David M. Gold *Legislative Service Commission*

H.B. 317

126th General Assembly
(As Introduced)

Reps. S. Smith, Barrett, S. Patton, Williams, Yuko, Allen, Brown, Key

BILL SUMMARY

- Modifies the list of offenses the official records of which may not be sealed under the law authorizing first offenders to apply for the sealing of official records of conviction, and authorizes a first offender whose application has been denied under that law to file a new application after one year from the date of the denial.

- Establishes a procedure by which offenders who are not first offenders may, with certain exceptions, apply to have their records of conviction sealed.

- Sets forth the legal consequences of an order sealing the record of conviction of an offender who is not a first offender and the permissible uses of a sealed record notwithstanding the sealing order.

- Generally prohibits public officers and employees from releasing or otherwise making available sealed official records of offenders who are not first offenders.

- Prohibits private individuals or entities from releasing information that is contained in the sealed official record of a first offender, an offender who is not a first offender, or a person who is found not guilty of an offense by a jury or a court, is the defendant named in a dismissed complaint, indictment, or information, or against whom a no bill is entered by a grand jury.

- Requires a court, before accepting a plea of guilty or no contest and before pronouncing judgment in a criminal case, to inform the defendant of the circumstances under which official records may be sealed.

- Replaces the existing mechanism for the sealing of official records in a case in which a person is found not guilty of an offense by a jury or a court, is the defendant named in a dismissed complaint, indictment, or information, or against whom a no bill is entered by a grand jury with a mechanism that, with certain exceptions, provides for the automatic sealing of the official records in a case in which any of those events occur after the effective date of the bill.

- Provides a procedure by which a person who, before the effective date of the bill, was found not guilty of an offense, had the charges in a case dismissed, or had a no bill returned by a grand jury may apply for the sealing of the official records in the case.

- Prohibits a prosecuting attorney from having access to an index of sealed records of cases in which a person is found not guilty of an offense, the charges are dismissed with prejudice, or a no bill is returned by a grand jury and that are maintained by a public office when determining a person's eligibility for a pre-trial diversion program.

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CONTENT AND OPERATION

Sealing of records of conviction of first offenders

Existing law provides a procedure by which a person who has been convicted of a criminal offense and is a first offender may apply to have the official records of the person's conviction sealed (see **COMMENT** 1; also see "***Records of conviction that may not be sealed***," below). Generally, as used in the sealing law, a "first offender" is a person who has been convicted of an offense in Ohio or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in Ohio or any other jurisdiction. A person may apply (generally to the sentencing court) for a sealing order after one year from the person's final discharge if the offense was a misdemeanor or three years after final discharge if the offense was a felony. The procedure that follows upon the application--investigation by the probation department, notice to the prosecutor for the case, a hearing, specified matters to be considered and determinations to be made by the court--is similar to the procedure the bill enacts for offenders who are not first offenders (see "***Determination of application***" under "***Sealing of records of conviction of offenders who are not first offenders***," below). (R.C. 2953.31--not in the bill, and R.C. 2953.32 through 2953.35.)

The bill makes no changes in the procedure for determining the application of a first offender for a sealing order. However, the bill specifies that, if a court denies a first offender's application, the applicant may file a new application at any time after one year from the date of the denial (R.C. 2953.32(C)(3)).

Records of conviction that may not be sealed

Existing law

Under existing law, the official records of conviction of first offenders may not be sealed under the procedure described above if the conviction falls within any of the following six categories (R.C. 2953.36):

(1) Convictions when the offender is subject to a mandatory prison term. Certain offenses, such as murder and rape, carry mandatory prison terms. With regard to some other offenses, the facts of the case--for example, the age of the victim or whether a firearm was used in the commission of the offense--determine whether a prison term is mandatory.

(2) Convictions under R.C. 2907.02 (rape), 2907.03 (sexual battery), 2907.04 (unlawful sexual conduct with a minor), 2907.05 (gross sexual imposition), 2907.06 (sexual imposition), 2907.321 (pandering obscenity involving a minor), 2907.322 (pandering sexually oriented matter involving a

minor), or 2907.323 (illegal use of a minor in nudity-oriented material or performance), former R.C. 2907.12 (felonious sexual penetration), or R.C. Chapter 4507. (driver's license), 4510. (suspension, cancellation, or revocation of driver's license), 4511. (operation of a motor vehicle), or 4549. (motor vehicle crimes), or a conviction for a violation of a municipal ordinance that is substantially similar to any section contained in any of those Chapters.

(3) Convictions of an offense of violence (see **COMMENT** 2) when the offense is a misdemeanor of the first degree or a felony and when the offense is not a violation of R.C. 2917.03 (riot) and is not a violation of R.C. 2903.13 (assault), 2917.01 (inciting to violence), or 2917.31 (inducing panic) that is a misdemeanor of the first degree.

(4) Convictions of an offense in circumstances in which the victim of the offense was under 18 years of age when the offense is a misdemeanor of the first degree or a felony.

(5) Convictions of a felony of the first or second degree.

(6) Bail forfeitures in a traffic case as defined in Traffic Rule 2 (a misdemeanor proceeding that involves one or more violations of a law, ordinance, or regulation governing the operation and use of vehicles, conduct of pedestrians in relation to vehicles, or weight, dimension, loads or equipment, or vehicles drawn or moved on highways and bridges).

Operation of the bill

The bill eliminates all of the foregoing categories of convictions the records of which may not be sealed and instead contains a single list of the following offenses for which the official records of conviction may not be sealed: R.C. 2903.01 (aggravated murder), 2903.02 (murder), 2905.01 (kidnapping), 2905.02 (abduction), 2905.05 (criminal child enticement), 2907.02 (rape), 2907.03 (sexual battery), 2907.04 (unlawful sexual conduct with a minor), 2907.05 (gross sexual imposition), 2907.06 (sexual imposition), 2907.321 (pandering obscenity involving a minor), 2907.322 (pandering sexually oriented matter involving a minor), 2907.323 (illegal use of a minor in nudity-oriented material or performance), and former R.C. 2907.12 (felonious sexual penetration). This list applies to both first offenders under existing law and offenders who are not first offenders under the procedure the bill enacts (see "***Sealing of records of conviction of offenders who are not first offenders***," below). (R.C. 2953.36.)

Sealing of records of conviction of offenders who are not first offenders

The bill allows offenders who are not first offenders to apply to have the official records (see **COMMENT** 1) of their convictions sealed if they meet certain criteria. As discussed in the preceding paragraph, records of conviction of some offenses may not be sealed.

Who may apply

The bill sets forth three categories of offenders who are not eligible to have their official records sealed as first offenders under existing law but who may apply under the bill: persons who have never been convicted of a felony (referred to in this analysis as "non-felons"); persons who have been convicted of a felony (referred to in this analysis as "felons"); and persons who have been convicted of or effected a bail forfeiture in relation to a charge under R.C. 4511.19 (referred to in this analysis as "DUI defendants").

Non-felons. Subject to the treatment of DUI cases, described below, a person who is not a first offender may apply to have the person's official records sealed if all of the following apply (R.C. 2953.322(A)):

(1) The person has been convicted of or pleaded guilty in Ohio to one or more misdemeanor offenses, whether or not the person was arrested in Ohio for any misdemeanor offense and effected a bail forfeiture.

(2) The person has not been convicted of or pleaded guilty to a felony in Ohio or any other jurisdiction.

(3) For at least seven years following the date of sentencing for the most recent misdemeanor offense, the person has not been charged with the commission of a felony offense in Ohio or any other jurisdiction and has not been convicted of or pleaded guilty to a misdemeanor offense in Ohio or any other jurisdiction.

Felons. Subject to the treatment of DUI cases, described below, a person who is not a first offender may apply to have the person's official records sealed if both of the following apply (R.C. 2953.322(B)):

(1) The person has been convicted of or pleaded guilty to one or more felony offenses in Ohio, whether or not the person has been convicted of or pleaded guilty to one or more misdemeanor offenses in Ohio.

(2) For at least seven years following the person's final discharge from the most recent conviction for a felony or misdemeanor offense, the person has not been:

(a) Charged with the commission of a felony offense in Ohio or any other jurisdiction;

(b) Convicted of or pleaded guilty to a misdemeanor offense; or

(c) Arrested for a misdemeanor offense and effected a bail forfeiture in Ohio or any other jurisdiction.

DUI defendants. A person who is not a first offender may apply to have the person's records sealed if all of the following apply (R.C. 2953.322(C)):

(1) The person has been convicted of, pleaded guilty to, or effected a bail forfeiture in relation to one or more violations or alleged violations of R.C. 4511.19 (operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them or operating a vehicle after underage alcohol consumption).

(2) For at least five years following the later of the date of sentencing for the most recent misdemeanor violation of R.C. 4511.19 or the person's final discharge from the most recent felony violation of R.C. 4511.19, the person has not been:

(a) Charged with the commission of any felony offense in Ohio or any other jurisdiction; or

(b) Convicted of or pleaded guilty to any misdemeanor offense in Ohio or any other jurisdiction.

(3) The official records in every case in which the person was convicted of, pleaded guilty to, or effected a bail forfeiture in relation to a violation or alleged violation of any statute or ordinance other than a violation of R.C. 4511.19 or of a substantially similar statute in another state previously have been sealed or expunged.

Where to apply

A non-felon or felon may apply for a sealing order to each court in which the person was convicted of or pleaded guilty to a misdemeanor offense (for non-felons) or to a felony or misdemeanor offense (for felons), and to each court in which a misdemeanor case was pending against the person when the person effected a bail forfeiture for the sealing of the official records in that court of each case that is a subject of the application (R.C. 2953.322(A) and (B)). A DUI defendant may apply to each court that sentenced the person for a violation of R.C. 4511.19 and to each court in which a case involving an alleged violation of R.C. 4511.19 was pending when the person effected a bail forfeiture for the sealing of the official records of the case in that court (R.C. 2953.322(C)).

Determination of application

When a person who is not a first offender files an application for the sealing of official records under the bill, the court must set a date for a hearing and notify the prosecutor for each case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor must specify in the objection the reasons for believing a denial of the application is justified. The court must direct its regular probation officer, a state probation officer, or the department of probation of the county in which the applicant resides to make inquiries and written reports as the court requires concerning the applicant. (R.C. 2953.322(D).)

The court must do all of the following (R.C. 2953.322(E)(1)):

(1) Determine whether the applicant has been charged with the commission of, convicted of, or pleaded guilty to any offense in Ohio or any other jurisdiction since the applicant's final discharge from all offenses;

(2) Determine whether the applicant has been rehabilitated to the satisfaction of the court;

(3) If the prosecutor has filed an objection, consider the reasons specified by the prosecutor for not granting the application;

(4) Weigh the interests of the applicant in having the applicant's official records sealed against the legitimate needs, if any, of the government to maintain those records.

Subject to R.C. 2953.322(H) and (I) (see "***Index to sealed records***" and "***Exclusion of a person by a school district***" under "***Effect of sealing order***," below), the court must order all official records pertaining to the applicant's cases sealed and all index reference to the cases deleted if it determines all of the following (R.C. 2953.322(E)(2)):

(1) That the applicant has not been charged with the commission of, convicted of, or pleaded guilty to any offense in Ohio or any other jurisdiction and has not been arrested in Ohio or any other jurisdiction for a misdemeanor and effected a bail forfeiture, whichever is applicable, since the date of sentencing or final discharge from those offenses, whichever is applicable;

(2) That the interests of the applicant in having the official records pertaining to the applicant's conviction or bail forfeiture sealed are not outweighed by any legitimate governmental needs to maintain those records;

(3) That the applicant has been rehabilitated to the satisfaction of the court.

Application fee

Upon the filing of an application under the bill by a person who is not a first offender, the applicant, unless indigent, must pay a fee of $50. The court pays $30 of the fee into the state treasury. The court pays $20 of the fee into the county general revenue fund if the sealed conviction or bail forfeiture was pursuant to a state statute, or into the general revenue fund of the municipal corporation involved if the sealed conviction or bail forfeiture was pursuant to a municipal ordinance. (R.C. 2953.322(E)(3).)

Effect of sealing order

Nonoccurrence of offense. When a court orders records sealed under the bill's provisions regarding persons who are not first offenders, the proceedings in the cases are considered not to have occurred and the convictions or bail forfeitures of the person must be sealed, except that upon conviction of a subsequent offense, the sealed record of prior convictions or bail forfeitures may be considered by the court in determining the sentence or other appropriate disposition (R.C. 2953.322(E)(2)).

Inspection of sealed records. Existing law authorizes the inspection of records sealed under the provisions applicable to first offenders for specified purposes (R.C. 2953.32(D)). The bill extends these provisions to records of persons other than first offenders that have been sealed under the bill's provisions (R.C. 2953.322(F)). Inspection of the sealed records included in a sealing order may be made only by the following persons or for the following purposes (R.C. 2953.32(D)):

(1) By a law enforcement officer or prosecutor, or the assistants of either, to determine whether the nature and character of the offense with which a person is to be charged would be affected by virtue of the person's previously having been convicted of a crime;

(2) By the parole or probation officer of the person who is the subject of the records, for the exclusive use of the officer in supervising the person while on parole or under a community control sanction or a post-release control sanction, and in making inquiries and written reports as requested by the court or Adult Parole Authority;

(3) Upon application by the person who is the subject of the records, by the persons named in the application;

(4) By a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case;

(5) By a prosecuting attorney or the prosecuting attorney's assistants, to determine a defendant's eligibility to enter a pre-trial diversion program established pursuant to R.C. 2935.36;[1]

(6) By any law enforcement agency or any authorized employee of a law enforcement agency or by the Department of Rehabilitation and Correction as part of a background investigation of a person who applies for employment with the agency as a law enforcement officer or with the Department as a corrections officer;

(7) By any law enforcement agency or any authorized employee of a law enforcement agency, for investigatory work product purposes set forth in R.C. 2953.321;

(8) By the Bureau of Criminal Identification and Investigation (BCII) or any authorized employee of the BCII for the purpose of providing information to a board or person pursuant to R.C. 109.57(F) or (G);[2]

(9) By the BCII or any authorized employee of the BCII for the purpose of performing a criminal history records check on a person to whom a peace officer training certificate is to be awarded by the Ohio Peace Officer Training Commission;

(10) By the BCII, an authorized employee of the BCII, a sheriff, or an authorized employee of a sheriff in connection with a criminal records check of an applicant for a license to carry a concealed handgun.

When the nature and character of the offense with which a person is to be charged would be affected by the information, it may be used for the purpose of charging the person with an offense.

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[1] *R.C. 2935.36 authorizes a prosecuting attorney to establish a pre-trial diversion program for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again.*

[2] *R.C. 109.57(F) and (G) authorize the BCII to do criminal background checks on persons seeking employment with schools, day-care centers, hospice care programs, and other specified institutions, agencies, or programs that service children, mentally retarded or developmentally disabled individuals, or the elderly.*

Use in criminal proceedings. In any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of sealing previously was issued under the bill's provisions regarding persons who are not first offenders (R.C. 2953.322(G)).

Exclusion of a person by a school district. Under existing law regarding the sealing of records of first offenders, a board of education of a city, local, exempted village, or joint vocational school district that maintains records of an individual who has been permanently excluded from school for committing an act that would be a designated offense if committed by an adult may maintain records regarding a conviction that was used as the basis for the individual's permanent exclusion, regardless of a court order to seal the record (R.C. 2953.32(G)). The bill enacts a similar provision regarding official records of persons other than first offenders that are sealed under its provisions. An order issued under the bill's provisions to seal the record of a conviction of a person who is not a first offender does not revoke the adjudication order of the Superintendent of Public Instruction to permanently exclude the individual who is the subject of the sealing order. A sealing order issued under the bill's provisions may be presented to a district superintendent as evidence to support the contention that the superintendent should recommend that the permanent exclusion of the individual who is the subject of the sealing order be revoked. Except as otherwise authorized by the bill and R.C. 3301.121 and 3313.662 (the existing sections governing permanent exclusion--not in the bill), any school employee in possession of or having access to the sealed conviction records of an individual that were the basis of a permanent exclusion of the individual is subject to R.C. 2953.35. (See "***Protection of confidential information***," below.) (R.C. 2953.322(I).)

Index to sealed records. The person or governmental agency, office, or department that maintains sealed records pertaining to convictions or bail forfeitures that have been sealed pursuant to the bill's provisions regarding persons who are not first offenders may maintain a manual or computerized index to the sealed records. The index may contain only the name of, and alphanumeric identifiers that relate to, the persons who are the subject of the sealed records, the word "sealed," and the name of the person, agency, office, or department that has custody of the sealed records and may not contain the name of the crime committed. The index may be made available by the person who has custody of the sealed records only for the purposes of a determination on an application for the sealing of records of another conviction, for the inspection of records as authorized (see "***Inspection of sealed records***," above), or as proof in a criminal proceeding of an otherwise admissible prior conviction. (R.C. 2953.322(H).)

Investigatory work product. Existing law authorizes law enforcement officers and agencies to make limited use of records and reports pertaining to the case of a first offender whose official records have been sealed that are the specific investigatory work product of a law enforcement officer or agency and that are excepted from the definition of official records. (See **COMMENT** 3.) The bill extends these provisions to the records of offenders other than first offenders that have been sealed pursuant to the bill's procedures. (R.C. 2953.321.)

Restoration of rights. Under existing law, except for the authorized use of a first offender's sealed record as the basis for a person's permanent exclusion from a school (see "***Exclusion of a person by a school district***," above), an order to seal the record of a person's conviction restores the person who is the subject of the order to all rights and privileges not otherwise restored by termination of the sentence or community control sanction or by final release on parole or post-release control. Existing law further provides that in any application for employment, license, or other right or privilege, in any appearance as a witness, or in any other inquiry, except when a sealed record is used to prove an otherwise admissible prior conviction (see "***Use in criminal proceedings***," above), a person may be questioned only with respect to convictions not sealed, bail forfeitures not expunged under repealed R.C. 2953.42,[3] and bail forfeitures not sealed, unless the question bears a direct and substantial relationship to the position for which the person is being considered. To the same extent and subject to the same exceptions, the bill restores the rights and limits the questioning of an offender who is not a first offender whose records are sealed under the bill's provisions. (R.C. 2953.33.)

Protection of confidential information in sealed records

Existing law

Existing law generally prohibits an officer or employee of the state or a political subdivision from releasing information contained in sealed records. Specifically, an officer or employee may not release or otherwise disseminate or make available for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any department, agency, or other instrumentality of the state or a political subdivision, any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with respect to which the officer or employee had knowledge of were sealed by an existing order issued pursuant to R.C. 2953.31 to 2953.36 (records of first

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[3] *R.C. 2953.42 dealt with the expungement of a record of an agreed bail forfeiture. It was repealed in 1988.*

offenders) or were expunged by an order issued pursuant to repealed R.C. 2953.42 (expungement after bail forfeiture). Existing law excepts from the prohibition the authorized inspection of sealed records, use of sealed records in criminal proceedings, or maintenance of an index of sealed records as described above or the use of information contained in sealed records pursuant to the Sex Offender Registration and Notification Law. Existing law also prohibits a person from using, disseminating, or otherwise making available an index of sealed records in violation of the statute that authorizes the index (see "***Index to sealed records***," above). A violation of either prohibition is a misdemeanor of the fourth degree. (R.C. 2953.35.)

Operation of the bill

The bill retains the foregoing prohibitions and makes them apply to records of offenders who are not first offenders that are sealed under the bill. The bill also extends the exceptions to the authorized inspection of sealed records, use of sealed records in criminal proceedings, or maintenance of an index of sealed records as these pertain to the records of persons who are not first offenders that have been sealed under the bill's provisions. (R.C. 2953.35(A) and (B).)

The bill requires that, within 30 days after the entry of an order sealing official records issued pursuant to R.C. 2953.32 (first offenders), 2953.322 (offenders who are not first offenders), or 2953.52 (an existing provision regarding persons who are found not guilty, who are the defendants named in a dismissed complaint, indictment, or information, or against whom a no bill is entered), any private individual, business organization, or other nongovernmental entity having records that include information concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision derived from or in substance identical to information in the official records that have been ordered sealed must delete the information from the records or destroy the records. A violation of this mandate is the offense of releasing sealed records and the offender must be fined $250,000. (R.C. 2953.35(C)(1) and (3)(a).)

The bill also prohibits a private individual, business organization, or other nongovernmental entity, more than 30 days after the entry of an order sealing official records issued pursuant to R.C. 2953.32, 2953.322, or 2953.52 from knowingly releasing or otherwise disseminating or making available for any purpose information concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision that is included in the official records that have been ordered sealed. A violation of this prohibition constitutes the offense of releasing sealed records and the offender must be fined $500,000 unless the information is made available over the Internet, in which case the fine is $1 million. (R.C. 2953.35(C)(2) and (3)(b) and (c).)

Provision of sealing information to a defendant

The bill requires that, before accepting a plea of guilty or of no contest and before pronouncing judgment in a criminal case, a court must inform the defendant of the circumstances under which official records may be sealed under the existing provisions regarding first offenders and the bill's provisions regarding offenders other than first offenders (R.C. 2937.06(B) and 2947.07).

Sealing of official records when there is no finding of guilt

Procedure for having records sealed

Existing law--application and determination. Under existing law, a person who is found not guilty of an offense by a jury or a court, who is the defendant named in a dismissed complaint, indictment, or information, or against whom a no bill is entered by a grand jury may apply to the court for an order to seal the person's official records in the case. Ordinarily, the person may file the application at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first, or at any time after two years have elapsed from the date on which the foreman or deputy foreman of the grand jury reports to the court that the grand jury has reported a no bill. However, if there are multiple charges against the person arising out of the same act and at least one has a final disposition that is different from the others, the person may not apply for a sealing order in any of the cases until the person is able to apply for a sealing order in all the cases. (R.C. 2953.52(A) and 2953.61.)

When a person files an application as described in the preceding paragraph to have official records sealed, the court must set a date for a hearing and notify the prosecutor in the case of the hearing. The prosecutor may file an objection before the hearing date specifying the reasons the prosecutor believes the application should be denied.

The court must do each of the following:

(1) Determine whether the person meets the qualifications to file the application;

(2) Determine whether criminal proceedings are pending against the applicant;

(3) If the prosecutor has filed an objection, consider the prosecutor's argument for not granting the application;

(4) Weigh the interests of the applicant in having the official records sealed against the legitimate needs, if any, of the government to maintain the records.

If the court then determines that the applicant was qualified to file the application, that no criminal proceedings are pending against the person, and that the interests of the person in having the official records sealed are not outweighed by any legitimate governmental needs to maintain such records, or if R.C. 4301.69(E)(2)(b), the pre-trial diversion program for underage drinkers, applies, the court must order that all official records pertaining to the case be sealed. (See **COMMENT** 4.) (R.C. 2953.52(B).)

Operation of the bill--automatic sealing. The bill replaces the existing mechanism for the sealing of official records when there is no finding of guilt with a mechanism that provides for the automatic sealing of the official records in a case in which a person, after the effective date of the bill, is found not guilty of an offense by a jury or a court, is the defendant named in a dismissed complaint, indictment, or information, or against whom a no bill is entered by a grand jury. Under the bill, the court ordinarily must issue the order upon the expiration of time to take an appeal if an appeal is not taken or upon a final determination of the appeal sustaining a finding of not guilty or a dismissal if an appeal is taken. However, if a complaint, indictment, or information is dismissed without prejudice, the court may not order the records sealed if the complaint or information is refiled or the person is reindicted before the expiration of the period of limitations for the offense that is the basis of the case. (R.C. 2953.52(A).)

The bill provides several exceptions to the general requirement that records be sealed when the case is dismissed, a no bill is entered, or the defendant is found not guilty. If there are multiple charges against a person arising out of the same act and at least one has a final disposition that is different from the others, the person's official records may not be sealed in any of the cases until they may be or would otherwise be required to be sealed in all the cases. The sealing provisions do not apply to any record pertaining to a case in which the defendant was found not guilty by reason of insanity or in which drug or alcohol use led to the offense and the court agrees to intervention in lieu of conviction under existing R.C. 2951.041. (See **COMMENT** 5.) (R.C. 2953.52(B) and 2953.61.)

The bill's mechanism for automatic sealing of records applies prospectively. However, the bill allows a person who, before the bill's effective date, was found not guilty in a case, was the defendant named in a complaint, indictment, or information in a case that was dismissed, or was the person against whom a no bill was entered to apply for an order sealing the official records in the case. The person must file a signed and notarized application that includes a case number or other information that allows the court to readily identify the case. Upon receipt of an application that complies with this requirement, a determination that the

applicant is authorized to file the application, and a determination that the applicant would have been entitled to an order sealing the official records in the case if the case had been concluded by a not guilty verdict, dismissal, or no bill *after* the bill's effective date, the court must issue an order sealing the applicant's official records in the case. (R.C. 2953.52(D).)

Notice of sealing order to public offices

Under existing law and the bill regarding the sealing of records when there is no finding of guilt, the court must send notice of an order sealing the official records by certified mail, return receipt requested, to any public office that it knows or has reason to believe may have an official or unofficial record of the case. In addition, a person whose records have been sealed may present a copy of the order to a public office or agency that has a record of the case with a written request to comply. However, the sealing order applies to every public office regardless of whether the office has received notice of the order or a written request to comply with the order. (R.C. 2953.53(A), (B), and (C).)

Effect of sealing order

Existing law. Under existing law, the proceedings in a case in which the official records have been sealed when there is no finding of guilt are deemed not to have occurred. However, a public office or agency may maintain a record of the case for the purpose of compiling statistical data only; the record must not contain any reference to the person who is the subject of the case. A public office or agency also may maintain an index of sealed official records to which access may not be afforded to any person other than the person who has custody of the records. The records to which the index pertains may not be available to any person, except as follows (R.C. 2953.52(C) and 2953.53(D)):

(1) To the person who is the subject of the records upon written application, and to any other person named in the application, for any purpose;

(2) To a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case;

(3) To a prosecuting attorney or the prosecuting attorney's assistants to determine a defendant's eligibility to enter a pre-trial diversion program established pursuant to R.C. 2935.36 (see footnote 1);

(4) To a prosecuting attorney or the prosecuting attorney's assistants to determine a defendant's eligibility to enter a pre-trial diversion program under R.C. 4301.69(E)(2)(b) (see **COMMENT** 4).

Except as otherwise provided in the Sex Offender Registration and Notification Law, when the official records in a case have been ordered sealed and the proceedings deemed not to have occurred as described above, law enforcement officers and agencies may make limited use of records and reports pertaining to the case that are the specific investigatory work product of a law enforcement officer or agency and that are excepted from the definition of official records. (R.C. 2953.54.) (See **COMMENT** 6.)

Operation of the bill. Under the bill, as under existing law, the proceedings in a case in which the official records have been sealed when there is no finding of guilt are deemed not to have occurred, but a public office may maintain a record of the case for statistical purposes and may maintain an index the accessibility of which is limited. However, the bill repeals the provisions that allow a prosecuting attorney or the prosecuting attorney's assistants access to the index for determining eligibility for a pre-trial diversion program under R.C. 2935.36 or 4301.69(E)(2)(b). In cases in which the complaint, indictment, or information was dismissed without prejudice, the bill permits prosecuting attorneys, the prosecuting attorney's assistants, or the complainant to have access to the index for the purpose of refiling the complaint or information or reindicting the person. (R.C. 2953.52(C) and 2953.53(D).)

The bill does not change the substance of the provisions governing the use of records and reports that are the specific investigatory work product of a law enforcement officer or agency and that are excepted from the definition of official records (R.C. 2953.54).

COMMENT

1. "Official records" means all records that are possessed by any public office or agency that relate to a criminal case, including, but not limited to: the notation to the case in the criminal docket; all subpoenas issued in the case; all papers and documents filed by the defendant or the prosecutor in the case; all records of all testimony and evidence presented in all proceedings in the case; all court files, papers, documents, folders, entries, affidavits, or writs that pertain to the case; all computer, microfilm, microfiche, or microdot records, indices, or references to the case; all index references to the case; all fingerprints and photographs; all records and investigative reports pertaining to the case that are possessed by any law enforcement officer or agency, except that any records or reports that are the specific investigatory work product of a law enforcement officer or agency are not and cannot be considered to be official records when they are in the possession of that officer or agency; and all investigative records and reports other than those possessed by a law enforcement officer or agency pertaining to the case. "Official records" does not include records or reports

related to child abuse or neglect and maintained pursuant to R.C. 2151.421 by a public children services agency or the Department of Job and Family Services. (R.C. 2933.31(D) and 2953.51(D)--not in the bill.)

2. "Offense of violence" means any of the following (R.C. 2901.01(A)(9)--not in the bill):

(a) A violation of R.C. 2903.01 (aggravated murder), 2903.02 (murder), 2903.03 (voluntary manslaughter), 2903.04 (involuntary manslaughter), 2903.11 (felonious assault), 2903.12 (aggravated assault), 2903.13 (assault), 2903.15 (permitting child abuse), 2903.21 (aggravated menacing), 2903.211 (menacing by stalking), 2903.22 (menacing), 2905.01 (kidnapping), 2905.02 (abduction), 2905.11 (extortion), 2907.02 (rape), 2907.03 (sexual battery), 2907.05 (gross sexual imposition), 2909.02 (aggravated arson), 2909.03 (arson), 2909.24 (terrorism), 2911.01 (aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary), 2917.01 (inciting to violence), 2917.02 (aggravated riot), 2917.03 (riot), 2917.31 (inducing panic), 2919.25 (domestic violence), 2921.03 (intimidation), 2921.04 (intimidation of an attorney, victim, or witness in a criminal case), 2921.34 (escape), or 2923.161 (improperly discharging a firearm at or into a habitation, in a school safety zone, or with the intent to cause harm or panic to persons in a school, in a school building, or at a school function or the evacuation of a school function), of R.C. 2911.12(A)(1), (2), or (3) (certain forms of burglary), of R.C. 2919.22(B)(1), (2), (3), or (4) (certain forms of endangering children who are under 18 or who are mentally or physically handicapped and under 21), or of former R.C. 2907.12 (felonious sexual penetration);

(b) A violation of an existing or former municipal ordinance or law of Ohio or any other state or the United States, substantially equivalent to any section, division, or offense listed in paragraph (2)(a);

(c) An offense, other than a traffic offense, under an existing or former municipal ordinance or law of Ohio or any other state or the United States, committed purposely or knowingly and involving physical harm to persons or a risk of serious physical harm to persons;

(d) A conspiracy or attempt to commit, or complicity in committing, any offense under paragraph (2)(a), (b), or (c).

3. "Investigatory work product" means any records or reports of a law enforcement officer or agency that are not "official records" and that pertain to a case the records of which have been ordered sealed pursuant to existing law covering first offenders or the bill's provisions covering persons other than first offenders. When a court issues an order that all official records pertaining to a case be sealed, every law enforcement officer who possesses investigatory work

product must immediately deliver that work product to the officer's employing law enforcement agency. Except as described below, when a court issues such and order, every law enforcement agency that possesses investigatory work product must close that work product to all persons who are not directly employed by the agency and must treat it, in relation to all persons other than those who are directly employed by the agency, as if it did not exist and never had existed.

A law enforcement agency that possesses investigatory work product may permit another law enforcement agency to use it in the investigation of another offense if the facts incident to the offense being investigated by the other law enforcement agency and the facts incident to an offense that is the subject of the case are reasonably similar. The agency that permits the use of investigatory work product may provide the other agency with the name of the person who is the subject of the case if it believes that the name of the person is necessary to the conduct of the investigation by the other agency.

Subject to the foregoing exception, no law enforcement officer or other person employed by a law enforcement agency may knowingly release, disseminate, or otherwise make the investigatory work product or any information contained in that work product available to, or discuss any information contained in it with, any person not employed by the employing law enforcement agency. A law enforcement agency, or person employed by a law enforcement agency, that receives investigatory work product for the investigation of another offense may not use the work product for any purpose other than the investigation of that offense or disclose the name of the person who is the subject of the work product except when necessary for the conduct of the investigation of the offense or the prosecution of the person for committing the offense. A violation of these prohibitions is divulging confidential investigatory work product, a misdemeanor of the fourth degree.

4. R.C. 4301.69(E)(1), which is not in the bill, prohibits underage persons from knowingly ordering, paying for, sharing the cost of, attempting to purchase, possessing, or consuming any beer or intoxicating liquor in any public or private place and from knowingly being under the influence of any beer or intoxicating liquor in any public place. The prohibitions against an underage person knowingly possessing, consuming, or being under the influence of any beer or intoxicating liquor do not apply if the underage person is accompanied by a parent, spouse who is not an underage person, or legal guardian, or the beer or intoxicating liquor is given by a physician in the regular line of the physician's practice or given for established religious purposes.

Under R.C. 4301.69(E)(2)(b), if a person is charged in a criminal complaint with violating division (E)(1) of the section, the person may be eligible for a pre-trial diversion program. R.C. 2935.36 authorizes a prosecuting attorney to

establish a pre-trial diversion program for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again. A person is ineligible for diversion if the person previously has been diverted pursuant to R.C. 4301.69(E)(2)(a) (diversion program for persons charged with violating division (E)(1) in a juvenile court complaint) or (E)(2)(b). If the person completes the diversion program to the satisfaction of the court, the court must dismiss the complaint and order the record in the case sealed under R.C. 2953.52. If the person fails to satisfactorily complete the diversion program, the court must proceed with the complaint.

5. R.C. 2951.041 allows a court to grant an offender's request to plead guilty and be given intervention in lieu of conviction if the offender is a first-time felony offender who has committed a fourth or fifth degree felony that is not an offense of violence or one of certain other specified offenses. The offender must meet certain other eligibility requirements, and the court must have reason to believe that drug or alcohol usage by the offender was a factor leading to the offender's criminal behavior. If the offender successfully completes the intervention program and subsequent period of abstinence, the court may order the records in the case sealed under R.C. 2953.31 to 2953.36 (sealing records of conviction).

6. R.C. 2953.54 provides that when the official records in a case have been sealed when there is no finding of guilt, every law enforcement officer who possesses records or reports pertaining to the case that are the officer's specific investigatory work product and that are excepted from the definition of "official records" shall immediately deliver the records and reports to his employing law enforcement agency. Except as provided in the second following paragraph, no such officer may knowingly release, disseminate, or otherwise make the records and reports or any information contained in them available to, or discuss any information contained in them with, any person not employed by the officer's employing law enforcement agency.

Except as otherwise provided in the next paragraph, every law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of "official records," or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under the foregoing paragraph, must close the records and reports to all persons who are not directly employed by the law enforcement agency and treat the records and reports, in relation to all persons other than those who are directly employed by the law enforcement agency, as if they did not exist and had never existed. Except as provided in the next paragraph, no person who is employed by the law enforcement agency may knowingly release, disseminate, or otherwise make the records and reports in the

possession of the employing law enforcement agency or any information contained in them available to, or discuss any information contained in them with, any person not employed by the employing law enforcement agency.

A law enforcement agency that possesses records or reports pertaining to the case that are its specific investigatory work product and that are excepted from the definition of official records, or that are the specific investigatory work product of a law enforcement officer it employs and that were delivered to it under the first paragraph above, may permit another law enforcement agency to use the records or reports in the investigation of another offense, if the facts incident to the offense being investigated by the other law enforcement agency and the facts incident to an offense that is the subject of the case are reasonably similar. The agency that provides the records and reports may provide the other agency with the name of the person who is the subject of the case, if it believes that the name of the person is necessary to the conduct of the investigation by the other agency.

No law enforcement agency, or person employed by a law enforcement agency, that receives from another law enforcement agency records or reports pertaining to a case the records of which have been ordered sealed pursuant to R.C. 2953.52 may use the records and reports for any purpose other than the investigation of the offense for which they were obtained from the other law enforcement agency, or disclose the name of the person who is the subject of the records or reports except when necessary for the conduct of the investigation of the offense, or the prosecution of the person for committing the offense, for which they were obtained from the other law enforcement agency.

Whoever violates R.C. 2953.54 is guilty of divulging confidential information, a misdemeanor of the fourth degree.

HISTORY

ACTION	DATE	JOURNAL ENTRY
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