

Sydnor_Testimony SB 47 - JPR .pdf

Uploaded by: Charles E. Sydnor III

Position: FAV

CHARLES E. SYDNOR III, ESQ.
Legislative District 44
Baltimore County



James Senate Office Building
11 Bladen Street, Room 216
Annapolis, Maryland 21401
410-841-3612 · 301-858-3612
800-492-7122 Ext. 3612
Charles.Sydnor@senate.state.md.us

Judicial Proceedings Committee
Executive Nominations Committee

Joint Committees

Administrative, Executive, and
Legislative Review

Children, Youth, and Families

Senate Chair
Legislative Ethics

Chair
Baltimore County Senate Delegation

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

**Testimony for SB 47
Evidence – Wiretapping and Electronic Surveillance –
Fair Housing Testing
Before the Judicial Proceedings Committee
January 31, 2023**

Good afternoon Chair Smith, members of the Judicial Proceedings Committee,

The [Fair Housing Act](#)¹ (the “FHA”) requires the United States Department of Housing and Urban Development (“HUD”) and its funding recipients, like states and local governments, to affirmatively further FHA policies and purposes. The duty to affirmatively further fair housing requires HUD funding recipients to “take meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity” because of someone’s race, color, national origin, religion, sex (including gender identity and sexual orientation), familial status, and disability.²

In fact, in 2021 the White House issued a [Memorandum to the Secretary of Housing and Urban Development](#), which declared that the affirmatively furthering fair housing provision in the FHA “...is not only a mandate to refrain from discrimination but a mandate to take actions that undo historic patterns of segregation and other types of discrimination and that afford access to long-denied opportunities.”³

One method used by local governments in Maryland to determine whether housing discrimination has occurred is through a process called “paired-testing” or “testing” for short. In a paired-testing, two similarly aged men or women (“testers”) are presented to a provider of real estate services as prospective renters, buyers, or borrowers with “equivalent social and economic characteristics

¹ Title VIII of the Civil Rights Act of 1968.

² <https://www.hud.gov/AFFH>

³ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>

[but] who differ only in terms of the characteristic being tested for discrimination, such as race, disability status, or marital status”.⁴ The testers are charged with gathering information from a targeted provider. In the case of the FHA, the transaction will usually focus on a provider of real estate services. The evidence the testers collect will help analysts determine whether the provider is complying with the FHA or other federal civil rights laws or engaged in unlawful housing discrimination and whether the disparate treatment can provide evidence of housing discrimination.⁵ While the Department of Justice has been able to show that testing can be a very valuable tool to investigate market practices⁶ and uncover unlawful discrimination; here in Maryland our wiretap law⁷ makes it difficult to obtain the evidence the jurors and courts need to enforce our civil rights laws. Senate Bill 47 addresses that limitation.

Senate Bill 47 adds one more circumstance in which the interception of wire, oral, and electronic communication should be available in the interest of justice. While Maryland has very stringent housing discrimination laws in place, catching discrimination in action has its barriers. Similar to the exception that we passed in 2015 allowing law enforcement officers to wear body worn cameras and capture audio, SB 47 is intended to provide a similar exception for testers.

Under current law it is illegal for a person to willfully intercept,⁸ disclose,⁹ or use¹⁰ the contents of any wire, oral or electronic in violation of §10-402. However, §10-402 has multiple exceptions to the general rule. This class of people include “switchboard operator, certain officers, employees, or agents of wire or electronic communication service providers,¹¹ officers, employees, and agents, landlords, custodians of wire or electronic communication service providers,¹² officers, employees, or agents of governmental emergency communications center,¹³ and investigative and law enforcement officers under certain circumstances prescribed in the code.¹⁴

⁴ “Much of the research into housing discrimination... relies on paired testing.... Depending on which part of the housing transaction process is being tested, the matched candidates may only request appointments from housing providers, or they may visit in person.” [Paired Testing and the Housing | HUD USER](#)

⁵ “Since 1992, the [United States] Department of Justice has resolved 109 pattern and practice testing cases with evidence directly generated from the Fair Housing Testing Program, leading to the recovery of more than \$14.3 million, including over \$2.3 million in civil penalties and over \$12 million in other damages. The vast majority of testing cases filed to date are based on testing evidence that involved allegations of agents misrepresenting the availability of rental units or offering different terms and conditions based on race, and/or national origin, and/or familial status.” <https://www.justice.gov/crt/fair-housing-testing-program-1>.

⁶ <https://www.justice.gov/crt/case/united-states-v-guaranteed-auto-sales-d-md>.

⁷ §10-402.

⁸ §10-402(a)(1).

⁹ §10-402(a)(2).

¹⁰ §10-402(a)(3).

¹¹ §10-402(c)(1)(i).

¹² §10-402(c)(1)(ii)(1).

¹³ §10-402(c)(5).

¹⁴ Exceptions for law enforcement officers are noted throughout §10-402(c).

Senate Bill 47 simply expands the class of people engaged in activities already under §10-402(c) by including, under specified circumstances, fair housing testers.¹⁵ This exception can only be used when "the interception [is] made for the purpose of obtaining evidence of a fair housing violation under federal, state or local law."

There is a tremendous hurdle in pursuing discrimination cases, making it very difficult to enforce. However, SB 47 will help provide those attempting to eradicate discrimination by providing us with the oral documentation needed for cases of discrimination.¹⁶ This issue is one that any Marylander can encounter. As such, I ask for you to vote favorably for SB 47.

¹⁵ The exception, as it now stands, would be for fair housing testers that are working for a fair housing testing program operated by the federal, state, or local governments or a nonprofit civil rights organization.

¹⁶ In a New York Times article from August 2022, a Black Maryland couple found an appraiser valued their home differently, and indeed more, if it had a white owner. This issue was not confined to them, or even to a small number of citizens, as The New York Times reported that since 2020 dozens of lawsuits have been filed. However, without being able to capture conversations uncovering potential discrimination, many others may not have their situations remedied. In some instances, it is a proverbial, "He said, She said," without the ability to have recorded evidence of the observation. "Home Appraised with a Black Owner: \$472,000. With a White Owner: \$750,000". The New York Times, August 18, 2022. See also <https://projects.newsday.com/long-island/real-estate-agents-investigation/#nd-promo>.

SB0047-JPR_MACo_SUP.pdf

Uploaded by: Dominic Butchko

Position: FAV



Senate Bill 47

Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing

MACo Position: **SUPPORT**

To: Judicial Proceedings Committee

Date: January 31, 2023

From: Dominic J. Butchko

The Maryland Association of Counties (MACo) **SUPPORTS** SB 47. This bill would provide counties with an additional tool in the enforcement of federal, state, and local fair housing standards.

In 1968, the federal government passed the Fair Housing Act with the intent of protecting Americans from discrimination when it comes to renting or buying a home, getting a mortgage, seeking housing assistance, or engaging in other housing-related activities. The act made it illegal to discriminate against people based on race, color, national origin, religion, sex (including gender identity and sexual orientation), familial status, or disability. The State of Maryland's own fair housing laws went even further, creating additional protections for marital status, gender identity, and source of income. With today's housing scarcity, it is challenging enough for many to find a home, let alone contend with the possible burdens of discrimination.

SB 47 would provide an important tool for jurisdictions seeking to take direct action in the detection and prevention of discrimination in their local housing markets. The bill strikes a balance, limiting the scope of who can legally record calls when testing for compliance with federal, state, and local fair housing policies.

SB 47 gives local jurisdictions an additional tool to ensure compliance with fair housing policies and combat the current housing crisis. For this reason, **MACo SUPPORTS SB 47** and urges a **FAVORABLE** report.

SB0047 MCCR Position (1).pdf

Uploaded by: Gerald Ford

Position: FAV

State of Maryland Commission on Civil Rights

Respect....Integrity...Effective Communication

"Our vision is to have a State that is free from any trace of unlawful discrimination."



Officers

Alvin O. Gillard, Executive Director
Cleveland L. Horton II, Deputy Director
Martine Chery, Assistant Director
Glendora C. Hughes, General Counsel
Kara N. Hunt, Ph.D., Director of Education & Outreach

Governor
Wes Moore
Lt. Governor
Aruna Miller
Commission Chairperson
Stephanie Suerth, MPA, CCEP
Commission Vice Chairperson
Janssen E. Evelyn, Esq.
Commissioners
Diane E. Bernier
Eileen M. Levitt, SPHR, SHRM-SCP
Rabbi Binyamin Marwick
Magdalena S. Navarro, MSc
Jeff Rosen
Gina McKnight-Smith, PharmD, MBA
Isabella Firth Shycoff

January 27, 2023

Senate Bill 47 – Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing Position: Support

Dear Chairperson Smith, Vice Chair Waldsteicher and Members of the Senate Judicial Proceedings Committee:

The Maryland Commission on Civil Rights (“MCCR”; “The Commission”) is the State agency responsible for the enforcement of laws prohibiting discrimination in employment, housing, public accommodations, health services, and state contracts based on race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, gender identity, genetic information, physical and mental disability, and source of income.

Senate Bill 47 amends Section 10-402(c)(12) of the Courts and Judicial Proceedings Article to allow persons working as fair housing testers to intercept communications for the purpose of obtaining evidence of a fair housing violation. This bill applies only to fair housing testers from the government or a nonprofit civil rights organization who are also a party to the communication.

Fair housing testers are trained individuals who discreetly pose as prospective renters or buyers to gather information on fair housing violations by housing providers. By visiting the property, making observations, and speaking with housing agents, testers can obtain evidence on whether the provider is in compliance with non-discrimination laws, or whether they deny housing to people based on protected characteristics, such as race or disability.

Maryland is one of only eleven states that requires all parties’ consent to record communications. The current requirement in Maryland prohibits testers from recording their own interactions with housing providers, or forces them to get the consent of the potential violator, thus defeating the purpose of the test. SB 47 would provide a limited one-party recording exception to Maryland’s general all-party consent rule. This carve out would align with the majority of other states that permit interception when the recorder is a party to the conversation.

One-party recording laws have proven effective in discovering fair housing violations. A 2019 study in New York—a one-party consent state—recruited housing testers to record their meetings with real estate agents and found that the testers of color were subjected to differential treatment more than white testers. Black testers experienced this discrimination 49% of the time, Latino testers 39% of the time, and Asian testers 19% of the time. In addition to revealing violations, documenting testers’ interactions through recordings also reduces issues with credibility, truthfulness, and accuracy. Such recorded evidence helps promote fairer outcomes both for prospective tenants and for providers.

Additionally, allowing testers to gather recordings of conversations is vital to pursuing difficult cases that otherwise may fail due to a lack of corroborating evidence. For example, landlords may tell prospective tenants with Section 8 vouchers that their building is not HUD-approved for Section 8 housing, while in reality, HUD does not provide blanket Section 8 approval to entire properties. Instead, Section 8 eligibility is individual to a particular person, who may generally seek housing at any private housing property. But evidence of these misrepresentations is hard to come by. SB 47’s exception is therefore needed to substantiate investigations and put an end to fair housing rights violations.

For these reasons, the Maryland Commission on Civil Rights urges a favorable vote on SB 47. Thank you for your time and consideration of the information contained in this letter. MCCR looks forward to the continued opportunity to work with you to improve and promote fair housing and civil rights in Maryland.

2023-01-31 SB 47 (Support).pdf

Uploaded by: Hannibal Kemerer

Position: FAV



STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

FACSIMILE NO.
443-681-1060

WRITER'S DIRECT DIAL NO.
410-576-7070

January 27, 2023

To: The Honorable William C. Smith, Jr.
Chair, Judicial Proceedings Committee

From: Hannibal G. Williams II Kemerer
Office of the Attorney General

Re: SB 47 – Evidence – Wiretapping and Electronic Surveillance – Fair Housing
Testing – **Support**

The Office of the Attorney General urges the Judicial Proceedings Committee to favorably report SB 47.

Senate Bill 47 makes it lawful for fair housing testers to record communications in order to obtain evidence of violations of federal, state, and local fair housing laws. The bill covers testers who are working for a fair housing program operated by the federal government, the State, a local government, or a non-profit civil rights organization. The testers must also be a party to the recorded communication.

This bill would provide a valuable evidentiary tool for proving discriminatory housing practices. Discrimination in housing is usually subtle, rather than overt. This can make it difficult to prove. For example, housing providers often give prospective tenants different information regarding unit prices, availability, deposits and fees, application processes, and other variables that affect would-be tenants' interest and access. Testing allows fair housing programs to identify when different information is provided to testers of different protected classes.

Making it lawful for testers to record their communications with housing providers would significantly strengthen the evidence of this discrimination. It would allow fair housing programs to put forward complete recordings, rather than relying on testers' written reports or oral testimony. Recordings provide direct evidence that is difficult to refute or misrepresent; they show the discriminatory actions directly, rather than through the voice of another.

The Office of the Attorney General is seeking, through separate legislation, authority to enforce state and federal civil rights laws, including those prohibiting discrimination in housing. Senate Bill 47 would ensure that the Office of the Attorney General has the same tools at its disposal as the U.S. Department of Justice, which regularly uses testers' recorded communications in its fair housing litigation. The DOJ exercises this authority nationwide, including in Maryland, where it is not bound by the Wiretap Act because of federal preemption and the Supremacy Clause of the Constitution. This bill would allow the Attorney General to employ those same critical investigative tools that the federal government already has at its disposal.

The Office of Attorney General urges a favorable report on SB 47.

cc: Committee Members

SB 47 ACDS Support - Fair Housing Compliance Test

Uploaded by: Lisa Sarro

Position: FAV



SB 47 - Evidence – Wiretapping & Electronic Surveillance – Fair Housing Testing

Hearing before the Senate Judicial Proceedings Committee on January 31, 2023

Position: SUPPORT (FAV)

SUPPORT: Senate Bill 47 is a narrowly drafted bill that will substantially enhance efforts to prevent unlawful housing discrimination.

ACDS serves as Anne Arundel County's nonprofit housing and community development agency, helping Anne Arundel County residents and communities thrive through the provision of safe and affordable housing opportunities, programs to prevent and end homelessness, and community development initiatives. In fulfilling this role, ACDS advises the County on housing and community development legislation and policy initiatives related to affordable, safe and habitable housing for County residents. ACDS also administers grants to nonprofit partners and directly develops and implements programming in furtherance of the County's priorities and goals.

Discrimination in housing results in reduced access to opportunities and leads to higher levels of residential segregation. It also perpetuates the racial wealth gap, the homeownership gap, and the gap in intergenerational income mobility. Federal, state and local laws unequivocally prohibit discrimination in housing, but Maryland's general prohibition on recording conversations without the consent of all parties is a significant barrier to effective enforcement of those laws. Although Maryland enacted the [HOME Act](#)¹ to supplement federal laws and many local jurisdictions, including [Anne Arundel County](#),² have enacted fair housing laws designed to prevent housing discrimination, the [National Fair Housing Alliance 2022 Trends Report](#)³ reports that *housing discrimination complaints increased in 2021 to the highest number in at least 25 years*. Similarly, annual reports of the [Maryland Commission on Civil Rights](#)⁴ reveal a *significant spike in fair housing complaints in Maryland in each of the years since the start of the COVID-19 pandemic*.

Fair housing testing is the most effective tool for uncovering evidence of housing discrimination. Testing involves two individuals who separately seek the same housing service from the same housing provider within a short period of time. They may be looking for a rental property, for example, or a home to purchase. Fair housing testers present with similar backgrounds in every respect, *except* one of them is a member of a class that is protected by anti-discrimination laws and the other is not. In most states, fair housing testers are able to record their interactions with the housing providers during the course of

¹ <https://mgaleg.maryland.gov/mgaweb/site/Laws/StatuteText?article=gsg§ion=20-705>

² https://codelibrary.amlegal.com/codes/annearundel/latest/annearundelco_md/0-0-0-99500#JD_1-9-103

³ <https://nationalfairhousing.org/wp-content/uploads/2022/11/2022-Fair-Housing-Trends-Report.pdf>

⁴ <https://mccr.maryland.gov/Pages/Publications.aspx>

the in person and telephone tests for analysis and use after the exchanges. A comparison of differences in the way the two housing testers are treated is used to determine whether discrimination has taken place.

Fair housing testing is much less useful in Maryland than in most other states as a result of Maryland's two-party consent requirement for recording conversations.

This bill would allow fair housing testers working with a fair housing program to record the conversations that take place during the course of fair housing tests without first getting the consent of the party who is the subject of the test. Fair housing testers in most states are able to record their conversations with housing providers and use those recordings as evidence of the interaction for purposes of future education of the test subject and their employer and, if necessary, as proof in contested compliance proceedings. However, in Maryland, evidence of housing discrimination uncovered during testing is limited to notes taken by testers and the testers' subsequent recounting of what happened. Even with good note taking, the lack of a recording results a "he said-she said" situation, which makes using fair housing testing much less useful than it otherwise would be. While contemporaneously taken notes may be used to support a claim of discrimination, proof by oral or video recording is much stronger and far more effective for proving statements and conduct.

If fully utilized (including recording), fair housing testing has the capacity addresses both the difficulty in identifying and the difficulty in proving discrimination. Relying on reporting by those against whom a housing provider has discriminated is ineffective for actually rooting out housing discrimination in our communities and tackling the problem. *Individuals who have been discriminated against often do not know the discrimination has taken place* - one homebuyer or renter would have no way of knowing if they were shown different properties or given conflicting information compared to another person similarly situated in every respect except for the person's membership or non-membership in a protected class. Even when an individual does believe they have been discriminated against, many do not complain for a multitude of reasons, including fear of retaliation and a perception that complaining may be futile. *When an individual does submit a complaint, proving the validity of the complaint is difficult to do without objective evidence* that they were treated differently from others, which is rarely accessible to the person complaining since they are not privy to the housing provider's interactions with others.

With reports of housing discrimination rising faster than ever before, every tool available to ensure enforcement of fair housing laws needs to be put to use. By allowing the recording of fair housing tests without requiring the consent of the subject of the test, this bill would allow fair housing testing to be used to its full potential.

For the reasons noted above, ACDS urges the Committee to issue a FAVORABLE report on SB 47.

SB 47 Public Justice Ctr FAV.pdf

Uploaded by: Matt Hill

Position: FAV



C. Matthew Hill
Attorney
Public Justice Center
201 North Charles Street, Suite 1200
Baltimore, Maryland 21201
410-625-9409, ext. 229
hillm@publicjustice.org

SB47: Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing

Hearing before the Senate Judicial Proceedings Committee on January 31, 2023

Position: SUPPORT (FAV)

Public Justice Center (PJC) is a nonprofit public interest law firm that assists over 800 renters each year. We stand with tenants to protect and expand their rights to safe, habitable, affordable, and non-discriminatory housing. PJC seeks a favorable report on SB 47.

SB47 would strengthen the ability of fair housing enforcement organizations to enforce anti-discrimination laws in Maryland by allowing recordings of fair housing tests. Fair housing “tests” such as those conducted by Economic Action Maryland involve sending two or more trained testers out to rent an apartment, inquire about a mortgage, or purchase a home. Test Coordinators assign testers an undercover identity that ensures the testers are alike in every meaningful way barring one characteristic – one tester will be a member of a protected class while the other tester is not. Testers are instructed to contact a housing agent about renting an apartment, qualifying for a mortgage, or purchasing a home. When there are differences in the way the testers are treated, that may be evidence of housing discrimination. A fair housing organization is then able to use the tests as evidence of discrimination in fair housing complaints filed with HUD or in a judicial action.

More robust fair housing testing supported by SB 47 is particularly critical to enforce the often-violated HOME Act. Passed in 2020, the HOME Act prohibits certain landlords from discriminating against tenants based on their source of income. At Public Justice Center, we have fielded many calls from tenants who say that a prospective landlord began treating them differently once the prospective landlord found out that the tenant used a Housing Choice Voucher to help pay the rent. However, without the kind of recorded testing facilitated by SB 47, it is difficult to find sufficient evidence to move forward with a case against such a landlord.

HUD’s recommended fair housing testing methodology involves equipping testers with recording devices so their interactions with housing agents are captured faithfully. Recording testers’ interactions with housing providers creates incontrovertible evidence. Unfortunately in

Maryland, we are constrained by Maryland's all-party consent requirement. Instead of using recordings to document tests, our testers must rely on their memory of the event to write a detailed report soon after the interaction. This curtails the types of tests that enforcement organizations are able to conduct to enforce fair housing laws. Furthermore, written reports are unable to capture the tone of the interaction and may be easily undermined by defense counsel. Testing experts agree: "Recordings are a critical tool in our enforcement arsenal to eliminate this scourge and ensure that all people have the right to obtain housing on a non-discriminatory basis." Maryland's all-party consent law unfairly shields housing providers from having their commercial speech recorded, even when that speech includes discriminatory misrepresentations and statements designed to discourage, steer, or deny housing opportunities to people based on race, national origin, and other protected characteristics. SB 47 would allow government and nonprofit civil rights agencies to record interactions between trained fair housing testers and housing providers, strengthening fair housing enforcement capabilities statewide.

Public Justice Center urges the Committee's report of Favorable on SB 47.

Press 'Record' To Catch Fair Housing Violators—If

Uploaded by: Robyn Dorsey

Position: FAV

Press 'Record' To Catch Fair Housing Violators—If You Can

Fair housing testers often go undercover to expose discriminatory housing practices, but laws prohibiting recording conversations hamper investigations

By **Fred Freiberg** - September 6, 2022



Photo by dixmedia.hu via Unsplash

In Spike Lee's 2018 film, *BlackkKlansman*, there is a scene where a white racist cop, Officer Landers, meets up with African American Officer Ron Stallworth's character and his female friend, Patrice Dumas. The bigoted Landers brags that he harassed and sexually assaulted Ms. Dumas and that he can do anything he wants to Black people without consequence.

"Get it?" he utters with a malicious smirk. Stallworth replies coolly, "I do get it," while opening his shirt to reveal that he is wired and has recorded the conversation. Landers' smile disappears as Officer Stallworth turns to fellow police officers who are sitting nearby and asks them, "Did you get it?" They reply that they did get it, and the bad cop is arrested on the spot.

The use of concealed recorders can be critical, not just in exposing racist cops, but also in documenting racially discriminatory housing practices through fair housing testing. In the past, courts have affirmed the necessity of **conducting testing** to enforce the Fair Housing Act. In 1965, Wisconsin enacted a law that prohibited housing discrimination but at the same time made it illegal to conduct testing. The law had the support of the state real estate industry, who knew that prohibiting testing would make it virtually impossible to enforce the law. By 1975, in response to a challenge by the U.S. Department of Justice in *U.S. v. Wisconsin*, a federal magistrate ruled that the anti-testing provision of the Wisconsin Open Housing Law "conflicts with the general scheme of the Fair Housing Act and therefore is invalid under the Supremacy Clause of Article VI of the United States Constitution." The court further stated that it was undisputed that **the prohibition on testing** "chills the exercise of the right to equal housing opportunity" and is "an obstacle to the accomplishment of the principal objective of Congress in passing the Fair Housing Act, that is, to provide fair housing throughout the United States.

U.S. v. Wisconsin recognized that testing is one of the most effective investigative tools in the enforcement of fair housing laws, but a new challenge is standing in the way. Currently, 11 states prohibit recording in-person conversations unless the consent of all parties to a conversation has been obtained. In these states, fair housing testers cannot record their

interactions with real estate agents, landlords, loan officers, and other housing providers. These so-called privacy laws are hampering fair housing enforcement and effectively shielding violators of fair housing laws from being held accountable for their discriminatory actions.

Hearing Is Believing

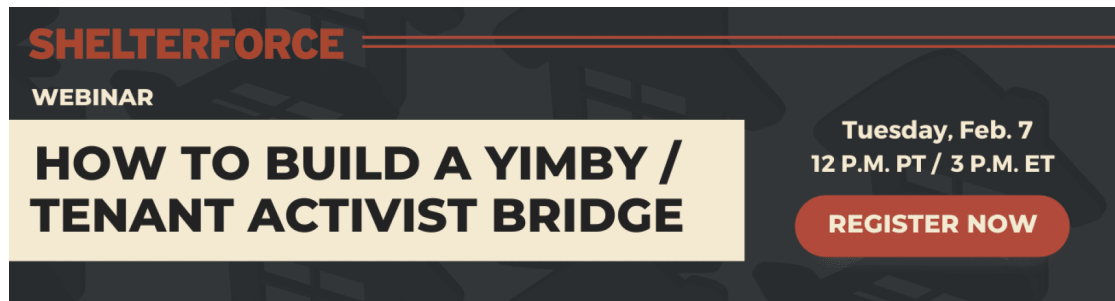
Throughout my career in fair housing, I have repeatedly observed the benefits of using recordings in both investigations and court cases. In 1979, the Metropolitan Milwaukee Fair Housing Council began equipping its testers with concealed microcassette tape recorders to document their test experiences. Since then, I have been involved in coordinating more than 12,000 tests in over 20 states and I have always utilized audio recorders in investigations that are aimed at enforcing fair housing laws. I have personally used recorders in more than 1,500 investigations where I was a tester, and quickly learned the value of recordings in providing incontrovertible evidence of illegal housing discrimination.

Over the past 46 years, I have been named as a witness in nearly 500 fair housing cases and I have provided sworn testimony in depositions and trials on roughly 70 occasions. I have witnessed firsthand how judges and juries have relied heavily on recordings to evaluate testing evidence and issued favorable decisions in fair housing cases. In 2010, I coordinated a testing investigation in the Astoria neighborhood of Queens, New York, which revealed that the on-site building superintendent falsely represented to African-American testers that no apartments were available, while showing available apartments to white testers. Four teams of African-American and white testers visited the same apartment building and all of the African-American testers received discriminatory treatment. On a couple of tests, the superintendent's wife had initial contact with some of the testers and informed African-American testers that she did not know where her husband was, but made an effort to locate her husband when white testers inquired.

The Fair Housing Justice Center (FHJC) and four African-American testers subsequently filed a federal fair housing lawsuit against the owner of the building, the superintendent, and the superintendent's wife. The defendants filed a motion for summary judgment asking the court to dismiss the case against the superintendent's wife arguing that she was not acting in any official capacity and did not work for the owner. In 2011, a federal judge carefully reviewed the test recordings to evaluate the substance and tenor of the interactions between testers of different races who visited the apartment building and met with the superintendent's spouse. The judge denied the motion to exclude the superintendent's wife from the case, characterizing her as a "gatekeeper" conveying negative and unhelpful responses to African-American testers who inquired about apartments while volunteering helpful information and assistance to the white testers. The judge concluded that "these discrepancies in treatment could lead a reasonable juror to conclude that Defendant . . . intentionally hindered and discouraged Black applicants from applying for available units." It is unlikely that without the test recordings and transcripts of these interactions between the testers and the superintendent's wife, the judge would have reached this decision. The FHJC was able to settle the case with all defendants one day prior to trial for \$341,000 along with extensive injunctive and equitable relief.

Holding people accountable for racially motivated and illegal conduct requires solid evidence. Recent successful prosecutions of the white police officer who murdered George Floyd and the white men who murdered Ahmaud Arbery provide further proof that recorded evidence can be highly probative.

I recognize that criminal cases require proof “beyond a reasonable doubt” and civil cases such as those involving fair housing only have to meet a lesser legal standard of “preponderance of the evidence” to find liability. But I have observed too many fair housing trials where judges and juries appear to struggle with the idea of holding a white defendant responsible for racially discriminatory conduct unless there is evidence that leaves virtually no doubt in their minds that illegal discrimination occurred. Recordings are often the key piece of evidence that persuades judges and juries that defendants should be held liable for their alleged discriminatory conduct.

A dark-themed banner for a Shelterforce webinar. On the left, the word "SHELTERFORCE" is in large, bold, orange letters, with "WEBINAR" in smaller white letters below it. In the center, a light yellow box contains the title "HOW TO BUILD A YIMBY / TENANT ACTIVIST BRIDGE" in bold black text. On the right, the date and time "Tuesday, Feb. 7 12 P.M. PT / 3 P.M. ET" are listed above a red button with the text "REGISTER NOW" in white.

SHELTERFORCE
WEBINAR

**HOW TO BUILD A YIMBY /
TENANT ACTIVIST BRIDGE**

Tuesday, Feb. 7
12 P.M. PT / 3 P.M. ET

REGISTER NOW

Recorded Fair Housing Tests Provide Powerful Evidence of Racial Discrimination

In November 2019, the Long Island-based newspaper *Newsday* published the results of one of the largest-ever journalistic investigations into **racial discrimination in a real estate sales market**. African-American, Latinx, and Asian American testers were matched with white testers and sent out by *Newsday* to inquire about homes for sale. Because it is legal in New York State to record phone calls and in-person contacts with only one person’s consent, all testers were equipped with concealed digital video and audio recorders. The results of this 3-year investigation were stunning. Nineteen percent of Asian/white tests, 39 percent of the Latinx/white tests, and 49 percent of the Black/white tests revealed evidence of racial steering or differential treatment based on race or national origin.

After the investigation concluded, the testers were invited by *Newsday* to listen and watch the recordings of their visits along with their counterparts. They saw with shock and dismay that their treatment in many cases was greatly disparate from that of the person with whom they were matched. What was particularly telling was that until the testers were allowed to view the audio/video recordings, only one African-American tester had even suspected she had been subjected to less favorable treatment than her white counterpart. Apart from the alarming rate of discrimination uncovered by the *Newsday* investigation, the other important finding concerned the nuanced nature of most racial discrimination in housing and the fact that it goes largely undetected by ordinary consumers.

***THE BURDEN OF ELIMINATING RACIAL DISCRIMINATION IN
THE HOUSING MARKET SHOULD NOT FALL SOLELY ON THE***

VICTIMS OF DISCRIMINATION.

Typically, most consumers are unaware when housing discrimination occurs and would have no reason to file a housing discrimination complaint. If complaints are not filed, no enforcement action is taken by government enforcement agencies. If the laws are not enforced, the cycle of discrimination simply continues. The invisibility of racial discrimination in housing virtually ensures its sustainability. Not only is testing the one investigative tool that can shine a light on continuing discrimination in the housing market, but audio recordings of tests can vividly illuminate the discriminatory conduct in more powerful ways than written narrative accounts prepared by testers.

Given the nature of contemporary housing discrimination, it is clear to me that our nation will never eliminate racial discrimination in housing if our enforcement agencies are going to rely solely on the filing of complaints. The burden of eliminating racial discrimination in the housing market should not fall solely on the victims of discrimination. We need to conduct more proactive systemic testing investigations and document these insidious practices, with recordings if possible, and hold violators accountable for their illegal conduct in courts of law.

Since 2005, the FHJC has conducted testing investigations that led to the filing of dozens of lawsuits alleging systemic discrimination based on race and/or national origin in the sale, rental, and financing of housing. The lawsuits were favorably resolved with substantial monetary recovery and extensive injunctive relief. The strength of testing evidence and the sheer ability to document and compare how home seekers of different races are treated in the housing market is a key factor that helps explain FHJC's track record. But that is not the whole story. The fact that FHJC testers are always equipped with digital audio recorders immensely contributes to FHJC's success.

Sometimes there is no substitute for being able to hear the exact words used by a housing provider when an unsolicited discriminatory statement is uttered or when misrepresentations are made about whether or when housing is available, how much the housing costs, or whether the housing can be viewed. When real estate agents, landlords, or loan officers make nuanced statements designed to steer or casual comments aimed at discouraging renters or homebuyers, sometimes their words must be heard to be believed.

All-Party Consent Represents a Barrier to Fair Housing Enforcement

There are only 11 states that do not allow one-party consensual recording of in-person conversations. California, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Oregon, Pennsylvania, and Washington require all-party consent to record an in-person conversation. While these 11 states constitute only 22 percent of the states, they are home to 35 percent of the U.S. population including 28 percent of the total African American population, 42 percent of the total Latinx population, and 50 percent of the total Asian population in our nation. Most of these states contain large, heavily populated metropolitan regions and many of these regions still exhibit exceedingly high levels of residential racial segregation. Currently, all-party consent laws unfairly shield housing

providers from having their commercial speech recorded even when that speech includes discriminatory misrepresentations and statements designed to discourage, steer, or deny housing opportunities to people based on race, national origin, and other protected characteristics. Do we value protecting the privacy of those in the housing industry and their commercial speech more than we care to protect entire populations who are routinely mistreated, steered, and denied housing opportunities based on their race?

Today, documenting discriminatory housing practices can be challenging because housing providers discriminate in different ways.

- Language used by discriminatory housing providers is often coded or more subtle. In some cases, the discrimination is characterized by selective misrepresentations about whether housing is available, how much it costs, steps in the application process, or when housing can be viewed. Obtaining an exact audio account of the words used by the housing provider can eliminate any ambiguity over what information housing providers gave to testers.
- Some statements made by discriminatory housing providers and reported by testers are so outrageous as to evoke disbelief or denial. Being able to listen to the exact statements made by a housing provider can convince people, including judges and juries, who may find the alleged statements to be dubious or incredible that these comments were made. Hearing is believing.
- Context matters. *How* information is conveyed can be just as important as what information is conveyed. Recordings can be tremendously helpful to judges and juries by conveying the tenor of statements made and the complexity and context of the interactions that occur between housing providers and testers posing as home seekers.

State Laws Should Be Modified

There is ample evidence from the recent *Newsday* investigation and from the enforcement efforts of organizations like the FHJC, that racial discrimination in housing remains a persistent and pervasive fact of life in our metropolitan regions. Recordings are a critical tool in our enforcement arsenal to eliminate this scourge and ensure that all people have the right to obtain housing on a non-discriminatory basis.

All-party consent requirement laws stifle effective fair housing law enforcement and must be changed or challenged to allow fair housing testers to record their interactions with housing providers for the purpose of investigating housing market practices and enforcing fair housing laws. Simply put, being able to legally record test experiences matters because:

- Recorded evidence can be highly probative for attorneys, investigators, judges, juries, and others who must evaluate whether fair housing laws have been violated. The value of recording tests has clearly been demonstrated in litigation brought in the other 39 states by many private fair housing organizations and in all 50 states by the Civil Rights Division of the U.S. Department of Justice. This Division operates a testing program in which testers use recorders in undercover testing investigations throughout the nation regardless of state privacy laws on recording based on the Supremacy Clause of the Constitution.
- Having an exact account of conversations virtually eliminates any credibility or bias issues concerning the testers *and* at the same time protects housing providers from the possibility of facing false allegations caused by faulty memories of testers, misunderstandings, or incomplete accounts of test experiences.

For fair housing organizations, recorders provide an important quality control which helps to ensure that testers are complying with test assignments, instructions, and testing program guidelines. The use of recorders by testers can help to ensure that testing organizations maintain the highest investigative standards. To be very clear, there is nothing private about the commercial speech that housing providers use to offer housing for rent or sale or that loan officers use to talk about the terms and conditions on available home mortgage products. These conversations occur in commercial spaces frequented by the public such as rental offices, real estate offices, or lending institutions. This is language that agents should be willing to share with any consumer who contacts them for information in the public marketplace. In fact, it is precisely because too many agents still refuse to provide the same information to consumers of all races that this speech should not be kept private or protected.

Over the past several years, fair housing, civil rights, and other advocates have waged a campaign to urge California state legislators to carve out an exception to the two-party consent requirement and allow fair housing testers to record their conversations while participating in covert housing discrimination investigations. Advocates assert that this change could significantly enhance their ability to vigorously enforce fair housing laws. They are right and, well, I do get it. But the more important question is, did you get it?

Fred Freiberg

<http://fairhousingjustice.org>

Fred Freiberg is a co-founder and the current National Field Consultant for the Fair Housing Justice Center (FHJC) in New York City. Prior to co-founding the FHJC, he directed a fair housing testing program, which he helped to establish in 1991, in the Civil Rights Division of the U.S. Department of Justice.

Testimony 2023 SB47.pdf

Uploaded by: Robyn Dorsey

Position: FAV

**Testimony to the Senate Judiciary Committee
SB47: Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing
Position: Favorable**

January 27, 2023

The Honorable Senator William Smith, Chair
Senate Judiciary Committee
3 West, Miller Senate Office Building
Annapolis, Maryland 21401

cc: Members, Judiciary Committee

Honorable Chair Smith and Members of the Committee:

Economic Action Maryland (formerly the Maryland Consumer Rights Coalition) is a statewide coalition of individuals and organizations that advances financial justice and economic inclusion for Maryland consumers through research, education, direct service, and advocacy. Our 8,500 supporters include consumer advocates, practitioners, and low-income and working families throughout Maryland.

SB47 would strengthen the ability of fair housing enforcement organizations to enforce anti-discrimination laws in Maryland by allowing recordings of fair housing tests. Economic Action's Fair Housing program, launched in 2021, conducts controlled fair housing tests to identify and document discrimination in the housing market. Fair housing testing involves sending two or more trained testers out to rent an apartment, inquire about a mortgage, or purchase a home. Test Coordinators assign testers an undercover identity that ensures the testers are alike in every meaningful way barring one characteristic – one tester will be a member of a protected class while the other tester is not. For example, both testers may be women in their 40s with two children and \$80,000 in annual income, but one tester is Black while the other is white. Testers are instructed to contact a housing agent about renting an apartment, qualifying for a mortgage, or purchasing a home. When there are differences in the way the testers are treated, that may be evidence of housing discrimination. Economic Action Maryland is able to use the tests as evidence of discrimination in fair housing complaints lodged with HUD or in a civil court case.

HUD's recommended fair housing testing methodology involves equipping testers with recording devices so their interactions with housing agents are captured faithfully. Recording testers' interactions with housing providers creates incontrovertible evidence. Unfortunately in Maryland, we are constrained by Maryland's all party consent requirement. Instead of using recordings to document tests, our testers must rely on their memory of the event to write a detailed report soon after the interaction. This curtails the types of tests we are able to conduct to enforce fair housing laws. Furthermore, written reports are unable to capture the tone of the interaction, and may be easily undermined by defense counsel. Testing experts say that, "Recordings are a critical tool in our enforcement arsenal to eliminate this scourge and ensure that all people have the right to obtain housing on a non-discriminatory basis."

Maryland's all-party consent law unfairly shields housing providers from having their commercial speech recorded, even when that speech includes discriminatory misrepresentations and statements designed to

2209 Maryland Ave · Baltimore, MD · 21218 · 410-220-0494

info@marylandconsumers.org · www.marylandconsumers.org · Tax ID 52-2266235

Maryland Consumer Rights Coalition, Inc is a 501(c)(3) nonprofit organization and your contributions are tax deductible to the extent allowed by law.

discourage, steer, or deny housing opportunities to people based on race, national origin, and other protected characteristics. SB 47 would allow government and nonprofit civil rights agencies like Economic Action Maryland to record interactions between trained fair housing testers and housing providers, strengthening fair housing enforcement capabilities statewide.

We urge you to give SB47 a favorable report .

Best,

Robyn Dorsey
Fair Housing Director

Anne Arundel County _FAV_SB 47.pdf

Uploaded by: Steuart Pittman

Position: FAV

January 31, 2023

Senate Bill 47

Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing

Senate Judicial Proceedings Committee

Position: FAVORABLE

Anne Arundel County **SUPPORTS** Senate Bill 47 – Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing

This Bill will significantly enhance efforts to combat unlawful housing discrimination by removing the two-party consent requirement for recording conversations for fair housing testers. Fair housing testing is the best tool for uncovering unlawful housing discrimination, yet Maryland remains at a significant disadvantage compared to most other states, which do not have a two party consent requirement. As a result, fair housing testers in other states are able to record their interactions with housing providers, something that this Bill would permit.

Housing discrimination increases residential segregation, the racial wealth gap, the homeownership gap, and the gap in intergenerational income mobility, while decreasing access to opportunity. Even with local and state laws to prevent housing discrimination, housing discrimination complaints have been increasing and increased in 2021 to the highest number in at least 25 years. Fair housing testing, when fully utilized to be most effective, addresses both the difficulty in identifying and the difficulty in proving discrimination, as people who have been discriminated against often do not know the discrimination has occurred, may not complain for a variety of reasons, and the difficulty of proving the validity of the complaint without objective evidence.

Given the significant problems created by housing discrimination and the growing number of complaints of housing discrimination, every tool available to investigate and enforce compliance with fair housing laws should be employed. Permitting the recording of fair housing tests without requiring the consent of the subject of the test would allow fair housing testing to be used to its full potential. For all of these reasons, I respectfully request a **FAVORABLE** report on Senate Bill 47.



Steuart Pittman
County Executive

ERC SB 47 Testimony.pdf

Uploaded by: Susie McClannahan

Position: FAV



January 30, 2023

Equal Rights Center Urges Passage of SB 47

The Equal Rights Center (ERC) is a civil rights organization that identifies and seeks to eliminate unlawful and unfair discrimination in housing, employment, and public accommodations in its home community of Greater Washington, D.C. and nationwide. For almost forty years, the ERC has used civil rights testing as a tool to pursue enforcement of the Fair Housing Act in its service area, which includes the Maryland and Virginia suburbs of D.C. The Equal Rights Center appreciates this opportunity to submit testimony to the Senate Judicial Proceedings Committee regarding SB 47.

The Equal Rights Center supports the passage of SB 47 Evidence-Wiretapping and Electronic Surveillance – Fair Housing Testing because the bill would strengthen our ability and our clients’ abilities to hold housing providers accountable for illegal housing discrimination in Maryland.

Civil rights testing is an effective, objective, and credible investigative tool to collect data about discrimination in our communities. It usually involves one or more people covertly engaging in a transaction or interaction. Advocates have been using testing to uncover discrimination for at least sixty years – in the 1960s Dr. King used testing as a strategy to uncover housing discrimination as part of the Chicago Freedom Movement. Testing is still used today by civil rights organizations, such as the ERC, to identify discrimination, especially more subtle forms of discrimination which maybe difficult for an individual to recognize on their own. For example, comparing the experiences of similarly situated Black and white testers as they interact with a landlord can help uncover problems like different terms and conditions being offered on the basis of race. Civil rights testing is critical for collecting data on compliance with civil rights laws.

The ERC is unable to record tests in Maryland because Maryland requires two-party consent to record. Instead, testers must write detailed narratives of their experiences, relying on memory and notes taken during the test. **Though our testers are trained extensively in accurate and objective report writing, we know there is always the potential that someone will question a report’s credibility in a way that a recording would not be.** Furthermore, testing in Maryland is more resource intensive because it takes testers a lot more time to write complete narratives than if they were able to record their interactions.

On the other hand, Virginia and D.C. only require the consent of one party to record. When the ERC conducts tests in the District of Columbia and Virginia, testers typically use audio recordings to record their interactions with housing providers. ERC staff listen to the recordings to determine if there is evidence of discriminatory policies, statements, and/or practices. If the

ERC determines steps must be taken to hold the housing provider accountable, the presence of the recording can significantly increase the likelihood of a positive outcome. The recording helps address the often stark power imbalance between the victim of discrimination and housing provider. It is more difficult for the housing provider to challenge the credibility of the victim of discrimination or the organization bringing forward the complaint when the discrimination is recorded for all parties to hear.

Everyone stands to benefit when fair housing tests are recorded. Test recordings will only provide stronger evidence that fair housing compliant housing providers are following their obligations. In our experiences, being confronted with recorded evidence of illegal discrimination has led non-compliant housing providers to be more willing to mitigate the harm they've caused quickly. Human rights offices in one party consent jurisdictions report to the ERC that test recordings significantly aid with their investigations of fair housing complaints. Finally, individual clients have shared that they feel more prepared to navigate the often lengthy administrative complaint process if there is testing evidence that substantiates their allegations.

Recordings should not be a prerequisite for proving housing discrimination, but they can play a critical role in demonstrating what discrimination sounds like. As a result, we urge lawmakers in Maryland to take advantage of all the tools at their disposal when it comes to stamping out illegal discrimination by passing SB 47.

SB 47 - Fair Housing - FWA - REALTORS.pdf

Uploaded by: Lisa May

Position: FWA



Senate Bill 47 – Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing

Position: Support with Amendments

Maryland REALTORS® takes all allegations of discrimination in the housing market seriously. As a result, we offer our support for the goals of SB 47, to allow for greater testing of fair housing violations in the state.

While the federal Fair Housing Act was passed 55 years ago, reports of discrimination persist today in areas of the home buying and selling process. At all levels of the REALTOR® organization, there is a renewed awareness of those issues, and a determined focus on addressing them. We thank the sponsor for sharing those goals.

As for the particulars of this legislation, we believe that clarifying amendments are necessary to achieve the intent of the bill.

First, the term “a non-profit civil rights organization” in Section 10–402(c)(12)(I)(4) is overly broad and could open fair housing testing to entities that are not fully trained in this area. The U.S. Department of Housing and Urban Development (HUD) has outlined requirements for Qualified Fair Housing Enforcement Organizations (QFHO) in their regulations which could act as a starting point for a new definition.

Also, Section 10–402(c)(12)(III), which outlines the conditions under which wire and video surveillance may occur, is open to interpretation as to which types of fair housing testing may be conducted in Maryland. Generally there are three unofficial categories of fair housing testing: educational, enforcement and exploratory. It could be argued that the current bill language allows or precludes each type. The bill also remains silent on reporting requirements for findings, records retention, and the like for each of these different types of testing.

REALTORS® fully support the goal of reducing any bias which may occur in the housing market. Once the above issues have been addressed, we respectfully ask for your support of Senate Bill 47.

For more information contact
lisa.may@mdrealtor.org or christa.mcgee@mdrealtor.org

MMHA - 2023 - SB 47 - wiretap fair housing - final

Uploaded by: Aaron Greenfield

Position: UNF



Bill Title: Senate Bill 47, – Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing

Committee: Judicial Proceedings Committee

Date: January 31, 2023

Position: Unfavorable

This testimony is offered on behalf of the Maryland Multi-Housing Association (MMHA). MMHA is a professional trade association established in 1996, whose members consist of owners and managers of more than 210,000 rental housing homes in over 958 apartment communities. Our members house over 538,000 residents of the State of Maryland. MMHA also represents over 250 associate member companies who supply goods and services to the multi-housing industry.

Bill Summary: The bill allows a person to intercept a wire, oral or electronic communication if the person is working as a fair housing tester for such a program operated by the Federal Government, the State, local government or non-profit civil rights organization. The person must be a party to the communication and the interception is for the purpose of obtaining a fair housing violation under federal, state or local law.

Background: In an unprecedented manner, Senate Bill 46 expands the Wiretap Statute to a non-criminal context. Current law allows such interception as “evidence” against the person making the communication by (1) an “investigative or law enforcement officer” or acting under the direction of one and (2) the target has to be alleged to be committing some type of crime – and serious crimes as specifically enumerated in the statute.

The reason it is defined this way is because the Wiretap Statute is very explicitly intended “to prevent, in non-criminal situations, the unauthorized interception of conversations where one of the parties has a reasonable expectation of privacy”. Bodoy v. N. Arundel Hosp., 945 F. Supp. 890, 899 (D. Md. 1996), *aff’d*, 112 F.3d 508 (4th Cir. 1997). Basically, the only way you can overcome the reasonable expectation of privacy guaranteed by the Fourth Amendment is when you have probable cause that the person is engaged in the commission of a crime. As a result, in those situations where law enforcement is allowed to wiretap, they FIRST have to show that they have probable cause to interfere with someone's reasonable expectation of privacy by obtaining a court order to be allowed to do the wiretap. So, there is even a “check” on the power of law enforcement to do a wiretap. For example, even in the criminal context, the court has found that to allow a wiretap (in a criminal context) just based on a desire to learn the identity of “higher ups” is to defy legislative intent and to render nugatory the provision of the Maryland Wiretapping and Electronic Surveillance Law that commands a showing of probable cause. Baldwin v. State, 1980, 413 A.2d 246, 45 Md. App. 378, cert. granted 288 Md. 733, 288 Md. 743, *aff’d* 426 A.2d 916, 289 Md. 635, cert. denied 102 S. Ct. 295, 454 U.S. 852, 70 L.Ed.2d 144.



SB 47 Violates the 4th Amendment:

1. Private Citizen: Outside of an “investigative or law enforcement officer”, current law reasonably allows such interception in the cases where there’s a switchboard operator, if all parties consent, if it involves a governmental emergency communications center in an emergency and ships/aircrafts/etc. with onboard communications to the ground. SB 47 creates a new exception by allowing any nonprofit civil rights organization” to wiretap. There is no precedent for allowing a private citizen to engage in the interception without any law enforcement involvement.
2. Crime: Under SB 47, the targeted individual is not alleged to have committed a crime which is the only way to overcome the reasonable expectation of privacy guaranteed by the Fourth Amendment. We are unaware of any violation of civil law that will overcome that expectation.
3. Probable Cause: In wiretap cases, “probable cause” must be communicated and evaluated by a neutral third party before the wiretap is allowed (i.e., a court order). This bill fails to provide this requirement and it would be highly unlikely that “probable cause” could even be articulated in a civil, fair housing case.
4. Other Investigative Means Failed: In requesting a wiretap, the law enforcement agency must proffer that other investigative means have failed (i.e., they’ve exhausted all other avenues of investigation). This is because a wiretap is such a serious intrusion into someone’s privacy – it is basically a means of last resort.

Allowing someone to intercept communications just for a fishing expedition or to “test” the landlord to see if they are engaging in housing discrimination would absolutely be unconstitutional and violate the Fourth Amendment because it’s just as likely they are going to end up intercepting a communication that the housing provider has reasonable expectation of privacy in and where the housing provider has done absolutely nothing wrong.

Lack of Training in SB 47

Lastly, law enforcement engaged in wiretapped interception undergo extensive initial training, re-education, document and evidence preservation, supervision and oversight. Specific recording protocol are in place to guide those in law enforcement investigation engaged in the recorded call process. There exist many aspects and required processes of intrusive wire intercept to insure what is recorded is authorized by the court order after judicial review to establish a crime is about to or is taking place. Law enforcement obtains court orders to conduct wire intercepts for specific periods of time, targeting specific individuals and is authorized with court order to capture specific communication after presenting probable cause to the court.

The bill makes no reference to many critical issues in the wiretap administrative process among them, verification and background of those to conduct wiretaps, training/education requirements, equipment and technology to be used, evidence preservation, evidence chain of



custody, liability for unlawful intercepts or use of communication intercepted and confidentiality of wire intercept.

For these reasons, the Maryland Multi-Housing Association respectfully requests an unfavorable report on Senate Bill 47.

Please contact Aaron J. Greenfield at 410.446.1992 if you have any questions.

SB 47-Testimony of RMI-Unfavorable.pdf

Uploaded by: Katherine Howard

Position: UNF

REGIONAL MANAGEMENT INC.

REGIONAL MANAGEMENT, INC. TESTIMONY IN OPPOSITION TO SB 47 January 31, 2023

Regional Management, Inc, (RMI) is a property management company which has, for over 60 years, managed over 5,000 units of affordable, market rate, residential properties in Baltimore City and County. RMI is a founding member of the Maryland MultiHousing Association.

RMI OPPOSES SB 47, Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing which is an unprecedented departure of current Maryland Law regarding electronic and Wiretap surveillance.

- This Bill **for the first time** takes electronic surveillance out of the realm of criminal law enforcement and Maryland Court supervision and places such sensitive and confidential surveillance in the hands of “non- profit” investigators, who have no training in this field.
- This Bill skirts current law which specifies that Maryland’s law is intended “to prevent, **in non-criminal situations**, the unauthorized interception of conversations **where one of the parties has a reasonable expectation of privacy**”. *Bodoy v. N. Arundel Hosp.*, 945 F. Supp. 890, 899 (D. Md. 1996), *aff’d*, 112 F.3d 508 (4th Cir. 1997).
- Please refer to the attachment, reprinted from recordinglaw.com for a summary of Maryland’s recording laws and the very strict scrutiny with which this Legislature has tasked that these laws be implemented.

SB 47 seeks to take this narrowly drawn law, designed to protect our citizens’ privacy, whether they be human or corporate, and expand it into a realm which is a flagrant violation of their constitutional rights.

For these reasons Regional Management, Inc. **requests an UNFAVORABLE report.**

Katherine Kelly Howard, Esq.

General Counsel

A Growing Repository of Local Laws
United States Recording Laws
Reprinted from recordinglaw.com*:



Maryland Recording Law Summary:

Maryland's Wiretapping and Electronic Surveillance Act stipulates that it is a [two-party consent state](#). In this state, it is a criminal offense to tape-record a conversation without the consent of all involved parties. Md. Code Ann., Cts. & Jud. Proc. § 10-402. This means that in Maryland you are not legally allowed to record a conversation you are taking part in unless all parties are in agreement. It is also forbidden to record someone with criminal or torturous intentions, and consent cannot be legally given in such situations.

Personal Conversations:

You may not record conversations without the consent of all involved parties.

However, Maryland law does make an exception in cases where the person or people communicating are doing so in an environment where they should not be under the expectation of privacy. For example, it is legal to record someone in a neighboring apartment if you can clearly hear them through the walls.

Maryland Video Recording Laws

No person is allowed to install or influence another person to install a camera on real property where a private residence is located for the purpose of conducting intentional secret observation of an individual inside the private residence. For example, it is illegal to install or use a surveillance camera to observe your neighbor while that neighbor is inside his or her private residence or inside his or her real property. Md. Code Ann., Crim. Law § 3-903(c)

However according to the state's laws, the following are not prohibited:

- Installation of a camera by an adult resident of a private residence.
- Installation of a camera in real property without the intention to secretly observe an individual inside the private residence.
- Installation of a camera with the intention of secretly observing an individual inside a private residence after obtaining consent from an adult resident or guardian of an adult resident.
- Lawful observation by a law enforcement officer conducting official duties.
- Filming conducted by a person or member of the media through the use of a camera that is clearly visible.
- Filming of a private residence through the use of a camera that is not located in the real property where the private residence is located.

Md. Code Ann., Crim. Law § 3-903(b)

Penalties:

Md. Code Ann., Cts. & Jud. Proc. § 10-402(b): Breaking the wiretapping law is considered a felony, punishable by no more than five years of prison time and a fine of up to \$10,000.

Md. Code Ann., Crim. Law § 3-903(d): Breaking the hidden camera law is considered a misdemeanor, punishable by up to a year in jail or a fine of \$2,500, or both.

***About Recordinglaw.com**

RecordingLaw.com is a website updated annually with local and regional recording laws. We will be starting with the United States then expanding to the rest of the world as research time permits.

Our information is researched through both physical and on-line sources with everything going through a final editor approval.

Disclaimer for RecordingLaw.com

If you require any more information or have any questions about our site's disclaimer, please feel free to contact us by email at adam@recordinglaw.com.

Disclaimers for RecordingLaw

All the information on this website – <https://recordinglaw.com> – is published in good faith and for general information purpose only. RecordingLaw does not make any warranties about the completeness, reliability and accuracy of this information. Any action you take upon the information you find on this website (RecordingLaw), is strictly at your own risk. RecordingLaw will not be liable for any losses and/or damages in connection with the use of our website.

From our website, you can visit other websites by following hyperlinks to such external sites.

While we strive to provide only quality links to useful and ethical websites, we have no control over the content and nature of these sites. These links to other websites do not imply a recommendation for all the content found on these sites. Site owners and content may change without notice and may occur before we have the opportunity to remove a link which may have gone 'bad'.

SB 47 MOPD fh tester wiretaps Info - amend.docx.pd

Uploaded by: Elizabeth Hilliard

Position: INFO



NATASHA DARTIGUE

PUBLIC DEFENDER

KEITH LOTRIDGE

DEPUTY PUBLIC DEFENDER

MELISSA ROTHSTEIN

CHIEF OF EXTERNAL AFFAIRS

ELIZABETH HILLIARD

ACTING DIRECTOR OF GOVERNMENT RELATIONS

POSITION ON PROPOSED LEGISLATION

BILL: SB0047 Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing

FROM: Maryland Office of the Public Defender

POSITION: Informational Only

DATE: 1/30/2023

The Maryland Office of the Public Defender takes no position on the intent of Senate Bill 47, to authorize the interception of wire, oral or electronic communication by a Fair Housing tester for the purpose of obtaining evidence of a fair housing violation under federal, state, or local law. However, the bill as written does not provide any limitations on the use of these interceptions. We strongly oppose allowing for interceptions created as part of civil rights investigations to open the door for those interceptions to be used to assist with criminal investigations or prosecutions.

Maryland's two-party consent provision is an intentional measure to provide greater privacy protections than available under federal law. Mustafa v. State, 323 Md. 65, 74 (1991). "The requirement of consent by all parties for the recording of a telephone conversation by a private individual has been a fundamental part of Maryland law since at least 1956," and protects the privacy interests of all individuals, even when accused of serious crimes. Perry v. State, 357 Md. 37, 61 (1999) (reversing murder conviction that relied on wiretap by co-conspirator).

While Senate Bill 47 is focused on fair housing investigations, it does not limit the use of the intercepted communications to this purpose. Other exceptions for investigative purposes rely on law enforcement, who are trained in criminal investigations and the constitutional protections implicated, are often limited to the narrow scope of a court order, and are accountable within the criminal justice process. In comparison, Fair Housing testers are often part-time consultants or volunteers whose training does not address criminal investigations, privacy protections, or the constitutional rights implicated by a recording. They are likely to lack the expertise to know

when to stop recording, but they enter residential locations where they are likely to interact with others and may intercept statements beyond the intended purpose of the investigation. Moreover, while not considered law enforcement, their role is directly for civil prosecutorial purposes.

Current exceptions authorizing interceptions, procurements, disclosures, or use of communications in Courts and Judicial Proceedings § 10-402(C) are extremely limited in order to ensure that privacy interests retain as much protection as possible. For example, § 10-402(C)(6), which authorizes “law enforcement personnel to utilize body wires to intercept oral communications in the course of a criminal investigation if there is reasonable cause to believe that a law enforcement officer's safety may be in jeopardy,” does not allow for these communications to be recorded or used against a defendant in a criminal proceeding. Here, where the intent of the recording is even more attenuated from criminal activity, but could potentially intercept communications beyond its stated purpose, a similar protection is warranted.

For these reasons, the Maryland Office of the Public Defender urges this Committee to consider the above information and amend SB 47 accordingly should it choose to issue a favorable report.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

**Authored by: Melissa Rothstein, Chief of External Affairs,
melissa.rothstein@maryland.gov, 410-767-9853.**