

No. 1990-207

AN ACT

HB 1141

Amending Title 18 (Crimes and Offenses) of the Pennsylvania Consolidated Statutes, further providing for obscene and other sexual materials; providing for obscene performances; prohibiting the disclosure of confidential tax information by certain persons; and further providing for criminal history record information.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 5903 of Title 18 of the Pennsylvania Consolidated Statutes is amended to read:

§ 5903. Obscene and other sexual materials *and performances*.

(a) Offenses defined.—No person, knowing the obscene character of the materials *or performances* involved, shall:

(1) display or cause or permit the display of any explicit sexual materials as defined in subsection (c) in or on any window, showcase, newsstand, display rack, billboard, display board, viewing screen, motion picture screen, marquee or similar place in such manner that the display is visible from any public street, highway, sidewalk, transportation facility or other public thoroughfare, or in any business or commercial establishment where minors, as a part of the general public or otherwise, are or will probably be exposed to view all or any part of such materials;

(2) sell, lend, distribute, exhibit, give away or show any obscene materials to any person [17] 18 years of age or older or offer to sell, lend, distribute, exhibit or give away or show, or have in his possession with intent to sell, lend, distribute, exhibit or give away or show any obscene materials to any person [17] 18 years of age or older, or knowingly advertise any obscene materials in any manner;

(3) design, copy, draw, photograph, print, utter, publish or in any manner manufacture or prepare any obscene materials;

(4) write, print, publish, utter or cause to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state where, how, from whom, or by what means any obscene materials can be purchased, obtained or had; [or]

(5) *produce, present or direct any obscene performance or participate in a portion thereof that is obscene or that contributes to its obscenity; or*

[(5)] (6) hire, employ, use or permit any minor child to do or assist in doing any act or thing mentioned in this subsection.

(b) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

“Community.” For the purpose of applying the “contemporary community standards” in this section, community means the State.

“Knowing.” As used in subsection (a), knowing means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any material or performance described therein which is reasonably susceptible of examination by the defendant.

“[Obscene materials] Material.” Any literature, including any book, magazine, pamphlet, newspaper, storypaper, bumper sticker, comic book or writing[, and]; any figure, visual representation, or image, including any drawing, photograph, picture, videotape or motion picture[; if:].

“Nude.” Means showing the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or showing the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple.

“Obscene.” Any material or performance, if:

(1) the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest;

(2) the subject matter depicts or describes in a patently offensive way, sexual conduct of a type described in this section; and

(3) the subject matter, taken as a whole, lacks serious literary, artistic, political, educational or scientific value.

“Performance.” Means any play, dance or other live exhibition performed before an audience.

“Sadomasochistic abuse.” Means, in a sexual context, flagellation or torture by or upon a person who is nude or clad in undergarments, a mask or in a bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one who is nude or so clothed.

“Sexual conduct.” Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, anal or oral sodomy and sexual bestiality; and patently offensive representations or descriptions of masturbation, excretory functions, sadomasochistic abuse and lewd exhibition of the genitals.

“Transportation facility.” Any conveyance, premises or place used for or in connection with public passenger transportation, whether by air, rail, motor vehicle or any other method, including aircraft, watercraft, railroad cars, buses, and air, boat, railroad and bus terminals and stations.

(c) Dissemination to minors.—No person shall knowingly disseminate by sale, loan or otherwise explicit sexual materials to a minor. “Explicit sexual materials,” as used in this subsection, means materials which are obscene or:

(1) any picture, photograph, drawing, sculpture, motion picture film, videotape or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors; or

(2) any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (1), or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.

(d) Admitting minor to show.—It shall be unlawful for any person knowingly to exhibit for monetary consideration to a minor or knowingly to sell to a minor an admission ticket or pass or knowingly to admit a minor for a monetary consideration to premises whereon there is exhibited, a motion picture show or other presentation *or performance* which, in whole or in part, depicts nudity, sexual conduct, or sadomasochistic abuse and which is harmful to minors, except that the foregoing shall not apply to any minor accompanied by his parent.

(e) Definitions.—As used in subsections (c) and (d) of this section:

(1) “Minor” means any person under the age of [17] 18 years.

(2) “Nudity” means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(3) “Sexual conduct” means acts of masturbation, homosexuality, sexual intercourse, *sexual bestiality* or physical contact with a person’s clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(4) “Sexual excitement” means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(5) “Sadomasochistic abuse” means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(6) “Harmful to minors” means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

(i) predominantly appeals to the prurient, shameful, or morbid interest of minors; and

(ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(iii) [is utterly without redeeming social importance for minors] *taken as a whole, lacks serious literary, artistic, political, educational or scientific value for minors.*

(7) “Knowingly” means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

(i) the character and content of any material *or performance* described herein which is reasonably susceptible of examination by the defendant; and

(ii) the age of the minor: Provided, however, That an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.

(f) Requiring sale as condition of business dealings.—No person shall knowingly require any distributor or retail seller as a condition to sale or delivery for resale or consignment of any literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, *videotape*, figure or image, or any written or printed matter, or any article or instrument to purchase or take by consignment for purposes of sale, resale or distribution any obscene literature, book, magazine, pamphlet, newspaper, storypaper, paper, comic book, writing, drawing, photograph, *videotape*, figure or image, or any written or printed matter of an obscene nature or any article or instrument of an obscene nature.

(g) Injunction.—The attorney for the Commonwealth may institute proceedings in equity in the court of common pleas of the county in which any person violates or clearly is about to violate this section for the purpose of enjoining such violation. The court shall issue an injunction only after written notice and hearing and only against the defendant to the action. The court shall hold a hearing within three days after demand by the attorney for the Commonwealth, one of which days must be a business day for the court, and a final decree shall be filed in the office of the prothonotary within 24 hours after the close of the hearing. A written memorandum supporting the decree shall be filed within five days of the filing of the decree. The attorney for the Commonwealth shall prove the elements of the violation beyond a reasonable doubt. The defendant shall have the right to trial by jury at the said hearing.

(h) Criminal prosecution.—

(1) Any person who violates subsection (a) or (f) is guilty of a misdemeanor of the first degree. Violation of subsection (a) is a felony of the third degree if the offender has previously been convicted of a violation of subsection (a) or if the material was sold, distributed, prepared or published for the purpose of resale.

(2) Any person who violates subsection (c) or (d) is guilty of a misdemeanor of the first degree. Violation of subsection (c) or (d) is a felony of the third degree if the offender has previously been convicted of a violation of subsection (c) or (d).

(3) Findings made in an equity action shall not be binding in the criminal proceedings.

(i) Right to jury trial.—The right to trial by jury shall be preserved in all proceedings under this section.

(j) Exemptions.—Nothing in this section shall apply to any recognized historical society or museum accorded charitable status by the Federal Government, any county, city, borough, township or town library, any public library, any library of any school, college or university or any archive or library under the supervision and control of the Commonwealth or a political subdivision.

(k) Ordinances or resolutions.—Nothing in this chapter shall be construed to invalidate, supersede, repeal or preempt any ordinance or resolution of any political subdivision insofar as it is consistent with this chapter, and political subdivisions further retain the right to regulate any activities, displays, exhibitions or materials not specifically regulated by this chapter.

Section 2. Title 18 is amended by adding a section to read:

§ 7326. *Disclosure of confidential tax information.*

(a) *Offense defined.*—A person commits a misdemeanor of the third degree if he discloses, except to authorized persons for official governmental purposes, any tax information that is:

(1) *designated as confidential by a statute or ordinance of a city of the second class; and*

(2) *obtained by him in conjunction with any declaration, return, audit, hearing or verification required or authorized by statute or ordinance.*

(b) *Exception.*—Subsection (a) shall not apply where disclosure is required by law or by court order.

(c) *Definition.*—As used in this section, the term “person” includes, but is not limited to, a current or former officer or employee of the Commonwealth or any of its political subdivisions and any other individual who has access to confidential tax information.

Section 3. The definitions of “intelligence information” and “treatment information” in section 9102 of Title 18 are amended to read:

§ 9102. Definitions.

The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

* * *

“Intelligence information.” Information concerning the habits, practices, characteristics, possessions, associations or financial status of any individual[.] *compiled in an effort to anticipate, prevent, monitor, investigate or prosecute criminal activity. Notwithstanding the definition of “treatment information” contained in this section, intelligence information may include information on prescribing, dispensing, selling, obtaining or using a controlled substance as defined in the act of April 14, 1972 (P.L.233, No.64), known as The Controlled Substance, Drug, Device and Cosmetic Act.*

* * *

“Treatment information.” Information concerning medical, psychiatric, psychological or other rehabilitative treatment provided, suggested or prescribed for any individual *charged with or convicted of a crime.*

Section 4. Section 9106 of Title 18 is amended to read:

§ 9106. **[Prohibited information]** *Information in central repository or automated systems.*

(a) *General rule.*—Intelligence information, investigative information and treatment information shall not be collected in the central repository **[nor in any automated or electronic criminal justice information system]**. This prohibition shall not preclude the collection in the central repository ~~[or in any automated or electronic criminal justice information system]~~ of names, words, numbers, phrases or other similar index keys to serve as indices to investigative reports.

(b) *Collection of protected information.*—

(1) Intelligence information may be placed in an automated or electronic criminal justice system only if the following apply:

(i) The criminal justice agency has reasonable suspicion of criminal activity.

(ii) Access to the intelligence information contained in the automated or electronic criminal justice system is restricted to the authorized employees of the criminal justice agency and cannot be accessed by any other individuals inside or outside of the agency.

(iii) The intelligence information is related to criminal activity that would give rise to prosecution for a State offense graded a misdemeanor or felony, or for a Federal offense for which the penalty is imprisonment for more than one year. Intelligence information shall be categorized based upon subject matter.

(iv) The intelligence information is not collected in violation of State law.

(2) Intelligence information may not be collected or maintained in an automated or electronic criminal justice system concerning participation in a political, religious or social organization, or in the organization or support of any nonviolent demonstration, assembly, protest, rally or similar form of public speech, unless there is a reasonable suspicion that the participation by the subject of the information is related to criminal activity or prison rule violation.

(3) Investigative information and treatment information contained in files of any criminal justice agency may be placed within an automated or electronic criminal justice information system, provided that access to the investigative information and treatment information contained in the automated or electronic criminal justice information system is restricted to authorized employees of that agency and cannot be accessed by individuals outside of the agency.

(c) Dissemination of protected information.—

(1) Intelligence information may be placed within an automated or electronic criminal justice information system and disseminated only if the following apply:

(i) The information is reliable as determined by an authorized intelligence officer.

(ii) The department, agency or individual requesting the information is a criminal justice agency which has policies and procedures adopted by the Office of Attorney General in consultation with the Pennsylvania State Police which are consistent with this act and include:

(A) Designation of an intelligence officer or officers by the head of the criminal justice agency or his designee.

(B) Adoption of administrative, technical and physical safeguards, including audit trails, to insure against unauthorized access and against intentional or unintentional damages.

(C) Labeling information to indicate levels of sensitivity and levels of confidence in the information.

(iii) The information is requested in connection with the duties of the criminal justice agency requesting the information, and the request for information is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.

(2) If an intelligence officer of a disseminating agency is notified that intelligence information which has been previously disseminated to another criminal justice agency is materially misleading, obsolete or otherwise unreliable, the information shall be corrected and the recipient agency notified of the change within a reasonable period of time.

(3) Criminal justice agencies shall establish retention schedules for intelligence information. Intelligence information shall be purged under the following conditions:

(i) The data is no longer relevant or necessary to the goals and objectives of the criminal justice agency.

(ii) The data has become obsolete, making it unreliable for present purposes and the utility of updating the data would be worthless.

(iii) The data cannot be utilized for strategic or tactical intelligence studies.

(4) Investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency which requests the information in connection with its duties, and the request is based upon a name, fingerprints, modus operandi, genetic typing, voice print or other identifying characteristic.

(5) Each municipal police department accessing automated information shall file a copy of its procedures with the Pennsylvania State Police for approval. Such plan shall be reviewed within 60 days.

(6) Each district attorney accessing automated information shall file a copy of its procedures with the Office of Attorney General for approval. Such plan shall be reviewed within 60 days.

(d) Secondary dissemination prohibited.—A criminal justice agency which possesses information protected by this section, but which is not the source of the information, shall not disseminate or disclose the information to another criminal justice agency but shall refer the requesting agency to the agency which was the source of the information. This prohibition shall not apply if the agency receiving the information is investigating or prosecuting a criminal incident in conjunction with the agency possessing the information. Agencies receiving information protected by this section assume the same level of responsibility for the security of such information as the agency which was the source of the information.

(e) Notations of the record.—Criminal justice agencies maintaining intelligence information, investigative information or treatment information must enter, as a permanent part of an individual's information file, a listing of all persons and agencies to whom they have disseminated that particular information, the date of the dissemination and the purpose for which the information was disseminated. This listing shall be maintained separate from the record itself.

(f) Security requirements.—Every criminal justice agency collecting, storing or disseminating intelligence information, investigative information or treatment information shall insure the confidentiality and security of such information by providing that, wherever such information is maintained, a criminal justice agency must:

(1) institute procedures to reasonably protect any repository from theft, fire, sabotage, flood, wind or other natural or manmade disasters;

(2) select, supervise and train all personnel authorized to have access to intelligence information, investigative information or treatment information;

(3) insure that, where computerized data processing is employed, the equipment utilized for maintaining intelligence information, investigative information or treatment information is dedicated solely to purposes related to the administration of criminal justice or, if the equipment is not used solely for the administration of criminal justice, the criminal justice agency is accorded equal management participation in computer operations used to maintain the intelligence information, investigative information or treatment information.

(g) Penalties.—Any person, including any agency or organization, who violates the provisions of this section shall be subject to the administrative penalties provided in section 9181 (relating to general administrative sanctions) and the civil penalties provided in section 9183 (relating to civil actions) in addition to any other civil or criminal penalty provided by law.

Section 5. Section 9141 of Title 18 is amended to read:

§ 9141. **[Annual audit of repositories] Audits.**

(a) Audit required.—

(1) The Attorney General shall conduct annual audits of the central repository and of a representative sample of all repositories. The Office of Attorney General shall conduct a review of State criminal justice agencies' automated policies and procedures established pursuant to section 9106 (relating to information in central repository or automated systems) to ensure that the provisions of this chapter are upheld within two years of the effective date of this act.

(2) The Pennsylvania State Police shall conduct an annual audit of at least 5% of all municipal police department plans, policies or procedures which are implemented pursuant to section 9106(c) to ensure that the provisions of this chapter are upheld. The first such audit shall be conducted within two years of the effective date of this act. A copy of the audit shall be submitted to the Attorney General.

(b) Access to records.—Persons conducting the audit shall be provided access to all records, reports and listings required to conduct an audit of criminal history record information, and all persons with access to such information or authorized to receive such information shall cooperate with and provide information requested.

(c) Contents of audit.—The audit shall contain a report of deficiencies and recommendations for the correction of such deficiencies. Upon the completion of every audit, the audited agency shall carry out the recommenda-

tions within a reasonable period of time unless the audit report is appealed to the Attorney General and the appeal is upheld.

(d) **Modification of recommendations.**—The Attorney General shall have the power to modify the corrective measures recommended by the audit.

Section 6. Title 18 is amended by adding a section to read:

§ 9143. Regulations.

It shall be the duty and responsibility of the Attorney General, in consultation with the Pennsylvania State Police, to adopt rules and regulations pursuant to this act. The Office of Attorney General, in consultation with the Pennsylvania State Police, shall have the power and authority to promulgate, adopt, publish and use guidelines for the implementation of this act for a period of one year immediately following the effective date of this section pending adoption of final rules and regulations.

Section 7. This act shall take effect as follows:

- (1) Section 4 of this act, amending section 9106, shall take effect in 60 days.
- (2) The remainder of this act shall take effect immediately.

APPROVED—The 19th day of December, A. D. 1990.

ROBERT P. CASEY