STORAGE NAME: h0125.go
DATE: November 18, 1999

HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS

BILL #: HB 125

RELATING TO: Release of Employee Information

SPONSOR(S): Representative Tullis

TIED BILL(S):

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

(1) JUDICIARY YEAS 5 NAYS 0
(2) GOVERNMENTAL OPERATIONS
(3) LAW ENFORCEMENT & CRIME PREVENTION
(4)
(5)

I. SUMMARY:

HB 125 requires a current or former employer, or the employer's agent, to release an employment record and other information to a law enforcement officer, correctional officer, or correctional probation officer who is conducting a background investigation of an applicant for employment as a law enforcement officer, a correctional officer, or a correctional probation officer.

The bill also requires the Criminal Justice Standards and Training Commission to design an authorization for release of information form, to be signed by the job applicant.

The bill imposes a non-criminal fine of up to $500 for failing to comply with the background investigation requirements. (This provision was removed from the bill by the Committee on Judiciary. See VI. Amendments or Committee Substitute Changes.)

The bill does not appear to have any significant fiscal impact.

The bill takes effect upon becoming law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes [] No [X] N/A []

The bill mandates that current or former employers assist law enforcement in disclosing information about job applicants and penalizes those employers who fail to do so.

2. Lower Taxes Yes [] No [] N/A [X]

3. Individual Freedom Yes [] No [X] N/A []

The bill requires employers to cooperate with law enforcement officers who are conducting background investigations. Employers are currently free to withhold cooperation absent a subpoena.

4. Personal Responsibility Yes [] No [] N/A [X]

5. Family Empowerment Yes [] No [] N/A [X]

B. PRESENT SITUATION:

Section 943.133(1), F.S., requires an "employing agency" as defined in Chapter 943, F.S., to collect, verify, and maintain documentation establishing an applicant's compliance with the job qualification provisions of sections 943.13 and 943.131, F.S.

Section 943.133(3), F.S., requires the Criminal Justice Standards and Training Commission to promulgate rules relating to the relevant forms and the background check that must be undertaken by an employing agency regarding an applicant for a position as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer. However, s. 943.133, F.S., does not provide any disclosure requirements for current or former employers.

Section 768.095, F.S., provides for qualified employer immunity from liability for disclosing job performance information concerning a former or current employee. The employer is immune from civil liability unless it is shown by clear and convincing evidence that the disclosure was knowingly false or in violation of the employee’s civil rights.

C. EFFECT OF PROPOSED CHANGES:

The bill requires the applicant's former or current employer, or the employer's agent, to provide a complete employment history and any other verifiable information that may indicate the applicant's failure to meet minimum qualifications in section 943.13, F.S., for employment as a law enforcement officer, correctional officer, or correctional probation officer. The law enforcement officer conducting the background examination of an applicant is required to present his or her credentials and a signed authorization for release form to the former or current employer.

The bill directs the Criminal Justice Standards and Training Commission to create an authorization for release of information form, which is to be completed by the applicant and his

or her current or former employer. The form provides the information needed by the requesting law enforcement officer.

Finally, the bill provides for a noncriminal fine of up to $500 for employers who fail to comply with the background investigation requirements of the bill.

D. SECTION-BY-SECTION ANALYSIS:

This section need be completed only in the discretion of the Committee.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

This bill may require state government to provide information about current and former state employees to law enforcement and corrections officers. The fiscal impact associated with such disclosure would probably be minimal. The cost to the Criminal Justice Standards and Training Commission of creating the authorization form is uncertain. At the same time, this bill may reduce costs associated with background investigations of applicants for certain positions within law enforcement, corrections, or correctional probations.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

This bill may require local government entities to provide information about current or former employees to law enforcement and corrections officers. The fiscal impact of such disclosure would probably be minimal.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The Department of Law Enforcement has estimated that the direct impact of HB 125 on the private sector would be minimal. However, HB 125 does not specify the full scope of actions private employers must take to comply with an inquiry by law enforcement or corrections officers. It is uncertain, for example, whether private employers have a duty to search for, compile, and organize records before handing these records over to law enforcement or corrections officers. Also, if this bill requires the employer to conduct a records search, it is uncertain how far back in time such a search must extend.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to expend funds or to take any action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

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

The bill does not reduce the percentage of a state tax shared with counties or cities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Comments by the Committee on Judiciary:

1. **First Amendment**:

a. **Freedom of Expression** - Not only does the First Amendment of the federal constitution protect the right to speak, but it protects the right to refrain from speaking and the right, under certain circumstances, to deny the government access to a private forum. In Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), the United States Supreme Court held that a state could not require a private parade sponsor to allow participation by a group which imparted a message that the sponsoring organization did not wish to convey. The Court reasoned that such a requirement would have amounted to forced expression of a government-approved message. See also West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)(holding that a state cannot condition the receipt of a public education upon student willingness to salute the flag and pledge allegiance). Similarly, the Court has refused to require a utility to include certain materials published by a customer group in utility billing envelopes. Pacific Gas and Electric Co. v. Public Utilities Commission of California, 475 U.S. 1 (1986).

b. **Compelled Disclosure/Freedom of Association** - By compelling disclosure, the government may also trespass upon associational rights under the First Amendment. Here, the strict scrutiny test applies. To compel disclosure, the government must seek to advance a compelling interest and must choose the least restrictive means for carrying out the inquiry. Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

2. **Due Process/Takings** - The Due Process Clause of the Fourteenth Amendment of the federal constitution applies when the government attempts to deprive a person of life, liberty, or property. Under due process analysis, "property" includes items such as personal belongings, intellectual property, or any benefit or entitlement to which a legitimate claim attaches. An employer could argue that employee records, compiled at the employer's expense, constitute property entitled to due process protection. In addition, the Takings Clause of the Fifth Amendment of the federal constitution prohibits taking private property for public use without just compensation. The bill does not allow an employer to charge a reasonable fee for the costs associated with record production, or require the law enforcement agency requesting the records to bear those costs.

3. **Involuntary Servitude** - The Thirteenth Amendment of the federal constitution provides that "[n]either slavery nor involuntary servitude . . . shall exist within the United States. . ." The Thirteenth Amendment has generally not operated as a barrier to basic recordkeeping or disclosure requirements (for example, income tax preparation) imposed by the government.

4. **Privacy** - Although privacy has been characterized as a fundamental right, the United States Supreme Court has not enunciated any general privacy interest associated with non-disclosure of personal data when such information is requested by the government. Whalen v. Roe, 429 U.S. 589 (1977). See also Kurtz v. City of North Miami Beach, 653 So. 2d 1025 (Fla. 1995); Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1984).

Comments by the Committee on Governmental Operations:

By imposing fines on private employers who fail to provide background employment information on their current or former employees, the bill effectively “coerces” such employers to serve as information sources for law enforcement. The coercion is diminished with the adoption of the amendment regarding the elimination of the non-criminal fine. Either way the coercion is maintained outside of either the judicial system or any licensing/regulatory system created by statute, which raises some First Amendment and privacy issues.

The freedom “not to speak” seems impacted only because the bill is outside of either the judicial system or any licensing/regulatory system. Clearly, employers may be required to speak and disclose certain information when under either system, such as subpoenas, record keeping, and filing reports with agencies. Proponents of the bill may argue that the bill does not require the employer to “speak” anything, but rather to disclose what it has already put into an employee record. The employer is not required to speak anything specific, unlike Barnette, nor is it required to carry the objectionable speech of others, unlike Hurley or Pacific Gas. Additionally, associational rights do not seem impacted in employment settings, since such relationships are extensively regulated, and the bill would not expose applicants to the type of harassment feared by the members of a political organization in NAACP v. Alabama.

The bill allows the employer to provide a copy of an employee’s records, but does not allow the employer to recover the cost of making such copies or for reasonable expenses in compiling them for disclosure, as public agencies can under our public records laws. Proponents of the bill may argue that the photocopying and clerical costs are minimal and would not rise to the level of a “taking” under 14th Amendment due process analysis, nor to “involuntary servitude” under 13th Amendment analysis.

Finally, it is unclear what expectations of privacy an employer can assert regarding information in employee records. There is no violation of privacy when the applicant has signed a written release for such personal information contained in his or her employee records.

B. RULE-MAKING AUTHORITY:

The bill provides clear direction to the Criminal Justice Standards and Training Commisssion to design an authorization for release form, for which it already has authority to design under sec. 943.133(3), F.S.

C. OTHER COMMENTS:

1. **Definition of Complete Employment Record** - HB 125 requires employers to turn over the "complete employment record" of the applicant. The bill does not define this term and, therefore, employers may be left unsure of their responsibilities.

2. **Definition of Other Verifiable Information** - HB 125 requires employers to turn over "other verifiable information which would lead one to believe that the applicant fails to meet the minimum qualifications as set forth in s. 943.13, Florida Statutes." The bill does not define the term "verifiable information." In addition, the bill may require employers to research whether any information in their possession could be interpreted as giving rise to a belief that an applicant is unfit under s. 943.13, F.S. Employers, unsure of the extent of their obligations, may be left unaware of how they may avoid the noncriminal fine imposed for noncompliance.

3. **Responsibility for Compiling Records** - HB 125 simply states that employers "shall provide . . . the complete employment record of the applicant and, to the extent known, any other verifiable information . . ." The bill does not directly assign responsibility for compiling such records, but seems to place primary responsibility with the employer. Under analogous circumstances (discovery, for example) the investigating party bears the responsibility for sorting through records and determining whether particular records apply.

The Criminal Justice Standards and Training Commission may wish to address these uncertainties when designing the authorization for release form.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On November 2, 1999, an amendment was adopted by the Judiciary Committee that eliminates the $500 fine for failure to comply with the statute.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by: Michael Poche'

Staff Director: P.K. Jameson

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:	Staff Director:
Douglas Pile	Jimmy O. Helms