



MIKE DEWINE

GOVERNOR OF OHIO

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www.governor.ohio.gov

July 28, 2020

Beth Bickford
Executive Director
Association of Ohio Health Commissioners
110A Northwoods Blvd.
Columbus, Ohio 43215

Dear Director Bickford,

Below is the concept paper for the Governor's plan to assist local government leaders with the enforcement of Ohio Department of Health orders. The general idea is to provide grant funding to help with local enforcement efforts against repeat and blatant violators at both the investigation and prosecution levels. If you have questions, please do not hesitate to contact me at Andy.wilson@governor.ohio.gov.

Enforcement Assistance to Local Government Agencies:

-The Governor would like to provide assistance to local health departments, and local prosecutor's offices to help with the enforcement of Ohio Department of Health orders. The basic concept is that the Ohio Department of Health would provide funding for local health departments to contract with investigators who would assist in the investigation of complaints against individuals and businesses who repeatedly and blatantly fail to comply with the Ohio Department of Health orders. These investigators would receive an appointment to carry out their duties from the State Director of Health. Although it is preferred that these contract investigators would be certified peace officers doing the contract work as extra duty, retired peace officers, or "reserve" officers, these investigators will not be making arrests, and are not expected to have arrest authority. Therefore, they are not required to hold a peace officer commission.

Ohio Revised Code Section 3701.28 allows the director of health to appoint assistants to enforce orders necessary to prevent a contagious or infectious disease that is, or threatens to become, an epidemic. The intent of this program is for these contract assistants to be hired by the local health



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department to do the investigative groundwork necessary for the prosecuting attorney to file a criminal complaint or civil action against repeat “bad actors”. These investigators would be funded through an Ohio Department of Health Grant. At the time of the grant award, the Ohio Department of health would enter into an MOU with the local health department to appoint the investigator to enforce Ohio Department of Health COVID – 19 pandemic orders pursuant to Revised Code Section 3701.28. These investigators would gather the evidence necessary for a prosecutor to file civil actions or criminal complaints for violations of sections 3701.352 and 3701.99. (Both sections are set forth below):

ORC § 3701.352 Violations prohibited.

“No person shall violate any rule the director of health or department of health adopts or any order the director or department of health issues under this chapter to prevent a threat to the public caused by a pandemic, epidemic, or bioterrorism event.”

ORC § 3701.99 Penalty.

“* * * (C) Whoever violates section 3701.352 or 3701.81 of the Revised Code is guilty of a misdemeanor of the second degree.”

In most Ohio counties, misdemeanor prosecutions are handled by the municipal prosecutor or city law director (as opposed to the county prosecutor’s office). This may be causing some confusion as the county prosecutor’s office is the statutory attorney for the county health departments. The fact that an enforcement action is not instituted through an injunction or nuisance action filed by a county prosecutor’s office does not prevent a county health department from taking enforcement action through a municipal prosecutor’s office using Revised Code Sections 3701.352 and 3701.99.

Here is an example of how confusing this can be. The Clark County Prosecutor’s Office is the statutory counsel for the Clark County Combined Health District. If the Clark County Health Commissioner wants to file an injunction to shut down a local business that is failing to comply with ODH’s orders, the Clark County Prosecutor’s Office would file that action in the Clark County Common Pleas Court. However, the Clark County Prosecutor does not typically handle misdemeanor criminal cases. The City of Springfield’s Prosecutor’s Office handles all misdemeanor prosecutions in Clark County, even those misdemeanors committed outside of the City of Springfield’s geographic borders. The City of Springfield Prosecutor files those cases in the Clark County Municipal Court. If a person in South Vienna, Ohio (still Clark County) was prosecuted for violating an ODH order, the Clark County Prosecutor would have no role or say in that case. If the Clark County Prosecutor were opposed to enforcing ODH orders, it would not matter because that case would be initiated and prosecuted by the municipal (city) prosecutor. There are many counties throughout Ohio that are set up so that county wide jurisdiction for the prosecution of misdemeanor cases is handled by the municipal prosecutor, not the county prosecutor. There are some counties in Ohio where the county



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prosecutor's office retains jurisdiction to handle misdemeanor prosecutions in municipal / county court. It varies county by county.

Under the enforcement assistance proposal, the contract investigator would work closely with the prosecutor's office that has jurisdiction for the misdemeanor prosecution. The proposal would also allow for funding to flow to prosecutor's offices that have jurisdiction over these misdemeanor prosecutions. This funding would pay for attorneys who would serve as special prosecutors on these order enforcement cases. Once the contract investigator established probable cause that a repeat and blatant violator had failed to comply with an ODH order, the contract investigator would provide the business or individual notice that they were in violation of ORC 3701.352 / 3701.99. The

investigator would then file an affidavit with either the clerk of courts or the local prosecutor having misdemeanor jurisdiction to prosecute the case. Whether the affidavit is filed with the clerk of courts or with the prosecutor should be determined by local practice. The affidavit would function as a supporting probable cause statement and an official request for charges by the local health department. As set forth below, the affidavit must undergo an official review by either a judge, a magistrate, or a prosecuting attorney before a criminal complaint and summons can be issued by the court. The purpose of this review is to ensure that there is sufficient probable cause to support the filing of the criminal complaint. This review is typically done by the prosecutor having jurisdiction over the criminal action.

2935.09 Person having knowledge of offense to file affidavit - official review before complaint filed.

(A) As used in this section, "reviewing official" means a judge of a court of record, the prosecuting attorney or attorney charged by law with the prosecution of offenses in a court or before a magistrate, or a magistrate.

(B) In all cases not provided by sections [2935.02](#) to [2935.08](#) of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer or a private citizen having knowledge of the facts shall comply with this section.

(C) A peace officer who seeks to cause an arrest or prosecution under this section may file with a reviewing official or the clerk of a court of record an affidavit charging the offense committed.

(D) A private citizen having knowledge of the facts who seeks to cause an arrest or prosecution under this section may file an affidavit charging the offense committed with a reviewing official for the purpose of review to determine if a complaint should be filed by the prosecuting attorney or attorney charged by law with the prosecution of offenses in the court or before the magistrate. A private citizen may file an affidavit charging the offense committed with the clerk of a court of record before or after the normal business hours of the reviewing officials if the clerk's office is open at those times. A clerk who receives an affidavit before or after the normal business hours of the reviewing officials shall forward it to a reviewing official when the reviewing official's normal business hours resume.



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Where there is sufficient probable cause that a repeat or blatant violator is failing to comply with Revised Code Section 3701.352 / 3701.99, an affidavit requesting charges should be filed with the appropriate clerk of courts or prosecutor. In addition to, or in lieu of criminal prosecution, a local prosecutor may choose to file a civil enforcement action. The filing of an affidavit shows that enforcement action is being taken by or on behalf of the local health department. If questioned about an alleged violation, this allows the local health department to show that they have taken enforcement action by requesting that charges be filed. The concept of funding contract investigators, appointing these assistants pursuant to Revised Code Section 3701.28, and funding special prosecutors to handle these cases is intended to assist local jurisdictions in carrying out these actions.

The administration is currently surveying the prosecutors' offices to see which offices may be interested in obtaining funding for a prosecutor to handle these enforcement cases. We would like to know how many local health departments / districts are interested in receiving funding to contract with enforcement investigators / assistants. It would be greatly appreciated if you could survey your members and let me know how many are interested in participating.

Sincerely,

Andy Wilson
Senior Advisor for Criminal Justice Policy
Office of Ohio Governor, Mike DeWine