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CITY OF BALTIMORE

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Mayor



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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 23-0379 – Facial Recognition Technology

Dear President and City Council Members:

The Law Department has reviewed the First Reader version of City Council Bill 23-0379 for form and legal sufficiency. There are numerous legal issues with this bill. The most notable is that the majority of this bill conflicts with the Maryland Public Information Act (“PIA”), which dictates when governments in Maryland may retain personally identifiable information and when that information can be redisclosed, both publicly and between record custodians within the same government. Md. Code, Gen. Prov., §§ 4-101(b), 4-102, 4-202(a); *Montgomery County v. Shropshire*, 420 Md. 362, 365 (2011). Under the PIA, the City is prohibited from sharing certain information about a person with anyone other than that person or a “designee” of that person. Md. Code, Gen. Prov., §§ 4-101(g), 4-329, 4-336. These prohibitions apply unless another state or federal law applies. *Fields v. State*, 432 Md. 650, 678 (2013) (McDonald, J., concurring).

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). Consent is not a feature of the government’s responsibilities under the PIA; rather, each request requires analysis to determine if the person seeking the record, or her designee, is allowed to receive it at the time of the request. Md. Code, Gen. Prov., §§ 4-101(g), 4-329, 4-336. For this reason, the bill’s Sections 18-1(c), 18-7, 18-8, 18-9, 18-18 and 18-20(c) must be removed as they conflict with state law. Md. Const., Art. 11-A, § 3. Relatedly, it is important to note that the PIA will allow access to most of the City’s records without the need for a subpoena or warrant. For this reason, the language in Section 18-20(b)(5) must be modified to make it clear that the reports on information dissemination required by this bill are not deficient if they fail to include a warrant or subpoena. Appropriate amendments are attached to this report.

Next, the adjective “intangible” should be inserted before “property” in the definition of “confidential and sensitive information” included in Section 18-1(b) or the word “property” should be omitted entirely from that Section. Both real and personal property in Maryland is permissibly identified with a unique identifying number—usually address, or block and lot number or another identifier. Such information is routinely disclosed by the City and other governments in Maryland; usually when associated with tax records to identify the property. *See, e.g.,*

<https://sdat.dat.maryland.gov/RealProperty/Pages/default.aspx>. Maryland prevents disclosure of any “return information” as that term is defined in the Internal Revenue Code. Md. Code, Tax-General, §§13-101(s)(1), *et. seq.*; 26 U.S.C. §6103(b)(1)(2)(A). The Tax-General Article covers income, sales and use, franchise, motor vehicle, admissions, amusement, alcoholic beverage, estate, and financial institution franchise taxes, among others but specifically does not protect real and personal property tax information from disclosure, as that is located in a different Article. Md. Code, Tax-Prop., § 1-301. The requisite amendment is attached to this report.

Next, in that same Section 18-1, the term “protected health information” should be clarified because its scope in Maryland is not the same as in the Federal Health Insurance Portability and Accountability Act (“HIPAA”). 42 U.S.C. § 1320d(6)(B). Maryland law prevents disclosure of any record containing medical information or information about a person with a disability. Md. Code, Gen. Prov. § 4-329. The record does not need to “identify an individual with absolute precision to fall within this exception.” 90 Md. Op. Atty. Gen. 45, 54 (2005). However, another state law applies if the medical information is also contained in a medical record. Md. Code, Health-Gen., §§ 4-302; 4-304 – 309. The amendment attached to this report utilizes the definition from the Maryland Confidentiality of Medical Records Act (“MCMRA”). However, it is important to note that in government records, the PIA will prevent disclosure of a broader range of medical information than what is defined in HIPAA or the MCMRA.

In the definition of Facial Recognition Technology, the qualifier “to an individual’s still or video images” that is present in Section 18-1(h)(1) needs to also be present in subsections (2) and (3) to be clear that the identification is particular to the images and does not capture other identifiers like address, phone number or email. An amendment to this effect is attached to this report.

The wholesale prohibition on sales of data could be considered a violation of the Commerce Clause of the United States Constitution. The Supreme Court has long held that the “inter-State commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation.” *Welton v. State of Missouri*, 91 U.S. 275, 282 (1875). As noted in a 1978 opinion of the Supreme Court, “where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected,” because these laws engender the “evils of ‘economic isolation’ and protectionism.” *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). “The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State’s borders.” *Id.* While there may be “a presumably legitimate goal” to the local legislation, such as preventing use of software the engenders misidentification, when that goal is “sought to be achieved by the illegitimate means of isolating the State from the national economy,” it is per se invalid. *Id.* at 627. This is different than merely determining if a burden on interstate commerce is greater than the legislation’s putative benefits because this is no mere burden; it is an outright ban. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970) (cited with approval in *Medical Waste Associates Ltd. Partnership v. Mayor and City Council of Baltimore*, 966 F.2d 148, 150 (4<sup>th</sup> Cir. 1992)). An amendment to remove the sales language is attached to this report.

Next, Part 2 of the bill applying to private entities is an overbroad restriction on commercial speech in violation of the First Amendment to the United States Constitution. U.S. Const. Amend. I; *Mitchell v. MVA*, 225 Md. App. 529, 537 n. 1 (2015) (*citing Gitlow v. New York*, 268 U.S. 652,

666 (1925) (First Amendment applies to the States through the Fourteenth Amendment)); *see also Billups v. City of Charleston, S.C.*, 961 F.3d 673, 683 (4<sup>th</sup> Cir. 2020) (“it is well-established that a law aimed at regulating businesses can be subject to First Amendment scrutiny even though it does not directly regulate speech.”); *US v. Blair*, Slip Copy. No. ELH-19-00410, 2021 WL 4339132, at \*26 (D. Md. Sept. 23, 2021) (“the creation and dissemination of information are speech within the meaning of the First Amendment.”) (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2021)).

“Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.” *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 638 (1985) (citations omitted). “The State cannot regulate speech that poses no danger to the asserted state interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 565 (1980). This bill’s wide-ranging restrictions on the private use and dissemination of data – even data that may lead to misidentifications in some private enterprise– are overly broad and completely suppress the exchange of this information. An amendment to remove private entities from Part 2 of the bill is attached to this report. Alternatively, the bill could be amended with narrow restrictions on private commercial speech that are narrowly tailored.

Another constitutional problem arises in Section 18-19 of the Bill attempting to prevent BPD’s use of facial recognition technology at only certain types of public gatherings but not all of them as it is underinclusive in violation of the Equal Protection Clause. *See, e.g., Hargrove v. Bd. of Trustees of Maryland Ret. Sys.*, 310 Md. 406, 420 (1987) (“classification was underinclusive in that it omitted some persons who should have been subjected to the regulation in order to attain the stated legislative purpose.”). The best way to achieve the desired outcome is to change the language in this section to prohibit the use of Facial Recognition in public entirely. An amendment to rectify the issue is attached to this report. If this total public ban is too broad to achieve desired police goals, it is worth considering not specifying a separate set of rules for law enforcement. *See, e.g., Orr v. Orr*, 440 U.S. 268, 272 (1979) (“In every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution’s commands either by extending benefits to the previously disfavored class or by denying benefits to both parties.”)

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 of 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. Nor is there any need to include Sections 18-7 through 18-15 on data distribution because Maryland state law already covers this concept and prevents local governments from enacting any conflicting provisions. *See, e.g., 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). Thus, most of Part 2 of the bill is preempted by existing state laws. Amendments to conform the bill to these state laws are attached to this report.

State and federal law, and the 4<sup>th</sup> Amendment to the United States Constitution, can allow for warrantless searches or clandestine information gathering that may not accommodate letting a

particular individual know if they were being surveilled. *See, e.g., Carlson v. Dep't of Just.*, No. 10 CIV. 5149 PAE KNF, 2012 WL 150574, at \*2 (S.D.N.Y. Jan. 18, 2012), report and recommendation adopted, No. 10 CIV. 5149 PAE KNF, 2012 WL 928124 (S.D.N.Y. Mar. 19, 2012) (unreported) (federal databases of warrantless surveillance information gathered pursuant to court order or other methods). Thus, amendments to Sections 18-21(a) and 18-22 are required and drafts are attached to this bill report.

Relatedly, the requirement that delayed notice to an individual requires a court order (Sections 18-21(b) through (e)) and that a person can seek injunctive relief against the government in Court (Section 18-24(a)) violate Section (48) of Article II of the City Charter providing the only two mechanisms allowed 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). A similar issue exists with the relief provided in Section 18-25(c). The requisite amendments are attached to this report.

Next, the language in Sections 18-23 concerning the required retention of certain information should clarify that the information retained would not automatically be required to be admitted into evidence but is rather available for consideration under state and federal rules of evidence. 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"). The requisite amendment is attached to this report.

Sections 18-25(a) and (b) on Whistleblower protections are 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.

Subject to the requisite 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 23-0379**  
(1<sup>st</sup> Reader Copy)

Proposed by: Law Dep't

**Amendment No. 1: Remove conflict with the State Public Information Act**

On page 2, delete lines 15-20; on page 4, delete lines 23-33; on page 5, delete lines 1-33; on page 6, delete lines 1 -32; on page 7, delete lines 1-6; on page 8, delete lines 1 – 10; on page 9, delete lines 8-9; on page 10 in line 16, insert “THE FOLLOWING IF ITS PUBLICATION DOES NOT VIOLATE STATE OR FEDERAL LAW” before the colon; and on page 9, in the start of line 4, insert “IF APPLICABLE”; and in that same line delete everything after the first comma; and on the same page delete all of line 5 before the semicolon.

**Amendment No. 2: Qualify “property” in Section 18-1**

On page 2, in lines 3 and 7, insert “INTANGIBLE” before “PROPERTY”.

**Amendment No. 3: Qualify “protected health information” in Section 18-1**

On page 2, in line 14, insert “AS DEFINED IN THE MARYLAND CONFIDENTIALITY OF MEDICAL RECORDS ACT CONTAINED IN SUBTITLE 3 OF TITLE 4 OF THE HEALTH-GENERAL ARTICLE OF THE MARYLAND CODE” before the period.

**Amendment No. 4: Qualify “Facial Recognition Technology”**

On page 3, in line 14 after “identifier” and on that same page in line 15 after “identification” insert “TO AN INDIVIDUAL’S STILL OR VIDEO IMAGES”.

**Amendment No. 5: Remove Sales Ban**

On page 3, delete lines 19 through 27.

**Amendment No. 6: Remove private entities from Part 2**

On page 4, in line 1, delete “*AND PRIVATE ENTITIES*”; and on that same page in lines 4 and 17 delete “PERSON” and substitute “CITY ENTITY.”

**Amendment No. 7: Remedy under-inclusivity of Police Department Ban on Surveillance Technology**

On page 8 in line 11, delete “AT, PROTESTS, RALLIES, ETC.” and substitute “IN PUBLIC”; and on that same page, delete lines 13 through 16.

**Amendment No. 8: Clarify that BPD follow existing state and federal technology laws**

On page 7, in line 13, add “COMPLY WITH EXISTING STATE AND FEDERAL LAWS, AND” before the colon.

**Amendment No. 9: Conform to existing state record retention laws**

On page 4, in lines 4 and 17, delete “POSSESSION” and substitute “CUSTODY” and in line 4 delete “PERMANENTLY” and substitute “INCLUDE THAT INFORMATION IN ITS RECORD RETENTION SCHEDULES AS REQUIRED BY SUBTITLE 10 OF ARTICLE 1 OF THE CITY CODE AND MANDATED BY PART III OF SUBTITLE 6 OF TITLE 10 OF THE STATE GOVERNMENT ARTICLE OF THE MARYLAND CODE.”

**Amendment No. 10: Conform to existing state data security and privacy laws**

On page 4, delete lines 5-15; and on that same page, in line 16, delete “(C)” and substitute “B”; and on that same page delete lines 18 through 22 and substitute “COMPLY WITH THE DATA SECURITY REQUIREMENTS IN SUBTITLE 13 OF TITLE 10 OF THE STATE GOVERNMENT ARTICLE OF THE MARYLAND CODE.”

**Amendment No. 11: Conform to existing state and federal laws and the 4<sup>th</sup> Amendment**

On page 9, in line 15 before the period, insert “AS LONG AS SUCH NOTIFICATION DOES NOT VIOLATE STATE OR FEDERAL LAW OR THE UNITED STATES CONSTITUTION, INCLUDING ITS 4<sup>TH</sup> AMENDMENT”; and on page 10, in line 11, insert “if applicable” before the semicolon; and on that same page in lines 12 and 13, delete “PERFORMED BY THE FEDERAL BUREAU OF INVESTIGATION ON BEHALF OF” and substitute “REQUESTED THAT THE FBI PERFORM”.

**Amendment No. 12: Conform to Maryland Law on Declaratory Judgment and Prohibition on Local Creation of Private Causes of Action and Section (48) of Article II of the City Charter**

On page 9, delete lines 16 through 31; on page 10, delete lines 1 through 3; page 11, delete lines 13 through 16; and on page 12, delete lines 18 through 20.

**Amendment No. 13: Conform to Maryland and Federal Rules of Evidence**

On page 10, in line 23 delete “for future” and on that same page delete lines 24 and all of line 25 before the colon.