SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 378

SPONSOR: Governmental Oversight and Productivity Committee and Senator King

SUBJECT: Release of Employee Information by Employers

DATE: February 8, 2000 REVISED: 2/10/00

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable/CS
2.			CJ	
3.				
4.				
5.				

I. Summary:

The committee substitute requires employers to disclose employment information about former and current employees, who apply for law enforcement, correctional, and correctional probation officer positions, to law enforcement agencies investigating the applicant's background.

This committee substitute creates an unnumbered section of the Florida Statutes.

II. Present Situation:

In Florida, the background of all applicants for temporary or part-time law enforcement, correctional, or correctional probation officer positions must be investigated by the employing agency to determine whether the applicant is of good moral character.[1] The Criminal Justice Standards and Training Commission is responsible for adopting rules which provide the procedures for these background investigations.[2]

The investigation must include an evaluation of the facts surrounding an applicant's previous separations from private or public employment.[3] No Florida statute requires a private employer to produce a former or current employee's employment record or to otherwise disclose information about a former or current employee. The employment records of public employees, however, are subject to disclosure pursuant to ch. 119, F.S.[4]

[1] Sections 943.13(7), 943.133(1) and (3), F.S.

[2] Section 943.133(3), F.S.

[3] Section 943.133(3), F.S.

[4] *Michel v. Douglas*, 464 So.2d 545 (Fla. 1985).

Employers who elect to disclose information about former or current employees have qualified immunity from civil liability.[5] Specifically, a current or former employer can only be sued for disclosing information to a prospective employer if it can be shown by clear and convincing evidence that the information was knowingly false or in violation of the employee's civil rights.

III. Effect of Proposed Changes:

Section 1. The bill requires current or former employers of an applicant for a law enforcement, correctional, or correctional probation officer position to provide an officer, who is conducting a background check of the applicant, with "employment information concerning the applicant." Prior to receiving this information from the employer, the investigating officer must present credentials demonstrating his employment with a law enforcement agency and an authorization form for release of information, which was designed and approved by the Criminal Justice Standards and Training Commission. The form must: (1) have been executed by the applicant no more than one year before the request; (2) contain a statement that the authorization has been specifically furnished to the presenting law enforcement agency; and (3) bear the notarized signature of the applicant.

The bill defines "employment information" as including, but not limited to, written information relating to job applications, performance evaluations, attendance records, disciplinary matters, reasons for termination, and eligibility for rehire, and other information relevant to an officer's performance, except information which is prohibited from disclosure by state or federal law. The section does not require an employer to maintain employment information other than that kept in the ordinary course of business, and an employer who provides employment information is presumed to have acted in good faith, and is not civilly liable unless it is shown that the employer maliciously falsified the information.

The bill enables a law enforcement agency to seek injunctive relief in the event an employer refuses to disclose the requested employment information, and allows the employer to recover costs of furnishing the documents to the law enforcement agency.

Section 2. The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(a) of the Florida Constitution, provides, "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with

[5] Section 768.095, F.S.

respect to records exempted pursuant to this section or specifically made confidential by this Constitution." There is no statutory or constitutional exemption for the employment information referenced in this bill. Accordingly, when the employer provides the applicant's employment information to a law enforcement agency pursuant to this bill, that information becomes a public record.

If the Legislature wishes for the applicant's employment information to be confidential after it is given to the law enforcement agency, a statutory exemption must be enacted. Pursuant to Art. I, s. 24(c) of the Florida Constitution, a separate bill creating this exemption would need to be filed.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Right to privacy

The right to privacy, as expressed in Art. I, s. 23 of the Florida Constitution, provides that, "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."A statute which impinges on this right is subject to strict scrutiny; i.e., the statute must serve a compelling interest and must accomplish its goal through the least intrusive means.[6]

Concerning the bill's provisions, any right to privacy the applicant for a law enforcement position may have in his or her employment records is waived when he or she completes the authorization form for release of information. It is less clear, however, whether the employer has any cognizable right to privacy interest in the employment records.

It might be argued that an employer has no standing to assert a right to privacy in its employment records because the right extends only to the private matters of "natural persons."[7] The Florida courts, however, have not expressly addressed this issue.

Even if Florida courts were to hold that an employer could assert a right to privacy in its employment records, the bill's provisions would not be unconstitutional so long as these served a compelling state interest which was accomplished by the least intrusive means. For example, the Florida Supreme Court has upheld the Florida Bar's requirement that bar

[6] *Von Eiff v. Azicri*, 720 So.2d 510 (Fla. 1998).

[7] *See CNA Financial Corp. v. Local 743 of International Brotherhood of Teamsters, Chaffeurs, Warehouseman and Helpers of America*, 515 F.Supp. 942, 946 (N.D.Ill.1981)(the right to privacy is a personal right which does not protect corporations); *H&M Associates v. City of El Centro*, 109 Cal.App.3d 399, 167 Cal.Rptr. 392 (4th Dist.1980)(limited partnership may bring a claim for invasion of privacy).

applicants must disclose prior psychiatric treatment history.[8] According to the Court, although this requirement implicates the applicant's right to privacy, the state has a compelling interest in ensuring that only those who are fit to practice law are admitted to the bar.[9] Similarly, it can be argued that the state has a compelling interest in insuring that only those applicants who are fit to be officers should be hired by law enforcement agencies, and that the bill contemplates the least intrusive means because obtaining the record directly from the employer is the only way to avoid the possibility of an applicant tampering with the record.

First Amendment

The United States Supreme Court has repeatedly considered cases in which government regulations requiring disclosure of information from certain groups were challenged on First Amendment right to assemble grounds. For example, in *Gibson v. Florida Legislative Investigation Committee,* the Legislative Investigation Committee asked the president of the Miami N.A.A.C.P. to identify the organization's members, and the president was held in contempt when he refused to disclose this information.[10] The Supreme Court reversed the contempt adjudication, holding the legislative inquiry unconstitutional because identification of the members could subject them to harassment, thereby chilling the individuals' freedom to assemble.[11]

The United States Supreme Court has also considered a line of cases in which government regulations which required persons to convey a certain message were challenged on First Amendment freedom of speech grounds. For example, in *West Virginia Bd. of Education v. Barnette*, West Virginia's requirement that public school students salute the flag as a condition of attendance was challenged.[12] Similarly in *Wooley v. Maynard*, New Hampshire's law which made it a misdemeanor to obscure the motto on state license tags, "Live Free or Die", was challenged.[13] In these cases, the Supreme Court held that the regulations unconstitutionally impinged on the First Amendment freedom of speech, because the First Amendment protects not only the right to speak freely, but also the right to refrain from speaking.

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[8] *Florida Bd. of Bar Examiners Re: Applicant*, 443 So.2d 71 (Fla. 1983).

[9] *Id.*

[10] *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

[11] *Id.*; *See also Shelton v. Tucker*, 364 U.S. 479 (1960)(holding statute, which required teachers to annually report the organizations to which they belong as a condition of employment, unconstitutional); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958)(reversing state requirement that N.A.A.C.P. identify its membership).

[12] *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *See also Pacific Gas and Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986)(holding that the utilities commission could not require Pacific Gas to distribute correspondence in customer bills).

[13] *Wooley v. Maynard*, 430 U.S. 705 (1977).

Based on these two lines of First Amendment cases, opponents of the bill might argue that the bill's requirement that an employer provide an employment record and other "verifiable information" constitutes compelled disclosure which unconstitutionally impinges on the right to refrain from speaking. Such an argument would be one of first impression because it appears that the courts have not considered a challenge to a regulation exactly like that created by the bill. Several factors, however, militate against a finding that the bill's regulation is unconstitutional like those in the cases discussed *supra*.

First, unlike *Gibson*, the bill does not require the disclosure of an association's membership; instead, it only requires disclosure of information about the applicant, who has given his express authorization for the disclosure. Second, unlike the regulations in *West Virginia* and *Wooley*, the bill does not require individuals to convey a certain message; rather, it only requires employment information, the content of which is left to the employer. Third, the type of information required to be disclosed under the bill has routinely been available by subpoena through the judicial and licensing/regulatory systems. Based on these distinguishing factors, the bill does not appear to violate First Amendment rights; however, given the lack of case law on the specific issue presented by the bill, how the court would rule if presented with a First Amendment challenge to the statute created by the bill cannot be positively stated.

Finally, even if the courts found that the bill impinges upon the right to refrain from speaking, the bill would not necessarily be unconstitutional.[14] A regulation which impinges on the freedom of speech is constitutional if it utilizes narrowly tailored means to achieve a compelling state interest. Here it can be argued that the bill uses the narrowly tailored means of requiring the employer to produce the employment information, thereby insuring the information has not been tampered with by the applicant, for the compelling state interest of insuring that the applicants are fit for law enforcement positions.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private sector employees will be able to recover costs associated with preparing employment information from the law enforcement agency.

C. Government Sector Impact:

Public employers should incur no additional costs as a result of the bill because, pursuant to ch. 119, F.S., public employment records are currently subject to disclosure. Additionally, the bill should reduce the time necessary for law enforcement agencies to conduct investigations of applicants' employment backgrounds.

[14] *State by Butterworth v. Republican Party of Florida*, 604 So.2d 477 (Fla. 1992).

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.