



**Bill Title:** House Bill 392, Evidence – Wiretapping and Electronic Surveillance – Fair Housing Testing

**Committee:** Judiciary Committee

**Date:** February 7, 2024

**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, House Bill 392 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.



### House Bill 392 Violates the 4<sup>th</sup> 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. House Bill 392 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 House Bill 392, 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. And, where does this end? If this passes, who will be next? Bankers, journalists, tax professionals, elected officials?

### Lack of Training in House Bill 392

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 House Bill 392.

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