

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE

House Bill 1111 (Delegate Glass)
Judiciary

Public Safety - Restrictions on Searches for Security Purposes - Penalties

This bill prohibits a “public servant,” while acting under color of the person’s office or employment, from (1) intentionally subjecting another person to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that the public servant knows is unlawful; (2) intentionally denying or impeding another person in the exercise or enjoyment of a right, privilege, power, or immunity, knowing that the conduct of the public servant is unlawful; or (3) intentionally subjecting another person to “sexual harassment.” A public servant, while acting under color of the public servant’s office or employment and without probable cause to believe the other person committed an offense, is prohibited from (1) performing a search without effective consent for the purpose of granting access to a publicly accessible building or form of transportation and (2) intentionally, knowingly, or recklessly touching the anus, sexual organ, buttocks, or breast of another person, including touching through clothing or causing physical contact with the other person when the public servant knows or should reasonably believe that the other person will regard the contact as offensive or provocative.

Violators are guilty of a misdemeanor and subject to imprisonment for up to one year and/or a maximum fine of \$4,000.

Fiscal Summary

State Effect: Minimal increase in general fund revenues from fines imposed in the District Court. Minimal increase in general fund expenditures due to the bill’s incarceration penalty. Minimal increase in expenditures for the Office of the Attorney General to litigate challenges to the bill’s validity and civil tort claims against State employees generated by the bill. Potential increase in expenditures in future years for affected State agencies if the State Insurance Trust Fund incurs losses as a result of paying out civil tort claims generated by the bill.

Local Effect: Minimal increase in local revenues from fines imposed in circuit court cases. Minimal increase in local expenditures due to the bill's incarceration penalty. Minimal increase in local expenditures for county attorneys to litigate challenges to litigate civil tort claims against local employees generated by the bill. Potential increase in expenditures in future years for affected local agencies if the local government self-insurers incur losses as a result of paying out civil tort claims generated by the bill.

Small Business Effect: None.

Analysis

Bill Summary: A “public servant” is (1) an officer, employee, or agent of the United States, the State, a branch/department/agency of the State or the United States; (2) another person acting under contract with a branch, department, or an agency of the State or the United States for the purpose of providing a security or law enforcement service; or (3) another person acting under color of federal or State law.

“Sexual harassment” is unwelcome sexual advances, requests for sexual favors, or other verbal or physical contact of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of a right, privilege, power, or immunity, either explicitly or implicitly.

A public servant acts under color of the person's office or employment if the person acts or purports to act in an official capacity or takes advantage of actual or purported official capacity. Consent is effective only if, immediately before any search, the public servant (1) verbally describes to the other person the area of the other person to be searched and the method to be used in the search; and (2) receives express consent for the search from the other person or the parent or guardian of the other person.

It is a defense to a prosecution for the misdemeanor that the defendant performed the search in accordance and consistent with an explicit and applicable grant of federal or State statutory authority that is consistent with both the Maryland Constitution and the U.S. Constitution. In a prosecution, if the government of the United States, the defendant, or the defendant's employer challenges the validity of the bill's provisions on grounds of unconstitutionality, preemption, or sovereign immunity, the Attorney General, with the consent of the appropriate State's Attorney, is authorized to take any actions necessary on behalf of the State to defend the validity of the statute created by the bill. The Attorney General may make any legal arguments the Attorney General considers appropriate.

The bill is enforceable up to, but no further than the maximum possible extent consistent with federal constitutional requirements, even if that construction is not readily apparent, as the constructions are authorized only to the extent necessary to save the bill's provisions from judicial invalidation.

Current Law:

Searches and Seizures

The Fourth Amendment of the U.S. Constitution, as applied to the states through the Fourteenth Amendment, protects individuals from unreasonable searches and seizures. The U.S. Supreme Court has held that a police officer may stop and frisk an individual if the officer has reasonable suspicion (a lower threshold than probable cause for an arrest) that the individual has committed or is in the process of committing a crime. The permitted "frisk" involves a pat down of the individual to ensure that the individual is not armed and to preserve evidence.

In 2007, the Court of Appeals, in the case of *Paulino v. State*, 399 Md. 341, articulated the perimeters of what constitutes a strip search, a body cavity search, and when the police may conduct such activity incident to an arrest. In *Paulino*, the Court of Appeals held (with three dissenting judges) on Fourth Amendment grounds that, ". . . the Court must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. The police officers' search of an arrestee is unreasonable when the officers conduct a highly intrusive search in the parking lot of a public business in the presence of others and there were no exigent circumstances requiring an immediate search."

Paulino also cited definitions of terms from a U.S. Court of Appeals for the First Circuit case. In *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), n. 3., the court said:

A "strip search," though an umbrella term, generally refers to an inspection of a naked individual, without any scrutiny of the subject's body cavities. A "visual body cavity search" extends to a visual inspection of the anal and genital areas. A "manual body cavity search" includes some degree of touching or probing of body cavities.

Federal Preemption

Under the supremacy clause of the U.S. Constitution, federal law overrides (preempts) state law. Preemption can be express (*i.e.*, the federal law states that it preempts state law) or implied, such as when there is an actual conflict between the two laws, when the state law presents an obstacle to the enforcement or intent of the federal law, or when the

state law involves a subject matter that is so pervasively regulated by the federal government that the federal government is thought to “occupy the field” of that area of law.

Under the Federal Aviation Act (FAA), the Under Secretary of Transportation for Security is required to provide for the screening of all passengers and luggage that will be carried aboard passenger aircraft in the United States. The federal government has required the mandatory search of all passengers and carry-on luggage since 1973. Federal courts have ruled on several occasions that the screening of airport passengers is not subject to the warrant and probable cause requirements of the Fourth Amendment. However, the legal reasoning used to reach these conclusions has varied among the cases.

Sexual Offenses

The crime of fourth degree sexual offense prohibits a person from (1) engaging in sexual contact with another without the consent of the other; or (2) engaging in a sexual act or vaginal intercourse with a victim who is 14 or 15 years old and the defendant is at least four years older than the victim. Fourth degree sexual offense is a misdemeanor and carries maximum penalties of imprisonment for one year and/or a fine of \$1,000. There is a three-year statute of limitations for prosecution of a fourth degree sexual offense involving a person in a position of authority.

Under the State’s prohibition against third degree sexual offense, a person may not:

- (a) engage in sexual contact with another without the consent of the other; and (b) employ or display a dangerous weapon, or a physical object that the victim reasonably believes is a dangerous weapon; suffocate, strangle, disfigure, or inflict serious physical injury on the victim or another in the course of committing the crime; threaten, or place the victim in fear, that the victim, or an individual known to the victim, imminently will be subject to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or commit the crime while aided and abetted by another;
- engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know of the victim’s condition;
- engage in sexual contact with another if the victim is under the age of 14, and the person performing the sexual contact is at least four years older than the victim;
- engage in a sexual act with another if the victim is 14 or 15 years old, and the person performing the sexual act is at least 21 years old; or

- engage in vaginal intercourse with another if the victim is 14 or 15 years old, and the person performing the act is at least 21 years old.

A violator is guilty of the felony of third degree sexual offense and subject to imprisonment for a maximum of 10 years.

Background:

Airport Security

The U.S. Transportation Security Administration (TSA) is a division of the U.S. Department of Homeland Security and has jurisdiction over national aviation security. TSA oversees the airport security program, which requires airport operators to implement measures to ensure the safety and security of persons and properties in the air and airport areas. Among other things, TSA screens more than 1.7 million passengers a day at more than 450 airports nationwide; screens checked bags for explosives; conducts air cargo screening on domestic and international-outbound passenger aircraft; and implements daily background checks on over 15 million transportation-related employees. In accordance with federal law, TSA is responsible for screening all commercial airline passengers and baggage.

Security at the two airports owned by the State is currently provided by TSA, Maryland Transportation Authority (MDTA) police, and a private contractor. At Baltimore/Washington International Thurgood Marshall Airport (BWI Marshall Airport), TSA conducts security screening of passengers and luggage in accordance with federal law, MDTA provides law enforcement services, and Akal Security provides unarmed security services. At Martin State Airport (MTN), similar to BWI Marshall Airport, MDTA police provide law enforcement services and Akal Security provides general security services. TSA does not have a passenger screening program at MTN because there is no regularly scheduled commercial air service; however, the Maryland Aviation Administration (MAA) meets quarterly with TSA on safety and security requirements for MTN.

MDTA police provide law enforcement services for the airport roadways, terminals, and airfields at both State airports in accordance with a Memorandum of Agreement (MOA) with MAA. This MOA is reviewed annually. MAA has a five-year contract, with an option for two one-year extensions with Akal Security to provide unarmed security guards for the two State airports.

Passenger and luggage screening does not currently take place at MTN; however, TSA has sole authority for all aspects of passenger and luggage screening at BWI Marshall Airport. Any potential contract, lease, or agreement to perform security screening at

BWI Marshall Airport must be implemented by TSA. The same TSA security protocols and standards that are implemented at all commercial airports nationwide must be implemented at BWI Marshall Airport.

TSA Searches

Controversy arose in 2010 and 2011 when TSA implemented new search procedures at airports. Under the new procedures, passengers could be subject to more extensive pat down searches or full body scans using more advanced imaging scanners. According to some news reports and posted online videos, some infants and children were subjected to pat down searches and elderly passengers were subjected to strip searches.

Texas Legislation

Legislation similar to this bill was passed by the Texas House of Representatives. Soon after, the U.S. Attorney for the Western District of Texas issued a letter informing legislators that (1) the bill was preempted by federal law; and (2) forcing TSA personnel to choose between risking criminal prosecution or performing their federal duties may result in TSA cancelling any flight or series of flights in Texas (effectively turning the state into a “no fly zone”) if the bill was enacted and a court did not grant the federal government a stay. The bill was eventually withdrawn in the Senate after some members rescinded their support following receipt of the letter.

State Revenues: General fund revenues increase minimally as a result of the bill’s monetary penalty provision from cases heard in the District Court. It is assumed that the prosecution of cases under the bill will be limited to actions that are beyond the scope of duties of affected State personnel and are not covered by existing criminal statutes.

State Expenditures: General fund expenditures increase minimally due to the bill’s incarceration penalty. To the extent that the bill’s provisions result in an increase in the number of civil lawsuits filed against State employees for actions deemed criminal under the bill, operational expenditures increase for the Office of the Attorney General to provide legal representation in these cases.

General fund expenditures increase minimally as a result of the bill’s incarceration penalty due to more people being committed to Division of Correction facilities for convictions in Baltimore City. The number of people convicted of this proposed crime is expected to be minimal. It is assumed that the prosecution of cases under the bill will be limited to actions that are beyond the scope of duties of affected State personnel and are not covered by existing criminal statutes.

Generally, persons serving a sentence of one year or less in a jurisdiction other than Baltimore City are sentenced to a local detention facility. The Baltimore City Detention Center, a State-operated facility, is used primarily for pretrial detentions.

Under the Maryland Tort Claims Act (MTCA), State personnel are immune from liability for acts or omissions performed in the course of their official duties, so long as the acts or omissions are made without malice or gross negligence. Under MTCA, the State essentially waives its own common law immunity. However, MTCA limits State liability to \$200,000 to a single claimant for injuries arising from a single incident. MTCA covers a multitude of personnel, including some local officials and nonprofit organizations. In actions involving malice or gross negligence or actions outside of the scope of the public duties of the State employee, the State employee is not shielded by the State's color of authority or sovereign immunity and may be held personally liable.

In fiscal 2011, the State Insurance Trust Fund (SITF) paid \$4.1 million for tort claims under MTCA. The proposed fiscal 2013 State budget includes a \$6.5 million appropriation for tort claims (including motor vehicle torts) under MTCA. The funds are to be transferred to SITF.

Agencies pay premiums to SITF that are comprised of an assessment for each employee covered and SITF payments for torts committed by the agency's employees. The portion of the assessment attributable to losses is allocated over five years. If the bill generates an increase in tort payments for actions by State employees, general fund expenditures for the affected agencies may increase in future years if SITF incurs losses as a result of tort claims against the employees.

The Maryland Transportation Authority (MDTA) advises that the bill could result in increased overtime costs since it is MDTA practice to suspend an officer's police powers when he/she is charged with a crime and use existing personnel to cover the officer's shifts.

Local Revenues: Local revenues increase minimally as a result of the bill's monetary penalty provision from cases heard in the circuit courts.

Local Expenditures: Local expenditures increase minimally due to the bill's incarceration penalty. To the extent that the bill's provisions result in an increase in the number of civil lawsuits filed against local employees for actions deemed criminal under the bill, local expenditures may increase (1) for county attorneys to provide legal representation in these cases; and (2) for the payment of any tort claims or settlements reached in these lawsuits.

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

LGTC limits the liability of a local government to \$200,000 per individual claim and \$500,000 per total claims that arise from the same occurrence for damages from tortious acts or omissions (including intentional and constitutional torts). It further establishes that the local government is liable for tortious acts or omissions of its employees acting within the scope of employment, so long as the employee did not act with ill will or improper motivation (“actual malice”). Thus, LGTC prevents local governments from asserting a common law claim of governmental immunity from liability for such acts or omissions of its employees.

Several counties and local governments covered by LGTC are insured by the Local Government Insurance Trust (LGIT), a self-insurer that operates similarly to SITF. Thus, future year expenditures for agencies affected by the bill may increase if LGIT incurs losses from payments of tort claims for local employees as a result of the bill.

Howard County and the Montgomery County Police Department advise that the bill is not expected to have a fiscal impact on their respective entities. Prince George’s County advises that the bill may have a significant fiscal impact due to increased civil litigation.

Additional Comments: The fiscal analysis assumes the bill does not impact the passenger and luggage screeners and operations at BWI Marshall Airport, as these services are under the exclusive jurisdiction of the federal government. Screening of passengers and luggage must be conducted by TSA in accordance with federally determined procedures and protocols.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Howard, Montgomery, and Prince George’s counties; Commission on Criminal Sentencing Policy; Governor’s Office of Crime Control and Prevention; Department of Natural Resources; Department of General Services; Department of Health and Mental Hygiene; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of State Police;

Office of the Public Defender; State's Attorneys' Association; Maryland Department of Transportation; University System of Maryland; U.S. Transportation Safety Administration; American Jurisprudence 2d; Forbes.com; *Texas Tribune*; *USA Today*; *Houston Chronicle*; *Fordham Law Review*; Department of Legislative Services

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