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March 3, 2017

The Honorable Curt Anderson
Maryland General Assembly
314 House Office Building
Annapolis, Maryland 21401

Re: House Bill 1504 - Baltimore City - Control of Baltimore City Police Department

Dear Delegate Anderson:

You asked for advice about House Bill 1504. The bill, among other things, changes the status of the Baltimore City Police Department ("BPD") from a State agency to an agency of Baltimore City. You asked what impact this change would have regarding the availability of sovereign immunity to Baltimore City. As described in more detail below, currently the BPD has sovereign immunity as a State agency. House Bill 1504, if enacted, would remove sovereign immunity from the BPD. The result would be that direct lawsuits could be brought against both the BPD and Baltimore City for State constitutional torts allegedly committed by BPD officers and for other State common law torts. In addition, direct claims against the City could be brought in federal court for alleged 42 U.S.C. § 1983 actions.

The BPD has been a State agency since 1860, although funding for the BPD is the City's responsibility. Moreover, the Mayor has appointment and removal authority over the BPD Commissioner. Chapter 920, Laws of Maryland 1976. Further, although the BPD is a State agency, the State has no direct administrative control over it.

Under [Article 4] § 16-2 the Department is constituted as an agency of the State, although under § 16-8 its operations are funded by the City. The Police Commissioner of Baltimore City is designated as the chief executive officer of the Department by § 16-4 and its 'affairs and operations' are placed under his supervision and direction.

Beca v. City of Baltimore, 279 Md. 177, 180-181 (1977).

The BPD is considered a "local government" for purposes of the Local Government Tort Claims Act ("LGTCA"). See Courts & Judicial Proceedings Article, § 5-301(d)(21).

In addition to the common law qualified immunity, Baltimore City police officers enjoy an *indirect* statutory qualified immunity under LGTCA. In contrast to the protection afforded to State personnel under the State Tort Claims Act, local government employees do not possess a direct immunity from liability for their tortious conduct under LGTCA. They may be sued, and judgments may be entered against them. The protection afforded by LGTCA is two-fold. If the action alleges that the conduct was within the scope of the defendant's employment, the local government must provide a legal defense for the employee. In addition, unless the employee is found to have acted with actual malice, the plaintiff may not execute on a judgment recovered against the employee, but, rather, subject to certain limits, the local government is liable on the judgment.

Smith v. Danielczyk, 400 Md. 98, 129-30 (2007) (citations omitted). See also *Estate of Anderson v. Strohman*, 6 F.Supp.3d 639, 643 (D. Md. 2014) (the LGTCA prohibits the BPD from asserting sovereign immunity to avoid its statutorily-imposed duty to defend or indemnify its employees).

At the same time, because the BPD is a State agency it has sovereign immunity in State court for *direct* tort liability. "Under the doctrine of sovereign immunity, neither a contract nor a tort action may be maintained against the State unless specific legislative consent has been given and funds (or the means to raise them) are available to satisfy the judgment." *Baltimore Police Dep't v. Cherkes*, 140 Md. App. 282, 305 (2001) (citations omitted). "This total immunity protects the State not only from damage actions for ordinary torts but also from such actions for State constitutional torts." *Id.* at 306. In addition, the City is not ordinarily directly liable for torts committed by BPD employees. Because the BPD is a State agency, "as a matter of Maryland law, no liability ordinarily attaches to Baltimore City under the doctrine of respondeat superior for the torts of Baltimore City police officers acting within the scope of their employment." *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662, 668 (1988). See also *Estate of Anderson*, 6 F. Supp. 3d at 646 ("Try as they may, Plaintiffs cannot avoid the mountain of law insisting the City does not sufficiently control the BPD or Baltimore police officers. Neither can this Court.") (involving civil rights claims against the City under 42 U.S.C. § 1983). Currently, BPD officers may be found liable for damages they inflict unless the City determines the officer acted appropriately within the scope of the officer's employment. BPD and the City are not liable, however, for damages due to faulty hiring, training or supervision unless the plaintiff proves a "pattern and practice" in federal court.

Making the BPD a City agency will result in the BPD having only local governmental immunity. Unlike State sovereign immunity, which provides "total protection" for State constitutional torts, local governmental immunity does not provide any immunity for State constitutional torts. "Unlike in a § 1983 action and unlike in an action for some common law torts, neither the local government official nor a local governmental entity has available any governmental immunity in an action based on rights protected by the State Constitution." *DiPino v. Davis*, 354 Md. 18, 51 (1999). In addition, the City could become liable for damages for negligent hiring and supervision, which have lower burdens of proof than a federal pattern and practice claim requires.

In summary, by designating the BPD an agency of Baltimore City and thus taking away sovereign immunity available to State agencies, the bill would (1) allow direct lawsuits against both the BPD and the City for State constitutional torts committed by BPD officers (where damages are uncapped); (2) allow direct claims against the City in federal court under 42 U.S.C. § 1983 for a civil rights violation (which is uncapped federal constitutional liability); and (3) allow direct tort claims against the BPD and the City for other State common law torts. As a result, it is reasonable to conclude that the City would be exposed to significantly higher damage awards.

Finally, you also asked whether House Bill 1504 would have any impact on the recently entered into consent decree with the BPD, Baltimore City and the Department of Justice. It is my understanding that the agreement was entered into by the three parties with the recognition that the BPD is a State agency, not a City agency, and therefore, they are separate entities. Accordingly, there is a possibility that this change in status would be considered significant. If so, the agreement may have to be renegotiated, or at a minimum, amended.

Sincerely,



Sandra Benson Brantley
Counsel to the General Assembly