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CITY OF BALTIMORE

BRANDON M. SCOTT  
Mayor



DEPARTMENT OF LAW  
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November 13, 2023

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 23-0377 – Surveillance Technology Procurement

Dear President and City Council Members:

The Law Department has reviewed the First Reader version of City Council Bill 23-0377 for form and legal sufficiency. The bill creates a Community Advisory Commission on Surveillance with the duty to create a yearly report on certain topics. It also would prevent the Mayor and City Council of Baltimore from buying or using certain surveillance technology without approval of the City Council.

There is no impediment to the creation of the Commission as there is broad power to legislate to further the public welfare. City Charter, Art. II, § (47). However, this bill would remove the BOE's ability to approve the procurement of surveillance items that have not received approval by the City Council. Requiring Council approval before an item is procured is contrary to the Charter language that gives the City's Board of Estimates the power to "formulate and execute the fiscal policy of the City to the extent, and in the manner provided for, in the Charter." City Charter, Art. VI, § 2; City Charter, Art. III, § 11 (Charter cannot be modified by the City Code).

The bill, which also requires City Council approval before an agency begins or continues using or borrowing certain surveillance technology, is contrary to the Charter's designation of the Mayor as the Chief Operating Officer of the City, and agencies' individual powers to execute their respective duties. City Charter, Art. IV, § 4; Art. VII, §§ 1, 2. The bill must be amended to remove City Council approval of surveillance technology procurement or uses. An amendment to this effect is attached to this report. Alternatively, the bill could be amended to list the items or types of items that are unable to be procured or used by City agencies.

The provisions of the bill that attempt to make a report or a policy of an agency "legally enforceable" is contrary to the provisions of the Charter that detail how the Mayor and City Council of Baltimore can be contractually bound. City Charter, Art. I, § 1; Art. VII, § 2(b). The amendments attached to this bill report remove this language.

Section 42-5's requirement to publish a legal analysis concerning the Mayor and City Council's potential liability for uses of certain surveillance technology and possible remedial

measures in advance of knowing its contents is an unintelligent waiver of the Attorney Client privilege. City Charter, Art. VII, § 24(a); *Ehrlich v. Grove*, 396 Md. 550, 576 (2007); Md. Rule 19-301.6. Moreover, decision about whether and how to memorialize strategies to avoid liability is the clear prerogative of the City's Law Department and as such, this provision arguably conflicts with the Charter's mandate that the City Solicitor have general direction of the City's legal business. City Charter, Art. VII, § 24(a). The amendments attached to this bill report remove this language.

In addition, the provisions of the bill that regulate data sharing both within City government and with the public are preempted by the state's Public Information Act. Md. Code, Gen. Prov., §§ 4-101(b), 4-102, 4-202(a); *Montgomery County v. Shropshire*, 420 Md. 362, 365 (2011). This law provides that government records can be requested without needing to state a reason or justification for that request. Md. Code, Gen. Prov., § 4-204. No local government in Maryland can create a different set of permissions or prohibitions on disclosure. *Police Patrol Security Systems v. Prince George's County*, 378 Md. 702, 710, 713-15 (2003); *see also* 86 Op. Att'y Gen. 94, 106-07 (2001). The amendments attached to this bill report remove this language.

State law already provides record retention requirements for government entities. Md. Code, State Gov't, Title 10, Subtitle 6; City Code, Article 1, Subtitle 10. Governments in Maryland may not keep information that identifies a person, including a still or moving image, unless it is needed by the government for a particular purpose set forth in a law, court rule or executive order. Md. Code, Gen. Prov., § 4-301. Maryland also has state laws addressing cyber security for government data that identifies individuals. Md. Code, State Gov't, Title 10, Subtitle 13. The amendments attached to this bill report remove this language.

The bill also provides for enforcement via court actions, in violation of Section (48) of Article II of the City Charter, which provide the only mechanisms the General Assembly has permitted for enforcement of the City's ordinances. It also violates a principle of Maryland law that prohibits local governments from creating private causes of action. *See McCrory Corp. v. Fowler*, 319 Md. 12, 20 (1990) ("In Maryland, the creation of new causes of action in the courts has traditionally been done either by the General Assembly or by [the Maryland Court of Appeals] under its authority to modify the common law of this State."); *accord Baker v. Montgomery County*, 201 Md. App. 642 (2011); *Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 636-37 (2005); *Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 287-94 (2004); *H.P. White Lab., Inc. v. Blackburn*, 372 Md. 160, 167-71 (2002); *Bourgeois v. Live Nation Entertainment, Inc.*, Civil Action No. ELH-12-58, 2012 WL 2234363 (June 14, 2012) (unreported) (recognizing this settled tenant of Maryland law). The necessary amendment to remove the remedies provision is attached to this report.

Section 42-12 on whistleblower protections is duplicative of the City Code provisions on Whistleblowers in Subtitle 8 of Article 1 of the City Code. An amendment to remove them is included with this report.

An amendment is also included to remove Section 42-13 as state law already provides for record retention provisions, as noted above, as well as for rules of evidence in state and federal courts. Md. Rules, Title 5; Federal Rules of Evidence; *see, e.g., Reyes v. State*, 257 Md. App. 596, 620-23 (2023) (evidentiary analysis of reliability of facial recognition software used by state); *Geiger v. State*, 235 Md. App. 102, 107 (2017) (case evaluating admissibility of hearsay evidence

in conjunction with facial recognition analysis); *Smith v. State*, 388 Md. 468 (2005) (vacating verdict and reversing criminal sentence when counsel was unable to argue in closing that there was a racial component to facial recognition); *see also El Ali v. Barr*, 473 F. Supp. 3d 479, 522 (D. Md. 2020) (“question of whether provision of cell phone passcodes or biometric information amounts to testimonial statements” is “an unsettled question of law”). An amendment to remove this Section is attached to this report.

Next, the attempt by Sections 42-14 and 42-15 to invalidate terms of existing contracts by operation of law violates the Contracts Clause of the United States Constitution. U.S. Const., Art I, s 10, cl. 1; *see, e.g., Garris v. Hanover Insurance Company*, 630 F.2d 1001, 1004 (4<sup>th</sup> Cir. 1980) (stricter scrutiny applies when the government enacts a law that impacts contracts to which it is a party). An amendment to remove these conflicts is attached to this report.

Subject to the necessary amendments, the Law Department can approve the amended bill for form and legal sufficiency.

Very truly yours,



Hilary Ruley  
Chief Solicitor

cc: Ebony Thompson, Acting City Solicitor  
Nina Themelis, Mayor’s Office of Government Relations  
Elena DiPietro, Chief Solicitor, General Counsel Division  
Ashlea Brown, Chief Solicitor  
Jeffrey Hochstetler, Chief Solicitor  
Teresa Cummings, Assistant Solicitor  
Michelle Toth, Assistant Solicitor

**AMENDMENTS TO COUNCIL BILL 23-0377**  
(1<sup>st</sup> Reader Copy)

Proposed by: Law Dep't

**Amendment No. 1: Remove conflict with the Charter**

On page 4, delete lines 20 through 23; and on page 5, delete lines 25 through 28; and on page 6, delete lines 1 through 5; and on page 9, delete lines 5 through 32; and on page 10, delete lines 1 through 31; and on page 11, delete lines 1 through 31; and on page 12, delete lines 1 through 36; and on page 13, delete lines 1 through 11 and 21 through 29; and on page 14, delete lines 1 through 10 and delete lines 23 and 24; and on page 15, delete lines 9 and 10 and lines 24 through 33; and on page 16, delete lines 1 through 31; and on page 19, delete lines 13 through 22.

**Amendment No. 2: Annual Surveillance Report Modifications**

On page 14, in line 13, delete "OBTAINS APPROVAL FOR THE USE OF" and substitute "USES"; and on the same page, delete lines 23 and 24.

**Amendment No. 3: Remove conflict with the Maryland Public Information Act**

On page 12, delete lines 26 through 36; and on page 13, delete lines 1 through 11; and on page 14, delete lines 1 through 4; and on page 15, delete lines 2 through 4.

**Amendment No. 4: Removing Impermissible Remedies**

On page 17, delete lines 1 through 16.

**Amendment No. 5: Removal of Duplicative Whistleblower Protections**

On page 17, delete lines 17 through 32; and on page 18, delete lines 1 through 4.

**Amendment No. 6: Remove data deletion and evidentiary provisions that conflict with state laws**

On page 18, delete lines 5 through 19.

**Amendment No. 7: Remove Conflict with the Contracts Clause**

On page 18, delete lines 24 through 31; and on page 19, delete lines 7 through 12.