

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 624

INTRODUCER: Community Affairs Committee and Senator Fasano

SUBJECT: Law Enforcement Officers and Correctional Officers

DATE: April 6, 2009 **REVISED:** 04/16/09

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Molloy	Yeatman	CA	Fav/CS
2.	Wilson	Wilson	GO	Fav/2 amendments
3.			JU	
4.			JA	
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
- B. AMENDMENTS..... Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

I. Summary:

The CS/SB 624 (the bill) expands the rights of an officer under investigation to access evidence and investigative files prior to interrogation. When a compliance hearing for a violation of the rights of an officer is ongoing, the limitations period for disciplinary action is tolled. The tolling expires with the written determination of the compliance review panel. The bill provides remedies for officers seeking recourse against an agency for violating the officers' rights, and provides that the officer being investigated bears the burden of proving that a violation of the officer's rights was intentional. Hearing procedures are exempt from the Administrative Procedure Act, ch. 120, F.S.

This bill substantially amends ss. 112.532, 112.533, and 112.534, Florida Statutes.

II. Present Situation:

Law Enforcement Officers' Bill of Rights

Section 112.532, F.S., commonly known as the "Law Enforcement Officers' Bill of Rights" provides specific rights when a law enforcement officer or a correctional officer is under investigation and subject to interrogation for a reason which could lead to a disciplinary action,

demotion, or dismissal. Section 112.532, F.S., places conditions on certain aspects of the interrogation of an officer under investigation relating to the time, place, and method of interrogation; witnesses being interviewed; prohibitions on mistreatment of the officer under investigation; the right to council; and the right to be informed of the nature of the complaint and the name of all complainants prior to the officer being interrogated.

With respect to evidence, the officer under investigation is entitled to receive the complaint and all witness statements prior to the first investigative interview with the officer. When a formal interrogation is conducted, the investigation must be recorded on audio tape, or otherwise preserved in transcript form. All statements or questions must be recorded. Copies of the recording or the transcript must be made available to the officer under investigation within 72 hours of completion of the interrogation. No disciplinary action, demotion, or dismissal may be taken unless the investigation is completed within 180 days of receipt of notice of a complaint against an officer. Complaints filed against law enforcement officers and correctional officers employed by law enforcement or correctional agencies, and all information obtained during an investigation, are confidential and exempt from the provisions of s. 119.07(1), F.S., until such time as the investigation ceases to be active.

In cases where a law enforcement agency or correctional agency fails to comply with the provisions of the “Law Enforcement Officers’ Bill of Rights,” the officer who is personally injured by such failure may apply for relief directly to the circuit court of the county where the agency is headquartered, and may receive an injunction to restrain and enjoin the violations and compel the agency to perform as required.

Burden of Proof and Standard of Review

The obligation to prove a material fact in issue is known as the burden of proof. Generally, in a legal action the burden of proof is on the party who asserts the proposition to be established, and the burden can shift between parties as the case progresses. The level or degree of proof that is required as to a particular issue is referred to as the standard of proof or standard of review. In most civil actions, the party asserting a claim or affirmative defense must prove the claim or defense by a preponderance of the evidence.¹

Preponderance of Evidence

Black’s Law Dictionary 1182 (6th ed. 1990) defines “preponderance of evidence” as a standard of proof in civil cases; preponderance of evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.²

Clear and Convincing Proof

Black’s Law Dictionary 251 (6th ed. 1990) defines “clear and convincing proof” as proof which results in reasonable certainty of the truth of the ultimate fact in controversy, proof which requires more than a preponderance of the evidence but less than proof beyond a reasonable

¹ 5 Fla. Prac., Civil Practice s. 16:1 (2009 ed.).

² Citing *Braud v. Kinchen*, LA. App. 310 So.2d 657, 659

doubt. Clear and convincing proof will be shown where the truth of the facts asserted is highly probable.³

Public Records

Section 24(c), Art. I of the State Constitution, gives the Legislature the authority to enact a general law by a two-thirds vote of each house of the Legislature to provide a public records exemption or a public meetings exemption. Such laws must contain only the public records or public meetings exemption and may relate to only one subject.

Open Government Sunset Review Act

Section 119.15, F.S., provides the Legislature's authority to review, repeal, or reenact public records or public meeting exemptions. Subsection (3) provides that if an exemption is substantially amended, it is repealed in the fifth year after amendment unless the Legislature acts to reenact the exemption. Subsection (4)(a) provides that a law that substantially amends an existing exemption must state that the record or meeting is:

- Exempt from s. 24, Art. I of the State Constitution;
- Exempt from s. 119.07(1) or s. 286.011, F.S.; and
- Is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.

Subsection (4)(b) provides that an exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information, or to include meetings as well as records.

III. Effect of Proposed Changes:

Section 1. Amends s. 112.532, F.S., as follows:

Subsection (1) – Rights of Officers While Under Investigation

- Expands certain interrogation rights to officers under investigation for any reason that could lead to suspension, as well as a disciplinary action, demotion, or dismissal.
- In addition to the complaint and all witness statements, the officer is to be provided all existing subject officer statements, and all other existing evidence, including, but not limited to, incident reports, GPS locator information, and audio or video recording relating to the incident under investigation.

Subsection (4) – Notice of Disciplinary Action

- Provides that when a law enforcement officer or correctional officer is subject to disciplinary action consisting of suspension with loss of pay, demotion, or dismissal, the officer or the officer's representative shall, upon request, be provided with a complete copy of the investigative file, including the final investigative report and all evidence.

Subsection (6) – Limitations Period for Disciplinary Actions

³ Citing *Lepre v. Caputo*, 131 N.J. Super. 18, 328 A.2d 650, 652 and *In re: Estate of Lobe*, Minn. App., 348 N.W. 2d 413, 414

- Clarifies that a disciplinary action, suspension, demotion, or dismissal may not be undertaken if the investigation of the alleged incident is not completed within 180 days after the agency receives notice of the allegation.
- If the agency does determine that disciplinary action is appropriate, it must provide the officer under investigation with written notice of the intent to proceed, and the specific action proposed, including the length of suspension, if applicable, within 180 days after the date the agency received notification of the alleged misconduct.
- Provides that the 180-day limitation period is tolled during the time that an officer's compliance hearing proceeding is continuing, beginning when the notice of violation of officer rights is filed and ending with the written determination of the compliance review panel.
- Provides that the 180-day limitation period is tolled by the filing of a petition for injunction or review under s. 112.534(1), F.S.

Section 2. Amends s. 112.533, F.S., to provide that an officer who is the subject of a complaint, may review all evidence, including, but not limited to, incident reports, analyses, GPS locator information, and audio or video recordings relating to the investigation, as well as the complaint and all witness statements, immediately before being interviewed.

Section 3. Amends s. 112.534, F.S., to provide a process for an officer under investigation to request a compliance hearing when an investigative agency or officer fails to comply with the officer's rights. Provides that the term "law enforcement officer" or "correctional officer" includes the officer's representative or legal counsel.

- The officer under investigation must advise the investigating officer of the intentional violation which is alleged to have occurred. The officer's notice is sufficient to notify the investigator of the requirements which have allegedly been violated and the factual basis of each violation.
- If the investigator fails to cure the violation, or continues the violation after notification, the officer being interviewed must request that the interview stop and that the agency head or a designee be informed of the alleged violation. The officer's refusal to respond to further questions does not constitute insubordination.
- The officer under investigation must then file in writing a notice of violation and a request for a compliance review hearing. All evidence related to the investigation must be preserved for review and presentation at the hearing. Such documents are not confidential for the purpose of presentation at the compliance review panel hearing.
- The hearing must be conducted within 10 days after the request is filed unless another date is chosen by mutual agreement.
- The compliance review panel consists of 3 members: 1 selected by the agency head, 1 selected by the officer filing the request, and 1 selected by the other two members. The hearing must be conducted in the county in which the officer works.
- The compliance review panel is responsible for determining if an intentional violation was committed.
- The officer bears the burden of proving that the violation was intentional, and the standard of proof is a preponderance of the evidence.
- The compliance review panel finding is final and binding on all parties.

- If the violation is found to be intentional, the investigator must be removed, and an investigation must be initiated. If the investigation of the investigator is sustained, the allegations must be forwarded to the Criminal Justice Standard and Training Commission for review as official misconduct or misuse of position.

All penalties for official misconduct provided in s. 838.022, F.S., apply to this section.

Section 4. Provides that the act shall take effect July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Paragraph (a) of subsection (2), s. 112.533, F.S., provides that a complaint filed against a law enforcement officer and all information obtained pursuant to the investigation conducted by the agency is confidential and exempt from the provisions of s. 119.07(1), F.S., until the investigation is completed.

This bill specifies additional evidence to be included in the investigation (incident reports, GPS locator information, and audio or video recordings), which could be construed as expanding the existing public records exemption since this evidence, some of which is due to technology not in existence or used at the time the initial exemption was created, will be confidential and exempt until the investigation is completed. If so, the requirements of s. 24, Art. I, State Constitution, govern how the Legislature may enact a public records exemption.

Alternatively, it may also be argued that no new evidence has been shielded but rather the communication medium through which existing evidence is gathered has changed.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Law enforcement and correctional agencies can expect to see an increase in costs associated with copies of additional evidentiary materials to be provided to officers under investigation, and an increase in costs associated with defending the agency decision to impose a disciplinary action resulting in demotion, suspension, or dismissal.

The Revenue Estimating Conference has not determined the fiscal impact of this bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

In the agency bill analysis dated February 26, 2009, the Department of Management Services (DMS) noted that although the agency does not have employees affected by the provisions of the bill, state agencies that do have such employees affected by the provisions of the bill include: the Department of Corrections, the Department of Highway Safety and Motor Vehicles, the Florida Department of Law Enforcement, the Department of Agriculture and Consumer Services, the Department of Environmental Protection, the Department of Children and Families, the Fish and Wildlife Conservation Commission, the Department of Business and Professional Regulation, the Department of Legal Affairs, the Agency for Persons with Disabilities, the Department of Juvenile Justice, and the Department of Transportation.

Additional public entities with law enforcement officers are the Department of Financial Services (Insurance Fraud), the Department of the Lottery, and the several non-state agency university members of the State University System.

As amended, the bill disclaims the applicability of the Administrative Procedure Act, ch. 120, F.S., to the alleged conduct. That applies to most state agencies and others named in statute. It does not routinely apply to units of local government. Such local governments develop their own codes of administrative practice. This disclaimer, then, will have little effect upon most local governments since the majority of law enforcement officers are employed by counties, cities, and independent districts. For state agencies, the investigative process will be exempt from ch. 120, F.S. At the conclusion of those proceedings it is likely that any referral due to violation or abuse of the investigative process will be referred to either the Criminal Justice Standards and Training Commission, for licensure action; the Public Employees Relations Commission, for civil service employment action; or to the collective bargaining agreement, if any, for contractual rights. In the first two of these instances, there will be supplemental recourse to ch. 120 if there is a final agency action.

An investigative party against whom an intentional violation is alleged and proven may find, in certain circumstances, that there has been a compromise to the employer's sovereign immunity privileges. In that case the investigative party may find that some of the immunities accompanying a public position may be reduced to the point that both the party and the public employer may find their interest adverse to one another. In that case the investigative party may wish to retain separate counsel.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on April 6, 2006:

The CS/SB 624 removes provisions of the original bill relating to multiple officers under investigation, disciplinary reversals, and declaratory relief or other extraordinary measures to ensure compliance with officers' rights. The CS/SB 624 adds a new process for compliance review hearings and provides that the officer under investigation bears the burden of proving that the investigating agency or officer intentionally violated a right or rights of the officer under investigation.

- B. Amendments:

Barcode 430626 by Governmental Oversight and Accountability on April 16, 2009:

Revises when the tolling period begins to recognize that the alleged violation has been remedied.

Barcode 945668 by Governmental Oversight and Accountability on April 16, 2009:

Provides for stated time frames for the filing of a notice of violation and a hearing on same. Provides that policy violations, in addition to insubordination, cannot be used against an officer for refusal to respond to investigative questions. Deletes applicability of the Administrative Procedure Act, ch. 120, F.S., to the complaint and hearing process. Removes provisions that made the findings of the review panel binding on all parties.