

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 2028

SPONSOR: Senator Burt

SUBJECT: Production of Records from Out-of-State Corporations

DATE: April 15, 2001

REVISED: 04/17/01 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matthews</u>	<u>Johnson</u>	<u>JU</u>	<u>Fav/6 amendments</u>
2.	_____	_____	<u>CJ</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill provides a process for the expedited production and admission into evidence of business records by out-of-state providers of electronic communications services or remote computing services. It requires Florida providers of electronic communication services or remote computing services to reciprocate in compliance to demands for production of documents through validly issued subpoenas, court orders or search warrants from other states. It provides civil immunity for specified persons who produce those business records in response to a subpoena, court order, or search warrant in a criminal or civil proceeding.

This bill creates the following sections of the Florida Statutes: 92.605.

II. Present Situation:

Discovery Processes

There are three primary court processes by which business records may be obtained: 1) subpoena, 2) court order or 3) search warrant.

In civil cases, subpoenas for testimony before the court, subpoenas for production of tangible evidence (aka subpoena duces tecum), and subpoenas for taking depositions may be issued by the clerk of court or by any attorney of record in an action. *See Fla. R. Civ. P. 1.410* The subpoena demands that the person to whom it is directed produce documents and whatever other evidence relating to the matter at hand within the limits of permissible discovery. A person who refuses to obey a subpoena served may be held in contempt. In criminal cases, with a few exceptions, the issuance of a subpoena for other than the production of documents is similarly governed by Fla. R. Civ. P. 1.410. Otherwise, Fla. R. Crim. P. 3.3612, governs subpoenas and subpoenas for production of tangible evidence. Either the clerk of the court or the attorney of record may issue a subpoena. *See Fla. R. Crim. P 3.361*. All business records secured pursuant to a subpoena duces tecum must be accompanied by an affidavit executed by the record custodian.

These records are admissible if the original records would have been admissible had the custodian been present to testify to the affidavit and the records meet the business records exception to the hearsay rule under section s. 90.806, F.S.

In civil proceedings, a court order may issue if there are objections raised to a notice of deposition or production of documents or other discovery method. Under general discovery provisions, a person may obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *See Fla. R.Civ.P. 1.280 and Fla. R. Civ. P. 1.350.* It is not grounds for objection that the information sought may be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. In criminal proceedings, general discovery provisions are governed by Fla. R. Crim. P. 3.220. In either the civil or criminal proceeding, a court order may compel discovery, limit the scope of discovery or condition the terms of discovery.

A search warrant is a written order issued by a judicial officer directing a law enforcement officer to search and seize property that might constitute evidence of a crime. A search warrant can be issued upon an affidavit or other sworn testimony. Search warrants are subject to the following requirements: 1) issued by a neutral judicial officer, 2) existence of probable cause, 3) specific as to thing to be seized and place to be searched.

Scope of Discovery

In recent years, the scope of permissible discovery in criminal prosecution has been expanded and facilitated to respond, in part, to the increased technological sophistication and multi-jurisdictional complexity of crimes, particularly in the area of white collar crime and crimes using the Internet. With the enactment of the federal Electronics Communications Privacy Act (18 U.S.C. ss.2703. et seq.), a government entity can seek discovery of specific categories of information and records from providers of electronic communications or remote computing services through court processes as follows:

Information Sought	Example	Court Process Required
Basic Subscriber Info	Name, address, toll billing information, service type, length of service, user name	Subpoena, court order or search warrant
Transactional Records	Anything between content and basic subscriber information, i.e., credit information, activity logs (web site visited and what was done on a web-site that was visited- not all web-sites keep this information).	Court Order (2703(d) Order) or Search Warrant
Fresh Content	Electronic communication (email) in storage for 180 days or less (fresh unopened email)	Search Warrant
Real Time Interception	Data transmission as it is occurring	Wire Tap
Stale Content	Opened email or on server for more than 180 days	Search Warrant or Court Order with notice to the subscriber

Last year, the Florida Legislature enacted major revisions to Florida’s Security of Communications Act in chapter 934, F.S. *See ch. 2000-369, L.O.F.* It substantially expanded law enforcement’s authority to wiretap or otherwise intercept wire, oral or electronic

communications consistent in part with authority found under the federal counterpart (18 U.S.C. 2510, et. seq.). Section 934.23, F.S., was revised to require a provider of electronic or remote computer services to provide certain information when subpoenaed such as the name, address, telephone toll billing records, telephone number or other subscriber number or identity, and length of service. It also required a provider of wire or electronic communication services or a remote computing service to preserve records and other evidence if requested by an investigative or law enforcement officer. Immunity from civil liability was also granted to such persons or entities for providing such records or information.

Admissibility of Evidence

The Florida Evidence Code provides that, except as provided by statute, hearsay evidence is inadmissible. *See* Chapter 90, F.S. Hearsay evidence is an out-of-court statement made by someone other than the declarant while testifying at the trial or hearing and offered to prove the truth of the matter asserted. There are a number of exceptions. Section 90.803(6), F.S., which is part of the Florida Evidence Code, currently contains an exception to the hearsay rule for business records. Business is defined to include business, institution, association, profession, occupation, and calling of every kind, whether for profit or not-for-profit. Records encompass a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion or diagnosis. It has to have been made at or near the time, or from information transmitted by a person with knowledge. If the sources of information or other circumstances show lack of trustworthiness, it will not be admissible.

Another exception to the hearsay rule in criminal and civil proceedings exists specifically as to foreign business records under chapter 92, F.S. Section 92.60, F.S., pertains only to the admission in any criminal or civil proceeding of *foreign records* of regularly conducted business activity or copy thereof from another country. It is an exception to the hearsay rule, provided the sources of information or the method or circumstances of preparation underlying the records do not lack trustworthiness¹. A foreign certification must attest that (1) the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (2) the record was kept in the course of a regularly conducted business activity; (3) the business activity made the a record as a regular practice; and (4) if the record is not the original, that it is a duplicate of the original. The party seeking admission of the records in a civil proceeding must give written notice of the intent to offer such records to the opposing party 60 days prior to trial. A written foreign certification may authenticate the record or its duplicate in lieu of live testimony. This provision was added in 1997. *See* ch. 97-189, L.O.F.

III. Effect of Proposed Changes:

Section 92.605, F.S., is created to provide for a specific process for the production and admission of business records for specified corporations from out-of-state. This section allows for the expedited production of records from out-of-state corporations that provide electronic communications services or remote computing services. This section is only available to a law

¹ For purposes of the statute, the term "foreign record of regularly conducted business activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country. The term "business" means any business, institution, association, profession, occupation, or calling of any kind, whether or not conducted for profit. The term "foreign certification" means a written declaration, made and signed in a foreign country by the custodian of a foreign business record or another qualified person, that if falsely made would subject the maker to criminal penalty under the laws of that country

enforcement officer seeking and acting pursuant to a court order or subpoena under s. 16.56², s. 27.04³, s. 905.185⁴, or s. 914.04⁵, or a search warrant issued pursuant to s. 933.01⁶.

Subsection (1) provides a number of definitions for purposes of the new section, including but not limited to:

- “Electronic communication services” and “remote computing services” is to have the same meaning as provided in the Electronic Communications Privacy Act in 18 U.S.C. s. 2701 et al.
- “Out-of-state corporation” is any corporation qualified to do business in the state under s. 607.1501.
- “Properly served” means delivery by hand or in a manner reasonably allowing for proof of delivery if delivered by U.S. mail, overnight-delivery service or facsimile.

The term “business” is taken from the definition from the hearsay exception under s. 90.803(6)(a), F.S.

Under subsection (2), the following procedural provisions are only applicable to out-of-state providers of electronic communications services or remote computing services when the production of their records are sought pursuant to a subpoena, court order, or search warrant:

- The out-of-state corporation must provide all records within 5 business days after receipt or by the date indicated on a subpoena, if applicable.
- If there is a showing by the law enforcement officer that failure to produce the records within the 5 days would cause an adverse effect, the subpoena, court order, or warrant may require production in less than 5 days. Adverse cause is defined as one of the following consequences: danger to the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses or serious jeopardy to an investigation or undue delay of a trial.
- If the out-of-state corporation shows good cause for an extension, the court may grant the extension of time if an extension would not cause an adverse result.
- The out-of-state corporation may move to quash the subpoena, court order or warrant within 5 days and the court must decide the motion within 5 days thereafter.

Subsection (3) provides reciprocity provisions which require Florida corporations that provide electronic communications services or remote computing services to produce business records in response to a subpoena, court order or warrant issued from another state as if it had been issued by a Florida court. “Florida corporation” means any corporation or other entity that is regulated under chapter 607, F.S.

Subsection (4) provides absolute immunity to any Florida or out-of-state corporation that provides electronic communications services or remote computing services and any other party acting on behalf or for such corporation when providing such records, information, facilities or assistance pursuant to a subpoena, court order or warrant under this new section.

² This section relates to the Office of Statewide Prosecution and its jurisdiction.

³ This section relates to the authority of the state to summon and examine witnesses from throughout the state to appear before the state attorney.

⁴ This section relates to the authority of the state attorney to issue process to summon a witness to appear before the grand jury.

⁵ No person is excused from testifying or producing evidence on the basis of self-incrimination.

⁶ This section relates to the authority of any county or circuit court judge or committing magistrate to issue a search warrant.

Subsections (5), (6), and (7) pertain to the admission of evidence obtained under this new section. These subsections essentially restate the hearsay exception under s. 90.803(6)(a), F.S., with the exception that the required live testimony of the custodian or other qualified witness is replaced with the requirement of the out-of-state certification. "Out-of-state certification" is defined as a written declaration made and signed in another state or country by the custodian or another qualified person regarding the out-of-state record. The out-of-state certification must also attest that the record was made at or near the time the matter occurred or the information was transferred, that the record was kept in the course of a regularly conducted business activity, that the business activity was a regular practice, that the record if not the original is a duplicate, and that the records are authenticated. Records accompanied by this certification are not to be excluded unless the source of information or the method of preparation indicates lack of trustworthiness. In addition, records in the form of an opinion or diagnosis are not admissible unless they would otherwise be admissible under existing s. 90.701-90.705, F.S., relating to the admission of opinion and expert testimony, and the person whose opinion is recorded were to testify directly.

Subsection (8) requires a party intending to introduce into evidence records secured pursuant to this section to provide written notice of that intent to the other party at the arraignment or as soon thereafter as practicable or 60 days prior to a civil trial. A party opposing the admission of such records must file a motion and the matter must be determined by the court before the trial. Failure to oppose the admission of such records constitutes a waiver. However, the court can grant relief from the waiver upon cause shown.

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:

This bill raises territorial jurisdictional issues. No state may enact a law or exercise jurisdiction over persons or property when the person or property is neither located within the state nor has the requisite substantial contacts with the state. Without personal jurisdiction, a court has no power to adjudicate a claim or obligation. *See Pennoyer v. Neff*, 95 U.S. 714 (1877). Due process requires that a defendant have minimum contacts with the forum state before the court may exercise either general or specific jurisdiction over the defendant. While this bill does apply to any out-of-state corporation qualified to do business in this state under s. 607.1501, F.S., it would be for the court to decide whether there is a substantial nexus between the entity and the state to exercise jurisdiction whether by subpoena, court order or search warrant. It is unclear what authority and to what extent if

any a court would have to compel process from those persons or entities beyond its jurisdiction.

It is also uncertain what the force and effect is for Florida to unilaterally enact reciprocal jurisdiction as to Florida corporations or unilaterally grant civil immunity. However, historically there have been uniform acts relating to interstate extradition of witnesses and prisoners whereby reciprocity is recognized by participating states. *See e.g.* ch. 942, F.S.(extradition of witnesses). Other than California which enacted a much narrower version of this business records exception in 1999 that applies only to search warrants in criminal proceedings (California Penal Code s. 1524), it is unknown whether there is similar legislation in existence in any other state. In addition, the civil immunity provision can only have force and effect within Florida and whatever other participating state agrees to bound by the provisions of this state.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

To the extent that an out-of-state corporation complies with the subpoena, court order or search warrant and does not challenge the underlying validity or jurisdiction of the court, an out-of-state corporation will have to act quickly to preserve its right to challenge the content of such subpoena, order or warrant

This bill will also impact Florida corporations or entities regulated under ch. 607, F.S., however, only corporate providers of electronic communications services or remote computing services who may be subject to a subpoena, court order or search warrant issued from out-of-state , presuming the underlying subpoena, order or warrant is valid and there is proper jurisdiction.

C. Government Sector Impact:

According to the Office of Statewide Prosecution, the streamlined process for document request and production would facilitate the preparation and prosecution of complex multi-jurisdictional criminal cases involving organized crime groups and white collar crimes. To the extent the bill allows business records from out-of-state corporations doing business in Florida to be produced without going through formal witness extradition under chapter 942, F.S., the Office of Statewide Prosecution anticipates that it will save time and money, and provide for faster, less complicated trials.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary

Deletes the unnecessary word “or.”

#2 by Judiciary

Specifies that the criteria and scope of the subpoena, court order, or search warrant must meet those set forth in the federal Electronic Communications Privacy Act for purposes of the discoverable content of electronic communications.

#3 by Judiciary

Conforms language with the purpose of amendment #2.

#4 by Judiciary

Conforms language with the purpose of amendment #2.

#5 by Judiciary

Specifies that in civil cases, only a court order can be used to secure the contents of an electronic communication and that in criminal cases, only a search warrant or subpoena may be used.

#6 by Judiciary

Adds the inadvertently omitted term “court order.”