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DATE: June 2, 1999

****FINAL ACTION****

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIME AND PUNISHMENT
FINAL ANALYSIS**

BILL #: CS/HB 49

RELATING TO: Criminal Use of Personal ID Information

SPONSOR(S): Committee on Crime & Punishment and Rep. Trovillion

COMPANION BILL(S): SB 0286(s), SB 0722(c) & SB 1074(c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 5 NAYS 0
- (2) JUDICIARY
- (3) CRIMINAL JUSTICE APPROPRIATIONS
- (4)
- (5)

I. FINAL ACTION STATUS:

CS/HB 49 was approved by the Governor on June 11, 1999, and became Chapter 99-335, Laws of Florida.

II. SUMMARY:

CS/HB 49 makes it a third degree felony to fraudulently use or possess with intent to fraudulently use any personal identification information without consent.

The bill makes it a first degree misdemeanor to use or attempt to use personal identification information to harass an individual.

The bill defines the term "personal identification information" very broadly to include: name, address, social security number, date of birth, driver's license or identification number, any account number, passport number, telecommunication identifying information, etc.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Theft

A person violates Florida's theft statute if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to deprive the other person of a right to the property or a benefit from the property. The term "obtains or uses" is defined by the theft statute to include obtaining property by fraud, willful misrepresentation of a future act, or false promise. "Obtains or uses" is also defined to mean making any unauthorized use, disposition, or transfer of property.

The appellate courts in Florida have held that Florida's broad theft statute encompasses criminal frauds, and that an act of criminal fraud should be prosecuted either under Florida's broad theft statute, or under a more specific statute proscribing fraud in chapter 817. State v. McDonald, 690 So. 2d 1317 (2nd DCA 1997); Thompson v. State, 585 So. 2d 492 (5th DCA 1991).

Uttering

Section 831.02, Florida Statutes, creates the offense of Uttering, a third degree felony. A person commits the offense of uttering a forgery if that person passed or offered to pass as true a document that the defendant knew to be false or altered, and the defendant intended to injure or defraud another person.

Forgery

Section 831.01, Florida Statutes, creates the offense of Forgery, a third degree felony. A person commits the offense of forgery if that person falsely made, altered, forged or counterfeited a document with the intent to injure or defraud another person.

False Statement to Obtain Credit or Property

Section 817.031, F.S., makes it a first degree misdemeanor to make a false statement with fraudulent intent about one's assets or liabilities to obtain credit or property. Section 817.59, F.S., makes it a misdemeanor to make a false statement, including the giving of a false identity, with the intent that it be relied on for the purpose of obtaining a credit card.

Florida Communications Fraud Act

Section 817.034 creates the offense of "organized fraud" for a person to engage in a scheme to defraud that causes the offender to obtain property.

B. EFFECT OF PROPOSED CHANGES:

Penalties

CS/HB 49 makes it a third degree felony to willfully and without authorization fraudulently use or possess with intent to fraudulently use any personal identification information without consent.

The bill makes it a first degree misdemeanor to willfully and without authorization possess, use or attempt to use personal identification information without consent to harass an individual.

Third degree felonies are punishable by a maximum of 5 years in prison. First degree misdemeanors are punishable by a maximum of one year in a county jail.

The bill authorizes a court to require a person convicted of this new section to pay for the victim's attorney's fees incurred to clear the victim's credit record, as well as any costs incurred in connection with any civil or administrative proceeding to satisfy any debt, lien, or other obligation resulting from the defendant's actions.

Definitions

The bill defines the term "personal identification information" very broadly to include, in part: name, address, social security number, date of birth, driver's license or identification number, any account number, passport number, telecommunication identifying information. "Personal identification information" is also defined to include "access devices."

"Access devices" are defined by the bill to mean any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with other access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

These definitions are substantially the same as those contained in a related bill that passed the United States Congress in 1998, H.R. 4151.

Exception

The bill provides an exception for authorized investigative, protective, or intelligence activity of a law enforcement agency.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

s. 464.018, 772.102, 895.02, Florida Statutes

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Providing definitions; provides for third degree felony penalties for fraudulently using or possessing with intent to fraudulently use any personal identification information without consent; provides for first degree misdemeanor penalties for possessing, using or attempting to use personal identification information to harass an individual; providing for nonapplicability of the new provisions to specified law enforcement activities; providing for restitution, including attorney's fees and costs to the victim and providing for prosecution by the statewide prosecutor.

Section 2: Providing cross-references by reenacting s. 464.018, F.S., relating to disciplinary actions for violations of the Nurse Practice Act, reenacting s. 772.102, F.S., relating to definition of "criminal activity" with respect to the Civil Remedies for Criminal Practices Act and s. 895.02, F.S., relating to definition of "racketeering activity"; and providing for incorporation of the newly created statute in references.

Section 3: Providing for an effective date.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

4. Total Revenues and Expenditures:

See, Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See, Fiscal Comments.

2. Recurring Effects:

See, Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See, Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

See, Fiscal Comments.

2. Direct Private Sector Benefits:

See, Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See, Fiscal Comments.

D. FISCAL COMMENTS:

The Criminal Justice Estimating Conference has not met to determine the fiscal impact of this bill.

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

VI. COMMENTS:

Any legislation attempting to proscribe identity theft may need to include a requirement that the offender had the intent to defraud or harass the person whose name or other identification was improperly used. It can be difficult to prosecute certain acts, including using another persons identification to conduct transactions such as signing leases if the intent is to defraud or steal from another person is uncertain. Fraud and theft generally requires a victim to suffer a loss that can be measured. If the injury to the victim is the actual or potential loss of something intangible like credit, then it may be very difficult to prove intent to defraud. Even when a credit card with an individual's name is used, the fraud is against the seller of the merchandise and not the person whose identification is used because the "victim" of the "I.D. theft" has no financial obligation from the fraudulent transaction. By proscribing possession with intent to defraud or harass, HB 49 captures behavior that is not prohibited by current law.

A person who uses a stolen or false credit card to make purchases over \$300 can now be charged with grand theft, forgery, uttering and a felony count fraudulent use of credit cards if the card has been used twice in six months. The bill would add an additional count that a person could be charged with for using a stolen or false credit card. (There would be a double jeopardy issue only if the counts charged were petit theft instead of grand theft, or if the fraudulent use of a credit card occurred only once.)

Section 775.089(1)(a) and (1)(c), F.S., authorize restitution for "damage or loss caused directly or indirectly by the defendant's offense; ...and [for] damage or loss related to the defendant's criminal episode. This statute grants the court such broad authorization that subsection (5) on page 4 of the bill does not add to the courts authority.

The criminal penalties created by the bill require the use of personal identification information without authorization *and* without consent. While state statutes and case law may occasionally use the terms "consent" and "authorization" interchangeably, the term "consent" is more precise and far more prevalent in the criminal law context.

Committee on Judiciary Comments:

A portion of this bill seeks to criminalize possession of personal identification information with an intent to fraudulently use that information in order to "harass" an individual. Specifically excluded from the definition of harassment is use of the information for "accepted commercial practices," which presumably means use for an "unaccepted commercial practice" may subject the possessor of the personal information to criminal liability.

It appears to be generally conceded that a statute, especially a penal statute, must be definite to be valid. *Locklin v. Pridgeon*, 30 So.2d 102 (Fla. 1947); *Cuda v. State*, 639 So.2d 22 (Fla. 1994). In analyzing *Locklin*, the Supreme Court in *Cuda* wrote:

the phrase 'not authorized by law' was 'too vague, indefinite and uncertain to constitute notice of the crime or crimes or unlawful acts which it purports to prohibit' and 'prescribes no ascertainable standard of guilt.

In *Cuda*, the Florida Supreme Court found that the phrase "improper or illegal use" did not provide a sufficiently definite warning of the proscribed conduct, and found the statute to be unconstitutional as a result of vagueness.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee substitute includes an amendment by Rep. Trovillion to remove the definition of “wantonly and maliciously.” The phrase “wantonly and maliciously” seems contradictory since “wanton” generally means a reckless intent and “maliciously” generally means an evil intent to do harm. The amendment changed the misdemeanor offense created by the original bill on page 4, lines 9-13 so that the wanton and malicious intent is replaced with an intent to harass. Other terms have been removed from the original bill as well such as “artifact to defraud” and “specific use.”

The bill was amended on the floor of the House to modify the definition of harass so that the term does not include “constitutionally protected conduct such as organized protests.”

VIII. SIGNATURES:

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