Ohio Legislative Service Commission

Bill Analysis

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(As Introduced)

Sens. Hughes and Oelslager, Schaffer, Skindell, Stewart, Wagoner

BILL SUMMARY

Prohibits a person from doing any of the following:

- Knowingly presenting or causing to be presented to any officer, employee, or agent of the state, or to any contractor, grantee, or other recipient of state funds or state property, a false or fraudulent claim for payment or approval;
- Knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim;
- Having possession, custody, or control of money or property used or to be used by the state and knowingly delivering or causing to be delivered less than all of that money or property;
- Making or delivering a document certifying receipt of property used or to be used by the state and making or delivering the document knowing that it falsely and fraudulently represents the property used or to be used;
- Knowingly buying, or receiving as a pledge of an obligation or debt, public property from an officer, employee, or agent of the state who is not lawfully authorized to sell or pledge the property;
- Knowingly making, using, or causing to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state;
- Knowingly concealing, or knowingly and improperly avoiding or decreasing, an obligation to pay or transmit money or property to the state;

- Conspiring with one or more others to violate any element of the prohibition in the previous dot points;

- Provides civil penalties for violating the prohibition;

- Requires the Attorney General to investigate suspected violations of the prohibition;

- Allows the Attorney General or any person to bring civil enforcement actions on behalf of the state against persons who violate the prohibition, and provides procedures that govern such actions;

- Provides that, whenever the Attorney General has reason to believe that a person may be in possession, custody, or control of any documentary material or information relevant to an investigation conducted under the bill's provisions, the Attorney General may issue civil investigative demands requiring the person to provide certain specified information;

- Provides that any employee who is discharged, demoted, suspended, threatened, harassed, or in other manner discriminated against in the terms and conditions of employment by the employee's employer because of lawful acts done by the employee on behalf of the employee and others in furtherance of a civil action under the bill is entitled to all relief necessary to make the employee whole.

TABLE OF CONTENTS

Prohibition and sanctions 3
Prohibition 3
Sanctions 4
Definitions regarding prohibitions 5
Investigation by AG of violation of the prohibition; civil action against violator by AG or any person 6
Investigation by AG and commencement of civil action by AG 6
Commencement of civil action by any person; possible AG intervention 6
In general 6
AG intervenes in action commenced by a person; effect and procedures 7
AG declines to intervene in action commenced by a person; effect and procedures; AG election to pursue claims through other means 8
Dismissal by court based when claim is based on public disclosure 8
Stay of discovery upon request of AG 9
Restrictions upon the bringing of an action by a person 9
Distribution of proceeds of sanctions imposed against violator; recovery of fees, costs, and expenses by state, person initiating the action, or defendant 10
Civil action against violator by AG or any person – period of limitations, jurisdiction, burden of proof, and estoppels 11
Civil investigative demands by AG 12
Issuance and content of demand 12

Material, answers, and testimony exempt from civil investigation demands.....13
Manner of service.....13
Manner of production of documentary materials pursuant to a demand 14
Manner of responding to interrogatories pursuant to a demand.....14
Manner of provision of oral testimony pursuant to a demand 15
General confidentiality of material, answers, and testimony provided pursuant to a demand; use by AG; return to person who produced material 17
Court order for enforcement of demand 18
Definition regarding civil investigative demands 18
Relief for employee-acts done in relation to a civil action 18
Commencement of action 19

CONTENT AND OPERATION

The bill enacts a mechanism that relates to the civil sanctioning of persons who filed specified false or fraudulent claims with the state or who defraud the state in specified manners of money or property.

Prohibition and sanctions

Prohibition

The bill prohibits a person from doing any of the following:[1]

(1) Knowingly presenting or causing to be presented to any officer, employee, or agent of the state, or to any contractor, grantee, or other recipient of state funds or state property, a false or fraudulent claim for payment or approval;

(2) Knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim;

(3) Having possession, custody, or control of money or property used or to be used by the state and knowingly delivering or causing to be delivered less than all of that money or property;

(4) Making or delivering a document certifying receipt of property used or to be used by the state and makes or delivers the document knowing that it falsely or fraudulently represents the property used or to be used;

(5) Knowingly buying, or receiving as a pledge of an obligation or debt, public property from an officer, employee, or agent of the state who is not lawfully authorized to sell or pledge the property;

[1] R.C. 2747.02(A).

(6) Knowingly making, using, or causing to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state;

(7) Knowingly concealing, or knowingly and improperly avoiding or decreasing, an obligation to pay or transmit money or property to the state;

(8) Conspiring with one or more others to violate any element of (1) to (7) above.

Sanctions

Except as otherwise described in this paragraph, a person who violates the prohibition described above is liable to the state for a civil penalty of not less than $5,500 and not more than $11,000 for each violation, plus three times the amount of damages that the state sustains because of the violation.[2] A person who violates the prohibition is liable to the state for not less than two times the amount of damages that the state sustains because of the violations and the costs of a civil action brought to recover the damages, but not civil penalties, if the court finds all of the following:

(1) The person committing the violation provided the Attorney General (hereinafter "the AG") with all information known to the person about the violation within 30 days after the date on which the person first obtained the information;

(2) The person fully cooperated with any state investigation of the violation;

(3) At the time the person provided the AG with the information about the violation, no criminal prosecution, civil action, or administrative proceeding had been commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.[3]

Any information provided to the AG as described in paragraph (1) above is not a public record and is exempt from disclosure under the existing Public Records Law (R.C. 149.43 – not in the bill).[4] Proof of intent to defraud is not required in any action brought under these proceedings.[5]

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[2] R.C. 2747.02(B)(1).

[3] R.C. 2747.02(B)(2).

[4] R.C. 2747.02(C).

[5] R.C. 2747.02(D).

Definitions regarding prohibitions

The bill provides that, as used in the provisions regarding actions brought under Chapter 2747. of the Revised Code:[6]

"Claim" means any request or demand for money or property, whether or not the state has title to the money or property, and either of the following applies:

(1) The claim is presented to an officer, employee, or agent of the state;

(2) The claim is presented to a contractor, grantee, or other recipient of the money or property, the money or property is to be spent or used on the state's behalf or to advance a state program or interest, and the state does either of the following:

(a) Provides or has provided any portion of the money or property requested or demanded;

(b) Will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.

"Claim" does not include a request or demand for money or property that the state has paid to an individual as compensation for state employment or as an income subsidy with no restrictions on that individual's use of the money or property.

"Knowingly" or "knowing" means that a person, with respect to information:

(1) Has actual knowledge of the information;

(2) Acts in deliberate ignorance of the truth or falsity of the information; or

(3) Acts in reckless disregard of the truth or falsity of the information.

"Material" or "materially" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

"Obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or rule, or from the retention of any overpayment.

"Person" means any natural person, partnership, corporation, organization, association, or other legal entity, including any political subdivision of the state.

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[6] R.C. 2747.01.

Investigation by AG of violation of the prohibition; civil action against violator by AG or any person

Investigation by AG and commencement of civil action by AG

The bill requires the AG to investigate violations of the prohibition the bill enacts, as described above. If the AG finds that a person has violated or is violating the prohibition, the AG may bring a civil action under the provisions described below against the person.[7] The bill also provides that the remedies described below are not exclusive, and are in addition to any other remedies provided for in any other statute or that are available under common law.[8]

Commencement of civil action by any person; possible AG intervention

In general

Any person may bring a civil action for a violation of the prohibition for the person and the state. The action must be brought in the name of the state. The bill requires that the complaint be filed in camera, remain under seal for at least 60 days, and cannot be served on the defendant until the court so orders. The bill also requires that a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses be served on the AG pursuant to Civil Rule 4. The AG, for good cause shown, may move the court for extensions of the time during which the complaint remains under seal. The motion may be supported by affidavits or other submissions in camera. The defendant is not required to respond to the complaint until 28 days after the complaint is unsealed and served upon the defendant pursuant to Civil Rule 4.[9]

Before the expiration of the 60-day period described in the preceding paragraph or any extensions of time obtained by the AG as described in that paragraph, the AG may elect to intervene on behalf of the state in the action or may notify the court that it declines to intervene in the action. If the AG intervenes in the action, the AG must conduct the action. If the AG declines to intervene in the action, the person who brought the action has the right to conduct the action.[10]

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[7] R.C. 2747.03(A).

[8] R.C. 2747.07(A).

[9] R.C. 2747.03(B)(1), (2), and (3).

[10] R.C. 2747.03(B)(4).

No person other than the AG may intervene or bring a related action based on the facts underlying that pending action.[11]

AG intervenes in action commenced by a person; effect and procedures

If the AG intervenes in an action commenced by a person as described above, the AG has the primary responsibility for prosecuting the action and is not bound by any act of the person who brought the action. The AG may file a complaint or amend the complaint of the person who brought the action to clarify or add detail to the claim in which the state is intervening or to add any additional claims to which the AG alleges the state is entitled. Any pleading filed by the AG relates back to the filing date of the complaint of the person who originally brought the action, to the extent that the state's claim arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the person's complaint. However, the person who brought the action has the right to continue as a party to the action, subject to certain limitations described in the next two paragraphs, below.[12]

The AG may move to *dismiss* the action upon a showing of good cause, notwithstanding the objections of the person who brought the action. The court may dismiss the action if the person who brought the action is notified by the AG of the filing of the motion to dismiss and the court provides the person with an opportunity to oppose the motion and to present evidence at a hearing. The AG may *settle* the action with the defendant, notwithstanding the objections of the person who brought the action, if the court determines, after a hearing providing the person who brought the action an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the court may hold the hearing in camera.[13]

Upon a *showing by the AG* that unrestricted participation during the course of the litigation by the person who brought the action would interfere with or unduly delay the AG's prosecution of the case or would be repetitious, irrelevant, or for purposes of harassment, the court, in its discretion, may impose limitations on the person's participation, by doing any of the following: (1) limiting the number of witnesses the person may call, (2) limiting the length of the testimony of the person's witnesses, (3) limiting the person's cross-examination of witnesses, or (4) otherwise limiting participation by the person in the litigation. Upon a *showing by the defendant* that unrestricted participation during the course of the litigation by the person who brought

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[11] R.C. 2747.03(B)(5).

[12] R.C. 2747.03(D).

[13] R.C. 2747.03(D)(1) and (2).

the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit participation in the litigation by the person who brought the action.[14]

AG declines to intervene in action commenced by a person; effect and procedures; AG election to pursue claims through other means

If the AG declines to intervene in an action brought by a person as described above, the person who brought the action has the right to conduct the action. If the AG so requests, the AG must be served with copies of all pleadings filed in the action, and must be supplied, at the AG's expense, with copies of all deposition transcripts. When the person proceeds with the action, the court, without limiting the status and rights of the person who brought the action, nevertheless may permit the AG to intervene at a later date upon a showing of good cause.[15]

The bill provides that, notwithstanding the preceding paragraphs, the AG may elect to pursue the state's claim through any other remedy available to the state, including any administrative proceeding to determine a civil monetary penalty. If any other remedy is pursued in another proceeding, the person who brought an action as described above has the same rights in that proceeding as the person would have had if the action had continued. Any finding of fact or conclusion of law made in the other proceeding that has become final is conclusive on all parties to an action under the bill's provisions. A finding of fact or conclusion made in the other proceeding is final if it has been finally determined on appeal to the appropriate court, if all time for filing an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.[16]

Dismissal by court based when claim is based on public disclosure

Upon timely motion of the AG, a court must dismiss an action brought by a person as described above if the allegations relating to all essential elements of liability on the claim alleged in the action are based on the public disclosure of allegations in a state criminal, civil, or administrative proceeding in which the state or its agent is a party, in a state legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the action is brought by the AG, or the person who brought the action is an original source of the information. An "original source" is a person who either, prior to a public disclosure, has voluntarily disclosed to the AG the

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[14] R.C. 2747.03(D)(3) and (4).

[15] R.C. 2747.03(E).

[16] R.C. 2747.07(B).

information on which allegations or transactions in a claim are based, or who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and has voluntarily provided the information to the state before bringing an action.[17]

Stay of discovery upon request of AG

Whether or not the AG intervenes in an action brought by a person as described above, upon a showing by the AG that certain discovery by the person who brought the action would interfere with the AG's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay that discovery for a period of not more than 60 days. The showing *must* be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the AG has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.[18]

Restrictions upon the bringing of an action by a person

The bill prohibits a person from bringing an action as described above against a member of the General Assembly, a judge or other judicial officer, the Governor, the Lieutenant Governor, the Secretary of State, the Treasurer of State, the Auditor of State, or the AG if the action is based on evidence or information that is known to the AG when the action is brought. The bill also prohibits a person from bringing an action as described above that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the state is already a party.[19]

The bill prohibits a court from having jurisdiction over an action brought by a former or present member of the Ohio National Guard against a former or present member of the Ohio National Guard arising out of that member's service in the Ohio National Guard.[20]

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[17] R.C. 2747.03(F).

[18] R.C. 2747.03(G).

[19] R.C. 2747.03(H).

[20] R.C. 2747.03(I).

Distribution of proceeds of sanctions imposed against violator; recovery of fees, costs, and expenses by state, person initiating the action, or defendant

If the AG intervenes in an action brought by a person as described above, the person must receive at least 15% but not more than 25% of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. If the action is one that the court finds to be based primarily on disclosures of specific information, other than information provided by the person who brought the action, relating to allegations or transactions specifically in a criminal, civil, or administrative proceeding, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award the sums that it considers appropriate, but in no case more than 10% of the proceeds of the action or settlement of the claim, taking into account the significance of the information and the role of the person who brought the action in advancing the case to litigation. Any payment to a person must be made from the proceeds of the action or settlement.[21]

If the AG declines to intervene in an action brought by a person as described above, the person who brought the action or settled the claim must receive an amount that the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25% and not more than 30% of the proceeds of the action or settlement and must be paid out of those proceeds. The person also must receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees, and costs shall be awarded against the defendant.[22]

Whether or not the AG intervenes in an action brought by a person as described above, if the court finds that the action was brought by a person who planned and initiated a violation of the prohibition the bill enacts upon which the action was brought, then the court, to the extent the court considers appropriate, may reduce the share of the proceeds of the action that the person would otherwise receive under provisions described in the two preceding paragraphs, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person who brought the action is convicted of criminal conduct arising from the person's role in violating the prohibition, the person

[21] R.C. 2747.04(A).

[22] R.C. 2747.04(B) and (C).

must be dismissed from the civil action and cannot receive any share of the proceeds of the action. The dismissal does not prejudice the right of the AG to continue the action.[23]

If the AG declines to intervene in an action brought by a person as described above and the person who brought the action conducts the action, the court may award the defendant reasonable attorney's fees and expenses if the defendant prevails in the action and the court finds that the claim of the person who brought the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.[24]

The bill also specifies that the state is not liable for expenses that a person incurs in bringing an action under the bill's provisions.[25]

Civil action against violator by AG or any person – period of limitations, jurisdiction, burden of proof, and estoppels

The bill provides that a civil action against a violator by the AG or any person brought under its provisions, as described above, may not be brought after the date that is six years after the date on which a violation of the bill's prohibition is committed, or three years after the date when facts material to the right of action are known or reasonably should have been known by the AG, but in no event more than ten years after the date on which the violation is committed, whichever occurs last.[26]

An action may be brought in the Franklin County Court of Common Pleas, in the court of common pleas of any county in which the defendant or any one of multiple defendants can be found, resides, or transacts business, or in the court of common pleas of any county in which any act prohibited by the bill occurred. The AG or the person who brought the action must prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.[27]

The bill specifies that a final judgment rendered in favor of the state in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, estops the defendant from denying the

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[23] R.C. 2747.04(D).

[24] R.C. 2747.04(E).

[25] R.C. 2747.03(J).

[26] R.C. 2747.05.

[27] R.C. 2747.03(C).

essential elements of the offense in any action brought under the bill's provisions involving the same conduct, transaction, or occurrence as in the criminal proceeding.[28]

Civil investigative demands by AG

Issuance and content of demand

Under the bill, whenever the AG has reason to believe that a person may be in possession, custody, or control of any documentary material or information relevant to an investigation conducted under the bill's provisions described above, the AG, before commencing a civil action or before making an election to intervene under those provisions, may issue in writing and cause to be served upon the person a civil investigative demand requiring the person to do any of the following: (1) produce the documentary material for inspection and copying, (2) answer in writing written interrogatories with respect to the documentary material or information, (3) give oral testimony concerning the documentary material or information, or (4) furnish any combination of the documentary material, answers, or testimony. The AG may delegate to a designee the authority to issue a civil investigative demand.[29]

Any documentary material or information obtained by the AG or the AG's designee pursuant to the issuance of a civil investigative demand may be shared with the person who brought a civil action under the bill's provisions, if the AG or the designee determines it is necessary as part of an investigation.[30]

Each civil investigative demand issued by the AG must state the nature of the conduct constituting an alleged violation of the bill's prohibition that is under investigation, and the applicable provision of law alleged to have been violated. If the civil investigative demand is for the *production of documentary material*, the demand also must describe each class of documentary material to be produced with such definiteness and certainty as to permit the documentary material to be fairly identified and prescribe a return date for each class of documentary material that will provide a reasonable period of time within which the documentary material so demanded may be assembled and made available for inspection and copying. If the civil investigative demand is for *answers to written interrogatories*, the demand also must set forth with specificity the written interrogatories to be answered and prescribe dates at which time answers to written interrogatories must be submitted. If the civil investigative demand is for the *giving of oral testimony*, the demand must also prescribe a date, time, and place

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[28] R.C. 2747.06.

[29] R.C. 2747.08(B)(1) and (2).

[30] R.C. 2747.08(B)(3).

at which oral testimony commences, specify that the attendance and testimony are necessary to the conduct of the investigation, notify the person receiving the demand of the person's right to be accompanied by an attorney and any other representative, and describe the general purpose for which the demand is being issued and the general nature of the testimony that will be taken pursuant to the demand, including the primary areas of inquiry.[31]

The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued by the AG must be a date that is not less than seven days after the date on which the demand is received, unless the AG or the AG's designee determines that exceptional circumstances are present that warrant the commencement of the testimony within a lesser period of time. The bill prohibits the AG or the AG's designee from issuing more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the AG or the designee, after investigation, notifies the person in writing that an additional demand for oral testimony is necessary.[32]

Material, answers, and testimony exempt from civil investigation demands

A civil investigative demand issued by the AG may not require the production of any documentary material or information, the submission of any answers to written interrogatories, or the giving of any oral testimony if the documentary material, information, answers, or testimony would be protected from disclosure under either of the following:

(1) The standards applicable to subpoenas or subpoenas duces tecum issued by a court to aid in a grand jury investigation; or

(2) The standards applicable to discovery requests under the Rules of Civil Procedure, to the extent that the application of the standards to the civil investigative demand is appropriate and consistent with the provisions and purposes of the bill's civil investigative demand provisions.[33]

Manner of service

Any civil investigative demand issued by the AG or any petition filed under the provisions described below in "**Court order for enforcement of demand**" may be served in the same manner as a summons under Civil Rules 4 to 4.3 and 4.5. A verified

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[31] R.C. 2747.08(C)(1), (2), (3), and (4)(a).

[32] R.C. 2747.08(4)(b) and (c).

[33] R.C. 2747.08(D).

return by the individual serving a civil investigative demand or a petition filed setting forth the manner of service is proof of the service. In the case of service by registered or certified mail, the return must be accompanied by the return post office receipt of delivery of the demand or petition.[34]

Manner of production of documentary materials pursuant to a demand

The bill specifies that the production of documentary material in response to a civil investigative demand served under its provisions must be made under a sworn certificate, in any form that the demand designates, by the following persons: (1) in the case of a natural person, the person to whom the demand is directed, or (2) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to the production and authorized to act on behalf of the person. The certificate must state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the AG or the AG's designee.[35]

Any person upon whom any civil investigative demand for the production of documentary material has been served under the bill's provisions described above must make the documentary material available to the AG or the AG's designee for inspection and copying at the person's principal place of business or at any other place that the AG or designee and the person may agree and prescribe in writing after the demand is served. The person must make the documentary material available on the return date specified in the demand, or on any later date that the AG or designee may prescribe in writing. Upon written agreement between the person and the AG or the designee, the person may substitute copies for originals of all or any part of the documentary material.[36]

Manner of responding to interrogatories pursuant to a demand

The bill specifies that each interrogatory in a civil investigative demand served under its provisions as described above must be answered separately and fully in writing under oath and must be submitted under a sworn certificate, in the form that the demand designates, by the following persons: (1) in the case of a natural person, the

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[34] R.C. 2747.08(E).

[35] R.C. 2747.08(F)(1) and (2).

[36] R.C. 2747.08(F)(3).

person to whom the demand is directed, or (2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.[37]

If any interrogatory is objected to, the reasons for the objection must be stated in the certificate instead of an answer. The certificate must state that all information required by the civil investigative demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information must be identified and reasons set forth with particularity regarding why the information was not furnished.[38]

Manner of provision of oral testimony pursuant to a demand

Under the bill, the examination of any person pursuant to a civil investigative demand for oral testimony served under its provisions must be taken before an officer authorized by law to administer oaths and affirmations. The officer before whom the testimony is to be taken must put the witness on oath or affirmation and, personally or by someone acting under the direction of the officer and in the officer's presence, must record the testimony of the witness. The testimony must be taken stenographically and must be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken must promptly transmit a copy of the transcript of the testimony to the AG or the AG's designee. This provision does not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Rules of Civil Procedure.[39]

The AG or the AG's designee must exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, any person who may be agreed upon by the AG or designee and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking the testimony. The oral testimony of any person taken pursuant to a civil investigative demand served under the bill's provisions must be taken in Franklin County or in the county within which the person resides, is found, or transacts business, or in any other place that may be agreed upon by the AG or the AG's designee and the person. When the testimony is fully transcribed, the AG, the AG's designees, or the officer before whom the testimony is taken must afford the witness, who may be accompanied by an attorney, a reasonable opportunity to examine and read the transcript, unless examination and reading are waived by the witness. Any changes in form or substance that the witness desires to

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[37] R.C. 2747.08(G)(1).

[38] R.C. 2747.08(G)(2).

[39] R.C. 2747.08(H)(1).

make must be entered and identified upon the transcript by the officer, the AG, or the designee, with a statement of the reasons given by the witness for making the changes. The transcript must then be signed by the witness, unless the witness waives the signing in writing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the AG, designee, or officer shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given. The officer before whom the testimony is taken must certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer, AG, or the AG's designee must take custody of the transcript.[40]

Any person compelled to appear for oral testimony under a civil investigative demand issued under the bill's provisions may be accompanied, represented, and advised by an attorney. The attorney may advise the person, in confidence, with respect to any question asked of the person. The person or the person's attorney may object on the record to any question, in whole or in part, and must briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that the person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. The person may not otherwise object to or refuse to answer any question, and may not directly or through the person's attorney otherwise interrupt the oral examination. If the person refuses to answer any question, a petition may be filed in the Franklin County Court of Common Pleas or in the county in which the examination takes place for an order compelling the person to answer the question. If the person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of the person may be compelled in the manner provided in the law regarding witnesses turning state's evidence (R.C. 2945.44).[41]

The bill also provides that any person appearing for oral testimony under a civil investigative demand issued by the AG is entitled to the same fees and allowances that are paid to witnesses in the court of common pleas.[42]

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[40] R.C. 2747.08(H)(2), (3), (4), and (5).

[41] R.C. 2747.08(H)(6).

[42] R.C. 2747.08(H)(7).

General confidentiality of material, answers, and testimony provided pursuant to a demand; use by AG; return to person who produced material

The bill specifies that, except as otherwise described below, no documentary material, answers to interrogatories, or transcripts of oral testimony received under this section, or copies of documentary material, answers to interrogatories, or transcripts of oral testimony so received, while in the possession of the AG or the AG's designee, must be available for examination by any individual other than an employee of the Attorney General. But this prohibition on the availability of documentary material, answers, or transcripts does not apply if consent is given by the person who produced the documentary material, answers, or transcripts. The bill states that nothing in these confidentiality provisions is intended to prevent disclosure to the General Assembly, including any committee or subcommittee of the General Assembly, to any other state agency for use by the state agency in furtherance of its statutory responsibilities, or to any law enforcement officer for use in the furtherance of the law enforcement officer's duties. While in the possession of the AG or the AG's designee and under any reasonable terms and conditions that the AG or designee prescribes documentary material and answers to interrogatories received pursuant to "**Manner of production of documentary materials pursuant to a demand**" and "**Manner of responding to interrogatories pursuant to a demand**," above must be available for examination by the person who produced the documentary material or answers, or by a representative of that person authorized by that person to examine the documentary material and answers and transcripts of oral testimony must be available for examination by the person who produced the testimony, or by a representative of that person who is authorized by that person to examine the transcripts.[43]

The bill permits the AG or the AG's designee to use any documentary material, answers to interrogatories, or transcripts of oral testimony received pursuant to a civil investigative demand in connection with any case or proceeding before a court, grand jury, or state agency.[44]

Under the bill, the AG or the AG's designee must return to a person, upon the person's request, any documentary material that the person produced in the course of any investigation pursuant to a civil investigative demand issued by the AG, other than copies furnished to the AG or the designee, and that has not passed into the control of any court, grand jury, or state agency through introduction into the record of the case or proceeding, or into the control of any law enforcement officer, if either of the following applies: (1) the case or proceeding before the court or grand jury arising out of the

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[43] R.C. 2747.08(I)(1) and (2).

[44] R.C. 2747.08(I)(3).

investigation, or any proceeding before any state agency involving the documentary material, has been completed, or (2) no case or proceeding in which the documentary material may be used has been commenced within a reasonable time after completion of the examination and analysis of documentary material and other information assembled in the course of the investigation.[45]

The bill also specifies that documentary material, information, answers to written interrogatories, and oral testimony provided under a civil investigative demand are not public records and are exempt from disclosure under the Public Records Law, not in the bill.[46]

Court order for enforcement of demand

The bill provides that, whenever any person fails to comply with any civil investigative demand, or whenever satisfactory copying or reproduction of any documentary material requested in the demand cannot be done and the person refuses to surrender the documentary material, the AG or the AG's designee may file in the Franklin County Court of Common Pleas or in the county in which the person resides, is found, or transacts business, and serve upon the person, a petition for an order of the court for the enforcement of the civil investigative demand.[47]

Definition regarding civil investigative demands

The bill states that "documentary material," for use in its civil investigative demand provisions, includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through a computer or other information retrieval systems and instructions and all other materials necessary to use or interpret the data compilations, and any product of discovery.[48]

Relief for employee-acts done in relation to a civil action

Any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by the employer (includes any person) of the employee, contractor, or agent because of lawful acts done by the employee, contractor, agent, or

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[45] R.C. 2747.08(I)(4).

[46] R.C. 2747.08(K).

[47] R.C. 2747.08(J).

[48] R.C. 2747.08(A).

associated others in furtherance of an action under the provisions of the bill, including investigation for, initiation of, testimony for, or assistance in the action, is entitled to all relief necessary to make the employee, contractor, or agent whole. The relief must include reinstatement with the same seniority status the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An employee, contractor, or agent may bring an action in the appropriate court of common pleas for the relief provided under this provision. The action may not be brought under this provision more than three years after the last act of the employer that is alleged to violate this provision.[49]

Commencement of action

The bill states that a civil action may be commenced under the bill's provisions to remedy a violation of the bill's prohibition that occurred before the effective date of the bill, unless the limitations period specified in the bill has elapsed.[50]

HISTORY

ACTION	DATE
Introduced	04-07-11

S0143-i-129.docx/ss

[49] R.C. 2747.09.

[50] Section 2.