CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG
Mayor

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October 9, 2020

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

Re: Mayor and City Council Bill 20-0606 – Banning Face Surveillance Technology in Baltimore

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 20-0606 for form and legal sufficiency. The bill would add two sections to the City Code concerning facial recognition software. The bill does not apply to facial recognition software "designed specifically to protect against unauthorized access to a particular location or electronic device."

First, the bill would add Section 41-4 to Article 5 (Finance, Property and Procurement) to the City Code. It would prohibit the City from purchasing, obtaining or contracting for the use of a face surveillance system. The City Code can ban the City's use and purchase of materials. City Charter, Art. II, § (47); Art. VII, §2(a). However, it should be noted that **this law would not apply to the Baltimore City Police Department** as its ability to purchase, obtain, contract or use a particular product could not be impeded by an ordinance of the Mayor and City Council of Baltimore. Charter, Art. II, § (27); Public Local Law 16-7 (11), (12).

Next, the bill would add Subtitle 18 to Article 19 (Police Ordinances) of the City Code to prohibit anyone in the City from obtaining, retaining, accessing or using a face surveillance system. While the Mayor and City Council of Baltimore has the power to pass all laws that promote the general welfare, those law can only be local in operation. City Charter, Art. II, § (47) (City can legislate to promote general welfare); Md. Constit., Art. XI-A, § 3 (after home rule adoption of a charter, local governments "shall have full power to enact local laws of said city or county"). A law that attempts to regulate the behavior of the state or federal government is not a local law. *See, e.g., Dasch v. Jackson*, 170 Md. 251, 183 A. 534, 538 (1936) (citations omitted) (explains that local laws are limited in geography and scope to local matters); *see also Bauer v. Elrich*, Crim. No. PJM 20-1212, 2020 WL 2797375, *4 (D. Md. May 29, 2020) (home rule for local governments in Maryland only gives power to enact local laws); *accord* October 29, 2007 Letter of the Maryland Attorney General to Mr. James Jones, p. 3 (a local law that attempted to govern the state was extraterritorial); 1 McQuillin Mun. Corp. § 3A:21 (3rd ed.) (states generally immune from local regulation). **This law will not apply to state or federal governments**. Therefore, the bill needs to be amended to change the phrase "governmental entity" to "an entity of the Mayor and City

Council of Baltimore" to make it conform with the Maryland Constitution. Md. Constit., Art. XI-A, § 3. A draft amendment is attached to this report.

Alternatively, the entirety of Section 18-1(d)(4) could be deleted. Although the Mayor and City Council is already prohibited from purchasing, obtaining or contracting for the use of a face surveillance system in the first part of this bill, a properly amended Section 18-1(d)(4) is not superfluous because it may capture additional behavior of the City government, such the use of already purchased facial recognition software. Thus, the amendment suggested is leaves in the language of Section 18-1(d)(4) but conforms it the state's constitution.

Subject to the foregoing amendment, the Law Department can approve the bill for form and legal sufficiency.

Very truly yours,

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cc: Dana P. Moore, Acting City Solicitor
       Matthew Stegman, Mayor's Office of Government Relations
       Elena DiPietro, Chief Solicitor, General Counsel Division
       Victor Tervala, Chief Solicitor
       Ashlea Brown, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 20-0496
(1st Reader Copy)

Proposed by: Law Dep't

Amendment No. 1

On page 3, in line 21 delete "a governmental entity or" and in the same page in line 22 delete "a governmental entity" and substitute "the Mayor and City Council of Baltimore."