

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 581 Subpoenas in Investigations of Sexual Offenses

SPONSOR(S): Criminal Justice Subcommittee; Latvala and others

TIED BILLS: IDEN./SIM. **BILLS:** SB 618

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 0 N, As CS	Jones	Sumner
2) Judiciary Committee	18 Y, 0 N	Jones	Poche

SUMMARY ANALYSIS

A subpoena is an order directed to a person requiring his or her attendance at a particular time and place to testify as a witness. A subpoena may also require the witness to bring documents or other tangible evidence which may be introduced as evidence in a case. The Sixth Amendment to the United States Constitution guarantees the defendant in a criminal case the right to have a compulsory process for obtaining witnesses in his or her favor. Subpoenas may be issued in a criminal investigation or a criminal prosecution.

In some cases, federal and state law authorizes investigating authorities to issue a subpoena and require the recipient of the subpoena to not disclose the existence or contents of the subpoena. Such authority is provided in limited circumstances where disclosure of the subpoena could result in the destruction of evidence or other harm to the investigation.

CS/HB 581 creates a new provision to prevent a subpoena recipient from disclosing the existence of the subpoena in certain investigations involving the sexual abuse of a child, without the need for a court order. The bill authorizes an investigative or law enforcement officer to:

- Use a subpoena to obtain information pertaining to a subscriber or customer, other than contents of a communication (without notice to the subscriber or customer of an electronic communications service provider or remote computing service provider).
- With prior notice, or delayed notice, use a subpoena to obtain contents of a communication that has been in electronic storage for more than 180 days.

The bill allows an investigative or law enforcement officer to prohibit the subpoena recipient from disclosing to any person for 180 days the existence of the subpoena or delay the required notification. A court may grant an extension of the nondisclosure period or delay notification.

The bill also specifies other related procedures including the manner in which a subpoena recipient can obtain relief from the subpoena or nondisclosure requirement; the manner in which an investigative or law enforcement officer may retain subpoenaed records after an investigation is closed; the manner in which compliance with a subpoena may be compelled; and manner of compensating a subpoenaed witness.

The bill does not appear to have a fiscal impact on state or local governments.

The effective date of the bill is October 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Subpoenas in General

A subpoena is an order directed to a person which requires his or her attendance at a particular time and place to testify as a witness. A subpoena may also require the witness to bring documents or other tangible evidence that may be introduced as evidence in a case.¹ The Sixth Amendment to the United States Constitution guarantees the defendant in a criminal case the right to have compulsory processes for obtaining witnesses in his or her favor.² Subpoenas may be issued in a criminal investigation³ or in a criminal prosecution during discovery⁴ or for trial⁵ by the defendant, his or her counsel, or the state attorney. Generally, a subpoena must state the name of the court and the title of action and the time and the place at which the witness is commanded to give testimony or produce evidence.⁶ Once a witness is subpoenaed by either party, he or she must remain available for attendance until the case is resolved or until he or she is excused by the court hearing the case.⁷ A witness's failure to do so could result in being held in contempt of court.⁸ In some cases, a subpoena may require the recipient of the subpoena to not disclose the existence or contents of the subpoena.

Investigative Subpoenas in Criminal Cases

An investigative subpoena is used to allow the State to obtain information necessary to determine whether a criminal activity has occurred or is occurring.⁹ The state attorney has authority under s. 27.04, F.S., to compel witness testimony and production of records and other information.¹⁰ Section 16.56(3), F.S., provides the same authority to the statewide prosecutor.

Overview of Section 934.23, F.S.

Section 934.23, F.S., is patterned after the federal Stored Communications Act ("SCA").¹¹ Section 934.23, F.S., specifies how an investigative or law enforcement officer may obtain the content of a wire or electronic communication that:

- Has been in electronic storage in an electronic communications system;
- A wire or electronic communication held or maintained on a remote computing service; and
- A record or other information pertaining to a subscriber or customer of such service, not including the contents of a communication.

¹ *Black's Law Dictionary* 1467 (8th ed. 2004).

² U.S. Const. amend. 6.

³ Florida law authorizes certain entities to use subpoenas for the purpose of conducting criminal investigations, including, but not limited to, s. 409.920, F.S. (authorizing the Attorney General to subpoena witnesses or materials, including medical records, during an investigation for Medicaid fraud); s. 415.107, F.S. (authorizing a criminal justice agency investigating a report related to abuse, neglect, or exploitation of a vulnerable adult to subpoena related records); and s. 414.411, F.S. (authorizing Department of Financial Services to subpoena witnesses and records related to a public assistance fraud investigation).

⁴ Florida Rule of Civil Procedure 3.220(h) allows any party to conduct a deposition by oral examination of any person authorized by the rule, generally including listed witnesses, co-defendants, or unlisted witnesses who have information relevant to the offense charged.

⁵ Subpoenas for testimony before the court and subpoenas for production of tangible evidence before the court may generally be issued by the clerk of the court or by any attorney of record in the case. Fla. R. Civ. P. 3.361(a).

⁶ *Id.*

⁷ S. 914.03, F.S.

⁸ *Id.*

⁹ *State v. Investigation*, 802 So. 2d 1141, 1144 (Fla. 2d DCA 2001).

¹⁰ *State v. Jett*, 358 So. 2d 875, 876 (Fla. 3d DCA 1978).

¹¹ The "Stored Communications Act" is Title II of the Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, 100 Stat. 1848 (1986).

Important Definitions in s. 934.23, F.S.

- "Investigative or law enforcement officer" means:
 - Any officer of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, who is empowered by law to conduct on behalf of the Government investigations of, or to make arrests for, offenses enumerated in Chapter 934, F.S., or similar federal offenses;
 - Any attorney authorized by law to prosecute or participate in the prosecution of such offenses; or
 - Any other attorney representing the State of Florida or political subdivision thereof in any civil, regulatory, disciplinary, or forfeiture action relating to, based upon, or derived from such offenses.¹²
- "Electronic communication" means 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, photoelectronic, or photooptical system that affects intrastate, interstate, or foreign commerce. Not included in this definition are any wire or oral communication; any communication made through a tone-only paging device; any communication from an electronic or mechanical device which permits the tracking of the movement of a person or an object; or electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.¹³
- "Contents" means any information concerning the substance, purport, or meaning of any wire, oral, or electronic communication.¹⁴
- "Electronic Communication Service" ("ECS") means any service which provides to users thereof the ability to send or receive wire or electronic communications.¹⁵
- "Remote Computing Service" ("RCS") means the provision to the public of computer storage or processing services by means of an electronic communications system.¹⁶

Obtaining Evidence Under s. 934.23, F.S.

Consent of the Subscriber or Customer

An investigative or law enforcement officer who obtains the consent of the subscriber or customer to the disclosure of a record or other information can require an ECS provider or RCS provider to disclose the record or other information, not including the contents of a communication.¹⁷

Subpoena without Notice to the Subscriber or Customer

An investigative or law enforcement officer with a subpoena may obtain from the ECS provider or RCS provider basic information, including session information, regarding a subscriber or customer of the provider, without the need to provide notice to the subscriber or customer. This information includes:

- Name and address;
- Local and long-distance telephone connection records, or records of session times or durations;
- Length of service, including the starting date of service;
- Types of services used;
- Telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and
- Means and source of payment, including any credit card or bank account number of a subscriber to or customer.¹⁸

¹² S. 934.02(6), F.S.

¹³ S. 934.02(12), F.S.

¹⁴ S. 934.02(7), F.S.

¹⁵ S. 934.02(14), F.S.

¹⁶ S. 934.02(19), F.S.

¹⁷ S. 934.23(4)(a)3., F.S.

¹⁸ S. 934.23(4), F.S.

Subpoena with Prior Notice to the Subscriber or Customer

An investigative or law enforcement officer who obtains a subpoena and provides prior notice to the subscriber or customer or delayed notice pursuant to s. 934.25, F.S., may obtain:

- Whatever can be obtained by subpoena without prior notice;
- Contents of a wire or electronic communication that has been held in electronic storage in an electronic communication system for more than 180 days;
- An electronic communication that is held or maintained on a RCS:
 - On behalf of a subscriber or customer of the RCS and received by means of electronic transmission from, or created by means of computer processing of communications received by means of electronic transmission from, a subscriber or customer of such service; and
 - Solely for the purposes of providing storage or computing processing services to a subscriber or customer, if the provider is not authorized to access the contents of any such communication for purposes of providing any service other than storage or computer processing.¹⁹

Court Order for Disclosure without Prior Notice

A court may order disclosure if an investigative or law enforcement officer offers specific and articulable facts showing that there are reasonable grounds to believe the contents of a wire or electronic communication or the records of other information sought are relevant and material to an ongoing criminal investigation. An investigative or law enforcement officer who obtains a court order for disclosure may obtain:

- Whatever can be obtained by subpoena without prior notice; and
- From an ECS provider or RCS provider, a record or other information pertaining to the subscriber or customer of such service, not including contents of communication.²⁰

Court Order for Disclosure with Prior Notice

An investigative or law enforcement officer who obtains a court order for disclosure, and gives prior notice to the subscriber or customer or complies with the delayed notice provisions of s. 934.25, F.S., may obtain:

- Whatever can be obtained by a court order for disclosure;
- Contents of a wire or electronic communication that has been held in electronic storage in an electronic communication system for more than 180 days; and
- Contents of an electronic communication that is held or maintained on a RCS as described in s. 934.23(3), F.S.²¹

Search Warrant

An investigative or law enforcement officer who obtains a search warrant may obtain:

- Whatever can be obtained pursuant to a court order for disclosure with notice; and
- Contents of a wire or electronic communication that have been held in electronic storage in an electronic communication system for 180 days or less.²²

¹⁹ S. 934.23(2)(b)1., (3), F.S.

²⁰ S. 934.23(5), F.S.

²¹ S. 934.23(1), (2), (3), F.S.

²² S. 934.23(1), F.S.

Delayed Notice

Section 934.25 provides that in certain situations the notice required in s. 934.23(2) may be delayed when an "adverse result" may occur, which means any of the following acts:

- Endangering the life or physical safety of an individual.
- Fleeing from prosecution.
- Destroying or tampering with evidence.
- Intimidating potential witnesses.
- Seriously jeopardizing an investigation or unduly delaying a trial.²³

If an investigative or law enforcement officer seeks to obtain evidence from an RCS provider under s. 934.23(2), F.S., pursuant to a court order for disclosure or subpoena, the officer may delay required notice under 934.23(2), F.S., as follows:

- If the officer requests a court order delaying notification for up to 90 days, the court must grant the request if it determines that there is a reason to believe that notification of the existence of the court order may have an adverse result.
- If the officer has a subpoena, the officer may delay the notification for up to 90 days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result.

The 90-day period may be extended by court order, but only in 90-day increments and only in accordance with s. 934.25(6), F.S., which requires the officer to demonstrate to the court or certify that there is reason to believe notification will result in an adverse result.²⁴

Upon the expiration of the period of delay of notification under s. 934.25(1), F.S. or s. 934.25(4), F.S., the investigative or law enforcement officer must serve upon or deliver by registered or first-class mail to the subscriber or customer a copy of the process or request together with notice which:

- States with reasonable specificity the nature of the law enforcement inquiry, and
- Informs the subscriber or customer:
 - That information maintained for such subscriber or customer by the service provider named in the process or request was supplied to or requested by the investigative or law enforcement officer and the date on which such information was so supplied or requested;
 - That notification of such subscriber or customer was delayed;
 - The investigative or law enforcement officer or the court that made the certification or determination pursuant to which delay was made; and
 - Which provision of ss. 934.21-934.28, F.S. allowed such delay.²⁵

An investigative or law enforcement officer acting under s. 934.23, F.S., when not required to notify the subscriber or customer under s. 934.23(2)(a), F.S. (warrant), or to the extent such notice may be delayed pursuant to s.934.25(1), F.S. (subpoena or court order for disclosure), may also apply to a court for an order commanding an ECS provider or RCS provider to whom a warrant, subpoena, or court order is directed not to notify any other person of the existence of the warrant, subpoena, or court order. The order of nondisclosure is for such period as the court deems appropriate and can only be entered if the court determines that there is reason to believe that notification of the existence of the warrant, subpoena, or court order will result in an adverse result.²⁶

²³ S. 934.25(2), F.S.

²⁴ S. 934.25(4), F.S.

²⁵ S. 934.25(5), F.S.

²⁶ S. 934.25(6), F.S.

Effect of Proposed Changes

CS/HB 581 creates s. 934.255, F.S. to specifically address the use of subpoenas by an investigative or law enforcement officer conducting an investigation into allegations of the sexual abuse of a child or an individual's suspected commission of a sex crime listed in s. 943.0435(1)(h)1.a.(I), F.S.

Definitions

The bill provides the following definitions:

- "Child" means a person under 18 years of age.
- "Deliver" is construed in accordance with completed delivery, as provided for in Rule 1.080(b) of the Florida Rules of Civil Procedure.
- "Sexual abuse of a child" means a criminal offense based on any conduct described in s. 39.01(71), F.S.
- "Supervisory official" means:
 - The person in charge of an investigating or law enforcement agency's or entity's headquarters or regional office;
 - The state attorney of the circuit from which the subpoena has been issued;
 - The statewide prosecutor; or
 - An assistant state attorney or assistant statewide prosecutor specifically designated by the state attorney or statewide prosecutor to make such written certifications.
- "Adverse result" means any of the following acts:
 - Endangering the life or physical safety of an individual;
 - Fleeing from prosecution;
 - Destroying or tampering with evidence;
 - Intimidating potential witnesses; or
 - Seriously jeopardizing an investigation or unduly delaying a trial.

Investigative Subpoena for Records or Other Information

The bill authorizes an investigative or law enforcement officer to use a subpoena in an investigation into allegations of the sexual abuse of a child or an individual's suspected commission of any crime listed in s. 943.0435(1)(h)1.a.(I), F.S., to compel the production of records and the testimony of the subpoena recipient to authenticate such information. This investigative subpoena does not apply to information held or maintained by an electronic communication service (ECS) provider or remote computing service (RCS) provider, which are addressed separately in the bill.

In an investigation involving allegations of the sexual abuse of a child, an investigative or law enforcement officer may, without notice to the subscriber or customer of an ECS or RCS provider, use a subpoena to obtain certain records or other information pertaining to the subscriber or customer, not including the contents of a communication.

In an investigation involving allegations of the sexual abuse of a child, an investigative or law enforcement officer may use a subpoena to require an RCS provider to disclose the contents of any wire or electronic communication that has been in storage for more than 180 days. This is only allowed, however, to an electronic communication that is held or maintained on an RCS both

- On behalf of a subscriber or customer and received by means of electronic transmission from, or created by means of, computer processing of communications received by means of electronic transmission from a subscriber or customer; and
- Solely for the purpose of providing storage or computer processing services to a subscriber or customer, if the provider is not authorized to access the contents of any such communication for purposes of providing any service other than storage or computer processing.

In this situation, the investigative or law enforcement officer may give prior notice to the provider, or may provide delayed notice to the subscriber or customer, as discussed below.

A subpoena used in accordance with these provisions must describe the records, documents, or other tangible objects required to be produced and prescribe a deadline to produce the information. At any time before the date by which records must be produced, the recipient of the subpoena may petition for a court order modifying or setting aside the subpoena or prohibition of disclosure.

Prohibition on Disclosure of the Existence of a Subpoena and Preservation of Records

The bill authorizes an investigative or law enforcement officer to prohibit a subpoena recipient from disclosing the existence of the subpoena to any other person for 180 days, if the subpoena is accompanied by a written certification of a supervisory official that there is reason to believe that notification of the subpoena's existence may have an "adverse result." This means that an investigative or law enforcement officer no longer needs a court order when seeking to require nondisclosure for up to 180 days pursuant to this section.

A subpoena recipient may disclose information otherwise subject to nondisclosure requirements to:

- Persons as necessary to comply with the subpoena;
- An attorney in order to obtain legal assistance regarding compliance with the subpoena;
- Any other person as allowed and specifically authorized by the investigative or law enforcement officer who obtained the subpoena or supervisory official who issued the certification.

The subpoena recipient must notify any person to whom disclosure of the subpoena is made of the existence of the nondisclosure requirement. The nondisclosure requirement is binding on any person to whom disclosure of the subpoena is made. If requested by an investigative or law enforcement officer or the supervisory official who issued the certification, the subpoena recipient must identify, before or at the time of compliance with the subpoena, the name of any person to whom disclosure was made. The subpoena recipient has an ongoing duty to disclose the identity of any individuals notified of the subpoena's existence throughout the nondisclosure period.

An investigative or law enforcement officer who obtains a subpoena may delay the notification requirement for up to 180 days upon the execution of a written certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result.

A court may extend the nondisclosure period or the delay of notification for a period of up to 90 days upon application by the investigative or law enforcement officer. In addition, in certain situations if the court determines there is reason to believe notification of the existence of the subpoena will result in an adverse result, the court must enter an order prohibiting an ECS or RCS provider to whom the subpoena is directed from notifying any other person of the existence of the subpoena for a specified time.

The bill requires a wire, ECS, or RCS provider, upon the request of an investigative or law enforcement officer, to preserve records in its possession pending court action, and for a period of at least 90 days. The 90-day period is extended for an additional 90 days if the investigative or law enforcement officer renews the request.

An investigative or law enforcement officer using a subpoena to obtain any record, document, or other tangible object may retain such items for use in any ongoing criminal investigation or a closed investigation with the intent that the investigation may later be reopened.

Expiration of Nondisclosure Period or Delay of Notification

Upon expiration of the nondisclosure period or delay in notification period, the investigative or law enforcement officer must mail the subscriber or customer a copy of the process or request, along with notice that states with reasonable specificity the nature of the law enforcement inquiry and informs the subscriber or customer of all of the following:

- That information maintained for such subscriber or customer was supplied to or requested by the investigative or law enforcement officer;
- The date on which the information was supplied or requested;
- That notification was delayed;
- The investigative or law enforcement officer or court that made the written certification or determination for the delay.
- Which legal provision under ss. 934.21 - 934.28 allowed for the delay.

Compelling Compliance with a Subpoena

The bill allows the investigative or law enforcement officer seeking the subpoena to petition the court to compel compliance. The court may address the matter as indirect criminal contempt.

Unlawfully disclosing the existence of a subpoena is punishable as provided in 934.43, F.S., which states that it is a third-degree felony for a person having knowledge of a subpoena issued or obtained by an investigative or law enforcement officer to give notice of the subpoena with the intent to obstruct, impede, or prevent:

- A criminal investigation or prosecution; or
- The obtaining by the officer of the information or materials sought pursuant to a subpoena.

Prohibition on Causes of Action and Reimbursement

The bill provides that no cause of action may lie in any court against any provider of wire or ECS (or against the provider's officers or agents, or certain other persons) for providing information, facilities, or assistance pursuant to a subpoena under this section.

The bill also provides that an ECS or RCS provider or other person furnishing assistance pursuant to this section is not subject to any claim or civil liability resulting from the disclosure of information pursuant to this section. Such provider or person must be reasonably compensated for reasonable expenses incurred in providing assistance pursuant to this section. A witness who is subpoenaed to authenticate records or other information must be paid the same fees and mileage rate paid to a witness appearing before a court of competent jurisdiction in the state.

The bill provides an effective date of October 1, 2018.

B. SECTION DIRECTORY:

Section 1: Creates s. 934.255, F.S., relating to subpoenas in investigations of sexual offenses.

Section 2: Provides an effective date of October 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 24, 2018, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed all references to the crime of failing to register as a sexual offender.
- Changed the list of crimes, the investigations of which may fall under this section from those listed in s. 775.21(4)(a), F.S., to those listed in s. 943.0435(1)(h)1.a.(l), F.S.
- Removed "electronic communication services" from the list of entities from which an investigative or law enforcement officer may obtain the contents of a wire or electronic communication pursuant to this section.
- Clarified the information that may be obtained by an investigative or law enforcement officer using a subpoena to obtain the contents of a communication.

- Clarified that delayed notification may occur upon written certification of a supervisory official that there is reason to believe an adverse result could occur.
- Deleted a provision stating that a subpoena may not be used for certain prohibited purposes.
- Deleted a provision relating to how a subpoena may be served on a corporation, partnership, or association.
- Prohibited certain causes of action against a provider of an electronic communication service, remote computing service, or person that provides information, facilities, or assistance pursuant to this section.
- Required compensation to certain entities furnishing assistance pursuant to this section.
- Directed a provider, upon request by an investigative or law enforcement officer, to preserve records and evidence for at least 90 days.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.