solicitation of a minor, or human trafficking. The first reader version of Senate Bill 542 would have required the Department of Health and Mental Hygiene to adapt regulations establishing which "buildings and commercial establishments" were to be required to post signs.

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Ordinarily, a "citation" is "a written charging document that a police officer or fire marshal issues to a defendant, alleging that the defendant has committed a crime." Criminal Procedure Article, § 4-101(a)(2)(i); Maryland Rules 4-102(b). Although some citations offer the defendant the option of simply paying the fine, all offer at least the opportunity for a hearing on the charges. The Maryland Rules permit the trying of offenses on citation in the District Court if it is a petty offense or if the use of the citation is otherwise authorized by law, but make no provision for the trying of any offense on citation in the circuit courts. Maryland Rule 4-201(b).

The citation provided for by Senate Bill 542 and House Bill 1322 appears not to be a citation in the ordinary sense at all. It does not charge the recipient with an offense of any kind, and no fine or imprisonment may be imposed under it. It clearly does not fall within the criminal jurisdiction of the District Court, Courts and Judicial Proceedings Article ("CP"), § 4-101(b), and it is not included among the civil matters that come before that Court, CP § 4-401. In fact, the bill gives no indication that the matter is to come before any court at all. Nor does it specify what procedures should be used in the determination to issue a citation. Because the issuance of a citation implicates First Amendment rights, we suggest that some opportunity be provided for a lodging establishment to be heard with respect to whether it should be required to post the signs before a citation requiring the posting is issued.²

The requirement that certain lodging establishments engage in specified speech – the posting of the sign – implicates First Amendment rights. Generally, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006); see also *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988). Compelled speech has been upheld in the commercial context, however, where the state required inclusion of "purely factual and uncontroversial information" in connection with commercial enterprises. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). In fact, lodging establishments are already subject to the requirement that they post a copy of certain laws, "together with all rules of the lodging establishment, in

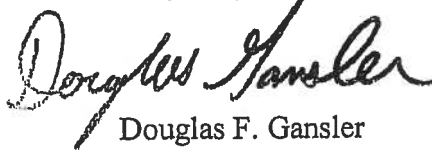
² The fact that the presence of the signs implies some level of involvement of the lodging establishment in human trafficking while a citation could be issued to a lodging establishment with no actual involvement in such offenses also provides support for a hearing. Many hotels are located in shopping centers or mixed use developments, making it possible that convictions for human trafficking offenses that occurred on the property where the hotel is located arose from conduct in a location with no relation to the hotel. Although reputational damage of this type does not, in itself, give rise to due process rights, *Paul v. Davis*, 424 U.S. 693, 701 (1976); *City of Annapolis v. Rowe*, 123 Md. App. 267, 284-292 (1998), it is a valid basis for concern about the accuracy of proceedings.

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a conspicuous place at or near the guest registration desk and in each guest room." Business Regulation Article, § 15-206. The requirements of Senate Bill 542 and House Bill 1322, however, are not applicable to every lodging establishment, but are imposed based on circumstances deemed to indicate the possibility that human trafficking offenses have occurred on the premises. In similar situations, courts have generally required that the required speech be reasonably related to the government interest for which it is imposed. Specifically, where businesses have been found to have engaged in deceptive or misleading speech, courts have held that they may be required to make disclosures designed to prevent the public from being deceived or misled, but have stated that the requirements must be no broader than necessary to serve this purpose. *Commodity Trend Service, Inc. v. Commodity Futures Trading Com'n*, 233 F.3d 981, 994-995 (7th Cir. 2000); *Encyclopaedia Britannica, Inc. v. F. T. C.*, 605 F.2d 964, 972-973 (7th Cir. 1979); *Consumer Protection Div. Office of Atty. Gen. v. Consumer Pub. Co., Inc.*, 304 Md. 731, 774 (1985).

The disclosure required by Senate Bill 542 and House Bill 1322 is purely factual and noncontroversial. Moreover, it is clearly related to the State's aim in protecting victims of human trafficking in the places where it occurs. Thus, the required disclosure is not overly broad. The requirement may be applied too broadly, however, if precautions are not taken to ensure that citations are not issued to lodging establishments that have not, in fact, had any connection to human trafficking offenses. For this reason, we recommend that some form of hearing be provided before citations requiring the posting are issued. We also suggest that the General Assembly may wish to codify this hearing requirement in a future legislative session.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable David C. Harrington
The Honorable Tom Hucker
The Honorable John P. McDonough
Joseph Bryce
Karl Aro