
CITY OF BALTIMORE

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Mayor



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September 22, 2022

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 22-0255 – Arson Offender Registry

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 22-0255 for form and legal sufficiency. The bill would require people convicted of arson in the Baltimore City Circuit or District Court to register with the Baltimore Police Department (“BPD”) after incarceration, and periodically thereafter. The bill purports to allow the Baltimore Police Commissioner (the “Commissioner”) to adopt rules and regulations to further the law, and attempts to authorize BPD to share this information with other law enforcement officials.

In general, the Mayor and City Council of Baltimore can exercise the “Police Power to the same extent as the State” within the limits of Baltimore City. Baltimore City Charter, Art. II, § (27). Arson registries have been held in at least one state to be proper exercises of police power because they allow law enforcement to monitor arsonists to prevent recidivism, while not creating a new sentence or punishment. *See, e.g., State v. Caldwell*, 18 N.E. 3d 467, 476 (Ohio 2014) (cited with approval in *State v. Daniel*, 188 N.E. 3d 671, 678 (Ohio 2022)).

However, the Supreme Court has held that registration requirements are unenforceable as violating the right to Due Process when the person had no notice of the requirement to register. *Lambert v. California*, 355 U.S. 225, 226, 227, 229 (1957) (“We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand.”). Thus, in Ohio the law requires the warden of a prison or the judge to provide the required notice. Ohio Rev. Code, § 2909.14.

The language in Section 61-3(b) of the bill providing that “when requested by a judicial officer or law enforcement officer, the offender must acknowledge, in writing, the offender’s duty to register” may not be enough to satisfy Due Process because it does not mandate that notice be given, as it could not because the City does not have control over the requisite judges or corrections officers. MD Constit., Art. 11-A, § 3; *see, e.g., Dasch v. Jackson*, 170 Md. 251, 183 A. 534, 538 (1936).

Since the adequacy of the notice given to any particular person would be challenged only as applied to the facts for that person, the issue does not make the bill illegal as written. *See, e.g., Motor Vehicle Admin. v. Seenath*, 448 Md. 145, 181 (2016) (explaining the difference between “an as-applied or a facial constitutional challenge”). However, there are other legal issues that require the bill be amended, as follows:

Registry of All Arsonists Dwelling in the City

This law would permit arsonists from other states, or convicted in courts in other Maryland jurisdictions, to live in the City without registering. This could make the law underinclusive and a violation of the Constitution’s Equal Protection clause. *See, e.g., Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (“legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have ‘some relevance to the purpose for which the classification is made.’”). The bill should be amended to require registration of all arsonists convicted in City Courts and all those arsonists convicted elsewhere and currently residing in the City. While that latter category may not receive actual notice of the duty to register (creating the problem discussed above) their inclusion in the bill can mitigate a facial challenge to the law’s under-inclusivity. An appropriate amendment is attached.

BPD Regulations

The Public Local Law already gives the Police Commissioner the power to “establish and modify systems for the reception, processing and maintenance of reports and records of occurrences, or alleged occurrences, of crime in the City of Baltimore.” Baltimore City Public Local Law, § 16-7(13). However, the requirement that such regulations be drafted and implemented “subject to” the City’s Administrative Procedure Act (“APA”) will not work because that Act does not apply to BPD. City Code, Gen. Prov. Art., § 4-101(b); Baltimore City Public Local Law, § 16-2(a); City Charter, Art. II, § (27). Amendments to modify this language are attached to this report.

The Use of Arson Registry Information

The information collected in the arson registry may constitute criminal history information, which may only be disseminated pursuant to the state law governing the Criminal Justice Information System Central Repository. Md. Code, Crim. Pro., §§ 10-101, 10-218. The Maryland Public Information Act (“PIA”) defers to this law. Md. Code, Gen. Prov., § 4-301; *Fields v. State*, 432 Md. 650, 678 (2013) (McDonald, J., concurring). This bill cannot authorize dissemination that in any way conflicts with this scheme. 86 Md. Op. Ag. 94, 107 (2001). Although most of the contemplated data sharing with other law enforcement is likely permissible under this scheme, sharing with other City agencies likely is not. Md. Code, Crim. Pro., §§ 10-218, 10-221, 10-238; COMAR 12.15.01.10 -11. *Montgomery County v. Shropshire*, 420 Md. 362, 383 (2011). An amendment to remove the preempted sharing language is attached. However, the sharing of this information with law enforcement is already permissible under existing state law.

Assuming the bill is amended, the Law Department can approve it for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Chief Solicitor

cc: James L. Shea, City Solicitor
Nina Themelis, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Jeff Hochstetler, Chief Solicitor
Ashlea Brown, Chief Solicitor
D'ereka Bolden, Assistant Solicitor
Michelle Toth, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 22-0255
(1st Reader Copy)

Proposed by: Law Dep't

Amendment No. 1 (To remedy under inclusivity)

On page 1, in lines 4 through 6, delete “IN THE CIRCUIT COURT FOR BALTIMORE CITY OR THE DISTRICT COURT OF MARYLAND FOR BALTIMORE CITY.”

Amendment No. 2 (To remove reference to the APA)

On page 3, in lines 16 and 17, delete “SUBJECT TO TITLE 4 {“ADMINISTRATIVE PROCEDURE ACT— REGULATIONS”} OF THE CITY GENERAL PROVISIONS ARTICLE,”

Amendment No. 3 (To remove conflict with state data sharing laws)

On page 6, delete lines 11 through 18.