



Sub. H.B. 48*

126th General Assembly

(As Reported by S. Judiciary on Criminal Justice)

Reps. Hughes, Aslanides, Combs, C. Evans, D. Evans, Faber, Flowers, Gibbs, Hoops, Kearns, Latta, McGregor, Oelslager, Schaffer, J. Stewart, Taylor, Trakas, Webster, DeGeeter, Otterman, Perry, Gilb, Seaver, Willamowski, D. Stewart, Barrett, Brown, Buehrer, Calvert, Carano, Cassell, Chandler, Collier, Distel, Driehaus, Garrison, Hagan, Harwood, Martin, T. Patton, Peterson, Setzer, G. Smith, Strahorn, Uecker, Wagner, Wagoner, Walcher, Widener, Williams, Wolpert, Yuko

BILL SUMMARY

- Increases, from a misdemeanor of the first degree to a felony of the fifth degree, the penalty for the offense of "identity fraud" when it is not committed in the circumstances described in the next dot point and when the enhanced penalties provided when the value of the credit, property, services, debt, or other legal obligation involved exceeds \$500 do not apply.
- Renames the offense of "identity fraud" when it is committed against an elderly person or disabled adult as "identity fraud against an elderly person or disabled adult" and generally enhances the penalty for "identity fraud against an elderly person or disabled adult."
- Makes the "law enforcement investigation affirmative defense" and the "lawful purpose affirmative defense" currently available for a person charged with certain prohibitions under the offense of "identity fraud" (or "identity fraud committed against an elderly person or disabled adult" under the bill) available to a person charged with any of the prohibitions under that offense.

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

- Modifies the "law enforcement investigation affirmative defense" available for a person charged under the offense of "identity fraud" (or "identity fraud committed against an elderly person or disabled adult" under the bill) by providing that it is available only when the person or entity using, obtaining, possessing, or creating the personal identifying information or permitting it to be used is a law enforcement agency, authorized fraud personnel, or a representative of or attorney for such an agency or personnel and is using, obtaining, possessing, or creating the information or permitting it to be used, with prior consent, in a bona fide investigation, an information security evaluation, a pretext calling evaluation, or a similar matter, and by requiring that the specified prior consent must be given by the person whose personal identifying information is being used, obtained, possessed, or created or is being permitted to be used or, if that person is deceased, by the deceased person's executor, or a member of the deceased person's family, or the deceased person's attorney.
- Modifies the "lawful purpose affirmative defense" available for a person charged under the offense of "identity fraud" (or "identity fraud committed against an elderly person or disabled adult" under the bill) by providing that it is not available if the person or entity using, obtaining, possessing, or creating the personal identifying information or permitting it to be used is a law enforcement agency, authorized fraud personnel, or a representative or attorney for such an agency or personnel that is using, obtaining, possessing, or creating the personal identifying information or permitting it to be used in an investigation, an information security evaluation, a pretext calling evaluation, or a similar matter.
- Permits the Attorney General, in cooperation with a law enforcement agency, to issue an identity fraud passport to a person who has filed a police report citing that the person is a victim in Ohio of identity fraud or identity fraud against an elderly person or disabled adult.
- Permits a victim of identity fraud or identity fraud against an elderly person or disabled adult to present an identity fraud passport to a law enforcement agency or to the victim's creditors and permits the agency or creditor to accept the passport at its discretion.
- Requires the Attorney General to maintain statistics with respect to the number of applications for identity fraud passports submitted, and the number of identity fraud passports issued, pursuant to the bill's provisions

and to submit a statistical report to the Governor, the President and Minority Leader of the Senate, and the Speaker and Minority Leader of the House of Representatives indicating the number of applications for identity fraud passports submitted, and the number of identity fraud passports issued, in the previous fiscal year; specifies that nothing in the statistics maintained or the report submitted may identify, or enable the identification of, any individual who applied for, was issued, or was denied an identity fraud passport; and specifies that the statistics and the report are public records for the purpose of the Public Records Law.

CONTENT AND OPERATION

Offense of identity fraud

Existing law

Prohibitions. The offense of "identity fraud" currently contains the following four prohibitions:

(1) First prohibition. Current law prohibits a person, without the express or implied consent of the other person, from using, obtaining, or possessing any personal identifying information¹ of another person with intent to do either of the following (R.C. 2913.49(B)): (a) hold the person out to be the other person, or (b) represent the other person's personal identifying information as the person's own.

(2) Second prohibition. Current law also prohibits a person from creating, obtaining, possessing, or using the personal identifying information of any person with the intent to aid or abet another person in violating the first prohibition (R.C. 2913.49(C)).

(3) Third prohibition. Additionally, current law prohibits a person, with intent to defraud, from permitting another person to use the person's own personal identifying information (R.C. 2913.49(D)).

¹ For purposes of all four current prohibitions, "personal identifying information" includes, but is not limited to, all of the following belonging to a living or dead individual: name, address, telephone number, driver's license, driver's license number, commercial driver's license, commercial driver's license number, state identification card, state identification card number, social security card, social security number, birth certificate, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, money market account number, mutual fund account number, other financial account number, personal identification number, password, or credit card number (R.C. 2913.49(A)).

(4) **Fourth prohibition.** Finally, under current law, a person who is permitted to use another person's personal identifying information (as described in the third prohibition) is prohibited from using, obtaining, or possessing the other person's personal identifying information with intent to defraud any person by holding the person out to be the other person or representing the other person's personal identifying information as the person's own (R.C. 2913.49(E)).

Affirmative defenses. Under existing law, there are several affirmative defenses available if a person is charged with one of the prohibitions described above in "**Prohibitions.**" It is an affirmative defense to a charge under the first prohibition that the person using the personal identifying information is acting in accordance with a legally recognized guardianship or conservatorship or as a trustee or fiduciary (hereafter, the "guardianship affirmative defense"). It is an affirmative defense to a charge under the first, third, or fourth prohibition that either: (1) the person or entity using the personal identifying information is a law enforcement agency, authorized fraud personnel, or a representative of or attorney for a law enforcement agency or authorized fraud personnel and is using the personal identifying information in a *bona fide* investigation, an information security evaluation, a pretext calling evaluation, or a similar matter (hereafter, the "law enforcement investigation affirmative defense"), or (2) the personal identifying information was obtained, possessed, or used for a lawful purpose (hereafter, the "lawful purpose affirmative defense"). (R.C. 2913.49(F)).

It is not a defense to a charge of identity fraud under any of the prohibitions that the person whose personal identifying information was obtained, possessed, or used was deceased at the time of the offense (R.C. 2913.49(G)).

Penalty. Generally, identity fraud is a first degree misdemeanor. If the value of the credit, property, services, debt, or other legal obligation involved in the violation or course of conduct is \$500 or more but less than \$5,000, identity fraud is a fourth degree felony. If the value is \$5,000 or more but less than \$100,000, it is a third degree felony. If the value is \$100,000 or more, it is a second degree felony. (R.C. 2913.49(I).) (See **COMMENT.**)

Operation of the bill

Penalty--in general. The bill provides increased penalties for violations of any of the four prohibitions contained in current law when they are committed in specified circumstances, as described in the next paragraph, and also increases the general penalty for a violation of any of the four prohibitions when they are not committed in those specified circumstances and when the violation is not subject to the current increased penalty for a violation involving credit, property, services, debt, or other legal obligation of \$500 or more. Under the bill: (1) identity fraud when not committed in the specified circumstances described in the next

paragraph *generally is a felony of the fifth degree* (increased from a misdemeanor of the first degree, under existing law), and (2) identity fraud when not committed in those specified circumstances retains the same penalty as under existing law when the value of the credit, property, services, debt, or other legal obligation involved in the violation is \$500 or more (i.e., either a fourth degree felony, a third degree felony, or a second degree felony, depending upon the value). (R.C. 2913.49(I)(2).)

Penalty--identity fraud against an elderly person or disabled adult. The bill provides for separate treatment of violations of any of the four prohibitions contained in current law when they are committed in specified circumstances. Under the bill, if the victim of a violation of one of the prohibitions is an elderly person or disabled adult, the offense is "identity fraud against an elderly person or disabled adult."² Except for the circumstance described in the preceding paragraph in which the bill increases the existing penalty for identity fraud, the penalty for identity fraud against an elderly person or disabled adult is one degree higher than the penalty for identity fraud. Thus, under the bill, identity fraud against an elderly person or disabled adult generally is a fifth degree felony. If the value of the credit, property, services, debt, or other legal obligation involved in the violation or course of conduct is \$500 or more but less than \$5,000, identity fraud against an elderly person or disabled adult is a third degree felony. If the value is \$5,000 or more but less than \$100,000, it is a second degree felony. If the value is \$100,000 or more, it is a first degree felony. (R.C. 2913.49(I)(3).)

Affirmative defenses. The bill modifies the "law enforcement investigation affirmative defense" and the "lawful purpose affirmative defense" available under existing law for a person charged with the first, third, or fourth prohibition described above in "**Prohibitions**" under "**Existing law**," and also makes those affirmative defenses available to a person charged with the second prohibition described above in that part of this analysis. The bill does not change the existing "guardianship affirmative defense" (R.C. 2913.49(F)(1)). Under the bill, it is an

² As used in this provision:

"Elderly person" means a person who is age 65 or older (R.C. 2913.01(CC), not in the bill).

"Disabled adult" means a person who is age 18 or older and has some impairment of body or mind that makes the person unable to work at any substantially remunerative employment that the person otherwise would be able to perform and that will, with reasonable probability, continue for a period of at least 12 months without any present indication of recovery from the impairment, or who is age 18 or older and has been certified as permanently and totally disabled by an agency of this state or the United States that has the function of so classifying persons (R.C. 2913.01(DD), not in the bill).

affirmative defense to a charge under the first, *second*, third, or fourth prohibition described above in "**Prohibitions**" under "**Existing law**" that either of the following applies (R.C. 2913.49(F)(2) and (3)):

(1) The person or entity using, *obtaining, possessing, or creating* the personal identifying information *or permitting it to be used* is a law enforcement agency, authorized fraud personnel, or a representative of or attorney for a law enforcement agency or authorized fraud personnel and is using, *obtaining, possessing, or creating* the personal identifying information *or permitting it to be used, with prior consent given as specified below*, in a *bona fide* investigation, an information security evaluation, a pretext calling evaluation, or a similar matter. *The prior consent required under this provision must be given by the person whose personal identifying information is being used, obtained, possessed, or created or is being permitted to be used or, if that person is deceased, by the deceased person's executor, or a member of the deceased person's family, or the deceased person's attorney. The prior consent may be given orally or in writing by the person whose personal identifying information is being used, obtained, possessed, or created or is being permitted to be used or that person's executor, or family member, or attorney.*

(2) The personal identifying information was obtained, possessed, used, *created, or permitted to be used* for a lawful purpose, *provided that this affirmative defense does not apply if the person or entity using, obtaining, possessing, or creating the personal identifying information or permitting it to be used is a law enforcement agency, authorized fraud personnel, or a representative or attorney for a law enforcement agency or authorized fraud personnel that is using, obtaining, possessing, or creating the personal identifying information or permitting it to be used in an investigation, an information security evaluation, a pretext calling evaluation, or a similar matter.*

The bill modifies the existing provision that specifies that it is not a defense to a charge of a violation of any of the prohibitions described above in "**Prohibitions**" under "**Existing law**" that the person whose personal identifying information was obtained, possessed, or used was deceased at the time of the offense, so that the provision also applies regarding a person whose personal identifying information *was created or permitted to be used* in the violation and who was deceased at the time of the offense (R.C. 2913.49(G)).

Identity fraud passport

The bill authorizes the Attorney General (the AG), in cooperation with any law enforcement agency, to issue an identity fraud passport to a victim in Ohio of "identity fraud" or "identity fraud against an elderly person or disabled adult" who has filed a police report with any law enforcement agency citing that the person is

a victim of the identity fraud statute. It further provides that once a person who is a victim in Ohio of "identity fraud" or "identity fraud against an elderly person or disabled adult" has filed a police report with a law enforcement agency citing that the person is a victim of a violation of the identity fraud statute, the victim is permitted to apply for an identity fraud passport through any law enforcement agency. Under the bill, the agency must send a copy of the police report and the application for the passport to the AG. The bill requires the AG to process the application and supporting police report and permits the AG to issue the victim an identity fraud passport in the form of a card or certificate. (R.C. 109.94(A).)

The bill permits a victim to present the victim's identity fraud passport issued by the AG to a law enforcement agency to help prevent the victim's arrest or detention for offenses committed by a person other than the victim who is using the victim's identity. A victim also is permitted to present the passport to any of the victim's creditors to aid in the creditors' investigation and establishment of whether fraudulent charges were made against accounts in the victim's name or whether accounts were opened using the victim's identity. A law enforcement agency or creditor may accept, but is not required to accept, the identity fraud passport at the agency's or creditor's discretion and is permitted to consider the surrounding circumstances and available information regarding the offense of identity fraud pertaining to the victim. (R.C. 109.94(B).)

The bill allows the AG to provide access to the applications and supporting documentation filed with the AG's office under the bill to other criminal justice agencies in this or another state. It specifies that, subject to their use for statistical purposes as described below, those materials are not public records under the Public Records Law.³ The bill requires the AG to maintain statistics with respect to the number of applications for identity fraud passports submitted, and the number of identity fraud passports issued, pursuant to the bill's provisions. Not later than November 1 in each year, the AG must submit a statistical report to the Governor, the President and Minority Leader of the Senate, and the Speaker and Minority Leader of the House of Representatives indicating the number of applications for identity fraud passports submitted, and the number of identity fraud passports issued, pursuant to the bill's provision in the previous fiscal year. Nothing in the statistics maintained or the statistical report submitted by the AG pursuant to this provision may identify, or enable the identification of, any individual who applied for, was issued, or was denied an identity fraud passport. Finally, the bill specifies that the statistics and the statistical report are public records for the purpose of the Public Records Law. (R.C. 109.94(C)(2).)

³ *Ohio's Public Records Law generally requires every "public office" to promptly prepare and make available for inspection all public records, at all reasonable times, during regular business hours (R.C. 149.43, not in the bill).*

COMMENT

If an offender commits a violation of the first, third, or fourth prohibitions discussed above in the **CONTENT AND OPERATION** section of this analysis, and the violation occurs as part of a course of conduct involving other violations of the first, third, or fourth prohibitions or violations of, attempts to violate, conspiracies to violate, or complicity in violations of the second prohibition or R.C. 2913.02, 2913.04, 2913.11, 2913.21, 2913.31, 2913.42, 2913.43, or 2921.13, the court, in determining the degree of the offense under the penalty provisions may aggregate all credit, property, or services obtained or sought to be obtained by the offender and all debts or other legal obligations avoided or sought to be avoided by the offender in the violations involved in that course of conduct. The course of conduct may involve one victim or more than one victim.

If an offender commits a violation of the second prohibition and the violation occurs as part of a course of conduct involving other violations of the second prohibition or violations of, attempts to violate, conspiracies to violate, or complicity in violations of the first, third, or fourth prohibitions or R.C. 2913.02, 2913.04, 2913.11, 2913.21, 2913.31, 2913.42, 2913.43, or 2921.13, the court, in determining the degree of the offense under the penalty provisions, may aggregate all credit, property, or services obtained or sought to be obtained by the person aided or abetted and all debts or other legal obligations avoided or sought to be avoided by the person aided or abetted in the violations involved in that course of conduct. The course of conduct may involve one victim or more than one victim. (R.C. 2913.49(H).)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	02-08-05	p. 192
Reported, H. Criminal Justice	03-01-05	pp. 242-243
Passed House (88-8)	03-08-05	pp. 301-302
Reported, S. Judiciary on Criminal Justice	---	---

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