# 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 1936

SPONSOR: Criminal Justice Committee and Senator Brown-Waite

SUBJECT: Florida Department of Law Enforcement

DATE: March 23, 1999 REVISED: _____ _____ _____ _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|---|---|---|---|---|
| 1. | White | Cannon | CJ | Favorable/CS |
| 2. | | | FP | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |

## I. Summary:

The committee substitute (CS) for Senate Bill 1936, which pertains to the Florida Department of Law Enforcement (FDLE), makes several technical changes to the statutes, addresses new federal laws, and defines the FDLE's role with regard to the Criminal Justice Network (CJNET). Specifically, the CS:

- gives the FDLE a role in implementing the "Foley Amendment," which is a federal law designed to facilitate background checks for volunteers and employees of entities dealing with children, the elderly, or those with disabilities;
- ratifies the National Crime Prevention and Privacy Compact and designates the FDLE as the criminal history record repository for purposes of the contract;
- defines the FDLE's role with regard to the CJNET and provides the FDLE with the authority to manage the network and enter into relationships with non-criminal justice entities;
- clarifies that criminal history records pertaining to any of the "dangerous crimes" set forth in s. 907.041, F.S., may not be sealed or expunged; and
- more precisely defines the meaning of *previously* being adjudicated guilty of a criminal offense which precludes the sealing or expunging of criminal history records.

This CS substantially amends ss. 943.0585 and 943.059, creates ss. 943.0542, 943.0543, and 943.0544, and repeals s. 943.051(5) of the Florida Statutes.

## II. Present Situation:

**Background Checks on Persons Who Work with "Vulnerable" People**

In 1993, the federal government passed the National Child Protection Act (NCPA or Act), which sought to better protect children from abuse, exploitation, and neglect. Among many other provisions, the Act provided that "qualified entities" could request an authorized agency to check the federal and state criminal history records of persons who work with children if a state required such background checks be conducted. The motivation for conducting criminal history checks on such persons was to determine whether such persons have been convicted of a crime that bears upon their fitness to have responsibility for the safety and well-being of children. The Act was soon amended to also apply the criminal-history check provision to elderly and disabled persons.

Under the NCPA, a "qualified entity" is a public or private business or organization which may be for profit or non-profit that provides child care services, including any businesses or organizations which license or certify others to provide child care services. An "authorized agency" is defined under the NCPA as a state office or division that is designated by an individual state to receive and disseminate federal criminal history records. The NCPA required state enabling legislation and set out federal guidelines for an authorized agency to follow in order to receive federal criminal history records to screen a person for a "qualified entity" to determine the person's fitness to work with children.

The NCPA requires that a person being "screened" under the Act must provide a set of fingerprints and sign an accompanying statement that contains pertinent identification information about the "provider" of the fingerprints and states that the provider has not been convicted of a crime and, if the provider has been convicted of a crime, provide a description of the crime and particulars of the conviction. The qualified entity has to notify the provider that it may request a background check prior to employment to determine "suitability" and must notify the fingerprint provider of his or her rights, such as obtaining a copy of the background check report and having an opportunity to challenge the accuracy and completeness of any information contained in a background check report.

The NCPA requires that an authorized agency must conduct research in its respective state and local record keeping systems that are available in order to obtain complete data on a provider of fingerprints for a background check. The authorized agency is also required to make the "determination" as to whether the provider has been convicted of, or is under current charges for, a crime that bears upon an individual's fitness to have responsibility for the safety and well-being of children, the elderly, or the disabled. Subsequent to this "determination," the authorized agency must convey that "determination" to the qualified entity. Therefore, the Act authorized the "screening" of the information by requiring the authorized agency to make a determination, but the Act did not allow the criminal history information to go directly to the qualified entity.

In 1995, the Florida Legislature enacted statutory procedures for the screening of prospective employees in cases where the Legislature had determined it is necessary to conduct criminal history background checks. Chapter 435 of the Florida Statutes delineates the screening standards for "Level 1" employment screening and "Level 2" employment screening. Pursuant to s. 435.05, F.S., the Department of Law Enforcement (FDLE) acts as the conduit or the screening entity that

makes "determinations" as to the suitability of employment of a person based on findings of a criminal history check.

Level 1 screenings are authorized and delineated in s. 435.03, F.S. Level 1 screenings must include, but are not limited to, employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement (FCIC). Level 1 screenings may also include local criminal records checks through local law enforcement agencies. Any person for whom employment screening is required by state statute must not have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any of the offenses delineated or described in subsection (2) of s. 435.03, F.S.

Level 2 screenings are authorized and delineated in s. 435.04, F.S. Level 2 screenings are required for all employees in positions designated by law as positions of trust or responsibility who are required to undergo "security background investigations" as a condition of employment and continued employment. Level 2 screenings must include, but are not limited to, employment history checks, fingerprinting for all purposes and criminal history checks, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement (FCIC), and federal criminal records checks through the Federal Bureau of Investigation (NCIC), and may include local criminal records checks through local law enforcement agencies. Security background investigations through level 2 screenings must ensure that no persons subject to undergoing such a screening has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any of the offenses delineated or described in subsection (2) of s. 435.04, F.S.

The procedure in Florida used to obtain such criminal history records for employment screenings, which remains in effect today, is: (1) an applicant submits a completed fingerprint card to a regulatory agency; (2) the agency forwards the card to FDLE; (3) FDLE obtains the federal and state criminal history records; (4) FDLE screens the records and then reports to the regulatory agency if the applicant has no record or has a record which would make the applicant unfit. The FDLE does not provide the records directly to a qualified entity.

**The "Foley Amendment" to the NCPA Passed By Congress**

Most recently, the "Foley Amendment" was incorporated into the federal act. Under this amendment, qualified entities may obtain federal criminal history information on *volunteers* and employees from an authorized state agency without specific enabling legislation. Therefore, it can be concluded that Congress has made a decision that qualified entities are entitled to the criminal history records even in the absence of state legislation. Moreover, the amendment allows a national criminal history record to be given directly to the qualified entity, whether public or private. This is a significant change from prior law which did not allow the dissemination of NCIC information directly to non-governmental entities.

Existing Florida law does not embrace the changes provided by the "Foley Amendment," and in order to conform to the amendment, legislation is necessary to: (1) specifically designate the state agency which will receive the results of these inquiries for distribution to the organization or entity dealing with children, the elderly, or the disabled; and (2) to revise Florida's current

procedure which requires the FDLE to screen the records, rather than give the records directly to the qualified entity.

**National Crime Prevention and Privacy Compact**

The National Crime Prevention and Privacy Compact provides for an electronic information sharing system between the Federal Government and the states for criminal history records used for noncriminal justice purposes, e.g., background checks for employment. The compact provides that the state shall appoint a compact officer who will administer the compact, and shall participate in the information sharing system.

**Criminal Justice Information Network**

Currently, s. 943.051, F.S. (Supp. 1998), provides generally for the Criminal Justice Information Program, and the collection, storage, and dissemination of criminal justice information. Subsection (5) states that the "department is encouraged to develop innovative and progressive methods of serving the information management needs of the criminal justice community." It further provides that "the department may contract with other agencies, or private entities for the purpose of facilitating the department's responsibilities for receiving, maintaining, managing, processing, allowing access to, and disseminating criminal justice information, intelligence, and data...."

**Sealing and Expunging of Criminal Records**

Pursuant to ss. 943.0585 and 943.059, F.S. (Supp. 1998), a criminal history record may not be sealed or expunged if it relates to an adjudication or withheld adjudication for certain enumerated offenses. Specifically, this provision incorporates the dangerous crimes enumerated in s. 907.401, F.S. Since this incorporation, several dangerous crimes were added to s. 907.41, F.S., by amendment. Under accepted rules of statutory construction, the subsequently added offenses, such as domestic violence, are *not* deemed incorporated by reference in the sealing and expunction statutes *unless those statutes were reenacted expressly for that purpose*. To date, this has not been done.

Pursuant to ss. 943.0585 and 943.059, F.S. (Supp. 1998), a person may not petition the court to seal or expunge his or her criminal record if he or she has ever "*previously* been adjudicated guilty of a criminal offense or comparable ordinance violation or adjudicated delinquent for committing a felony or misdemeanor specified in s. 943.051(3)(b)." Current case law differs as to the meaning of "previously." Under an older case, construing an *earlier* version of the law, *State v. Zawistowski*, 339 So.2d 315 (Fla. 1st DCA 1976), "previously" means *prior to the arrest* for the record to be seal or expunged. Under a more recent case, *Hunt v. State*, 670 So.2d 1180 (Fla. 3d DCA 1996), *rev. den.*, 684 So.2d 1351 (Fla. 1996), "previously" means *prior to the filing* of the petition to seal or expunge. These divergent interpretations of the law require clarification.

## III. Effect of Proposed Changes:

**"Foley Amendment"**

The CS creates a new section, s. 943.0542, F.S., for the purpose of conforming Florida record obtaining procedures to the "Foley Amendment." The majority of the CS mirrors the language used in the NCPA, as amended.

Specifically, the CS defines a "qualified entity" as a public or private business or organization, whether for profit or not for profit, which provides care to children, the elderly, and the disabled. This definition also includes businesses or organizations which license or certify others to provide such care. In order for the entity to be recognized as qualified, the entity must register with the FDLE, and sign an agreement providing that the entity will comply with state and federal law. Once registered, information about the "qualified entity," including its name, address, and phone number, may be entered into a database, which will be accessible to all registered qualified entities. The purpose of this database is to facilitate contact between the entities concerning the employee's or volunteer's previous involvement with an entity.

After a qualified entity is registered, the entity may then request background screenings for any current or prospective employee or volunteer. The request must:

- be on a completed fingerprint card, signed by the person fingerprinted, which includes a waiver allowing the release of state and national crime history information;
- be accompanied by a fee, the amount of which will approximate the actual cost of producing the state record, plus the amount required by the FBI for the NCIC check.

Moreover, the "qualified entity" must notify the person to be screened in writing that he or she has a right to a copy of any background screening report, and a right to challenge the accuracy of the report.

In response to a proper request, the FDLE will directly provide a qualified entity with those state criminal history records which are not confidential under law, and with the national criminal history record information. Unlike existing law, the qualified entity is statutorily responsible for determining whether the criminal record information shows that a person has been convicted of or is under pending indictment for a crime bearing upon the fitness of the person for employment. The FDLE no longer must screen the criminal history records.

The CS further provides that a "qualified entity" is not liable for damages resulting solely from its failure to obtain the information authorized by the section, nor is the state or any subdivision liable for damages resulting from the provision of information under the section.

Finally, the CS provides FDLE with the authority to adopt rules to implement the section.

**National Crime Prevention and Privacy Compact**

The CS creates a new section, s. 943.0543, F.S., for the purpose of implementing the National Crime Prevention and Privacy Compact. The CS provides that the Legislature approves and ratifies this compact, that the executive director of the FDLE shall administer the compact on behalf of the state, and that the FDLE will serve as the repository for criminal records in this state. Moreover, the CS provides that the FDLE may adopt rules and establish procedures for the cooperative exchange of criminal history records between the state and federal government for use in noncriminal justice cases.

**Criminal Justice Information Network (CJNET)**

The CS creates a new section, s. 943.0544, F.S., which enables the FDLE to comply with the requirement in s. 943.051, F.S. (Supp. 1998), that the FDLE develop and implement innovative and effective methods of serving the information-management needs of criminal justice agencies. Specifically, the CS provides that the FDLE may develop CJNET, an intra agency information and data-sharing network for state criminal justice agencies. The CS allows rulemaking authority as may be required to manage CJNET.

Moreover, as the FDLE implements CJNET, the CS permits the FDLE to allow noncriminal justice entities, which provide a product, program, or service determined by the FDLE to be of substantial value to state criminal justice agencies, to maintain a limited and regulated presence on the Network. The FDLE can also enter into a contract with any entity for the purpose of facilitating the FDLE's responsibilities for managing criminal history record information. Any entity, under contract, shall be considered a criminal justice agency for the purpose of handling, collecting, managing or disseminating criminal justice information, intelligence, data, histories, or other records. Disclosure of such information to an entity does not waive any confidentiality of records as provided by law.

**Expunging or Sealing Criminal History Records**

The CS amends ss. 943.0585 and 943.059, F.S. (Supp. 1998), to clarify that the sections' references to other chapters, sections, or subdivisions of the Florida Statutes, including s. 907.41, F.S., are incorporated by reference. In so providing, the CS incorporates all amendments to the referenced chapters, sections, or subdivisions, which have been made subsequent to the sections' original incorporation.

Furthermore, the CS amends ss. 943.0585 and 943.059, F.S. (Supp. 1998), to clarify that a person cannot petition to have his or her criminal history record expunged or sealed if he or she, *prior to the date on which the petition is filed*, has been adjudicated delinquent for a felony or misdemeanor offense specified in s. 943.051(3)(b), F.S. (Supp. 1998).

## IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

## V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Qualified entities must pay a fee to obtain the records information.

C. Government Sector Impact:

The main fiscal impact from this CS stems from the implementation of the "Foley Amendment." The CS provides for an initial authorization of 14 new positions, with increases of one position for each 5,000 record requests. The program, however, will be self-sustaining; i.e., all positions and equipment associated with the CS will be funded by fees charged for the records.

## VI. Technical Deficiencies:

None.

## VII. Related Issues:

None.

## VIII. Amendments:

None.