

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 266

(The President, *et al.*) (By Request - Administration)

Judicial Proceedings

Judiciary

Freedom of Association and Assembly Protection Act of 2009

This Administration bill establishes the responsibilities of law enforcement agencies relating to investigations affecting “First Amendment activities” and the rights of persons, groups, and organizations engaged in such activities. These activities include constitutionally protected speech or association; or conduct related to freedom of speech, free exercise of religion, freedom of the press, the right to assemble, or the right to petition the government.

Fiscal Summary

State Effect: None. The bill’s requirements can be accommodated with the existing budgeted resources of State law enforcement agencies.

Local Effect: None. The bill’s requirements can be accommodated with the existing budgeted resources of local law enforcement agencies.

Small Business Effect: The Administration has determined that this bill has minimal or no impact on small business (attached). Legislative Services concurs with this assessment. (The attached assessment does not reflect amendments to the bill.)

Analysis

Bill Summary: The bill prohibits a law enforcement agency from conducting a “covert investigation” of a person, a group, or an organization engaged in First Amendment activities, unless the law enforcement agency’s chief or designee makes a written finding in advance, or as soon as is practicable afterwards, that the covert investigation is justified because:

- it is based on a reasonable, articulable suspicion that the person, group, or organization is planning or engaged in criminal activity; and
- a less intrusive method of investigation is not likely to yield satisfactory results.

Membership or participation in a group or organization engaged in First Amendment activities does not alone establish reasonable, articulable suspicion of criminal activity.

The bill requires that a law enforcement agency conduct all investigations involving First Amendment activities for a legitimate law enforcement objective and, in the process of conducting the investigation, safeguard the constitutional rights and liberties of all persons. A law enforcement agency may not investigate, prosecute, disrupt, interfere with, harass, or discriminate against a person engaged in a First Amendment activity to punish, retaliate against, or prevent or hinder the person from exercising constitutional rights. An investigation involving First Amendment activities must be terminated when logical leads have been exhausted or no legitimate law enforcement objective justifies the continuance of the investigation.

Information maintained in a criminal intelligence file must be evaluated for the reliability of the source of the information and the validity and accuracy of the information. A law enforcement agency must accurately classify intelligence information in its databases to properly reflect the purpose for which the information is collected. When a law enforcement agency lists in a database a specific crime for which an individual, a group, or an organization is under suspicion, the agency must ensure that the classification is accurate based on the information available to the agency at the time.

By January 1, 2010, the Department of State Police (DSP) and all other law enforcement agencies in Maryland covered under the bill must adopt regulations or policies governing the conduct of covert investigations of persons, groups, or organizations engaged in First Amendment activities and the collection, dissemination, retention, database inclusion, purging, and auditing of intelligence information relating to persons, groups, or organizations engaged in First Amendment activities.

Also by that date, DSP must report to the Senate Judicial Proceedings Committee and the House Judiciary Committee on the status of matters relating to its Case Explorer database. Finally, DSP must contact all persons who have been described in the Case Explorer database as being suspected of involvement in terrorism, or who have been labeled in that database as a terrorist, but as to whom DSP has no reasonable, articulable suspicion of involvement in terrorism; afford those persons an opportunity to review and obtain copies of the relevant database entries; and subsequently purge those entries.

Current Law: Except as otherwise specified in statute, it is unlawful for a person to:

- willfully intercept, endeavor to intercept, or procure any other person to intercept a wire, oral, or electronic communication;
- willfully disclose, or endeavor to disclose, to any other person the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through an illegal intercept; and
- willfully use, or endeavor to use, the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through an illegal intercept.

However, it is lawful for law enforcement officers and persons acting with the prior direction and under the supervision of law enforcement officials to intercept communications as part of a criminal investigation to provide evidence of the commission of the following crimes:

- murder;
- kidnapping;
- rape;
- sexual offense in the first or second degree;
- child abuse in the first or second degree;
- child pornography;
- gambling;
- robbery;
- arson and related felonies;
- bribery;
- extortion;
- dealing in a controlled dangerous substance;
- fraudulent insurance act;
- manufacture or possession of destructive device;
- sexual solicitation or abuse of a minor;
- obstruction of justice; and
- a conspiracy or solicitation to commit any of the above crimes.

Wiretapping is also authorized if a person has created a barricade situation, and there is probable cause to believe a hostage or hostages may be involved.

Several other exceptions to this prohibition exist, including:

- Providers of wire or electronic communications services and their agents or employee may provide information or assistance to persons authorized by law to intercept communications or conduct electronic surveillance if the provider has been provided with a court order.

- A person may intercept communications where all parties to the communication have given consent, unless the communication is intercepted for the purpose of committing a tortious or criminal act.
- An employee or agent of an emergency communications center may intercept communications concerning an emergency where that person is a party to the communication.
- Law enforcement personnel may utilize body wires to intercept oral communication if there is reasonable cause to believe a law enforcement officer's safety may be in jeopardy.
- A person may intercept electronic or radio communications through a communications system accessible to the general public.
- Law enforcement may place a device within a vehicle to intercept communication to provide evidence of vehicle theft.

Generally, a person who violates State eavesdropping or wiretapping laws is guilty of a felony and is subject to maximum penalties of a \$10,000 fine and/or five years imprisonment.

Under provisions governing access to public records, unless otherwise provided by law, if a custodian of the records believes that inspection of a part of a public record by the applicant would be contrary to the public interest, the custodian may deny inspection by the applicant of that part. A custodian may deny inspection of:

- records of investigations conducted by the Attorney General, a State's Attorney, a city or county attorney, a police department, or a sheriff;
- an investigatory file compiled for any other law enforcement, judicial, correctional, or prosecution purpose; or
- records that contain intelligence information or security procedures of the Attorney General, a State's Attorney, a city or county attorney, a police department, a State or local correctional facility, or a sheriff.

A custodian may deny inspection by a person in interest only to the extent that the inspection would interfere with a valid and proper law enforcement proceeding, deprive another person of a right to a fair trial or an impartial adjudication, constitute an unwarranted invasion of personal privacy, disclose the identity of a confidential source, disclose an investigative technique or procedure, prejudice an investigation, or endanger the life or physical safety of an individual. (*See* State Government Article, § 10-618.)

Background: In July 2008, it became publicly known that DSP had engaged in covert surveillance of anti-death penalty and anti-war groups in 2005 and 2006. The surveillance was revealed when DSP released 43 pages of documents to the American Civil Liberties Union (ACLU) in response to a Public Information Act request. According to news reports, officers spent at least 288 hours monitoring meetings and rallies between March 2005 and May 2006 and provided reports to databases accessible by local and federal law enforcement agencies. However, no indication of any intention to engage in criminal activity by the subjects of the surveillance was ever discovered.

Governor O'Malley denounced the surveillance activities, noting that it had occurred under the previous Administration, and vowed not to allow police to monitor people exercising their right to free speech when there is no evidence of wrongdoing. On July 31, 2008, the Governor appointed former Attorney General Stephen H. Sachs to conduct an independent review of the facts and circumstances surrounding the covert surveillance operation. Mr. Sachs completed his review and submitted a report on September 29, 2008.

Findings from the Sachs Report

According to the Sachs report, the covert operation was launched in March 2005 for the purpose of gathering information relating to the upcoming executions of death row inmates Vernon Lee Evans, Jr. and Wesley Eugene Baker. Using false names and posing as sympathizers, the State troopers involved in the surveillance attended over two dozen protests and meetings of groups including the Baltimore Coalition Against the Death Penalty, the Baltimore Pledge of Resistance, and the Committee to Save Vernon Evans. The trooper leading the investigation, who was a member of DSP's Homeland Security and Intelligence Division (HSID), took significant steps to infiltrate the groups, including chatting online with group members via a covert email account, and attending numerous small planning meetings. The trooper filed detailed written reports about what happened at each meeting and what was said by participants.

The lead trooper's reports revealed no evidence of proposed criminal conduct or unlawful activity of any kind. In fact, the trooper noted that the subjects clearly stated that they did not intend to violate the law during their planned protests. Nevertheless, the trooper repeatedly recommended that the investigation continue.

Information about the investigation was then entered into HSID's electronic database, "Case Explorer," and labels such as "Security Threat Group" and "Terrorism – Anti-War Protestor" were assigned to subjects of the surveillance. Information about these subjects – including, in some cases, the "terrorism" designation – was then transmitted to a database maintained by the Washington-Baltimore High Intensity Drug Trafficking Area (HIDTA) program, a federally funded initiative to promote cooperation and information-sharing among federal, State, and local law enforcement agencies.

Mr. Sachs found no evidence that DSP targeted the activists for monitoring because of any disagreement with, or desire to suppress, their political, ideological, or moral beliefs. He determined, rather, that DSP's principal purpose was to promote public safety by preparing for any civil disturbance that might occur in connection with the planned executions.

The Sachs report concluded that (1) the surveillance intruded upon the ability of law-abiding Marylanders to associate and express themselves freely; (2) DSP violated federal regulations when it transmitted some of its investigative findings to the HIDTA database, because there was no reasonable suspicion of involvement in criminal activity; and (3) DSP showed a lack of judgment in labeling as "terrorism" the peaceful activism that was the subject of its investigation.

Recommendations from the Sachs Report

To prevent this type of overreaching from happening in the future, the Sachs report recommended that DSP (1) adopt regulations forbidding covert surveillance of individuals or groups unless there is a prior written finding by the superintendent that the surveillance is justified because it is based on a reasonable, articulable suspicion of a present or planned violation of the law, and a less intrusive method of investigation is not likely to yield equivalent results; (2) establish standards for the collection, dissemination, auditing, and purging of criminal intelligence information; (3) revise, and possibly discontinue, its use of the Case Explorer database in connection with its intelligence-gathering activities; and (4) contact all individuals who are inaccurately described in the Case Explorer database as being suspected of involvement in "terrorism," allow those individuals an opportunity to review the relevant data entries, and then purge those entries.

Hearing in Judicial Proceedings Committee

At a hearing before the Senate Judicial Proceedings Committee on October 7, 2008, Thomas E. "Tim" Hutchins, Superintendent of State Police at the time of the surveillance, maintained that the surveillance was legal as well as necessary because the groups had a potential for violence. According to Superintendent Hutchins, Governor Ehrlich was not aware of the surveillance. The current superintendent, Colonel Sheridan, indicated acceptance of the Sachs report and stated that the investigation went on too long and was a waste of resources. Sheridan pledged that the practices in question would not continue and reported that he has instituted internal rules that clearly define how DSP will conduct criminal intelligence gathering. Sheridan further stated that DSP was in the process of mailing certified letters to the 53 individuals mistakenly identified as terrorists in the database so they can review their files and request that these files be purged from the system. (The mailings were completed shortly after the date of this hearing.)

Additional Information

Prior Introductions: None.

Cross File: HB 311 (The Speaker, *et al.*) (By Request - Administration) - Judiciary.

Information Source(s): Governor's Office, Office of the Attorney General, Department of State Police, Department of Legislative Services

Fiscal Note History: First Reader - February 27, 2009
mcp/hlb Revised - Senate Third Reader - March 31, 2009
Revised - Enrolled Bill - May 18, 2009

Analysis by: Guy G. Cherry

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES

TITLE OF BILL: Public Safety - Department of State Police - Investigations Affecting First Amendment Rights

BILL NUMBER: SB 266

PREPARED BY: State Police

PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

The proposed legislation will have no impact on small business in Maryland.