

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 166

SPONSOR: Criminal Justice Committee and Senators Brown-Waite, Bronson and others

SUBJECT: Law Enforcement Agencies/Operations

DATE: February 2, 1999 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable/CS</u>
2.	_____	_____	<u>FP</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 166 would make it a third degree felony if a person contacts or communicates with a person directly involved in or directly affected by a tactical operation where a special tactical operations team or hostage negotiator deploys or is deployed in response to a hostage-taking or kidnapping, and the person knew or should have known that the person contacted was directly involved in such tactical operation.

The CS would also make it a third degree felony if a person authorizes a “live” broadcast or telecast of such tactical operation, and the person making that authorization knew or should have known that the activity broadcasted or telecasted “live” was such tactical operation.

The penalty would only apply if the contact or communication, or the authorization of a broadcast or telecast, occurred while such tactical operation was in progress. However, the head of the law enforcement agency having jurisdiction over such tactical operation, or the agency head’s designee, may approve the contact or communication, or the broadcast or telecast, while such tactical operation is in progress. In this case, the penalty would not apply.

The CS would also require that the law enforcement agency having jurisdiction over such tactical operation inform the public when such operation is concluded. The CS would encourage, but not require, all law enforcement agencies to develop a protocol for dissemination of information relating to such tactical operation. However, the absence of such protocol would not be a defense to prosecution. Further, nothing in the section that would be created by the CS would affect prosecution for resisting arrest (with or without violence) or a prosecution for any other violation of state law.

Committee Substitute for Senate Bill 166 creates a new, and as yet, unnumbered section of the Florida Statutes.

II. Present Situation:

Presently, there is no law that directly attaches criminal liability to reporters or others who contact or communicate with a person directly involved in or directly affected by a tactical operation, or who authorize a “live” broadcast or telecast of such tactical operation while such operation is in progress. Perhaps, in certain unusual cases, such acts would amount to the failure or refusal to comply with a lawful order or direction of a law enforcement officer (s. 316.072, F.S.), resisting an officer with violence (s. 843.01, F.S.), resisting an officer without violence (s. 843.02, F.S.), the neglect or refusal to aid a peace officer (s. 843.06, F.S.), or a breach of the peace (s. 877.03, F.S.). More likely, the action of the reporter or other person, if sufficiently egregious, would invite a civil suit.

III. Effect of Proposed Changes:

Committee Substitute for Senate Bill 166 would make it a third degree felony if a person contacts or communicates with a person directly involved in or directly affected by a tactical operation during the course of that tactical operation, and the person knew or should have known that the person contacted was directly involved in or directly affected by the tactical operation.

The CS also would make it a third degree felony if a person authorizes a “live” broadcast or telecast of such tactical operation, and the person making such authorization knew or should have known that the activity broadcasted or telecasted “live” was such tactical operation.

Key terms are defined in the legislation. A “tactical operation” is defined as “any operation involving a special weapons or tactical operations team or detail, or any operation involving a hostage negotiator or crisis negotiator, in which such team, detail, or negotiator deploys, or is deployed, in response to a situation that involves a kidnapping or hostage-taking.” Therefore, by definition, the only relevant tactical operation is one involving a SWAT team or hostage negotiator, and only when one or both of them are deployed in response to a kidnapping or hostage-taking.

A “special weapons or tactical operations team or detail” is defined as “any type of specialized team or detail of a law enforcement agency, regardless of how such team or detail may be described or designated, which is responsible for responding to, and which uses specialized training, techniques, tactics, and equipment to respond to, any . . . sensitive or potentially life-threatening situation[,] . . . or special tactical situation that, by its nature, would be considered excessively dangerous or complex, or that is beyond the capability of a routine patrol force or out of the scope of normal patrol or investigative functions.”

A “hostage or crisis negotiator” is defined as “any person used by a law enforcement agency for the purpose of negotiating for the release of any person who has been kidnapped or taken or held hostage.” Unlike the SWAT team, the negotiator does not have to be with a law enforcement agency but only be “used” by a law enforcement agency.

The time period relevant to the tactical operation, for purposes of the prohibited acts, is “during the course of such tactical operation,” which is defined as “from the time a tactical operation is commenced by a special weapons or tactical operations team or detail, or a hostage negotiator or

crisis negotiator, deploying or being deployed until the time at which the law enforcement agency having jurisdiction over such tactical operation expressly informs the public that such tactical operation has concluded.”

“Any person directly involved in or directly affected by a tactical operation” is defined as “any member of a special weapons or tactical operations team or detail, or any hostage negotiator or crisis negotiator, who is deploying or is deployed in response to a situation involving a kidnapping or the taking or holding of a hostage”; “the perpetrator of a kidnapping or the taking or holding of a hostage”; and “the person kidnapped or taken or held hostage.” By this definition, a person “directly involved or directly affected by a tactical operation” would not include law enforcement officers at the scene of the kidnapping or hostage-taking who were not part of the SWAT team, nor would it include bystanders at the scene.

The term, “law enforcement agency,” which appears in several of the definitions, is defined as “an agency of the state, political subdivision of the state, or the United States if the primary responsibility of the agency is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state and if its agents and officers are empowered by law to conduct criminal investigations and make arrests.” The definition includes local, state, and federal law enforcement officers, as well as correctional officers.

By defining all key terms, there is considerable guidance in determining the nature of the acts punished. Therefore, there appears to be no open-ended authority that would allow law enforcement officers to interpret the nature of the prohibited acts differently.

The CS also contains scienter requirements (unlawful intent) for both offenses, so there is no strict criminal liability. The question of whether unlawful intent is present will be a question for the jury based on the evidence in the case.

One of the important features of this legislation is that it would only punish the described acts if they occur within a limited time frame: “during the course of such tactical operation.” Therefore, there is no absolute prohibition on either news gathering or news dissemination. The penalty would apply to contact or communication with a person directly involved in or directly affected by a tactical operation only if such contact or communication was made during the course of such tactical operation. However, the penalty would not apply to recording or depicting such tactical operation, even while it is in progress.

The penalty also would apply to authorizing a broadcast or telecast of a recording or depiction of such tactical operation only if such broadcast or telecast occurred during the course of such tactical operation. The penalty would not apply to the cameraman on the scene filming the tactical operation, even if the recording or depiction of the tactical operation were broadcast or telecast while the operation was in progress, because the penalty only applies to the person *authorizing* the broadcast or telecast.

The CS also would require that the law enforcement agency having jurisdiction over such tactical operation inform the public when such operation is concluded. The CS would encourage, but not require, all law enforcement agencies to develop a protocol for dissemination of information relating to such tactical operation. However, the absence of such protocol would not be a defense

to prosecution. Further, nothing in the section that would be created by the CS would affect prosecution for resisting arrest (with or without violence) or a prosecution for any other violation of state law.

The effective date of the act would be July 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

It is probable that any legislation or law that affects press activities and involves a sanction will be challenged by the press as an unlawful encroachment on the First Amendment. However, a challenge is not a ruling by a court of law. Many laws are challenged in court and most are upheld. No constitutional rights, not even the right to speak and the right to a free press, are absolute.

A court reviewing a challenge to a law invoking the First Amendment, or the similar state constitutional provision, Article I, Section 9, of the Florida Constitution, would have to balance the State's interest protected by the law with the guarantees of speech and press in those federal and state constitutional provisions.

The U.S. Supreme Court has recognized that the interest in securing public safety is a strong State interest; in fact, it is a "fundamental" State interest. *See Branzburg v. Hayes*, 408 U.S. 665, 690, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) ("Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government. . . ."). In the context of news gathering, the Court in *Branzburg* declared that "[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded. . . ." *Branzburg*, 408 U.S., at 684-685.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The whereas clauses to CS/SB 166 specifically include a description of the events which occurred in May of 1998, when a repeat offender named Hank Earl Carr fatally shot two Tampa homicide detectives after being picked up for questioning in the shooting death of his 4-year old son. Carr then fled in a stolen truck down I-75, fatally shot a state trooper, and finally entered a gas station near Brooksville, where he took the gas station clerk hostage. A nearly four-hour standoff ensued, during which time the hostage was released. After the release of the hostage, police stormed the gas station and found Carr dead of a self-inflicted wound. "After Slaying of 3 Officers, Fla. Gunman Found Dead," Associated Press (May 20, 1998).

According to news reports, during the standoff, "[n]ews helicopters ringed the site." "3 cops die in rampage," *Orlando Sentinel* (May 20, 1998). Also, during the standoff, a radio station "interviewed Carr by telephone, preventing law enforcement officials from reaching him." "Bill could restrict how media covers breaking news events," *Tampa Tribune* (December 2, 1998). Moments after the interview, a reporter called Carr and interviewed him. "Bill would restrict reporters at crime scenes," *St. Petersburg Times* (December 2, 1998).

Subsequent to the Carr incident, a few media organizations signed a cooperative agreement with local law enforcement to "delay coverage that would reveal police strategy in volatile situations." "2 stations agree to limit coverage," *Tampa Tribune* (December 5, 1998).

VIII. Amendments:

None.