



Ohio Legislative Service Commission

Bill Analysis

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Am. H.B. 663*

130th General Assembly

(As Reported by H. Policy and Legislative Oversight)

Reps. Buchy, Huffman

BILL SUMMARY

- Declares the General Assembly's finding that the identities of persons who assist in carrying out executions by lethal injection must be kept confidential.
- Excludes from the definition of "public record" and prohibits the disclosure of any information or record that identifies or reasonably leads to the identification of any individual that makes, supplies, or administers drugs or equipment used in executions by lethal injection or who participates in carrying out such executions, other than the Director of Rehabilitation and Correction and prison wardens. And provides the same privacy protections, except that the protection sunsets after 20 years, to entities who participate in those activities if the entity submits the proper application for recognition of the protections.
- Requires a court immediately to seal records pertaining to information protected by the bill 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 the Director of Rehabilitation and Correction to follow if a protected document is subpoenaed or requested by a court.

** Corrects the placement of two paragraphs regarding nondisclosure.

* This analysis was prepared before the report of the House Policy and Legislative Oversight Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

- 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 participating in, consulting regarding, performing any function with respect to, or providing any expert opinion testimony regarding an execution by lethal injection.
- Voids contracts that either prohibit the sale, distribution, or transfer of any drug to a governmental entity for use in an execution by lethal injection or are designed to prevent a governmental entity from obtaining a drug for use in such an execution.

CONTENT AND OPERATION

Need for confidentiality for persons who assist in executions

The bill declares the General Assembly's finding that the identities of persons, including business and other entities,¹ who assist the Department of Rehabilitation and Correction (DRC) in carrying out executions by lethal injection must be kept confidential to protect them from harassment and possible physical harm. The bill declares the General Assembly's further findings that such persons, have been subjected to threats and risks in other states, that DRC cannot get the necessary assistance to carry out death sentences by lethal injection without the protection of confidentiality, and that the bill is needed to prevent foreign and domestic individuals and entities from interfering with executions by entering into agreements to prevent DRC from obtaining the necessary drugs.²

Nondisclosure

The bill provides certain protections and limitations with respect to any information or record that identifies or reasonably leads to the identification of a person who, in a variety of ways (see "**Qualifying activities**" below), is involved in the administration of a death sentence by lethal injection. By definition, "person" includes an individual, corporation, business trust, estate, trust, partnership, and association.³ Therefore, the protections and limitations outlined in the bill apply to individuals as well as to the other entities mentioned. The protections and limitations are as follows:⁴

¹ R.C. 1.59, incorporated by reference into R.C. 2949.222(A)(1).

² R.C. 2949.221(B).

³ R.C. 2949.222(A)(1) and 1.59.

⁴ R.C. 2949.222(B)(1), (2), and (3).



(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 or otherwise.⁵

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

These rights 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 to the Director of Rehabilitation and Correction.

Under the bill, the Director of Rehabilitation and Correction 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.⁶

The bill also expressly applies the foregoing confidentiality provisions to information or records identifying to any current or former DRC employee or other individual, other than the Director of DRC or the warden of the state correctional institution in which the execution took place, who, having been elected or designated by the Director, participated in the administration of a sentence of death by lethal injection.⁷

The bill establishes a civil cause of action for the knowing disclosure, without the approval of the Director of DRC, of the identity of any person protected by the bill's nondisclosure provisions. The plaintiff in such an action may recover actual damages,

⁵ R.C. 149.43(A)(1)(cc).

⁶ R.C. 2949.222(D).

⁷ R.C. 2949.222(C).



punitive damages upon a showing of a willful violation of the nondisclosure provisions, and reasonable attorney's fees and court costs.⁸

Qualifying activities

Under the bill, a person who is involved 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 limited and protected in the three ways described above. The qualifying activities are as follows:⁹ 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.

Judicial access to information

The bill 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, whenever such a record comes into the court's possession. Under the bill, 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.¹⁰

If such a record is subpoenaed or requested by a court order, the Director of Rehabilitation and Correction 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 was redacted appears to have acted unlawfully with respect to the person's involvement in the administration of a lethal injection.¹¹

⁸ R.C. 2949.222(E).

⁹ R.C. 2949.222(B).

¹⁰ R.C. 2949.223(A) and (B).

¹¹ R.C. 2949.223(C).



Protection of licensees

The bill prohibits a licensing authority from challenging, reprimanding, suspending, or revoking the license of, or otherwise taking any disciplinary action against, a licensee for 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 the second paragraph under "**Nondisclosure**," above.¹²

Void contracts

The bill renders void any agreement or portion of an agreement that either (1) prohibits the sale, distribution, or transfer of any drug to any governmental entity for use in the administration of a death sentence by lethal injection or (2) is designed to prevent a governmental entity from obtaining a drug for use in the administration of such a sentence.¹³ (See **COMMENT**.)

COMMENT

To the extent that the bill's provision voiding contracts applies to contracts entered into before the bill's effective date, it might be found to violate the clauses of the U.S. and Ohio Constitutions that prohibit the General Assembly from passing laws that impair contractual obligations.¹⁴

HISTORY

ACTION	DATE
Introduced	11-10-14
Reported, H. Policy & Legislative Oversight	---

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¹² R.C. 2949.222(D).

¹³ R.C. 2949.222(F).

¹⁴ U.S. Const. art I, § 10; Ohio Const. art II, § 28.

