



HB0392 - Evidence – Wiretapping & Electronic Surveillance – Fair Housing Testing

Hearing before the House Judiciary Committee on February 7, 2024

Position: SUPPORT (FAV)

SUPPORT: House Bill 392 will substantially enhance efforts to prevent unlawful housing discrimination in Maryland by allowing fair housing testers working for a government or nonprofit civil rights organization to use an effective fair housing testing method currently in use by the United States Department of Justice, the United States Department of Housing and Urban Development (HUD) and the vast majority of U.S. States.

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. As part of fulfilling this role, ACDS works with the County to affirmatively further fair housing in Anne Arundel County to ensure that housing opportunities are available and accessible to all County residents.

HOUSING DISCRIMINATION PERSISTS AND IS ON THE RISE

Despite local State and federal laws prohibiting discrimination in housing, the problem persists and in fact complaints regarding discrimination in housing are rising significantly. The [National Fair Housing Alliance 2023 Trends Report](#)¹ reports that housing discrimination complaints increased in 2022 to the highest number of complaints ever in a single year, an increase that comes on the heels of a record number of discrimination complaints made in 2021. Similarly, the 2023 annual report of the [Maryland Commission on Civil Rights](#)² reveals a *significant spike in fair housing complaints in Maryland in each of the years since the start of the COVID-19 pandemic, through and including 2023.*

“SECRET SHOPPERS” FOR HOUSING – HOW FAIR HOUSING TESTING WORKS

Fair housing testing by housing “secret shoppers,” also known as “mystery shoppers” is the most effective tool for uncovering evidence of housing discrimination.

Secret shoppers for housing, sometimes called mystery shoppers, simulate ordinary housing transactions for the purpose of obtaining credible and objective information about housing practices. Mystery shopping can be used to investigate all types of housing and housing-related services, including renting, buying and lending. Mystery shopping evidence often forms the basis for the successful resolution of a housing discrimination complaint.

¹ <https://nationalfairhousing.org/resource/2023-fair-housing-trends-report/>

² <https://mccr.maryland.gov/Pages/Publications.aspx>

Actual home buyers and renters have no way of knowing how others are treated by housing providers, and even if they have evidence of discrimination, they are often too embarrassed, humiliated or even fearful to report instances of discrimination. As a result, reliance on renters and buyers to uncover instances of housing discrimination is generally ineffective. On the other hand, fair housing “secret shoppers,” are an incredibly effective resource for discovering violations of fair housing laws.

There are a couple of ways mystery shopping works for fair housing investigations. In one basic scenario, a tester who is a member of a protected class – for example, someone with a physical disability, or someone who has a housing voucher - reaches out to a housing provider by phone or in person to ask if the provider can accommodate their disability or will accept their voucher. If the housing provider says no, or is evasive, then there may be evidence of discrimination. The tester may then engage in further conversation to gather additional information to be assessed for evidence of discrimination. **In states where it is legal (38 states, plus the District of Columbia), that telephone conversation can be recorded to ensure the best, most reliable and accurate depiction of the interaction is gathered. In Maryland, however, the interaction must be captured through notes of the tester taken during and after the interaction – notes which rely on memory and the subjective impressions of the tester. Neither the tester *nor the subject* can rely on a recording to establish what really happened.**

The other scenario is called “matched pair testing,” in which two individuals (the testers) pose as buyers or renters having all the same financial, educational, employment and other characteristics – except that one is a member of a protected class, and the other is not. The testers separately seek the same housing service from the same housing provider within a short period of time. A difference in treatment of the two testers may be evidence of unlawful discrimination based on a tester’s membership in a protected class. Again, Maryland’s current law, without the exception contemplated with this bill, hinders the ability of the State and local jurisdictions to identify and enforce fair housing laws because the most reliable evidence cannot be gathered.

U.S. DEPARTMENT OF JUSTICE FAIR HOUSING TESTING PROGRAM

The United States Department of Justice has operated a Fair Housing Testing Program for more than thirty years, using covert testing methods with tremendous success. In its recent report, entitled “[Three Decades of Guarding Civil Rights](#),”³ (April, 2022), the Department notes that,

“Since its creation in 1991, the Department of Justice’s (DOJ) Fair Housing Testing Program has **successfully used covert testing to uncover evidence of discrimination** and

³ <https://www.justice.gov/crt/page/file/1497551/dl?inline>

unlawful treatment by landlords, lenders, places of public accommodation, and others in all 50 states and the District of Columbia. As a result of the Testing Program's efforts over the past three decades, the DOJ has **resolved over 100 federal civil rights cases** and has **obtained over \$14,000,000 in monetary relief**, including damages for those hurt by discrimination and penalties paid to the United States.

Interestingly, noting that applying for credit - particularly for home and auto loans - is an area where discrimination often goes undetected, **one case highlighted in the DOJ's testing report is a 2020 case arising from discrimination discovered through testing at an business in Glen Burnie, Maryland.** Although not a housing case, the facts illustrate how testing is used to uncover discrimination. In that case, matched pair testing was used to uncover that white testers were offered more favorable credit terms than similarly situated Black testers. For example, the dealership offered white testers the option to split their down payment into two installments over a 30-day period, yet Black testers were required to make the entire down payment immediately. The dealership told Black testers they needed higher down payment amounts than white testers and quoted a Black tester a higher bi-weekly payment than a white tester for the same car. DOJ filed a lawsuit based on the strength of the testing evidence, and ultimately reached a settlement and consent order requiring concessions from the company and drawing attention of other federal enforcement agencies to discriminatory practices in the auto lending industry. (See *United States v. Guaranteed Auto Sales*, D. Md. 2020.)

RECORDED TESTS ARE MOST COMMON AND MOST EFFECTIVE

Although currently prohibited in Maryland, most fair housing testing programs involve surreptitious recording of the interactions of the testers and the subject(s) being tested. As stated by HUD recently in an [entry for the Federal Registry](#):

“Based on HUD's experience investigating fair housing complaints, testers today generally audio and/or video record their testing experiences, meaning that the recordings—not the testers' testimony—are of utmost importance in most fact-finding hearings. ***Recording fair housing tests has become ubiquitous as cost of devices and technology has gone down and the utility of such recordings has become evident...***

...In many cases, **sharing recorded evidence of fair housing testing facilitates early resolution and settlement**, negating the need to interrogate tester credibility. And in housing discrimination cases that go to trial, the main role of testers as witnesses is to introduce the recorded evidence of the interaction, not to recount their experience in detail. **In short, testing evidence often speaks for itself** and a tester merely needs to be credible enough for the judge or jury to believe their testimony that the recording being presented is an authentic recording of the events at issue in the case.” [Emphasis added.]

RECORDING OF COMMUNICATIONS - ONE-PARTY AND TWO-PARTY CONSENT LAWS

Laws relating to the recording of communications are generally broken into two categories,

called “one-party consent” laws, and “two-party consent” laws. The most effective fair housing testing programs rely on one-party consent laws because the test may be recorded without the knowledge of the subject of the test. Federal law⁴ and the vast majority of states have one-party consent laws, which in the context of fair housing means the tester can record a phone call or conversation so long as they are a party to the conversation. In contrast, Maryland is in the minority with a two-party consent law⁵, which in the context of fair housing testing would mean that the tester would have to disclose their intent to record and get the subject’s consent for the recording, which defeats the entire purpose of the test.

CURRENT MARYLAND LAW STANDS IN THE WAY OF EFFECTIVE ENFORCEMENT OF FAIR HOUSING LAWS. Without an exception to Maryland’s current law, the most effective methodology for conducting fair housing tests is unavailable as a tool to protect Marylanders from discrimination at a time when we are in a housing crisis throughout the state and discrimination complaints are at their highest point ever. As it stands, **Maryland’s law operates as a shield to protect housing providers that discriminate against Maryland residents.** This bill would change that by creating a narrowly drafted carve out to allow fair housing testers working with governments and civil rights nonprofit organizations to record tests which, in turn, would help the State and local jurisdictions to better fulfill their obligations to affirmatively further fair housing.

MARYLAND’S STATE LAW IS THE ONLY BARRIER TO USE OF RECORDINGS FOR FAIR HOUSING TESTING IN MARYLAND. Some members of the Senate Judicial Proceedings Committee expressed concerns that allowing one-party consent recordings by fair housing testers may violate the 4th amendment of the U.S. Constitution. However, with respect, that concern is misplaced. **Neither federal law nor the 4th Amendment or any other provision of the United States Constitution prevent fair housing testers from lawfully recording communications.** As noted above, federal law dating back to at least the 1960s only requires one-party consent for recording of communications. That is the law of the land, as evidenced by the fact that covert fair housing testing is the standard procedure for the Department of Justice, is acknowledged by HUD as a best practice, and fair housing testers in a majority of other states use the practice. There is nothing stopping the use of recording devices for fair housing tests in Maryland except the Maryland law this bill seeks to amend.

⁴ [18 U.S.C. 2511](#) ... (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. ¶ (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

⁵ [Annotated Code of Maryland, Courts and Judicial Proceedings §10-401](#)

POSSIBLE AMENDMENT SUGGESTED BY THE OFFICE OF THE PUBLIC DEFENDER

The Office of the Public Defender has expressed concerns that allowing the recording of conversations in the context of fair housing testing could ultimately be used in the context of unrelated criminal matters. **Our support for this bill would not change if an amendment were made to specifically prevent the use of fair housing test recordings in the context of unrelated criminal charges.**

CONCLUSION

This bill would make a narrow exception to Maryland’s “wiretapping” law, which is necessary to allow one-party consent for recordings made by trained testers working for State, local jurisdictions, or nonprofit civil rights organizations so they may record fair housing tests for evidence of violations of fair housing laws, thus enabling the State and local jurisdictions to meet their obligations to further fair housing and ensure that all Marylanders are protected from unlawful housing discrimination.

For the reasons noted above, ACDS urges the Committee to issue a FAVORABLE report on HB 392.