

Department of Legislative Services  
Maryland General Assembly  
2014 Session

FISCAL AND POLICY NOTE

House Bill 785  
Judiciary

(Delegate George, *et al.*)

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Drones - Unauthorized Surveillance

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This bill prohibits a law enforcement agency from using a “drone” to gather evidence or other information, unless the drone is being used to respond to an emergency. A “drone” is a powered aerial vehicle that does not carry a human operator, uses aerodynamic forces to provide vehicle lift, can fly autonomously or be piloted remotely, is expendable or recoverable, and can carry a lethal or nonlethal payload.

The bill also prohibits a person, State agency, or local governmental agency from using a drone to conduct surveillance or observation of any individual, property owned by an individual, a farm, or agricultural industry without the consent of the individual property owner, farm, or agricultural industry. The prohibition does not apply to (1) the use of model aircraft; (2) a law enforcement agency or fire, rescue, or emergency medical services responding to an emergency; or (3) an institution of higher education that is conducting educational research or training programs meeting specified criteria.

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Fiscal Summary

**State Effect:** Minimal increase in special fund expenditures for the State Insurance Trust Fund (SITF) for judgment awards in future cases against the State involving the bill’s cause of action. The bill’s requirements can be incorporated into any future drone policies.

**Local Effect:** Minimal increase in local expenditures for judgment awards in future cases against local governments involving the bill’s cause of action. The bill’s requirements can be incorporated into any future local law enforcement drone policies.

**Small Business Effect:** None.

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## Analysis

**Bill Summary:** A party aggrieved by violations of either of the bill’s prohibitions may initiate a civil action against a person, agency, or law enforcement agency to prevent or remedy a violation. The bill’s provisions may not be construed to affect the application of the Maryland Tort Claims Act (MTCA) or the Local Government Tort Claims Act (LGTC). Evidence collected through the unauthorized use of a drone without a warrant is not admissible in a criminal prosecution. Evidence obtained through surveillance or observation in violation of the bill’s provisions is not admissible in a civil action or a State administrative hearing.

**Current Law:** There are no statutory provisions specifically dedicated to drones.

*Local Government Tort Claims Act:* LGTCA defines local government to include counties, municipal corporations, Baltimore City, and various agencies and authorities of local governments such as community colleges, county public libraries, special taxing districts, nonprofit community service corporations, sanitary districts, housing authorities, and commercial district management authorities.

LGTCA limits the liability of a local government to \$200,000 per individual claim and \$500,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). It further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment. Thus, LGTCA prevents local governments from asserting a common law claim of governmental immunity from liability for such acts of its employees.

LGTCA also specifies that an action for unliquidated damages may not be brought unless notice of the claim is given within 180 days after the injury. However, under case law, a plaintiff who does not strictly comply with the notice requirement may substantially comply with LGTCA’s notice requirement by providing notice “in fact” which, while not strictly compliant with the statutory notice requirements, provides requisite and timely notice of the facts and circumstances giving rise to the plaintiff’s claim and fulfills the purpose of the notice requirement – to apprise the local government of its potential liability at a time when it is still possible for the local government to conduct a proper investigation. *Faulk v. Ewing*, 371 Md. 284, at 298-99 (2002).

The notice requirement does not apply to actions against specified nonprofit corporations covered under LGTCA. Unless the defendant (the local government) in an LGTCA suit can affirmatively show that its defense has been prejudiced by lack of required notice, the court, upon motion and for good cause shown, may entertain the suit even though the notice was not given.

*Maryland Tort Claims Act:* In general, the State is immune from tort liability for the acts of its employees and cannot be sued in tort without its consent. Under MTCA, the State statutorily waives its own common law (sovereign) immunity on a limited basis. MTCA applies to tortious acts or omissions, including State constitutional torts, by “State personnel” performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially “...waives sovereign or governmental immunity and substitutes the liability of the State for the liability of the state employee committing the tort.” (*Lee v. Cline*, 384 Md. 245, 262 (2004)).

However, MTCA limits State liability to \$200,000 to a single claimant for injuries arising from a single incident. Attorney’s fees are included in the liability cap under MTCA. Under MTCA, attorneys may not charge or receive a fee that exceeds 20% of a settlement or 25% of a judgment. MTCA claims are typically paid out of SITF, which is administered by the State Treasurer. The liability for an MTCA tort claim may not exceed the insurance coverage granted to units of State government under SITF.

In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State’s color of authority or sovereign immunity and may be held personally liable.

MTCA also contains specific notice and procedural requirements. A claimant is prohibited from instituting an action under MTCA unless (1) the claimant submits a written claim to the State Treasurer or the Treasurer’s designee within one year after the injury to person or property that is the basis of the claim; (2) the State Treasurer/designee denies the claim finally; and (3) the action is filed within three years after the cause of action arises.

The purpose of the notice provision is “...to give the State early notice of claims against it. That early notice, in turn, affords the State the opportunity to investigate the claims while the facts are fresh and memories vivid, and, where appropriate, settle them at the earliest time.” *Haupt v. State*, 340 Md. 462, 470 (1995).

**Background:** Unmanned aerial vehicles (UAVs), or “drones,” are aircraft controlled remotely from another location without a human pilot on board. Once exclusively thought of in the context of overseas military operations, UAVs/drones are becoming an

increasingly popular tool with domestic law enforcement. Civilian uses of drones can range from backyard/playground recreational use to meteorology and professional photography from higher altitudes. In December 2013, the popular online retailer Amazon.com announced plans to implement “Amazon Prime Air,” a 30-minute delivery system using UAVs. The proliferation and rapid advancement of UAV technology has generated discussion regarding Fourth Amendment protections and privacy concerns.

The State does not currently use UAVs, but there is great potential for their use in law enforcement, including surveillance, search and rescue, accident investigations, hostage situations, and aerial mapping. In 2012, Congress passed the Federal Aviation Administration (FAA) Modernization and Reform Act, which directed the FAA to safely integrate UAVs into national airspace by September 2015.

To assist with integration, the FAA designated six UAV test sites in 2013. The sites are located in Alaska, Nevada, New York, North Dakota, Texas, and Virginia. The University System of Maryland (USM) was 1 of 25 applicants from 24 states to submit a proposal to become one of the FAA test sites. Though USM was not selected, USM, Virginia Polytechnic and State University, and Rutgers University did enter into a memorandum of understanding to collaborate on UAV research prior to the FAA’s decision. The Patuxent Partnership, a nonprofit in Southern Maryland, received \$500,000 in fiscal 2013 to establish a test site proposal. Because of the tri-state collaboration agreement, personnel and facilities in Maryland and New Jersey will assist Virginia in its UAV research; however, the extent of this assistance is unknown at this time.

Under current law, UAVs are banned for commercial use until the FAA issues regulations in 2015. However, there are two ways to obtain FAA approval to operate a UAV: (1) obtain an experimental airworthiness certificate to conduct private sector research and development, training, and flight demonstrations; or (2) obtain a Certificate of Waiver or Authorization (COA). A COA allows public entities to fly UAVs in civil airspace, including law enforcement, border patrol, search and rescue, and other governmental operational missions. There were 545 active COAs as of December 4, 2013.

According to the National Conference of State Legislatures, 13 states enacted 16 new laws and 11 states adopted 16 resolutions pertaining to drones in 2013.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Charles, Frederick, and Montgomery counties; cities of Frederick and Havre de Grace; Maryland Department of Agriculture; Department of Natural Resources; Department of General Services; Comptroller's Office; Judiciary (Administrative Office of the Courts); Department of State Police; Maryland Department of Transportation; University System of Maryland; Federal Aviation Administration; National Conference of State Legislatures; CNN.com; *The Baltimore Sun*; Department of Legislative Services

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