

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

House Bill 1074
Judiciary

(Delegate Smigiel, *et al.*)

Fourth Amendment Protection Act

This emergency bill states that it is the policy of the State to refuse material support, participation, or assistance to any federal agency that claims the power to, or with any federal law, rule, regulation, or order that purports to, authorize the collection of electronic data or metadata of a person in accordance with an action not based on a warrant that particularly describes the person, place, and thing to be searched or seized (noncompliant federal agency). The bill also prohibits a State agency or a political subdivision of the State from engaging in specified activity with a noncompliant federal agency or activity that is in violation of the aforementioned State policy.

If any provision of the bill or application of the bill is held invalid for any reason by a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of the Act, which can be given effect without the invalid provision or application.

The bill may be cited as the “Fourth Amendment Protection Act.”

Fiscal Summary

State Effect: Assuming that the bill can be implemented, the bill has a significant operational impact and may result in a significant decrease in federal fund revenues.

Local Effect: Assuming that the bill can be implemented, the bill has a significant operational impact on local governments. Potential significant decrease in federal fund revenues for complying with the bill. Potential significant loss of State grant revenues for violating the bill’s provisions.

Small Business Effect: Potential meaningful impact on small businesses that lose State or local government contracts for violations of the bill's provisions.

Analysis

Bill Summary: Notwithstanding any law, regulation, rule, or order to the contrary, an agency of the State, a political subdivision of the State, an employee of an agency or political subdivision acting in the employee's official capacity, or a corporation providing services on behalf of the State or a political subdivision of the State may not:

- provide material support, participation, or assistance in any form with any noncompliant federal agency;
- utilize any assets, State funds, or funds allocated by the State to local entities in whole or in part, to engage in activity that aids a federal agency, federal agent, or corporation providing services to the federal government that is engaging in activity contrary to the aforementioned State policy;
- provide services, or participate or assist with the provision of services, to a federal agency, federal agent, or corporation providing services to the federal government that is involved in activity in violation of the aforementioned State policy; or
- use information in a criminal investigation or prosecution provided by a federal agency, federal agent, or corporation providing services to the federal government that was obtained through activity in violation of the aforementioned State policy.

A political subdivision of the State that adopts a rule, an order, an ordinance, or a policy under which the political subdivision violates the bill's provisions may not receive State grant funds, following a specified judicial determination.

An agent or employee of the State or of a political subdivision of the State who knowingly violates the bill's provisions must be (1) deemed to have resigned any commission from the State that the agent or employee may possess and the office of the agent or employee must be deemed vacant and (2) forever ineligible to hold an office of trust, honor, or emolument under the laws of the State.

A corporation or person that provides services to or on behalf of the State and violates the bill's provisions must be forever ineligible to act on behalf of, or provide services to, the State or any political subdivision of the State.

Current Law: The Fourth Amendment of the U.S. Constitution, as applied to the states through the Fourteenth Amendment, protects individuals from unreasonable searches and seizures.

A circuit court or District Court judge may issue a search warrant whenever it is made to appear to the judge that there is probable cause to believe that (1) a misdemeanor or felony is being committed by a person or in a building, apartment, premises, place, or thing within the jurisdiction of the judge or (2) property subject to seizure is on the person or in or on the building, apartment, premises, place, or thing.

An application for a search warrant must be in (1) writing; (2) signed and sworn to by the applicant; and (3) accompanied by an affidavit that sets forth the basis for probable cause and contains facts within the personal knowledge of the affiant that there is probable cause.

Any search and seizure made under the authority of a search warrant must be made within 15 calendar days after the day the warrant was issued. A search warrant is void after this 15-day period.

A judge who issues a search warrant must retain a copy of the warrant, application, and supporting affidavit. A judge may order a supporting affidavit to be sealed for up to 30 days under certain circumstances. The warrant, application, affidavit, and other supporting documentation may not be filed with the clerk of the court until the search warrant is returned executed.

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.

Nullification refers to an action of a state in abrogating federal law by declaring federal law void and unenforceable in that state. The theory of nullification has never been legally upheld by the U.S. Supreme Court. *See Cooper v. Aaron*, 358 U.S. 1 (1958). The court has held that, under the Supremacy Clause, federal law is superior to state law, and under Article III of the Constitution, the federal judiciary has the final power to interpret the Constitution. Consequently, federal courts, not the states, are vested with the authority to make final decisions about the constitutionality of federal laws, and states may not nullify federal laws. Thus, while a state may challenge the constitutionality of federal laws by filing a lawsuit in federal court, the Supreme Court has held that states do not have the unilateral power to pass state laws that invalidate federal law. Accordingly, it is unclear if this bill can even be implemented.

Background: In June 2013, Edward Snowden, a computer technician for a U.S. defense contractor at the National Security Agency (NSA), leaked details of an NSA program that collected significant amounts of telephone and Internet data through the tracking of cell phone calls and monitoring of email messages and Internet use by the American public. Some of the data was allegedly obtained through a secret court order directed at Verizon and some was allegedly gathered through direct access to data stored by well known Internet companies. After a stop in Hong Kong, Snowden landed in Russia, where he was granted asylum after refusals by several countries. Opinions on Snowden's action varied; some people hailed him as a champion of civil liberties and privacy rights, while others condemned him for endangering U.S. security interests.

The United States has called for Snowden's extradition to face criminal charges. Based on published news reports, the U.S. Department of Justice is not considering clemency for Snowden.

State Fiscal Effect: Assuming that the bill can be implemented, the bill may result in significant operational impacts due to (1) the removal of State employees for violations of the bill's provisions; (2) dissolution of business relationships with corporations and service providers for violations of the bill's provisions; (3) constraints on existing relationships with federal agencies; and (4) revocation of federal funds for violation of the Supremacy Clause under the U.S. Constitution, noncompliance with funding policies, or lack of cooperation with federal agencies. The extent of any decrease in federal funding cannot be reliably determined at this time.

Local Fiscal Effect: Assuming that the bill can be implemented, the bill may result in significant operational impacts due to the removal of employees for violations of the bill's provisions, potential significant loss of federal and/or State funding, dissolution of business relationships with corporations and service providers, and constraints on relationships with federal agencies.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Charles, Frederick, and Montgomery counties; cities of Frederick and Havre de Grace; Department of Budget and Management; Judiciary (Administrative Office of the Courts); Maryland Association of Counties; State Prosecutor's Office; *The Washington Post*; *The Guardian (UK)*; CNN.com; Department of Legislative Services

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