

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1161 Identity Theft
SPONSOR(S): Waters
TIED BILLS: **IDEN./SIM. BILLS:**

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|-------------------------------------|--------|---------|----------------|
| 1) Criminal Justice | | Kramer | De La Paz |
| 2) Public Safety & Crime Prevention | | | |
| 3) Commerce | | | |
| 4) | | | |
| 5) | | | |

SUMMARY ANALYSIS

HB 1161 amends section 817.568 to provide for increased penalties for the criminal use of personal identification information (also known as identity theft). Currently, if the amount of fraud perpetrated is \$75,000 or more, the offense is a second degree felony. Under the provisions of the bill, if the amount of fraud perpetrated is \$20,000 or more, the offense will be a second degree felony. If the amount of fraud perpetrated is \$100,000 or more, the offense will be a first degree felony. The bill also enhances penalties for identity theft if the offense was committed using the personal identification information of a child, and further enhances penalties if the offense was committed using the personal identification information of the offender's child.

Based on a recommendation of the statewide grand jury on identity theft, this bill requires a consumer reporting agency to provide, free of charge, upon the request of any person, up to two consumer reports each calendar year, including explanations of the codes contained therein.

The bill requires out-of-state corporations who provide electronic communication services or remote computing services to comply with subpoenas or other court order issued by a Florida court. The bill also requires Florida providers of electronic communication services or remote computing services to comply with subpoenas or other court orders issued by a court of another state.

The bill also creates a new hearsay exception in the Florida evidence code by providing that in a criminal court proceeding, out-of-state records of regularly conducted business activity or a copy of such a records, shall not be excluded as hearsay evidence if accompanied by a certification that the records meet specified qualifications.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain: The bill requires private consumer reporting agencies to provide two free credit reports each year upon the request of any person. This restricts the ability of credit companies to charge their normal fee for their work product.

B. EFFECT OF PROPOSED CHANGES:

Statewide Grand Jury – Identity Theft

The Sixteenth Statewide Grand Jury of Florida was impaneled on July 17, 2001, and was seated in the Ninth Judicial Circuit to investigate the issues involved in identity theft. The panel was authorized by the Florida Supreme Court at the request of Governor Jeb Bush. The grand jury heard testimony from several law enforcement agencies, representatives of the banking industry, credit card industry and credit reporting industry and from victims of identity theft. The grand jury released two interim reports as well as a final report on November 12, 2002. The reports contained extensive findings and recommendations relating to improving the security of drivers licenses, changing Florida's public records laws, and increasing governmental assistance to victims of identity theft.

Criminal Use of Personal Identification Information:

Section 817.568, F.S., provides that any person who willfully and without authorization fraudulently uses personal identification information¹ concerning an individual without first obtaining that person's consent commits a third degree felony.² If the pecuniary benefit, value of the services received, payment sought to be avoided or the amount of the injury of fraud perpetrated is \$75,000 or more, the offense is a second degree felony.³

Changes made by HB 1161: HB 1161 amends s. 817.568, F.S., to provide that if the value of the pecuniary benefit, services received or injury is between \$20,000 and \$100,000, the offense is a second degree felony.⁴ If the value is \$100,000 or more, the offense is a first degree felony. The bill does not rank this offense in the offense severity ranking chart of the Criminal Punishment Code. As a

¹ This section defines "personal identification information" to mean any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any: 1) Name, social security number, date of birth, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, or Medicaid or food stamp account number; 2) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; 3) Unique electronic identification number, address, or routing code; or 4) Telecommunication identifying information or access device.

² s. 817.568(2)(a), F.S. This offense is ranked in Level 4 of the offense severity ranking chart of the Criminal Punishment Code. s. 921.0022(3)(d), F.S.

³ s. 817.568(2)(b), F.S. This offense is ranked in Level 5 of the offense severity ranking chart of the Criminal Punishment Code. s. 921.0022(3)(e), F.S.

⁴ The offense will remain ranked in level 5 of the offense severity ranking chart.

result, the first degree felony offense will default to Level 7.⁵ The lowest permissible sentence for a level 7 offense (for a first time offender who did not commit any additional felonies) is a sentence of at least 21 months in prison, unless the judge finds that there is a ground for sentence mitigation. The maximum sentence for a first degree felony is thirty years in prison.⁶

The bill also provides that if an offense prohibited under this section was committed using the person identification information of a child, the offense severity level must be increased to level 8. If the child involved was the defendant's natural child or any child over whom the defendant had custodial authority, the offense severity level shall be increased to level 9.

Consumer Reporting Agencies

The federal "Fair Credit Reporting Act" defines the term "consumer reporting agency" to mean:

[A]ny person which, for monetary fees, dues, or on a cooperative basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.⁷

There are three major consumer reporting agencies: Equifax, Experian and Trans Union. A consumer can obtain a copy of his or her credit report for a fee. As of January 1, 2003, the maximum fee for such a report was 9 dollars.⁸ The Fair Credit Reporting Act requires credit reporting agencies to provide upon request once in a 12 month period, a free copy of a consumer's credit report if the consumer: 1) is unemployed and intends to apply for employment in the 60-day period beginning on the date on which the certification is made; 2) is a recipient of public welfare assistance; 3) has reason to believe that the file on the consumer at the agency contains inaccurate information due to fraud; or 4) has been the subject of adverse action, such as denial of credit or insurance, within the past 60 days.

HB 1161 requires a consumer reporting agency to provide, *free of charge*, upon the request of any person, up to two consumer reports each calendar year, including explanations of the codes contained therein.⁹ This was a recommendation of the statewide grand jury on identity theft intended to provide information which would allow a consumer to determine whether they have been the victim of identity theft.

Disclosure of Customer Communications or Records

Section 934.23, F.S. provides that an investigative or law enforcement officer may require the disclosure by a provider of electronic communication service of the content of a wire¹⁰ or electronic

⁵ s. 921.0023(3), F.S.

⁶ s. 775.082(3)(b), F.S.

⁷ See section 603(f) of the Fair Credit Reporting found at 15 U.S.C. 1681.

⁸ 15 U.S.C 1681j (s. 612 of the Fair Credit Reporting Act) requires the Federal Trade Commission to adjust the maximum charge each year based on the Consumer Price Index. In

⁹ Colorado (C.R.S.A. § 12-14.3-105), Massachusetts (MA ST 93 § 59), Maryland, New Jersey, and Vermont have statutes allowing a consumer to receive one free copy of a credit report each year from the each of the credit bureaus. Georgia law allows a consumer to receive two free copies of a credit report each year from the credit bureaus.

¹⁰ s. 934.02(1), F.S. contains the following definition of the term "wire communication": "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception including the use of such connection in a switching station furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications or communications affecting intrastate, interstate, or foreign commerce."

communication¹¹ that has been in electronic storage in an electronic communications system for 180 days or less only pursuant to a warrant issued by the judge of a court of competent jurisdiction. This language is apparently modeled on a section of the federal Electronic Communications Privacy Act.¹²

HB 1161 amends this section to provide that "a court of competent jurisdiction" means a court having jurisdiction over the investigation or otherwise authorized by law.

Production of Records

The bill creates section 92.605 which relates to the production of records by Florida corporations and out-of-state corporations.

Out-of-state corporation: An out-of-state corporation is defined as any corporation that is qualified to do business in Florida under s. 607.1501, F.S. The newly created section applies to a subpoena, court order or search warrant issued in compliance with the federal Electronic Communications Privacy Act which allows a search for records that are in the actual or constructive possession of an out-of-state corporation that provides electronic communication services¹³ or remote computing services¹⁴ to the public, when those records would reveal:

- the identity of the customers using those services,
- data stored by the customers,
- the customers' usage of those services, or
- the recipients or destinations of communications sent to or from those customers.

The bill provides that when properly served¹⁵ with a subpoena, court order, or search warrant issued by a Florida court, an out-of-state corporation subject to this section shall provide to the applicant¹⁶ all records sought pursuant to the subpoena, court order or search warrant within 10 days or within the time indicated, including records located outside the state of Florida. The bill provides that the corporation can be required to produce the records sooner if the applicant shows that the delay would cause an adverse result. The bill also allows the judge to authorize an extension of time upon a showing of good cause by the corporation. If the corporation seeks to quash the subpoena, court order or warrant, it must seek relief from the court ordering production within 10 days of the order. The corporation must verify the authenticity of records it produces by providing an affidavit.

Florida corporation: The bill requires a Florida corporation that provides electronic communication services or remote computing services to the public to comply with a subpoena, court order or warrant issued by another state in the same manner as if the order had been issued by a Florida court.

¹¹ s. 934.02(12), F.S. contains a definition of the term "electronic communication" to mean "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photooptical system that affects intrastate, interstate or foreign commerce but does not include: (a) any wire or oral communication; (b) any communication made through a tone-only paging device; (c) any communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object; or (d) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

¹² 18 U.S.C. 2703.

¹³ "Electronic communication service" means "any service which provides to users thereof the ability to send or receive wire or electronic communications". 18 U.S.C § 2510 The term does not apply to corporations that do not provide those services to the public. This term is defined in the same manner in s. 934.02(14), F.S.

¹⁴ "Remote computing service" means "the provision to the public of computer storage or processing services by means of an electronic communications system". 18 U.S.C. § 2711. This term is defined in the same manner in s. 934.02(19), F.S.

¹⁵ The bill defines the term "properly served" to mean "delivery by hand or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight-delivery service, or facsimile to a person or entity properly registered to do business in any state."

¹⁶ The bill defines the term "applicant" to mean "a law enforcement officer who is seeking a court order or subpoena or who is issued a search warrant or anyone who is authorized to issue a subpoena under the Florida Rules of Criminal Procedure. Rule 3.361 authorizes the clerk of the court or any attorney of record in an action to issue a subpoena.

The bill provides that a cause of action does not arise against any corporation subject to this section for providing records, information facilities or assistance in accordance with the terms of the subpoena, court order or warrant subject to this section.

Admissibility of Records – Hearsay Exception

The Florida Evidence code provides that, with certain exceptions, hearsay evidence is inadmissible. Hearsay evidence is an out-of-court statement made by someone other than the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. s. 90.801(1)(c), F.S. There are a number of exceptions to the hearsay rule. s. 90.803, F.S. and s. 90.804, F.S.

HB 1161 provides that in a criminal court proceeding, out-of-state records of regularly conducted business activity¹⁷ or a copy of such a records, shall not be excluded as hearsay evidence if an out-of-state certification¹⁸ attests that:

1. Such record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.
2. Such record was kept in the course of a regularly conducted business activity.
3. The business activity made such a record as a regular practice.
4. If such records is not the original, it is a duplicate of the original, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

This provision is apparently not intended to apply only to records of electronic communication services or remote computing services but to apply to out-of-state records of any “business”. The term business is defined as any “business, institution, association, profession, occupation or calling of any kind, whether or not conducted for profit.” The bill also provides that no evidence in such records in the form of opinion or diagnosis is admissible unless such opinion or diagnosis would be admissible if the person whose opinion is recorded were to testify to the opinion.

These provisions are similar to the hearsay exception contained in s. 90.803(6)(a) of the Florida Evidence Code relating to business records with the exception that the required live testimony of the custodian or other qualified witness is replaced with the requirement of out-of-state certification. The Federal Evidence Code contains a similar provision, allowing records of regularly conducted business activity to be admitted based on a written certification.¹⁹ This provision is also similar to the hearsay exception contained in s. 92.60, F.S. which relates to business records kept in a foreign country.

The bill requires a party intending to offer evidence of an out-of-state record of regularly conducted business to provide notice to the other parties as soon after the arraignment as possible or 60 days prior to trial. A party opposing the admission of such records must file a motion and the matter must be determined by the court before the trial. Failure to oppose the admission of the records constitutes a waiver unless the court grants relief from the waiver upon a finding of good cause.

The bill provides that in a criminal case, the content of any electronic communication may be obtained under this section only by court order or by the issuance of a search warrant, unless otherwise provided under the Electronic Communications Privacy Act or other provision of law.

¹⁷ The bill defines the term “out-of-state record of regularly conducted business activity” to mean “a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in another state or country.”

¹⁸ The bill defines the term “out-of-state certification” to mean “a written declaration made and signed in another state or country by the custodian of an out-of-state record of regularly conducted business activity or another qualified person that, if falsely made, would subject the declarant to criminal penalty under the laws of another state or country”.

¹⁹ Federal Rule of Evidence 803(6).

C. SECTION DIRECTORY:

Section 1: Amending s. 817.568, F.S.; relating to criminal use of personal information; providing for enhanced penalties if offense involved \$100,000 or more or used person information of child; requires consumer reporting agency to provide two free consumer reports each year to person requesting.

Section 2: Amending s. 934.23, F.S.; relating to disclosure of customer communications or records.

Section 3: Creating s. 92.605, F.S.; relating to production of certain records by Florida corporations and out-of-state corporations.

Section 4: Providing effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Criminal Justice Impact Conference has not considered the prison bed impact of this bill on the Department of Corrections. The bill provides for enhanced penalties for the crime of identity theft.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires a consumer reporting agency, as defined by federal law, to provide, free of charge, up to two consumer reports each year upon the request of any person. Currently, these companies charge up to 9 dollars for each copy.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

B. RULE-MAKING AUTHORITY:

C. DRAFTING ISSUES OR OTHER COMMENTS:

Section 1 of the bill provides for enhanced penalties for identity theft offenses which are committed against a "child". A definition of the term "child" is not contained within the bill or elsewhere in chapter 817.

It is not clear whether the bill is intended to create a new substantive offense for identity theft committed using the identifying information of a child, or whether it is intended to enhance the sentence for an existing offense. The bill provides that if an offense prohibited by the section is committed using the identifying information of a child, the ranking of the offense is increased. Further, the enhanced penalties appear to apply to every offense contained within section 817.568, F.S., regardless of the value of the property involved. This would lead to substantially increased penalties in certain situations. For example, if the value of the property involved was \$5,000, under current law, the offense would be a third degree felony, ranked in level 4 of the offense severity ranking chart. If the offender had no prior convictions, the judge could impose any sentence ranging from a non-state prison sanction (such as a fine, probation or jail time) up to five years in prison. Under this bill, if the offense was committed using the personal identifying information belonging to the offender's 10 year old child, the offense would be ranked in level 9 of the offense severity ranking chart. The lowest permissible sentence for a level 9 offense is 48 months in prison.

Additionally, the bill does not amend the offense severity ranking chart to indicate the level 8 and level 9 rankings. Typically, the ranking of an offense is not indicated in the statute creating the offense but rather, is placed in the ranking chart.

The bill purports to require "out-of-state corporations" who provide electronic communication services to provide records when served with a subpoena, court order or search warrant issued by a Florida court. The bill defines the term "out-of-state corporation" to mean any corporation that is "qualified to do business in this state under s. 607.1501." Section 607.1501, F.S. provides that a foreign corporation may not transact business in this state until it obtains a certificate of authority from the Department of State. Subsection 2 of section 607.1501, F.S. further provides a list of activities that do not constitute transacting business within the meaning of the section. Subsection 4 of section 607.1501, F.S. provides that "this section has no application to the question of whether any foreign corporation is subject to service of process and suit in this state under any law of this state." Due process requires that a defendant have minimum contacts with the forum state before the court may exercise jurisdiction over the defendant. It is not clear whether registering to do business in the state is enough, by itself, to "constitute sufficient contacts with this state such that maintenance of the lawsuit does not offend 'traditional notions of fair play and substantial justice.'" Springer v. Blue Cross & Blue Shield of Florida, Inc., 695 So.2d 944, 946 (Fla. 4th DCA 1997).

Further, the bill purports to require a Florida corporation that provides electronic communication services or remote computing services to comply by providing certain information when served with a subpoena, court order or warrant issued by another state. This is apparently intended to require a Florida corporation to comply with an order of any state – regardless of whether the corporation does business in the state where the order was issued.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES