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# OHIO LEGISLATIVE SERVICE COMMISSION

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H.B. 337  
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## Bill Analysis

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**Version:** As Introduced

**Primary Sponsors:** Reps. Stein and Galonski

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### SUMMARY

- Provides a testimonial privilege for confidential communications between a qualified advocate in a legal proceeding and a victim of a specified domestic violence, trafficking, stalking, or sex offense, in the course of specified advocacy services provided by the advocate to the victim and related to the offense and for records related to the advocate's provision of the services.
- Provides for a waiver of the testimonial privilege described above in specified circumstances and exempts certain types of communications and disclosures from the privilege.
- Expands an existing mandatory child abuse or neglect reporting requirement so that it also will apply to qualified advocates, and provides in specified circumstances an exemption from the requirement for advocates under the testimonial privilege described above and for a waiver of the exemption.
- Exempts from the offenses of "failure to report a crime" and "failure to report knowledge of a death" the failure to report by:
  - A qualified advocate, regarding information that is privileged by reason of the relationship between the advocate and a victim of a specified domestic violence, trafficking, stalking, or sex offense.
  - A person with duties in a designated type of victim advocacy office, women's center, health center, or other program, regarding information acquired by the person in the course of the person's duties in the office, center, or program.

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## DETAILED ANALYSIS

### Testimonial privilege for qualified advocates

Existing law provides that persons in certain specified categories are not to testify in certain respects. The bar against testifying is a “testimonial privilege.”<sup>1</sup> The bill expands the testimonial privilege provisions so that they also will apply to qualified advocates in specified circumstances. The bill defines the terms in quotation marks in the following paragraphs, as set forth below in “**Definitions under the bill.**”

#### General privilege

The bill expands the existing testimonial privilege provisions to provide that a “qualified advocate” in any civil, criminal, administrative, or education discipline proceeding generally shall not testify concerning: (1) a “confidential communication” made by a “victim” to a qualified advocate or by a qualified advocate to a victim in the course of safety planning, counseling, support, or advocacy services (hereafter, “the specified services”) provided by the qualified advocate to the victim and related to the “domestic violence,” “human trafficking,” “menacing by stalking,” or “sexual violence” for which the victim sought those services, or (2) a record created or maintained in the course of the qualified advocate providing the specified services regarding the victim and related to the domestic violence, human trafficking, menacing by stalking, or sexual violence for which the victim sought those services. This new testimonial privilege is subject to the waiver and the exemption described in the next two paragraphs.<sup>2</sup>

#### Waiver of privilege

If the victim voluntarily reveals the substance of any qualified advocate-victim communication in a nonprivileged context or is considered by R.C. 2151.421(A)(5)(b) to have waived the testimonial privilege described above that the bill enacts, the qualified advocate may be compelled to testify on the same subject in any proceeding of a type to which that privilege applies, as described in the preceding paragraph.<sup>3</sup> The R.C. 2152.421(A)(5)(b) waiver, enacted in the bill, is discussed below in “**Waiver of exemption**” under “**Qualified advocate reporting of known or suspected child abuse or neglect.**”

#### Communications and disclosures to which privilege does not apply

The bill specifies that the testimonial privilege described above that it enacts does not apply concerning any:<sup>4</sup>

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<sup>1</sup> R.C. 2317.02.

<sup>2</sup> R.C. 2317.02(M)(1).

<sup>3</sup> R.C. 2317.02(M)(2).

<sup>4</sup> R.C. 2317.02(M)(3).

1. Confidential communication between a qualified advocate and a victim in a civil, criminal, administrative, or education discipline proceeding or action brought against the qualified advocate or the “qualified victim services program” of which the qualified advocate is an employee or volunteer by the victim or by any other person in relation to the specified services provided to the victim, if the confidential communication is relevant to the defense of the qualified advocate or qualified victim services program;
2. Disclosure of “aggregate, nonpersonally identifiable data.”

## **Qualified advocate reporting of known or suspected child abuse or neglect**

The bill expands an existing mandatory child abuse or child neglect reporting mechanism so that, in addition to the categories of persons to which the provision currently applies, it also will apply to qualified advocates. The bill defines the terms in quotation marks in the following paragraphs, as set forth below in “**Definitions under the bill.**”

### **General prohibition against failure to report**

The bill generally prohibits any “qualified advocate” who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under age 18, or a person under age 21 with a developmental disability or physical impairment, has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child from failing to immediately report that knowledge or reasonable cause to suspect to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. Under an existing provision applicable to this prohibition, a violation of the prohibition is a fourth degree or first degree misdemeanor, depending on the circumstances present. This prohibition is subject to the exemption described in the next paragraph.<sup>5</sup>

### **Exemption for prohibition**

The bill specifies that a qualified advocate is not required to make a report under the bill’s child abuse or neglect reporting provision described above concerning any “confidential communication” the qualified advocate receives from a “victim” in a qualified advocate-victim relationship, if, in accordance with the bill’s testimonial privilege described above, the qualified advocate could not testify with respect to that communication in a civil, criminal, administrative, or education discipline proceeding. This exemption is subject to the waiver described in the next paragraph.<sup>6</sup>

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<sup>5</sup> R.C. 2152.421(A)(1)(a) and (b) and (A)(5)(a) and R.C. 2151.99(C), not in the bill.

<sup>6</sup> R.C. 2151.421(A)(5)(a).

## Waiver of exemption

The bill specifies that the victim in a qualified advocate-victim relationship described in the preceding paragraph is considered to have waived any testimonial privilege under the bill with respect to any confidential communication the qualified advocate receives from the victim in that qualified advocate-victim relationship, and the qualified advocate must make a report under the bill's child abuse or neglect reporting provision described above with respect to that communication, if all of the following apply:<sup>7</sup>

1. The victim, at the time of the communication, is either a child under age 18 or a person under age 21 with a developmental disability or physical impairment.
2. The qualified advocate knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, as a result of the communication or any observations made during it, that the victim has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the victim.
3. The abuse or neglect does not arise out of the victim's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with existing R.C. 2151.85, which is not in the bill.

## Offenses of “failure to report a crime” and “failure to report knowledge of a death”

### Prohibitions and penalties

Existing law, unchanged by the bill, prohibits a person: (1) knowing that a felony has been or is being committed, from knowingly failing to report that information to law enforcement authorities, or (2) knowing that a violation constituting the offense of “unauthorized use of computer, cable, or telecommunications property” has been, or is being committed or that the person has received information derived from such a violation, from knowingly failing to report the violation to law enforcement authorities. A violation of the prohibition is the offense of “failure to report a crime,” a second or fourth degree misdemeanor, depending on the circumstances present.<sup>8</sup>

Existing law, unchanged by the bill, prohibits a person from failing to provide upon the request of a physician, advanced practice registered nurse, law enforcement officer, ambulance service, emergency squad, or coroner to whom a required report of a death was made, or to any law enforcement officer who has reasonable cause to assert the authority to investigate the circumstances surrounding the death, any facts within the person's knowledge that may

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<sup>7</sup> R.C. 2151.421(A)(5)(b).

<sup>8</sup> R.C. 2921.22(A) and (I).

have a bearing on the investigation of the death. A violation of the prohibition is the offense of “failure to report knowledge of a death,” a fourth degree misdemeanor.<sup>9</sup>

Under existing law, unchanged by the bill, no disclosure of information pursuant to any of the provisions described above gives rise to any liability or recrimination for a breach of privilege or confidence.<sup>10</sup>

### **Exemptions from reporting and disclosure duties**

Existing law provides several exemptions from the reporting and disclosure duties described above that the prohibitions under “failure to report a crime” and “failure to report knowledge of a death” establish. The bill adds two exemptions from the prohibitions that apply with respect to victim’s advocates. The bill defines the terms in quotation marks in the following paragraphs, as set forth below in **“Definitions under the bill.”**

The first exemption added by the bill specifies that the prohibitions described above do not require disclosure of information when the information is privileged by reason of the relationship between a “qualified advocate” and a “victim” of “domestic violence,” “human trafficking,” “menacing by stalking,” or “sexual violence.”<sup>11</sup> Currently, a privileged communications exemption of this nature is provided for information that is privileged by reason of the relationship between attorney and client; physician or advanced practice registered nurse and patient; licensed psychologist, licensed school psychologist, licensed professional clinical counselor, licensed professional counselor, independent social worker, social worker, independent marriage and family therapist, or marriage and family therapist and client; member of the clergy, rabbi, minister, or priest and person communicating information confidentially to the clergy member, rabbi, minister, or priest for a religious counseling purpose of a professional character; husband and wife; or communications assistant and parties to a telecommunications relay service call.<sup>12</sup>

The second exemption added by the bill specifies that the prohibitions described above do not require disclosure of information when the disclosure would amount to revealing information acquired by the actor in the course of the actor’s duties in a designated victim advocacy office, women’s center, health center, or other program that satisfies four criteria. The four criteria are that the office, center, or program: (1) provides the specified services to victims of domestic violence, human trafficking, menacing by stalking, or sexual violence, (2) employs or otherwise engages one or more qualified advocates, and (3) has a memorandum of understanding with a “qualified victim services program.”<sup>13</sup>

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<sup>9</sup> R.C. 2921.22(D) and (J).

<sup>10</sup> R.C. 2921.22(H).

<sup>11</sup> R.C. 2921.22(G)(1).

<sup>12</sup> R.C. 2921.22(G)(1).

<sup>13</sup> R.C. 2921.22(G)(7)(a).

Existing exemptions not modified by the bill specify that the prohibitions described above do not require disclosure of information when the information would tend to incriminate a member of the actor's immediate family, disclosure would amount to revealing a specified privileged news source, disclosure would amount to disclosure by a member of the ordained clergy of an organized religious body of a confidential communication made in a specified manner by a person seeking the aid or counsel of that member of the clergy, disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a specified type of program of drug treatment or services, or disclosure would amount to revealing information acquired by the actor in the course of the actor's duties in connection with a specified type of program for providing counseling to victims of certain sex offenses.<sup>14</sup>

## Definitions under the bill

The bill defines many terms that apply for purposes of some, or all, of its provisions described above.

### Testimonial privilege definitions

The bill defines the following terms for purposes of its testimonial privilege provisions described above:<sup>15</sup>

**“Aggregate, nonpersonally identifiable data”** means all data from or through which the person to whom the data pertains cannot be identified.

**“Rape crisis program”** means, by reference to existing R.C. 109.921 (not in the bill), any of the following: (1) the nonprofit state sexual assault coalition designated by the Center for Injury Prevention and Control of the Federal Centers for Disease Control and Prevention, (2) a victim witness assistance program operated by a prosecuting attorney, or (3) a program operated by a government-based or nonprofit entity that provides a full continuum of services to victims of sexual assault, including hotlines, victim advocacy, and support services from the onset of the need for services through the completion of healing, that does not provide medical services, and that may refer victims to physicians for medical care but does not engage in or refer for services for which the use of genetic services funds is prohibited by R.C. 3701.511 (not in the bill).

### Testimonial privilege and child abuse and neglect reporting definitions

The bill defines the following terms for purposes of its testimonial privilege provisions and its child abuse and neglect reporting provisions described above:<sup>16</sup>

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<sup>14</sup> R.C. 2921.22(G)(2) to (6).

<sup>15</sup> R.C. 2317.02.

<sup>16</sup> R.C. 2151.421 and 2317.02.

**“Confidential communication”** means any written or oral communication intended for furthering the victim’s interest in the course of the specified services and not intended for further disclosure to another person except for: (1) any person who is present at the time the communication is made and is present to further the victim’s interest in the course of seeking the specified services, (2) any person reasonably necessary for transmitting the communication, (3) any other persons in the context of group counseling, or (4) any person to whom disclosure is reasonably necessary to accomplish a purpose for which the victim consulted the qualified advocate and to whom information is disclosed pursuant to a voluntary and knowingly written informed consent given by the victim to the qualified advocate.

**“Qualified advocate”** means any person who has completed at least 40 hours of training in advocacy for victims of domestic violence, human trafficking, menacing by stalking, or sexual violence, or has registered for such a training program and is under the supervision of a qualified advocate and who is an employee or volunteer of a qualified victim services program. As used in this term, “qualified” pertains exclusively to the advocacy requirements of this section, and does not apply to the definitions of “victim advocate” in any other Revised Code section.

### **Testimonial privilege and failure to report a crime/failure to report knowledge of a death definitions**

The bill defines the following terms for purposes of its testimonial privilege provisions and its failure to report a crime/failure to report knowledge of a death provisions described above:<sup>17</sup>

**“Domestic violence”** means, by reference to existing R.C. 3113.31, which is not in the bill: (1) attempting to cause or recklessly causing bodily injury to a “family or household member,” or (2) any conduct that is prohibited in an existing or former municipal ordinance or law of Ohio, any other state, or the United States and that is or was substantially equivalent to any conduct described in clause (1). As used in this definition, a “family or household member” is either the natural parent of any child of whom the person who allegedly committed the domestic violence is the other natural parent or is the putative other natural parent, or any of the following who is residing with or has resided with the person who allegedly committed the domestic violence: a spouse, a “person living as a spouse” (a defined term), or a former spouse of the person who allegedly committed the domestic violence; a parent, a foster parent, or a child of the person who allegedly committed the domestic violence, or another person related by consanguinity or affinity to the person who allegedly committed the domestic violence; or a parent or a child of a spouse, person living as a spouse, or former spouse of the person who allegedly committed the domestic violence, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the person who allegedly committed the domestic violence.

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<sup>17</sup> R.C. 2317.02 and 2921.22.

**“Human trafficking”** means any conduct that is prohibited by the prohibition under the offense of “trafficking in persons”<sup>18</sup> or any conduct that is prohibited in an existing or former municipal ordinance or law of Ohio, any other state, or the United States and that is or was substantially equivalent to any conduct that is prohibited by the prohibition under the offense of “trafficking in persons.”

**“Menacing by stalking”** means any conduct that is prohibited by the prohibition under the offense of “menacing by stalking”<sup>19</sup> or by the prohibition under the offense of “menacing,”<sup>20</sup> or any conduct that is prohibited in an existing or former municipal ordinance or law of Ohio, any other state, or the United States and that is or was substantially equivalent to any conduct that is prohibited by the prohibition under either of those specified offenses.

**“Qualified victim services program”** means either: (1) a nongovernmental, nonprofit, community-based program that receives moneys administered by a local, state, or federal government agency; offers the specified services to victims of domestic violence, human trafficking, menacing by stalking, or sexual violence; and adheres to the standards set forth by the federally recognized state sexual violence or state domestic violence coalitions, or (2) a rape crisis program.

**“Sexual violence”** means any conduct that: (1) would be a violation of any prohibition in the Sex Offenses chapter of the Revised Code,<sup>21</sup> (2) would constitute a sexually oriented offense as defined in the Sex Offender Registration and Notification Law,<sup>22</sup> or (3) is prohibited in an existing or former municipal ordinance or law of Ohio, any other state, or the United States that is or was substantially equivalent to any conduct described in clause (1) or (2).

### **Testimonial privilege, child abuse and neglect reporting, and failure to report a crime/failure to report knowledge of a death definitions**

The bill defines “**victim**,” for purposes of its testimonial privilege provisions, its child abuse and neglect reporting provisions, and its failure to report a crime/failure to report knowledge of a death provisions described above, as a person who seeks the specified services at a qualified victim services program if those services are related to domestic violence, human trafficking, menacing by stalking, or sexual violence against the person.<sup>23</sup>

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<sup>18</sup> R.C. 2905.32(A), not in the bill.

<sup>19</sup> R.C. 2903.211(A), not in the bill.

<sup>20</sup> R.C. 2903.22(A), not in the bill.

<sup>21</sup> R.C. Chapter 2907, not in the bill.

<sup>22</sup> R.C. Chapter 2950, not in the bill.

<sup>23</sup> R.C. 2151.421, 2317.02, and 2921.22.

## Failure to report a crime/failure to report knowledge of a death definitions

The bill defines “**qualified advocate**,” for purposes of its failure to report a crime/failure to report knowledge of a death provisions described above, as any person who has completed at least 40 hours of training in advocacy for victims of domestic violence, human trafficking, menacing by stalking, or sexual violence, and who is an employee or volunteer of a designated victim advocacy office, women’s center, health center, or other program that: (1) provides the specified services to victims of domestic violence, human trafficking, menacing by stalking, or sexual violence, (2) employs or otherwise engages one or more qualified advocates, and (3) has a memorandum of understanding with a qualified victim services program.<sup>24</sup>

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### HISTORY

Action	Date
Introduced	09-17-19

H0337-I-133/ts

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<sup>24</sup> R.C. 2921.22.