

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1161 w/CS Identity Theft

SPONSOR(S): Waters

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Criminal Justice	6 Y, 0 N	Kramer	De La Paz
2) Public Safety & Crime Prevention	17 Y, 0 N w/CS	Kramer	De La Paz
3) Commerce			
4)			
5)			

SUMMARY ANALYSIS

CS/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 committee substitute, if the amount of fraud perpetrated is \$5,000 or more or there are 10 or more victims, the offense will be a second degree felony and the court will be required to impose a three year minimum mandatory sentence. If the amount of fraud perpetrated is \$50,000 or more or there are 20 or more victims, the offense will be a first degree felony and the court will be required to impose a five year minimum mandatory sentence. If the amount of fraud perpetrated is \$100,000 or more or if there are 30 or more victims, the offense will be a first degree felony and the court will be required to impose a ten year minimum mandatory sentence. The committee substitute 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.

The committee substitute 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 committee substitute 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 committee substitute 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 records, shall not be excluded as hearsay evidence if accompanied by a certification that the records meet specified qualifications.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1161b.ps.doc

DATE: April 2, 2003

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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:

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 CS/HB 1161: CS/HB 1161 amends the definition of the term "personal identification information" to include bank account or credit card numbers. The committee substitute amends s. 817.568, F.S. as follows:

- If the value of the pecuniary benefit, services received or injury is \$5,000 or more or if the person fraudulently uses the personal identification information of ten or more individuals

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.

without their consent, the offense is a second degree felony⁴ and will require the imposition of a three year minimum mandatory term of imprisonment.

- If the value of the pecuniary benefit, services received or injury is \$50,000 or more or if the person uses the personal identification information of 20 or more individuals, the offense is a first degree felony and will require the imposition of a five year minimum mandatory sentence.
- If the value of the pecuniary benefit, services received or injury is \$100,000 or more or if the person uses the personal identification information of 30 or more individuals, the offense is a first degree felony and will require the imposition of a ten year minimum mandatory sentence.

The committee substitute also provides that if an offense prohibited under this section was committed using the person identification information of a individual less than 18 years of age, the offense is a second degree felony which is ranked in level 8 of the offense severity ranking chart. If the individual under the age of 18 was the defendant's child or any child over whom the defendant had custodial authority, the offense severity level will be increased to level 9.

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 wire⁵ or electronic communication⁶ 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.⁷

CS/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 committee substitute 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

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

⁵ 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."

⁶ 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.

⁷ 18 U.S.C. 2703.

corporation that provides electronic communication services⁸ or remote computing services⁹ 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 committee substitute provides that when properly served¹⁰ 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 applicant¹¹ all records sought pursuant to the subpoena, court order or search warrant within 20 days or within the time indicated, including records located outside the state of Florida. The committee substitute 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 committee substitute 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 20 days of the order. The applicant is required to pay the reasonable expenses associated with compliance with the order. The corporation must verify the authenticity of records it produces by providing an affidavit. The committee substitute also requires that specific boilerplate language be printed on the first page of the subpoena, court order or warrant indicating that response is due within 20 days.

Florida business: The committee substitute requires a Florida business 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.

The committee substitute 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.

⁸ "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.

⁹ "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.

¹⁰ 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. In order for an out-of-state corporation to be 'properly served', the service described in this paragraph must be effected on the corporation's registered agent."

¹¹ 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.

CS/HB 1161 provides that in a criminal court proceeding, out-of-state records of regularly conducted business activity¹² or a copy of such a records, shall not be excluded as hearsay evidence if an out-of-state certification¹³ 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 committee substitute 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.¹⁴ 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 committee substitute 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 committee substitute 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.

C. SECTION DIRECTORY:

Section 1: Amending s. 817.568, F.S.; relating to criminal use of personal information; providing for enhanced penalties.

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: Amending s. 921.0022, F.S; relating to the offense severity ranking chart of the Criminal Punishment Code.

¹² 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."

¹³ 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".

¹⁴ Federal Rule of Evidence 803(6).

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 committee substitute on the Department of Corrections. The committee substitute provides for enhanced penalties for the crime of identity theft.

The committee substitute lowers the second degree felony threshold for identity theft from \$75,000 to \$5,000 and also provides for a minimum mandatory three year sentence for this offense. The committee substitute also provides for five and ten year minimum mandatory sentences for other identity theft offenses. This could lead to substantially increased sentences for certain offenses. For example, under current law, if an offender committed identification theft in the amount of \$50,000, the offense would be a third degree felony, punishable by any sentence ranging from a non-state prison sentence (such as jail time, probation or a fine) up to five years in prison. The committee substitute would make this offense a first degree felony, which would require the imposition of a five year minimum mandatory sentence and would be punishable by up to thirty years in prison.

The committee substitute also 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 committee substitute, 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 (assuming the offender has no prior record or any other sentence enhancers) is 48 months in prison.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The committee substitute may have an fiscal impact on out-of-corporations who will be required to produce records in response to a search warrant or court order. However, the committee substitute requires the applicant to pay the corporation the reasonable expenses associated with compliance.

D. FISCAL COMMENTS:

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The committee substitute 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:

The committee substitute 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 committee substitute 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 committee substitute 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

The Subcommittee on Criminal Justice recommended the adoption of a strike-all amendment which retained much of the substance of the initial bill but made the following changes:

- The amendment removed the provision of the original bill which would have required a consumer reporting agency to provide, free of charge upon the request of any person, up to two consumer reports each calendar year.
- The amendment modified the provisions relating to the criminal use of personal identification information to create new subsections relating to identification theft where the victim is under the age of 18 and relating to identification theft where the offender commits the offense against his or her child. These newly created offenses are second degree felonies and are ranked in level 8 and level 9 of the offense severity ranking chart respectively.

- The amendment modified the section relating to productions of records by Florida corporations and broadened the applicability of the provision by replacing the word “corporation” with the word “business”. The term corporation was defined in the original bill to only include entities regulated under chapter 607. The term “business” was defined in the strike-all to mean “any business, institution, association, profession, occupation, or calling of any kind, whether or not conducted for profit.”

The Committee on Public Safety & Crime Prevention adopted a substitute strike all amendment which contained the minimum mandatory sentence provisions and the other modifications to the identity theft statute discussed in the EFFECT OF PROPOSED CHANGES section. The amendment also: modified the provisions relating to production of records by an out-of-state corporation to allow a corporation additional time to comply; required the placement of boilerplate language on a search warrant or court order issued under this provision; required the applicant to pay the reasonable expenses of compliance and modified the definition of the term “properly served”.