

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE
 Revised

House Bill 866 (Delegate McComas, *et al.*)
 Judiciary

**Wiretapping and Electronic Surveillance - Law Enforcement and Public
 Transportation - One-Party Consent for Interception of Oral Communications**

This bill establishes the circumstances under which it is lawful for a law enforcement officer to intercept an oral communication with a “body-worn camera” (BWC) and the lawful circumstances under which an operator of a public transit service may make an audio recording of an oral communication in or on the transit service.

Fiscal Summary

State Effect: Transportation Trust Fund (TTF) expenditures increase by approximately \$7.5 million in FY 2016 only to retrofit recording systems on Maryland Transit Administration (MTA) buses to meet the bill’s requirements and post and update signs on MTA fleet buses. Transit vehicles procured in future years can be purchased with systems that meet the bill’s requirements at no additional cost; thus, expenditures are not affected in future years. Any impact on law enforcement agencies is assumed to minimal. Revenues are not affected.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Revenues	\$0	\$0	\$0	\$0	\$0
SF Expenditure	7,500,000	0	0	0	0
Net Effect	(\$7,500,000)	\$0	\$0	\$0	\$0

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Some jurisdictions with recording systems already in place for public transit systems may experience significant retrofitting costs. For example, Montgomery County reports anticipated costs of more than \$2.0 million, as discussed below. The bill may lend itself to greater operational efficiencies for local law enforcement units employing BWCs; the extent to which such efficiencies may lead to greater numbers of arrests or prosecutions cannot be reliably predicted.

Small Business Effect: Minimal.

Analysis

Bill Summary: Specifically, the bill makes it lawful for a law enforcement officer in the course of the officer's regular duty to intercept an oral communication with a BWC if:

- the officer is a party to the oral communication;
- the officer has made a reasonable effort under the circumstances to be identified as a law enforcement officer to the other parties to the oral communication before any interception;
- the officer has made a reasonable effort under the circumstances to inform all other parties to the communication of the interception at the beginning of the communication; and
- the oral interception is being made as part of a video tape or digital recording.

“Body-worn camera” means a device worn on the person of a law enforcement officer that is capable of recording video and intercepting oral communications.

The bill also makes it lawful for the Maryland Transportation Administration or other operator of a public transit service to make an audio recording of an oral communication in or on the transit service if (1) the recording device is under the exclusive control of the vehicle operator; (2) the recording device is activated by the operator only in the event of an incident involving public safety that requires documentation; and (3) notice is posted on the vehicle stating that:

- the vehicle is equipped with an audio recording device that may be activated by the operator in the event of an incident involving public safety that requires documentation; and
- by boarding the vehicle, a passenger consents to having the passenger's conversation recorded in the event that the operator deems it necessary to activate the audio recording device in accordance with these provisions.

Current Law/Background:

Wiretapping

Under the Maryland Wiretapping and Electronic Surveillance Act (Wiretap Act), it is unlawful to willfully intercept any wire, oral, or electronic communication. Under the Act,

“intercept” is defined, in part, as “the... acquisition of the contents of any... oral communication through the use of any... device.” Therefore, the Wiretap Act does not regulate a video recording that does not contain an audio component. The statute does authorize the interception of an oral communication if all participants have given prior consent (sometimes called “two-party consent”). Maryland is 1 of 12 two-party consent states, most of which spell out clearly that the consent is required only in circumstances where there is a “reasonable expectation of privacy.”

The Act does provide specified exceptions, including one for a law enforcement officer who intercepts an oral communication in the regular course of the officer’s duty, so long as the officer (1) initially lawfully detained a vehicle during a criminal investigation or for a traffic violation; (2) is a party to the oral communication; (3) has been identified as a law enforcement officer to the other parties to the communication prior to any interception; (4) informs all other parties to the communication of the interception at the beginning of the communication; and (5) makes the interception as part of a videotape recording.

Each interception in violation of the Wiretap Act may be prosecuted as a felony, punishable by up to five years imprisonment, and/or a \$10,000 fine. A person who is the victim of a violation of the Wiretap Act has a civil cause of action against the wiretapper for damages, attorney’s fees, and litigation costs.

Use of BWCs

According to the Department of State Police, as of January 16, 2015, the following local law enforcement agencies in the State have already purchased and/or deployed BWCs for field use:

- Berwyn Heights Police Department;
- Cambridge Police Department;
- Capital Heights Police Department;
- Cheverly Police Department;
- Cottage City Police Department;
- Denton Police Department;
- Federalsburg Police Department;
- Forest Heights Police Department (pilot program);
- Fruitland Police Department;
- Harford County Sheriff’s Office (field testing four cameras);
- Hurlock Police Department;
- Hyattsville Police Department;
- Laurel Police Department;

- Mount Rainier Police Department;
- Pokomoke City Police Department;
- Princess Anne Police Department;
- Rising Sun Police Department (one camera);
- Snow Hill Police Department;
- Upper Marlboro Police Department (pilot, testing);

Additional police agencies are considering the purchase and deployment of such equipment. For example, in December 2014, the Baltimore City Council voted to require body cameras for all city police officers. However, the mayor vetoed the bill and awaits recommendations from a mayoral task force that will address issues of cost and privacy. The Baltimore City Police Commissioner has publically advocated a limited pilot program.

The Laurel Police Department has had an on-body camera program for nearly four years. The police chief calls the cameras “a huge success” and says complaints about his officers have dropped and training has improved.

Public Transit Services

Under the Transportation Article, a “transit service” is the transportation of persons and their packages and baggage and of newspapers, express, and mail in regular route, special, or charter service by means of transit facilities between points within the metropolitan transit district. Transit service does not include taxicab service, vanpool operation, or railroad service. A “transit vehicle” is a mobile device used in rendering transit service.

MTA operates a comprehensive transit system throughout the Baltimore-Washington metropolitan area, including more than 50 local bus lines in Baltimore and other services such as the light rail, Metro subway, commuter buses, Maryland Area Regional Commuter (MARC) trains, and mobility/paratransit vehicles.

MTA has begun to install and activate audio surveillance equipment in its local bus vehicles, in part, to serve as an after-the-fact investigative tool in the event of a criminal incident or crash. MTA reports that all 750 of its fleet buses are equipped with video recording devices; however, only 487 buses have audio capability active. MTA has plans to procure approximately 50 new buses each year over the next several years.

MTA advises that its audio recording devices are built into the cameras located in the front and back of its buses. In buses where the recording device is activated, the system records both audio and visual data at all times. Previously recorded sections of data are recorded over unless the operator activates the “save” feature to prevent a section from being recorded over. Saved recordings are downloaded to the MTA database when the bus

completes its route for the day. MTA reports that because the audio recording circuitry is integrated with the video circuitry, the video and audio recorders cannot be turned on or off independent of one another. As such, MTA reports that it is not feasible to add an on/off switch specifically tailored to audio at this time. Thus, a completely new surveillance system needs to be purchased and installed to meet the bill's requirement that the operator have exclusive control of the device and activate it only in specified situations.

MTA's metro rail cars and light rail cars are equipped with cameras that record video to a unit in the vehicle. Approximately 82% of the metro rail car fleet is audio capable; however, the proper circuitry is not installed to allow audio recording. At this time, MTA does not have any plans to add audio surveillance equipment to metro rail cars, but MTA reports this feature could be added to existing equipment in approximately six months at a relatively low cost. MTA advises that when new metro rail cars are ordered, they will be equipped with both audio and video camera equipment. All light rail cars do not currently have audio capability. However, for a "mid-life overhaul" beginning in March 2016, MTA plans to add audio surveillance equipment into rail cars that will enable the operator to have exclusive control of the equipment whereby the device can only be activated in the same specified situations described in the bill.

At this time, MTA does not have, nor does it plan to install, audio surveillance equipment in MARC trains or commuter buses. However, MTA is exploring the feasibility of installing video and audio on mobility vehicles in future years.

State Fiscal Effect: The bill's exceptions to wiretapping and electronic surveillance provisions applicable to the use of BWCs are not expected to have a significant operational or fiscal impact on the courts. It is assumed that the bill may lend itself to greater operational efficiencies for State law enforcement units employing BWC digital recording devices. The extent to which such efficiencies may lead to greater numbers of arrests or prosecutions cannot be reliably predicted.

Because MTA's audio surveillance system is not configured to allow operators to readily activate and deactivate the system, this analysis assumes that MTA must uninstall existing systems in transit vehicles equipped with an audio surveillance system and replace them with new systems that are capable of meeting the bill's requirements.

MTA's TTF expenditures increase by approximately \$7.5 million in fiscal 2016 to replace existing audio systems with systems that allow operators to selectively activate and deactivate audio recordings. This estimate assumes:

- existing audio recording systems on 750 buses require retrofitting with new stems to meet the bill's requirements;

- a per unit retrofitting cost of \$10,000, based on costs incurred by the Washington Metropolitan Area Transit Authority to install the same system in its bus fleet; and
- minimal costs to post new signs and update existing signs to include the information required by the bill.

The Maryland Department of Transportation (MDOT) advises that buses procured in future years can be purchased already equipped with systems that meet the bill's requirements at no additional cost. Thus, expenditures are not affected in future years.

As noted above, MDOT also advises that approximately 82% of its rail car fleet has an audio capability built into its camera system, but that the audio system is not functional. To activate these audio systems, MDOT needs to purchase additional appropriate motherboards and install them into the camera system on each car. Because the bill applies to transit vehicles that are "equipped" with audio recording devices but does not define the term "equipped," and because the systems in these rail cars are not currently functional, this analysis assumes that these systems are not subject to the bill's requirements.

This estimate assumes the Judiciary can absorb any costs associated with additional cases that may be filed as a result of audio recording evidence.

Local Fiscal Effect: The Montgomery County Department of Transportation (MCDOT) advises that the county's Ride On buses come equipped with cameras and audio systems, which is helpful in securing the safety of both MCDOT employees and the riding public and in resolving disputes between bus operators and passengers.

MCDOT audio records only the area near the front of the bus near the bus operator and does not pick-up any conversations outside this area. All buses with cameras and audio capabilities are outfitted with signs alerting passengers that video and audio is being used. Camera images and audio recordings are recorded over at 30-day intervals. Nearly all of the Ride On fleet of 342 buses are equipped with this recording technology, and Montgomery County advises that it has spent \$2.1 million to date for installation of these systems. The video and audio of an incident are captured on a hard drive inside the bus which is then secured by a supervisor on the street and transported to Central Communications where it is reviewed by another supervisor and safety officials.

Montgomery County advises that the bill requires the installation of a new video/audio system that costs more than \$2.0 million. Montgomery County also notes that the bill's requirement that a public transit service's recording system be under the exclusive control of the vehicle operator, who must decide when a public safety incident requiring documentation is occurring, likely poses some operational difficulties for vehicle operators.

The Department of Legislative Services assumes that any local public transit service with current recording capacities that do not meet the bill's requirements may be similarly affected under the bill. It is assumed that transit vehicles procured in future years are procured to already meet the bill's requirements. The actual impact on each jurisdiction varies.

Additional Comments: Because the bill does not define a "public safety incident" that requires documentation, the circumstances under which an operator should activate audio surveillance equipment are not clear.

In addition, the bill refers to the Maryland Transportation Administration; it is assumed that the bill intends to apply to MTA.

Additional Information

Prior Introductions: None. However, SB 239 of 2014 and HB 938 of 2013 contained some similar features to this bill with respect to public transit systems operated by MTA. SB 239 of 2014 received a hearing in the Senate Judicial Proceedings Committee, but no further action was taken. HB 938 of 2013 received a hearing in the House Environmental Matters Committee but was subsequently withdrawn.

Cross File: None.

Information Source(s): Anne Arundel, Charles, Frederick County, and Montgomery counties; cities of Frederick and Havre de Grace; Department of Natural Resources; Department of General Services; Maryland Department of Transportation; Department of Legislative Services

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