



Ohio Legislative Service Commission

Bill Analysis

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Sub. H.B. 663* 130th General Assembly (As Reported by S. Criminal Justice)

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

BILL SUMMARY

- Declares the General Assembly's intent in enacting the bill is to:
 - Protect the identities of persons who assist the Department of Rehabilitation and Correction 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 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.
- 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 that, at any time prior to the day that is 24 months after its effective date, 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 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, at any time prior to the day that is 24 months after its effective date, 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,

* This analysis was prepared before the report of the Senate Criminal Justice appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

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 must report its findings to the Director of Rehabilitation and Correction.

- Specifies that if the confidentiality and other protections in the bill apply to a person with respect to any conduct or activity of the person occurring at a time prior to the day that is 24 months after the bill's effective date, 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.
- 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.
- 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 the day that is 24 months after its effective date, participating in, consulting regarding, performing any function with respect to, or providing any expert opinion testimony regarding an execution by lethal injection.
- Provides for a schedule of fees to be paid to appointed counsel in a capital case as set by the Supreme Court.
- 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.
- Provides for written jury instructions in capital cases.
- 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.



- 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 that 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 bill declares that the General Assembly's intent in enacting the bill is to: (1) protect the identities of persons who assist the Department of Rehabilitation and Correction 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.¹

Nondisclosure

The bill 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 bill'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. By definition, "person" includes an individual, corporation, business trust, estate, trust, partnership, and

¹ Section 7 of the bill.



association.² 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: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 Law⁴ 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 "**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.**"

If information of a record protected under the provisions described above 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 must report its findings to the Director of Rehabilitation and Correction. The specified requirements are that the relationship between the person and the 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.⁵

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 in writing to the Director of Rehabilitation and Correction. Under the bill, the Director of Rehabilitation and Correction (DRC) 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

² R.C. 2949.221(A)(1) and 1.59.

³ R.C. 2949.221(B)(1), (2), and (3).

⁴ R.C. 149.43(A)(1)(cc).

⁵ R.C. 2949.221(B)(4).



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 in the possession of a public office identifying 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 selected or designated by the Director, participated, at any time prior to the day that is 24 months after the bill's effective date, in the administration of a sentence of death by lethal injection and the person's participation in that administration.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 described above and the person's involvement in the administration of the lethal injection. 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.⁸

The bill 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 at a time prior to the day that is 24 months after the bill's effective date, 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.⁹

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.¹⁰

Qualifying activities

Under the bill, except with respect to the protections afforded to DRC employees or former employees, a person who is involved, at any time prior to the day that is 24 months after the bill's effective date, in the administration of the death penalty by lethal injection by being involved in any of the following activities is entitled to have any

⁶ R.C. 2949.221(D).

⁷ R.C. 2949.221(C).

⁸ R.C. 2949.221(F).

⁹ R.C. 2949.221(G).

¹⁰ R.C. 2949.221(A)(3), by reference to R.C. 117.01, which is not in the bill.



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:¹¹ 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, and the person's involvement in the administration of the lethal injection, 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.¹²

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 is protected appears to have acted unlawfully with respect to the person's involvement in the administration of a lethal injection.¹³

Protection of licensees

The bill prohibits a licensing authority (a defined term) from challenging, reprimanding, suspending, or revoking the license of, or otherwise taking any disciplinary action against, a licensee for, at any time prior to 24 months after the bill's effective date, 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.¹⁴

¹¹ R.C. 2949.221(B).

¹² R.C. 2949.222(A) and (B).

¹³ R.C. 2949.222(C).

¹⁴ R.C. 2949.221(E).



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 funding provided by the state. Each county may establish a county public defender and provide representation through that office;¹⁵ may affiliate with one or more adjoining or neighboring counties, establish a joint county public defender, and provide representation through that office;¹⁶ 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").¹⁷ 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").¹⁸ The bill 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.

County appointed counsel mechanism

Currently, 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. Prior to establishing the schedule, the board must request the bar association or associations of the county to submit a proposed schedule. The schedule submitted is subject to the review, amendment, and approval of the board of county commissioners, except with respect to capital cases. The bill 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 bill, 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

¹⁵ R.C. 120.13 to 120.18, not in the bill.

¹⁶ R.C. 120.23 to 120.28, not in the bill.

¹⁷ R.C. 120.33.

¹⁸ R.C. 120.16(E) and 120.26(E), not in the bill.



amount or at the rate set by the Supreme Court, and the board of county commissioners must approve that amount or rate.¹⁹

Currently, 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 bill 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.²⁰

Related to both of its provisions, described above, the bill 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.²¹

Existing law, unchanged by the bill, provides for state reimbursement of part of a county's cost of providing counsel under a county appointed counsel mechanism.²² 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 in the fiscal year for operating its county public defender system, its joint county public defender system, and its county appointed counsel system.²³

Other appointed counsel

Currently, 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. Prior to establishing the schedule, the board must request the bar association or associations of the county to submit a proposed schedule. The schedule submitted is subject to the review, amendment, and approval of the board of county commissioners, except with respect to capital cases. The bill 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

¹⁹ R.C. 120.33(A)(3).

²⁰ R.C. 120.33(A)(4).

²¹ R.C. 120.33(D).

²² R.C. 120.33.

²³ R.C. 120.34 and 120.35, not in the bill.



submitted schedule, is for cases other than capital cases. Under the bill, 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.²⁴

Currently, 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 bill 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**."²⁵

Existing law, unchanged by the bill, provides for state reimbursement of part of a county's cost of appointed counsel under the provisions described above.²⁶ 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 in the fiscal year for operating its county public defender system, its joint county public defender system, and its county appointed counsel system.²⁷

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

Existing law 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. However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed under a specified provision that relates to child abuse or neglect to have waived testimonial privilege, the attorney may be compelled to testify on the same

²⁴ R.C. 2941.51(B).

²⁵ R.C. 2941.51(A) and (B).

²⁶ R.C. 2941.51.

²⁷ R.C. 120.34 and 120.35, not in the bill.



subject. The testimonial privilege established under this provision does not apply concerning a communication between a client who has since died and the deceased client's attorney if the communication is relevant to a dispute between parties who claim through that deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction, and the dispute addresses the competency of the deceased client when the deceased client executed a document that is 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 is the basis of the dispute. Another exception to the testimonial privilege applies when the client is an insurance company.²⁸

The bill adds a new exception to the attorney-client testimonial privilege. Under the bill, 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.²⁹ The bill 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."

Written jury instructions in capital cases

The Revised Code currently provides an order of proceedings in a criminal case. It specifies that the trial of an issue upon an indictment or information is to proceed before the trial court or jury as follows: (1) counsel for the state must first state the case for the prosecution, and may briefly state the evidence by which the counsel expects to sustain it, (2) the defendant or the defendant's counsel must then state the defense, and may briefly state the evidence which the defendant or the counsel expects to offer in support of it, (3) the state must first produce its evidence and the defendant shall then produce the defendant's evidence, (4) the state then is confined to rebutting evidence, but the court, for good reason, in furtherance of justice, may permit evidence to be offered by either side out of its order, (5) when the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions must be reduced to writing if either party requests it, (6) when the evidence is concluded, unless the case is submitted without argument, the counsel for the state commences, the defendant or the defendant's counsel follows, and the counsel for the state concludes the argument to the jury, and (7) the court, after the argument is concluded and before proceeding with other business, forthwith charges the jury. The charge to the jury must be reduced to writing by the court if either party requests it before the argument to the

²⁸ R.C. 2317.02(A)(1) and (2).

²⁹ R.C. 2317.02(A)(1).



jury is commenced. The charge, or other charges or instructions provided for in the section, when so written and given, may not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions are taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case. The court may deviate from the order of proceedings listed in the section.³⁰

The bill modifies the existing jury instructions provisions in capital cases heard by a jury. Under the bill, 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.³¹

Legislative Study Committee

The bill 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 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.³²

Time for filing postconviction relief petition

Under existing law, unchanged by the bill, 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

³⁰ R.C. 2945.10.

³¹ R.C. 2945.10(E).

³² Section 6 of the bill.



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 bill, 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.³³ 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 bill increases the period of time for filing the petition. Under the bill, subject to the existing limited exceptions:³⁴

(1) If an appeal is taken, the petition must be filed no later than 365 days (currently, 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;

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

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	---

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³³ R.C. 2953.21(A)(1) and (4).

³⁴ R.C. 2953.21(A)(2).

