

Department of Legislative Services
Maryland General Assembly
2009 Session

FISCAL AND POLICY NOTE

House Bill 182
Judiciary

(Delegate Hixson, *et al.*)

Freedom of Association and Assembly Protection Act of 2009

This bill prohibits a “law enforcement agency,” including the Department of State Police (DSP) from using a “covert technique” to investigate or infiltrate a “protest or advocacy entity,” except under specified circumstances where certain requirements for the law enforcement agency are met.

Fiscal Summary

State Effect: None. The bill’s requirements can be handled with the existing budgeted resources of DSP and other State law enforcement agencies. Some agencies have written policies already in place.

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

Small Business Effect: None.

Analysis

Bill Summary: This bill prohibits a “law enforcement agency” from using an otherwise lawful “covert technique” to investigate or infiltrate a “protest or advocacy entity” unless, before the covert technique is used, the “chief” makes a written finding, including specific factual determinations upon which the finding is based, that the use of the covert technique 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 satisfactory results.

On or before January 1, 2010, DSP must adopt regulations governing the use by DSP of covert techniques involving the surveillance of protest or advocacy entities. On or before July 1, 2010, each law enforcement agency other than DSP must adopt a written, publicly available policy governing similar activities.

A law enforcement agency may not:

- collect, disseminate, or maintain “protected information” in a criminal intelligence database unless the information is directly related to criminal activity that is the subject of an investigation or preliminary inquiry authorized and conducted in accordance with this subtitle; or
- knowingly receive, disseminate, or maintain any information that has been obtained in violation of an applicable federal, State, or local law, ordinance, or regulation.

A law enforcement agency may disseminate protected information lawfully obtained during an investigation conducted in accordance with these provisions to other law enforcement agencies only if the information:

- falls within the investigative or protective jurisdiction or litigation-related responsibility of the agency;
- may assist in preventing an unlawful act, the use of violence, or any other conduct dangerous to human life; or
- is required to be disseminated by an interagency agreement, statute, or other law.

Each request for dissemination of protected information collected and maintained must be evaluated and approved by the chief of the law enforcement agency receiving the request. The dissemination of protected information must be through written transmittal or recorded on a form that describes the documents or protected information transmitted. A record of each dissemination must be maintained for at least one year. Collected and maintained information may not be disseminated to a nonlaw enforcement agency, department, group, organization, or individual, except as legally authorized.

On or before January 1, 2010, DSP must adopt regulations governing all departmental collection, dissemination, retention, database inclusion, purging, and auditing of criminal intelligence information relating to protest or advocacy entities. On or before July 1, 2010, each law enforcement agency other than DSP must adopt a written, publicly available policy governing similar issues. These regulations and policies must include a requirement that:

- such a database be: (1) audited periodically for relevance to criminal activity, timeliness, accuracy, and reliability; and (2) purged on an appropriate cycle;
- information unlawfully or inappropriately entered into the database be purged promptly and the fact of the existence of the information and the date of purging be recorded and maintained in law enforcement records; and
- retained information be evaluated for the reliability of the source of the information and the validity and accuracy of the content of the information prior to filing and include a statement as to whether that reliability and validity and accuracy have been corroborated.

Finally, on or before January 1, 2010, DSP must report to the Senate Judicial Proceedings Committee and the House Judiciary Committee on the status of DSP's efforts to:

- revise or discontinue use of the Case Explorer database in connection with DSP's intelligence-gathering activities; and
- contact all individuals who have been described in the Case Explorer database as being suspected of involvement in criminal activity, but as to whom DSP has no articulable reasonable suspicion of involvement in criminal activity; expeditiously afford those individuals an opportunity to review and obtain copies of the unredacted 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;
- manufacturer 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.

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: SB 256 (Senator Raskin, *et al.*) - Judicial Proceedings.

Information Source(s): Baltimore City, Kent, Montgomery, Washington, and Worcester counties; City of Rockville; Office of the Attorney General; Department of Natural Resources; Department of General Services; Department of State Police; Maryland Department of Transportation; Department of Legislative Services

Fiscal Note History: First Reader - February 27, 2009
mcp/hlb

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