



# Ohio Legislative Service Commission

## Final Analysis

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### Sub. H.B. 663

130th General Assembly  
(As Passed by the General Assembly)

**Reps.** Buchy and Huffman, Brenner, Maag, Scherer, Wachtmann, Batchelder

**Sens.** Coley, Eklund, Hughes, Patton, Seitz

**Effective date:** March 23, 2015

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## ACT SUMMARY

### Confidentiality and protections regarding involvement in execution by lethal injection

- Declares the General Assembly's intent in enacting the act is to:
  - Protect the identities of persons who assist the Department of Rehabilitation and Correction (DRC) in carrying out a court-ordered sentence of death by lethal injection, in order to protect those persons from harassment and potential physical harm; and
  - Enable DRC to obtain the necessary assistance of persons in carrying out a court-ordered sentence of death by lethal injection or the drugs needed to administer such a sentence.
- Excludes from the definition of "public record" and prohibits the disclosure of any information or record in the possession of a public office that identifies or reasonably leads to the identification of any individual and the individual's involvement in the execution that, at any time prior to March 23, 2017, makes, supplies, or administers drugs or equipment used in executions by lethal injection or who participates in carrying out such executions and the individuals involvement in the execution, other than DRC's Director and prison wardens. And provides the same privacy protections, except that the protection sunsets after 20 years, to entities who participate, at any time prior to March 23, 2017, in those activities if the entity submits the proper application for recognition of the protections.

- Specifies that if the information or record to be protected pertains to the manufacture, compounding, distribution, or supplying, etc., of any item or material, the person or entity that maintains it must disclose it to the Ohio Ethics Commission, the Commission may use the information or record to confirm specified ethical and licensing requirements, the Commission must complete its use of the information or record within 14 days of its receipt, and the Commission promptly must report its findings to DRC's Director.
- Specifies that if the confidentiality and other protections in the act apply to a person with respect to any conduct or activity of the person occurring at a time prior to March 23, 2017, the expiration of that period does not affect, add to, or diminish the confidentiality and protections with respect to their application to that person.
- Requires a court immediately to seal records pertaining to information protected by the act whenever the records come into the court's possession. And provides that the information or record is not subject to disclosure unless a court, through clear and convincing evidence, finds that the protected person appears to have acted unlawfully.
- Establishes a process for DRC's Director to follow if a protected document is subpoenaed or requested by a court.
- Creates a civil cause of action for unauthorized disclosure of confidential information relating to executions by lethal injection.
- Prohibits a licensing authority from taking disciplinary action against a licensee for, at any time prior to March 23, 2017, participating in, consulting regarding, performing any function with respect to, or providing any expert opinion testimony regarding an execution by lethal injection.

### **Fees for appointed counsel in a capital case**

- Provides for a schedule of fees to be paid to appointed counsel in a capital case as set by the Supreme Court.

### **Attorney-client privilege in capital case**

- Provides that the attorney-client privilege does not apply if the case in which the attorney-client relationship is established is a capital case and the client subsequently claims ineffective assistance of counsel regarding the case.

### **Jury instructions in capital cases**

- Provides for written jury instructions in capital cases.



## Joint legislative study committee – homicide and death sentence issues

- Provide for a joint legislative study committee to study the manner in which families of homicide victims can best be supported by government programs, social service entities, and charitable organizations and the manner and means by which a court-ordered sentence of death is performed in Ohio, consistent with judicial precedent.

### Time for filing postconviction relief petition

- Increases, from 180 days after the filing of the trial transcript in the court of appeals or the expiration of the time for filing an appeal to 365 days after the particular event, the time within which a petition for postconviction relief must be filed.

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## CONTENT AND OPERATION

### Need for confidentiality for persons who assist in executions

The act declares that the General Assembly's intent in enacting the act is to: (1) protect the identities of persons who assist the Department of Rehabilitation and Correction (DRC) in carrying out a court-ordered sentence of death by lethal injection, in order to protect those persons from harassment and potential physical harm, and (2) enable the Department to obtain the necessary assistance of persons in carrying out a court-ordered sentence of death by lethal injection or the drugs needed to administer such a sentence.<sup>1</sup>

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<sup>1</sup> Section 7 of the act.



## Nondisclosure

The act provides certain protections and limitations with respect to any information or record in the possession of a "public office" (see below) that identifies or reasonably leads to both the identification of a person who, in a variety of ways occurring not later than 24 months after the act's effective date (see "**Qualifying activities**," below) is involved in the administration of a death sentence by lethal injection and the person's involvement in that administration. March 23, 2017, is the date occurring 24 months after the act's effective date. By definition, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association.<sup>2</sup> Therefore, the protections and limitations established in the act apply to individuals as well as to the other entities mentioned. The protections and limitations are as follows:<sup>3</sup>

(1) The information or record must be classified as confidential, is privileged under law, and is not subject to disclosure by any person, state agency, governmental entity, board, or commission or any political subdivision as a public record under Ohio Public Records Law<sup>4</sup> or otherwise.

(2) The information or record is not subject to disclosure by or during any judicial proceeding, inquiry, or process, except as described below in (4) or in "**Judicial access to information**."

(3) The information or record is not subject to discovery, subpoena, or any other means of legal compulsion for disclosure to any person or entity, except as described below in (4) or in "**Judicial access to information**."

(4) If information or a record protected under the provisions described above pertains to the manufacture, compounding, distribution, or supplying, etc., of any item or material used in a lethal injection, the person or entity that maintains it must disclose it to the Ohio Ethics Commission, the Commission may use the information or record to confirm specified ethical and licensing requirements, the Commission must complete its use of the information or record within 14 days of its receipt, and the Commission promptly must report its findings to DRC's Director. The specified requirements are that the relationship between the person and DRC is consistent with and complies with Ohio Ethics Laws and that at the time of the specified conduct, the person had all licenses required under Ohio law to engage in that conduct and the licenses were valid.

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<sup>2</sup> R.C. 2949.221(A)(1), by reference to R.C. 1.59, which is not in the act.

<sup>3</sup> R.C. 2949.221(B)(1), (2), (3), and (4).

<sup>4</sup> R.C. 149.43(A)(1)(cc).



The rights described above are to be automatically recognized with respect to individuals. But with respect to a person (entity) that is not an individual, the rights do not exist unless the person (entity) requests to have the rights recognized by applying in writing to DRC's Director. Under the act, DRC's Director by rule must establish the procedure according to which a person who is not an individual may apply in writing for the rights. The Director must approve an application that is submitted in compliance with the rules. A person (entity) whose application is approved is entitled to the rights for 20 years after the person ceases the qualifying activity.<sup>5</sup>

The act also expressly applies the foregoing confidentiality provisions to information or records in the possession of a "public office" (see below) identifying any current or former DRC employee or any other individual selected or designated by the Director, who participated, prior to March 23, 2017, in the administration of a sentence of death by lethal injection and the person's participation in that administration. This confidentiality does not apply to the Director of DRC or the warden of the state correctional institution in which the execution took place.<sup>6</sup>

The act establishes a civil cause of action for the knowing disclosure, without the approval of DRC's Director, of the identity of any person protected by the act's nondisclosure provisions described above and the person's involvement in the lethal injection process or administration. The plaintiff in such an action may recover actual damages, punitive damages upon a showing of a willful violation of the nondisclosure provisions, and reasonable attorney's fees and court costs.<sup>7</sup>

The act specifies that if the confidentiality and other protections it enacts apply to a person with respect to any conduct or activity of the person occurring prior to March 23, 2017, the expiration of that 24-month period does not affect, add to, or diminish the confidentiality and protections with respect to their application to that person.<sup>8</sup>

As used in these provisions, "public office" means any state agency, public institution, political subdivision, other organized body, office, agency, institution, or entity established by state law for the exercise of any function of government, other than JobsOhio.<sup>9</sup>

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<sup>5</sup> R.C. 2949.221(D).

<sup>6</sup> R.C. 2949.221(C).

<sup>7</sup> R.C. 2949.221(F).

<sup>8</sup> R.C. 2949.221(G).

<sup>9</sup> R.C. 2949.221(A)(3), by reference to R.C. 117.01, which is not in the act.

## **Qualifying activities**

Under the act, except with respect to the protections afforded to DRC employees and former employees and other individuals selected or designated by DRC's Director, a person who is involved, prior to March 23, 2017, in the administration of the death penalty by lethal injection by being involved in any of the following activities is entitled to have any information or record that identifies or reasonably leads to the identification of the person and the involvement limited and protected in the three ways described above. The qualifying activities are as follows:<sup>10</sup> manufacturing, compounding, importing, transporting, distributing, supplying, prescribing, preparing, administering, using, or testing any of the compounding equipment or components, the active pharmaceutical ingredients, the drugs or combination of drugs, the medical supplies, or the medical equipment used in lethal injection.

## **Judicial access to information**

The act requires a court promptly to order the immediate sealing of records containing information that identifies or may reasonably lead to the identification of a current or former employee of DRC, or a person involved in a qualifying activity described above, and the person's involvement in the administration of the lethal injection, whenever such a record comes into the court's possession. Under the act, sealing a record means to remove a record from the main file of similar records and to secure it in a separate file that contains only sealed records accessible only to the court.<sup>11</sup>

If such a record is subpoenaed or requested by a court order, DRC's Director must provide the record. If the court determines that the record is necessary for just adjudication, the court must order the Director to appear at a private hearing with a copy of the record and any other relevant evidence. The information is not otherwise subject to disclosure unless the court, through clear and convincing evidence presented in the private hearing, finds that the person whose identity is protected appears to have acted unlawfully with respect to the person's involvement in the administration of a lethal injection.<sup>12</sup>

## **Protection of licensees**

The act prohibits a "licensing authority" (see below) from challenging, reprimanding, suspending, or revoking the license of, or otherwise taking any

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<sup>10</sup> R.C. 2949.221(B).

<sup>11</sup> R.C. 2949.222(A) and (B).

<sup>12</sup> R.C. 2949.222(C).

disciplinary action against, a licensee for, at any time prior to March 23, 2017, participating in, consulting regarding, performing any function with respect to, or providing any expert opinion testimony regarding an execution by lethal injection. This prohibition applies to activities described in (1), (2), and (3) under the first paragraph under "**Nondisclosure**," above.<sup>13</sup>

As used in this provision, "licensing authority" means an entity, board, department, commission, association, or agency that issues a license to a person or entity.<sup>14</sup>

## **Fees for appointed counsel in a capital case**

### **Introduction**

The state has established a system for providing legal representation to criminal defendants who are indigent. Generally, the representation is provided on the county level, with some funding provided by the state. Each county may establish a county public defender and provide representation through that office;<sup>15</sup> may affiliate with one or more adjoining or neighboring counties, establish a joint county public defender, and provide representation through that office;<sup>16</sup> or may establish a mechanism that provides for the payment of counsel who are either personally selected by the indigent defendant or appointed by the court (hereafter, "county appointed counsel mechanism").<sup>17</sup> If a county establishes a county or joint county public defender, the establishment does not prevent a court from appointing counsel other than the county public defender or joint county public defender, from allowing an indigent person to select the indigent person's own personal counsel to represent the indigent person, or from appointing counsel or allowing an indigent person to select the indigent person's own personal counsel to assist the county public defender or joint county public defender as co-counsel when the interests of justice so require (hereafter, "other appointed counsel").<sup>18</sup> The act requires fees that are paid to appointed or selected counsel under these provisions to be determined in accordance with an amount or rate set by the Supreme Court.

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<sup>13</sup> R.C. 2949.221(E).

<sup>14</sup> R.C. 2949.221(A)(2).

<sup>15</sup> R.C. 120.13 to 120.18, not in the act.

<sup>16</sup> R.C. 120.23 to 120.28, not in the act.

<sup>17</sup> R.C. 120.33.

<sup>18</sup> R.C. 120.16(E) and 120.26(E), not in the act.



## County appointed counsel mechanism

Under preexisting law retained by the act, in a county that has established a county appointed counsel mechanism, the board of county commissioners establishes a schedule of fees by case or on an hourly basis to be paid to counsel for legal services provided under the mechanism. Formerly, prior to establishing the schedule, the board was required to request the bar association or associations of the county to submit a proposed schedule. The schedule submitted was subject to the review, amendment, and approval of the board of county commissioners. The act retains these procedures, but specifies that the request to the bar association or associations for submission of a proposed schedule, and the board of county commissioner's review, amendment, and approval of a submitted schedule, is for cases other than capital cases. Under the act, with respect to capital cases, the schedule must provide for fees by case or on an hourly basis to be paid to counsel in the amount or at the rate set by the Supreme Court, and the board of county commissioners must approve that amount or rate.<sup>19</sup>

Under preexisting law, in a county that has established a county appointed counsel mechanism, counsel selected by the indigent person or appointed by the court at the request of an indigent person, except for counsel appointed to represent a person charged with a municipal ordinance violation in specified circumstances, is paid by the county and receives the compensation and expenses the court approves. The act retains these procedures, but specifies that, with respect to capital cases, the court must approve compensation and expenses in accordance with the amount or at the rate set by the Supreme Court.<sup>20</sup>

Related to both of its provisions described above, the act requires the Supreme Court to set an amount by case, or a rate on an hourly basis, to be paid under the county appointed counsel mechanism to counsel in a capital case.<sup>21</sup>

Preexisting law, unchanged by the act, provides for state reimbursement of part of a county's cost of providing counsel under a county appointed counsel mechanism.<sup>22</sup> For a capital case, the law specifies that the State Public Defender is to reimburse 50% of all costs and expenses of conducting the defense in the case, but that if appropriations are insufficient to pay 50% of such costs and expenses, the reimbursement is to be reduced proportionately so that each county is paid an equal percentage of its total cost

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<sup>19</sup> R.C. 120.33(A)(3).

<sup>20</sup> R.C. 120.33(A)(4).

<sup>21</sup> R.C. 120.33(D).

<sup>22</sup> R.C. 120.33.



in the fiscal year for operating its county public defender system, its joint county public defender system, and its county appointed counsel system.<sup>23</sup>

### **Other appointed counsel**

Under preexisting law retained by the act, in a county that uses appointed counsel other than under a county appointed counsel mechanism, the board of county commissioners establishes a schedule of fees by case or on an hourly basis to be paid to counsel for legal services provided by appointed counsel. Formerly, prior to establishing the schedule, the board was required to request the bar association or associations of the county to submit a proposed schedule. The schedule submitted was subject to the review, amendment, and approval of the board of county commissioners. The act retains these procedures, but specifies that the request to the bar association or associations for submission of a proposed schedule, and the board of county commissioner's review, amendment, and approval of a submitted schedule, is for cases other than capital cases. Under the act, with respect to capital cases, the schedule must provide for fees by case or on an hourly basis to be paid to counsel in the amount or at the rate set by the Supreme Court as described above in "**County appointed counsel mechanism**," and the board of county commissioners must approve that amount or rate.<sup>24</sup>

Under preexisting law, when counsel is appointed to a case or selected by an indigent person in a county that has established a county public defender or joint county public defender, or otherwise is appointed by a court, except when counsel is appointed to represent a person charged with a municipal ordinance violation in specified circumstances, the county pays the counsel's compensation and expenses for services that the trial court approves. The act retains these procedures, but specifies that, with respect to capital cases, counsel is to be paid compensation and expenses in accordance with the amount or at the rate set by the Supreme Court as described above in "**County appointed counsel mechanism**."<sup>25</sup>

Preexisting law, unchanged by the act, provides for state reimbursement of part of a county's cost of appointed counsel under the provisions described above.<sup>26</sup> For a capital case, the law specifies that the State Public Defender is to reimburse 50% of all costs and expenses of conducting the defense in the case, but that if appropriations are

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<sup>23</sup> R.C. 120.34 and 120.35, not in the act.

<sup>24</sup> R.C. 2941.51(B).

<sup>25</sup> R.C. 2941.51(A) and (B).

<sup>26</sup> R.C. 2941.51.



insufficient to pay 50% of such costs and expenses, the reimbursement is to be reduced proportionately so that each county is paid an equal percentage of its total cost in the fiscal year for operating its county public defender system, its joint county public defender system, and its county appointed counsel system.<sup>27</sup>

### **Attorney-client privilege not applicable if ineffective assistance of counsel asserted after capital case**

Preexisting law retained by the act specifies that an attorney may not testify concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. Formerly, three exceptions were provided to this general privilege. First, if the client voluntarily revealed the substance of attorney-client communications in a nonprivileged context or was deemed under a specified provision that related to child abuse or neglect to have waived testimonial privilege, the attorney could be compelled to testify on the same subject. Second, the testimonial privilege did not apply concerning a communication between a client who had since died and the deceased client's attorney if the communication was relevant to a dispute between parties who claimed through that deceased client, regardless of whether the claims were by testate or intestate succession or by *inter vivos* transaction, and the dispute addressed the competency of the deceased client when the deceased client executed a document that was the basis of the dispute or whether the deceased client was a victim of fraud, undue influence, or duress when the deceased client executed a document that was the basis of the dispute. The third exception to the testimonial privilege applied when the client was an insurance company.<sup>28</sup>

The act adds a fourth exception to the attorney-client testimonial privilege. Under the act, the testimonial privilege also does not apply concerning a communication between a client in a "capital case" and the client's attorney if the communication is relevant to a subsequent ineffective assistance of counsel claim by the client alleging that the attorney did not effectively represent the client in the case.<sup>29</sup> The act refers to the definition of "capital case" set forth in R.C. 2901.02, but that section specifies the type of offense that is a "capital offense" and does not actually define "capital case."

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<sup>27</sup> R.C. 120.34 and 120.35, not in the act.

<sup>28</sup> R.C. 2317.02(A)(1) and (2).

<sup>29</sup> R.C. 2317.02(A)(1).



## Written jury instructions in capital cases

Preexisting statutory law provides an order of proceedings in a criminal case. Formerly, it specified that the trial of an issue upon an indictment or information was to proceed before the trial court or jury as follows: (1) counsel for the state first had to state the case for the prosecution, and could briefly state the evidence by which the counsel expected to sustain it, (2) the defendant or the defendant's counsel had to then state the defense, and could briefly state the evidence which the defendant or the counsel expects to offer in support of it, (3) the state first had to produce its evidence and the defendant then had to produce the defendant's evidence, (4) the state then was confined to rebutting evidence, but the court, for good reason, in furtherance of justice, could permit evidence to be offered by either side out of its order, (5) when the evidence was concluded, either party could request instructions to the jury on the points of law, which instructions had to be reduced to writing if either party requested it, (6) when the evidence was concluded, unless the case was submitted without argument, the counsel for the state commenced, the defendant or the defendant's counsel followed, and the counsel for the state concludes the argument to the jury, and (7) the court, after the argument was concluded and before proceeding with other business, forthwith charged the jury. The charge to the jury had to be reduced to writing by the court if either party requested it before the argument to the jury was commenced. The charge, or other charges or instructions provided for in the statute, when so written and given, could not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions were taken by the jury in their retirement and returned with their verdict into court and remained on file with the papers of the case. The court could deviate from the order of proceedings listed in the statute.<sup>30</sup>

The act retains these preexisting provisions, except that it modifies the jury instructions provisions in capital cases heard by a jury. Under the act, when the evidence is concluded in a capital case that is being heard by a jury, the court must prepare written instructions to the jury on the points of law, must provide copies of the written instructions to the jury before orally instructing the jury, and must permit the jury to retain and consult the instructions during the court's presentation of the oral instructions and during the jury's deliberations.<sup>31</sup>

## Legislative Study Committee

The act establishes a joint committee of members of the Senate and members of the House of Representatives to study the manner in which families of homicide victims

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<sup>30</sup> R.C. 2945.10.

<sup>31</sup> R.C. 2945.10(E).



in Ohio can best be supported by government programs, social service entities, and charitable organizations and the manner and means by which a court-ordered sentence of death is performed in Ohio, consistent with judicial precedent. The study must consider the issues with respect to both short-term and long-term considerations.

The Committee will be comprised of six members. The President of the Senate and the Speaker of the House of Representatives must each appoint two members of their respective houses to serve on the Committee. The Minority Leader of the Senate and the Minority Leader of the House of Representatives must each appoint one member of their respective houses to serve on the Committee. At their first meeting, the members of the Committee must select a Chairperson and Vice-Chairperson. The Committee is required to meet in the same manner, be governed by the rules applicable to, and be afforded staffing in the same manner as standing committees of the Senate and House of Representatives.<sup>32</sup>

### **Time for filing postconviction relief petition**

Under preexisting law, unchanged by the act, a person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the U.S. Constitution or who has been convicted of a felony and has a specified DNA-related type of claim may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. Unchanged by the act, if the person was sentenced to death, the petition may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.<sup>33</sup> The law specifies a time within which the petition must be filed, subject to a few limited exceptions set forth in R.C. 2953.23, and the act increases the period of time for filing the petition. Under the act, subject to the preexisting limited exceptions:<sup>34</sup>

(1) If an appeal is taken, the petition must be filed no later than 365 days (formerly, 180 days) after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the Supreme Court;

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<sup>32</sup> Section 6 of the act.

<sup>33</sup> R.C. 2953.21(A)(1) and (4).

<sup>34</sup> R.C. 2953.21(A)(2).



(2) If no appeal is taken, the petition must be filed no later than 365 days (formerly, 180 days) after the expiration of the time for filing the appeal.

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## HISTORY

ACTION	DATE
Introduced	11-10-14
Reported, H. Policy & Legislative Oversight	11-20-14
Passed House (62-27)	11-20-14
Reported, S. Criminal Justice	12-11-14
Passed Senate (20-10)	12-11-14
House concurred in Senate amendments (66-23)	12-17-14

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