Michael J. O'Neill *Legislative Service Commission*

H.B. 727

123rd General Assembly
(As Introduced)

Reps. Schuler, Buchy, Distel, Allen, Williams, Grendell, Taylor, Vesper

BILL SUMMARY

- Provides an exclusion to the physicians' and dentists' testimonial privilege and permits a physician or dentist to testify or to be compelled to testify in a criminal action concerning whether the accused is HIV positive.

- Specifies that, if a person is charged with certain sexually oriented offenses, any law enforcement officer who wishes to obtain from any health care provider a copy of any records the provider possesses that pertain to any HIV test or the results of any HIV test administered to the person must submit to the health care provider a statutorily prescribed written statement requesting the release of records.

- Requires a health care provider to whom the written request is provided to provide the requested information.

- Creates an exception to the prohibition against disclosing certain HIV information to also permit the results of an HIV test or the identity of an individual on whom an HIV test is performed or who is diagnosed as having AIDS or an AIDS-related condition to be disclosed to law enforcement authorities pursuant to a written request of the type authorized under the bill.

CONTENT AND OPERATION

Physician testamentary privilege

Existing law

Existing law specifies that a physician or a dentist may not testify concerning a communication made to the physician or dentist by a patient in that relation or the physician's or dentist's advice to a patient, except as otherwise provided below, and except that, if the patient is deemed to have waived this testimonial privilege, the physician may be compelled to testify on the same subject (R.C. 2317.02(B)(1)).[1]

The testimonial privilege does not apply, and a physician or dentist may testify or may be compelled to testify, in any of the following circumstances (R.C. 2317.02(B)(1)):

(1) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under the Workers Compensation Law, under any of the following circumstances: (a) if the patient or the guardian or other legal representative of the patient gives express consent, (b) if the patient is deceased, the spouse of the patient or the executor or administrator of the patient's estate gives express consent, or (c) if a medical claim, dental claim, chiropractic claim, or optometric claim, an action for wrongful death, any other type of civil action, or a claim under the Workers Compensation Law is filed by the patient, the personal representative of the estate of the patient if deceased, or the patient's guardian or other legal representative.

(2) In any criminal action concerning any test or the results of any test that determines the presence or concentration of alcohol, a drug of abuse, or alcohol and a drug of abuse in the patient's blood, breath, urine, or other bodily substance at any time relevant to the criminal offense in question.

(3) In any criminal action against a physician or dentist.

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[1] *"Communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician or dentist to diagnose, treat, prescribe, or act for a patient. A "communication" may include, but is not limited to, any medical or dental, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis. (R.C. 2317.02(B)(4)(a).)*

Existing law prescribes a form by which law enforcement officers may request health care providers to provide the results of tests described in paragraph (2), above, and requires health care providers to provide that information. Existing law also permits certified copies of those test results to be introduced into evidence. (R.C. 2713.02(B)(2) and (3) and R.C. 2713.022--not in the bill.)

Operation of the bill

Exclusion from privilege. Under the bill, the testimonial privilege also does not apply, and a physician or dentist may testify or may be compelled to testify, in any criminal action concerning whether the accused is a carrier of a virus that causes acquired immunodeficiency syndrome (hereafter "HIV positive") (R.C. 2317.02(B)(1)(b)(ii)).

Written request to a health care provider. If a person is charged with felonious assault, rape, sexual battery, unlawful sexual conduct with a minor, soliciting, soliciting after positive HIV test, loitering to engage in solicitation, loitering to engage in solicitation after positive HIV test, prostitution, or prostitution after positive HIV test or with a violation of a municipal ordinance that is substantially equivalent to any of those offenses, any law enforcement officer who wishes to obtain from any health care provider a copy of any records the provider possesses that pertain to any HIV test or the results of any HIV test administered to the person to determine if the person is HIV positive must submit to the health care provider a statutorily prescribed written statement (see **COMMENT** 1 for the prescribed form of the written statement).[2] If any law enforcement officer submits the written statement to a health care provider, the provider, except to the extent specifically prohibited by any Ohio or federal law, must supply to the officer a copy of any of the requested records the provider possesses. If the health care provider does not possess any of the requested records, the provider must give the officer a written statement that indicates that the provider does not possess any of the requested records.

If the health care provider possesses the requested records at any time relevant to the criminal offense in question, in lieu of personally testifying as to the results of the test in question, the custodian of the records may submit a certified copy of the records. Upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of

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[2] *"Health care provider" means a hospital, ambulatory care facility, long-term care facility, pharmacy, emergency facility, or health care practitioner (R.C. 2317.02(B)(4)(b) by reference to R.C. 3729.01(G)--not in the bill).*

Evidence. A specified provision establishing standards regarding the certification of medical records and their introduction into evidence does not apply to any certified copy of records submitted in accordance with this provision. Nothing in this provision may be construed to limit the right of any party to call as a witness the person who administered the test to which the records pertain, the person under whose supervision the test was administered, the custodian of the records, the person who made the records, or the person under whose supervision the records were made. (R.C. 2317.02(B)(2) and 2317.024.)

Submission of certified copy by a physician or dentist. If the testimonial privilege does not apply to a physician or dentist as provided under the bill, the physician or dentist, in lieu of personally testifying as to the results of the test in question, may submit a certified copy of those results. Upon its submission, the certified copy is qualified as authentic evidence and may be admitted as evidence in accordance with the Rules of Evidence. A specified provision establishing standards regarding the certification of medical records and their introduction into evidence does not apply to any certified copy of records submitted in accordance with this provision. Nothing in this provision may be construed to limit the right of any party to call as a witness the person who administered the test in question, the person under whose supervision the test was administered, the custodian of the results of the test, the person who compiled the results, or the person under whose supervision the results were compiled. (R.C. 2317.02(B)(3)(b).)

Prohibition against disclosing HIV test information

Existing law

Generally, a person or agency of Ohio or local government that acquires the information while providing any health care service or while in the employ of a health care facility or health care provider is prohibited from disclosing or compelling another to disclose any of the following (R.C. 3701.243(A)):

(1) The identity of any individual on whom an HIV test is performed;

(2) The results of an HIV test in a form that identifies the individual tested;

(3) The identity of any individual diagnosed as having AIDS or an AIDS-related condition.

Generally, the results of an HIV test or the identity of an individual on whom an HIV test is performed or who is diagnosed as having AIDS or an AIDS-related condition may be disclosed only to specified classes of individuals. One of those

specified classes of individuals are law enforcement authorities pursuant to a search warrant or a subpoena issued by or at the request of a grand jury, a prosecuting attorney, a city director of law or similar chief legal officer of a municipal corporation, or a village solicitor, in connection with a criminal investigation or prosecution. (R.C. 3701.243(B)(1)(h).) (See **COMMENT** 2 and 3 for a list of other classes of individuals to whom the prohibition does not apply.)

Any disclosure pursuant to the exceptions must be in writing and accompanied by a written statement that includes the following or substantially similar language: "This information has been disclosed to you from confidential records protected from disclosure by state law. You shall make no further disclosure of this information without the specific, written, and informed release of the individual to whom it pertains, or as otherwise permitted by state law. A general authorization for the release of medical or other information is not sufficient for the purpose of the release of HIV test results or diagnoses." (R.C. 3701.243(E).)

Operation of the bill

The bill expands the exceptions to also permit the results of an HIV test or the identity of an individual on whom an HIV test is performed or who is diagnosed as having AIDS or an AIDS-related condition to be disclosed to law enforcement authorities pursuant to a written request of the type authorized under the bill (R.C. 3701.243(B)(1)(h)).

COMMENT

1. The written statement the law enforcement officer submits to a health care provider under the bill must be in the following form (R.C. 2317.024(A)):

Written statement requesting the release of records

To:..... (insert the name of the health care provider in question).

I hereby state that an official criminal investigation has begun regarding, or a criminal action or proceeding has been commenced against,..... (insert the name of the person in question), and that I believe one or more HIV tests has been administered to that person by this health care provider to determine if the accused is a carrier of a virus that causes acquired immunodeficiency syndrome. Therefore, I hereby request that, pursuant to division (B)(2) of section 2317.02 of the Revised Code, this health care provider supply me with copies of any records the provider possesses that pertain to any HIV test or the results of any HIV test administered to the person specified above to determine if the accused is a carrier of a virus that causes acquired immunodeficiency syndrome.

.....
(Name of officer)
.....
(Officer's title)
.....
(Officer's employing agency)
.....
(Officer's telephone number)
.....
.....
.....
(Agency's address)
.....
(Date written statement submitted)

2. Generally, the results of an HIV test or the identity of an individual on whom an HIV test is performed or who is diagnosed as having AIDS or an AIDS-related condition may be disclosed only to the following (R.C. 3701.243(B)(1)):

(a) The individual who was tested or the individual's legal guardian, and the individual's spouse or any sexual partner;

(b) A person to whom disclosure is authorized by a written release, executed by the individual tested or by the individual's legal guardian and specifying to whom disclosure of the test results or diagnosis is authorized and the time period during which the release is to be effective;

(c) The individual's physician;

(d) The Department of Health or a health commissioner to which reports are made;

(e) A health care facility or provider that procures, processes, distributes, or uses a human body part from a deceased individual, donated for a purpose specified in the Anatomical Gifts Laws and that needs medical information about the deceased individual to ensure that the body part is medically acceptable for its intended purpose;

(f) Health care facility staff committees or accreditation or oversight review organizations conducting program monitoring, program evaluation, or service reviews;

(g) A health care provider, emergency medical services worker, or peace officer who sustained a significant exposure to the body fluids of another individual, if that individual was tested pursuant to law, except that the identity of the individual tested may not be revealed;

3. The following are other exceptions to the general prohibition against disclosing the results of an HIV test or a diagnosis of AIDS or an AIDS-related condition:

(a) The results of an HIV test or a diagnosis of AIDS or an AIDS-related condition may be disclosed to a health care provider, or an authorized agent or employee of a health care facility or a health care provider, if the provider, agent, or employee has a medical need to know the information and is participating in the diagnosis, care, or treatment of the individual on whom the test was performed or who has been diagnosed as having AIDS or an AIDS-related condition (R.C. 3701.243(B)(2)).

(b) Any person or government agency may receive access to or authority to disclose the HIV test records of an individual if, in a civil action, the person establishes by clear and convincing evidence that the person has a compelling need for disclosure of the information that cannot be accommodated by other means (R.C. 3701.243(C)(1)).

(c) A person or government agency that considers it necessary to disclose the results of an HIV test of a specific individual in an action in which it is a party may disclose the information if it establishes in a hearing by clear and convincing

evidence that a compelling need for the disclosure has been demonstrated (R.C. 3701.243(C)(2)).

(d) The results of an HIV test or the identity of an individual on whom an HIV test is performed or who is diagnosed as having AIDS or an AIDS-related condition may be disclosed to a federal, state, or local government agency, or the official representative of such an agency, for purposes of any public assistance program (R.C. 3701.243(D)).

(e) An individual who knows that the individual has received a positive result on an HIV test or has been diagnosed as having AIDS or an AIDS-related condition must disclose this information to any other person with whom the individual intends to make common use of a hypodermic needle or engage in sexual conduct (R.C. 3701.243(F)).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	05-25-00	p. 2149

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