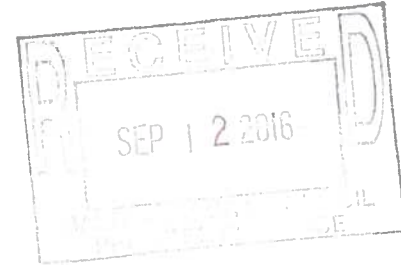




September 12, 2016



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 16-0652 – Baltimore City Municipal Identification  
Cards

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 16-0652 for form and legal sufficiency. The bill would create Subtitle 38 in Article 1 of the City Code to govern a municipal identification card program. It would also add Section 41-14(.25) to Subtitle 41 of the same Article to make a civil citation of \$100 for counterfeit or fraudulent municipal identification cards.

Generally

The City would have general police power to issue a municipal identification card. See City Charter, Art. II, §(27). The bill requires that the Mayor's Office of Information Technology ("MOIT") operate this municipal identification card program. Since MOIT is not an agency created by Charter or Code, it is certainly possible that a future Mayor could place the general duties of the current MOIT in another entity, multiple entities or outsource them to a vendor, leaving it unclear what entity is responsible for running this program. To ensure the program is not outsourced to a private vendor, it would be wise to amend the bill to state that the City intends for it to be administered by the Mayor's Office.

Accepting the Card

Section 38-11(a) requires that "all municipal agencies and offices, and all municipal employees, including law enforcement officers, must accept a valid Baltimore City ID card as proof of identity and residency." This section will operate only when there is no other state or federal law that preempts it and requires a particular other type of document to establish identity and residency. See, e.g., *Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 512-513 (Md. 2004)(citations omitted). This appears to be the intent of this Section, which must be read in conjunction with Section 38-2(c) that states that there is no intent to expand identification requirements. *Gillespie v. State*, 370 Md. 219, 222 (2002).

Fav w/ Amend

For example, the Baltimore City ID card cannot replace the types of identification required by the Motor Vehicle Administration or to complete an I-9 for work. *See, e.g.,* Md. Code, Transp., §§12-301; 16-121 (listing what the MVA must do when there is a non-match between a document it uses for identification and the Department of Homeland Security regulations); 8 USC §1324a (listing documents acceptable to obtain work in the United States).

Moreover, it must also be read in conjunction with Section 16-1 of the Public Local Laws of Baltimore City in which the General Assembly of Maryland created the Baltimore City Police Department (“BCPD”) to be an agency and instrumentality of the state with the Police Commissioner having sole charge of its operation. *See* Public Local Law (“PLL”) §16-2, *et. seq.* The General Assembly has provided that no city ordinance can contradict BPD’s stated powers. City Charter, Art. II, §27. Therefore, the term “law enforcement officers” as used in the bill cannot be read to include an officer of the Baltimore City Police Department. *See, e.g., Criminal Injuries Compensation Bd. v. Gould*, 273 Md. 486, 498 (1975).

### Confidentiality

The Maryland Public Information Act governs the release of information by all governmental units in the state. Md. Code, Gen. Prov., §4-101, *et. seq.* Local governments may not provide that certain information be kept confidential or not disclosed in response to a public information act request where state law has not protected such information from disclosure. *See, e.g.,* 86 Md. Op. Ag. 94, 107 (2001)(municipalities cannot create laws that determine what information is available to the public because, “a contrary interpretation ‘would allow...local entities at their election to undermine the [PIA]. ... [H]ad the General Assembly intended to give this effect to a ... local ordinance, [local ordinances] would have been included in the list in SG §10-615...’”)(citing Office of the Attorney General, Public Information Act Manual 15 (8 ed. 2000); 71 Opinions of the Attorney General 297, 299-300 (1986)). If a person were to request the information sought in Section 38-10(b)(2), state law would govern what part of that information could be released and to whom. Md. Code, Gen. Prov., §4-101 *et. seq.* Information itself does not take on the characteristics of confidential or disclosable, it depends on who is requesting that information. Md. Code, Gen. Prov., §§4-204. For example, a person requesting a copy of his or her own application for a municipal identification card would likely be treated differently than a request for that same information by a third party. *Id.* Moreover, the exemption for driver’s license information in Section 4-320 of the General Provisions Article of the Maryland Code would not apply to shield any information in city records about the holders of municipal identification cards. Since state law preempts Section 38-10(B), it must be removed from the bill.

### Amount of Fee

Fees set by the government must have legislative guidance as to amount. *See, e.g., Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 385 (1942)(statute allowing the Baltimore City Police Commissioner to set a fee for a dance license was struck down as “the amount is left, within certain limits, to the uncontrolled discretion of an administrative official. This is not permitted under the police power.”)(cited with approval in *County Council of Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 442 (1973) (statute giving a County Commission discretion to fix civil penalties in any amount up to \$ 1,000 was held invalid because it completely “lack[ed] any legislative safeguards or standards”). Therefore, Section

38-4(b) must be amended to provide that guidance. The fee must bear a reasonable relationship to the cost of providing the municipal identification card. *See, e.g., Mayor and City Council of Baltimore v. Canton Co. of Baltimore*, 186 Md. 618, 631-32 (1946); *see also Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 404-05 (1991).

### Types of Documents Required

It is unclear what is meant by Section 38-8(a)'s requirement that the government give more or less weight to the documents to be used to substantiate identity or residency. This leaves the law subject to challenge on the ground that it is void for vagueness because a person is not sure what documents are needed to establish eligibility for the municipal identification card. *See, e.g., A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-239 (1925)(courts have held a civil "provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was")(citations omitted); *see also Johnson v. U.S.*, 135 S.Ct. 2551, 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."). To avoid a vagueness challenge, the bill should be amended to establish what documents a person must provide to obtain an identification card.

Additionally, Section 38-8(a) would allow the City to exercise discretion for each applicant, demanding one type of document from one applicant and another type of document from another applicant. This type of subjectivity does not provide sufficient guidance to carry out the legislative intent.

the Court will approve only those "delegations of legislative power to administrative officials where sufficient safeguards are legislatively provided for the guidance of the agency in its administration of the statute." This means that the delegations to the administrative agency should be reasonably specific and provide some guidelines for the agency to follow. In other words, the Legislature must "lay down ... an intelligible principle to which the person or body authorized to [act] is directed to conform."

*Lussier v. Maryland Racing Com'n*, 343 Md. 681, 704 (1996)(citations omitted); *accord Tighe v. Osborne*, 149 Md. 349, 359, 361 (1925)(discretion by administrative body must be "guided and restrained by rules and standards sufficient to protect the citizen against any arbitrary or unreasonable exercise thereof.")(citations omitted); *Wo v. Hopkins*, 118 US 356, 372-73 (1886)(citing with approval *Mayor and City Council of Baltimore v. Radeke*, 49 Md. 217, 230-31 (1878)(holding that a single elected official in Baltimore City could not have the power to determine which businesses receive a license without any guidelines)); *accord* McQuillin §26.64 ("arbitrary or absolute discretion to grant or deny a license, vested in an official or board, is in violation of the constitutional guaranties of due process and equal protection of the law, and also violates reasonableness pertaining to all ordinances.").

Additionally, this type of subjectivity could lead to an unconstitutional application of the law because nothing prevents the City from intentionally discriminating between two similarly situated people. *Applegate, LP v. City of Frederick*, 2016 WL 1427084, \*5-\*6 (April 11, 2016);

*see also U.S. v. Stevens*, 559 U.S. 460, 480 (2010) (“We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”).

The discretion could also make it possible for the City to fail to accept a document because it does not appear authentic. Although this type of discretion may appear to combat fraud, the City is prevented by federal laws from rejecting documents from other states or certain foreign countries because they are not authentic. *See, e.g.*, 89 Md. Op. Atty. Gen. 60, 61 (2004) (“The ‘Convention Abolishing the Requirement of Legalisation for Foreign Public Documents’ treaty, also known as the Hague Convention, provides for a simplified certification of public documents to be used in countries that have joined the convention.”). The Attorney General noted that while the treaty dealt only with “formalities necessary to authenticate the document,” “to reject a foreign birth certificate accompanied by an apostille as a permissible means of identification, the MVA must have a rational basis other than concerns about the authenticity of the document.” 89 Md. Op. Atty. Gen. at 64. Additionally, Section 1738 of Article 28 of the United States Code provides that the City should accept as authentic the records from other states in the union. 28 U.S.C. §1738.

To avoid these problems, it would be best if Section 38-8(a) provided what combinations of documents would be required or articulate how the discretion is to be exercised. This problem is not remedied by creating rules and regulations because an administrative entity cannot “create standards with respect to the granting or denial” of something. *McQuillin* §26.63; *Andy’s Ice Cream v. City of Salisbury*, 125 Md. App. 125, 161 (1999) (“When the delegated activities have exceeded mere ministerial tasks, however, the delegation is unlawful.”)(citations omitted).

The criteria on how to exercise the discretion in Section 38-8(a) because it is unclear if the Mayor and City Council would want to pass this bill if the type of discretion found in this section were removed. *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329-330 (2006)(citations omitted); *accord Stevens*, 559 U.S. at 481(courts “‘will not rewrite a . . . law to confirm it to constitutional requirements,’ for doing so would constitute a ‘serious invasion of the legislative domain’”)(citations omitted).

Alternatively, Section 38-3(A) could be deleted so that there is no uncertainty or discretion about what documents will be accepted to get a municipal ID.

### Contradictory Terms

Finally, subsections (1) and (2) of Section 38-11(c) appear to conflict or contradict. The bill should be amended to clarify what is meant by having agencies require the possession of a card to obtain city provided privileges and benefits but preventing the agencies from requiring possession of the card for city services. Without more information on the types of benefits or privileges contemplated in Section 38-11(b) it is not clear if that provision would impair any other rights. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)(cited with approval by *Elrod v. Burns*, 427 U.S. 347, 359 (1978)) (“even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely”); *accord Delong v. U.S.*, 621 F.2d 618, 624 (4th Cir. 1980); *State v. Burning Tree Club, Inc.*, 315 Md. 254 (Md. 1989).

Subject to the required amendments discussed herein and with the comments provided, the Law Department could approve an amended bill for form and legal sufficiency.

Very truly yours,



Hilary Ruley  
Chief Solicitor

cc: The Honorable Councilmember Scott  
David Ralph, Acting City Solicitor  
Angela C. Gibson, Mayor's Legislative Liaison  
Elena DiPietro, Chief Solicitor, General Counsel Division  
Victor Tervalá, Chief Solicitor  
Jennifer Landis, Assistant Solicitor