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: CS/SB 252

SPONSOR: Commerce and Economic Opportunities Committee and Senator King

SUBJECT: Release of Employee Information by Employers

DATE: March 16, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gillespie	Maclure	CM	Favorable/CS
2.	Forgas	Johnson	JU	Favorable
3.				
4.				
5.				
6.				

I. Summary:

The CS for SB 252 requires current and former employers of an applicant seeking employment as a law enforcement officer, correctional officer, or correctional probation officer to provide employment information about the applicant to the employing agency as part of a background investigation.

The committee substitute allows employers to be sued if they refuse to disclose employment information to an employing agency. The committee substitute also protects employers by allowing them to charge fees for furnishing records, providing them immunity from liability when releasing employment information as required, directing that they are not required to maintain employment information other than that kept in the ordinary course of business, and exempting from disclosure information that any other state or federal law prohibits disclosing and information that is subject to a legally recognized privilege the employer is otherwise entitled to invoke.

This committee substitute creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Background Investigations Required

Current law establishes minimum qualifications for the employment of law enforcement officers, correctional officers, and correctional probation officers. These minimum qualifications require an officer to have a "good moral character."[1] Before employing or appointing an officer, the

[1] Section 943.13(7), F.S.

employing agency must conduct a thorough background investigation to determine, among other things, whether the applicant has a good moral character.[2] These background investigations are conducted using procedures established by the Criminal Justice Standards and Training Commission (commission).[3] The employing agencies required to conduct background investigations are those listed in s. 943.10(4), F.S.:

> "Employing agency" means any agency or unit of government or any municipality or the state or any political subdivision thereof, or any agent thereof, which has constitutional or statutory authority to employ or appoint persons as officers. The term also includes any private entity which has contracted with the state or county for the operation and maintenance of a nonjuvenile detention facility.

Under current law, information obtained from these background investigations should include the facts and reasons for the applicant's previous separations from private or public employment or appointment.[4] These items include any firing, termination, resignation, retirement, or voluntary or involuntary extended leave of absence from any salaried or nonsalaried position.[5]

To implement current law, the commission has adopted rules that provide minimum background investigation procedures. These minimum procedures include:[6]

- Neighborhood checks by attempting, where practical, to have a contact interview with at least three neighbors of the applicant within the previous three years.
- Previous employment data obtained from prior employers.
- Local law enforcement records, Florida Crime Information Center records, National Crime Information Center records, and military records.
- Questioning of the applicant regarding any history of prior unlawful conduct.
- Questioning of the applicant regarding any unlawful drug use.

Employers Not Required to Release Records

While current law requires employing agencies to conduct background investigations, no existing statute requires a private employer to release employment information to the employing agency. The employment records of public employees are, however, subject to disclosure under ch. 119, F.S.[7]

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[2] Sections 943.13(7) and 943.133(1) and (3), F.S.

[3] Sections 943.13(7) and 943.133(3), F.S.

[4] Section 943.133(3), F.S.

[5] *Id.*

[6] Rule 11B-27.0022(2), F.A.C.

[7] *Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985).

Employers Immune from Civil Liability

Employers that disclose information about current or former employees have qualified immunity from civil liability.[8] Specifically, a current or former employer is only liable for disclosing information to a prospective employer if it is shown by clear and convincing evidence that the information was knowingly false or violated the employee's civil rights.[9]

III. Effect of Proposed Changes:

Employers Will Be Required to Release Records

The committee substitute requires the current and former employers (or their agents) of an applicant seeking employment as a law enforcement officer, correctional officer, or correctional probation officer to provide the officer or an agent of the officer, who is conducting a background investigation of the applicant, with "employment information concerning the applicant." The committee substitute defines "employment information" as including, but not limited to, written information relating to job applications, performance evaluations, attendance records, disciplinary matters, reasons for termination, and eligibility for rehire, and other information relevant to an officer's performance. The committee substitute does not require disclosure of information that any other state or federal law prohibits disclosing. In addition, the committee substitute exempts from disclosure "information that is subject to a legally recognized privilege the employer is otherwise entitled to invoke."

When requesting employment information from the employer, the committee substitute requires the investigating officer or agent to present credentials demonstrating his or her employment with the employing agency and an authorization form for release of the information, which was designed and approved by the Criminal Justice Standards and Training Commission. The form must: (1) have been executed by the applicant no more than 1 year before the request; (2) contain a statement that the authorization has been specifically furnished to the employing agency presenting the authorization; and (3) bear the authorized signature of the applicant.

The committee substitute defines the term "employing agency" to have the same meaning as that term is currently defined in s. 943.10, F.S. The committee substitute also requires release of employment information regardless of whether the applicant is seeking temporary or permanent employment or appointment as a full-time, part-time, or auxiliary officer.

Enforcement

If an employer refuses to disclose employment information to an employing agency as required, the committee substitute provides that the employing agency has grounds for a civil action for injunctive relief requiring disclosure on the part of the employer.

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[8] Section 768.095, F.S.

[9] *Id.*; *see also Linafelt v. Beverly Enterprises-Florida, Inc.*, 745 So. 2d 386, 389 (Fla. 1st DCA 1999) (burden is on employee to demonstrate by clear and convincing evidence that former employer's statement to prospective employer was knowingly false, deliberately misleading, or rendered with a malicious purpose).

Protections for Employers

The committee substitute includes several protections for employers, including:

- Employers are not required to maintain employment information other than that kept in the ordinary course of business.
- Employers are not required to disclose information that is subject to a legally recognized privilege the employer is otherwise entitled to invoke.
- Employers are allowed to charge a reasonable fee to cover the actual costs incurred by the employer in copying and furnishing documents.
- Employers who release employment information as required are presumed to have acted in good faith and are not liable for releasing the information unless it is proved the employer maliciously falsified the information.

It is noted, however, that the committee substitute imposes limits on the employer immunity from liability which are different from the limits placed on the existing employer immunity in current law.[10] Section 768.095, F.S., grants immunity unless it is proved by clear and convincing evidence that the information disclosed by the employer was *knowingly false* or violated the employee's civil rights. Conversely, the committee substitute creates a presumption that the employer acted in good faith and grants immunity unless it is proved the employer *maliciously falsified* the information. To avoid possible confusion, the Legislature may wish to amend the committee substitute to use a uniform standard for employer immunity from liability.

It is further noted that the committee substitute exempts from disclosure "information that is subject to a *legally recognized privilege* the employer is otherwise entitled to invoke."[11] Because the term "legally recognized privilege" is not defined, the Legislature may also wish to amend the committee substitute to define the term in order to promote the consistent application of this provision by both employing agencies and employers.

Effective Date

The committee substitute takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Section 24(a), Art. I of the State Constitution, provides that: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf,

[10] *See* s. 768.095, F.S.

[11] (Emphasis added.)

except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." There is no statutory or constitutional exemption for the employment information that is required to be disclosed by the committee substitute.[12] Accordingly, when an employer provides an applicant's employment information to an employing agency as required, that information becomes a public record.

If the Legislature wishes an applicant's employment information to be confidential after it is provided to an employing agency, a statutory exemption must be enacted. Under s. 24(c), Art. I of the State Constitution, a separate bill creating this exemption would need to be introduced.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Right of Privacy

The right of privacy, as expressed in s. 23, Art. I of the State Constitution, provides that, "[e]very *natural person* has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."[13] A statute that infringes upon this right is subject to strict scrutiny; that is, the statute must serve a compelling state interest and must accomplish its goal through the least intrusive means.[14]

With regard to the committee substitute, an applicant waives any right of privacy when he or she completes the authorization form for release of the employment information. It is less clear, however, whether an employer has any right of privacy in its employment information. It may be argued that an employer does not have standing to assert a right of privacy in its employment information because the right extends only to the private matters of "natural persons."[15] The Florida courts, however, have not expressly addressed this issue.

Even if the Florida courts were to rule that an employer may assert a right of privacy in its employment information, the committee substitute would not be unconstitutional if required release of this information served a compelling state interest that was accomplished by the least intrusive means. For example, the Florida Supreme Court has upheld The Florida Bar's

[12] *See Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985).

[13] (Emphasis added.)

[14] *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998).

[15] *See CNA Financial Corp. v. Local 743 of Int'l Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America*, 515 F. Supp. 942, 946 (N.D. Ill. 1981) (the right of privacy is a personal right which does not protect corporations); *H&M Associates v. City of El Centro*, 109 Cal. App. 3d 399, 167 Cal. Rptr. 392 (Cal. 4th Dist. Ct. App. 1980) (limited partnership may bring a claim for invasion of privacy).

requirement that bar applicants must disclose prior psychiatric treatment history.[16] The Court wrote that the "state's interest in ensuring that only those fit to practice law are admitted to the Bar is a compelling state interest."[17] Similarly, it may be argued the state has a compelling interest in ensuring that only those applicants who are fit to be officers should be employed by law enforcement agencies.

It may also be argued the committee substitute contemplates the least intrusive means because obtaining employment information directly from the employer is the only way to avoid the possibility of an applicant altering the information. In addition, the committee substitute describes what type of information is being requested: "written information relating to job applications, performance evaluations, attendance records, disciplinary matters, reasons for termination, and eligibility for rehire, and other information relevant to an officer's performance." Obtaining these types of employment information from the employer might also be shown to be the least intrusive means because this information, it may be argued, is unavailable from any source other than the employer.

First Amendment

The United States Supreme Court has repeatedly invalidated government regulations that compel persons to convey a certain message on First Amendment freedom of speech grounds. For example, in *West Virginia Bd. of Education v. Barnette*, a state regulation requiring public school students to salute the flag was challenged.[18] Similarly in *Wooley v. Maynard*, a statute making it a crime to obscure the state motto "Live Free or Die" on state license tags was challenged.[19] In these cases, the Supreme Court held the regulations were unconstitutional because they impinged on the First Amendment freedom of speech. The Court wrote that the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[20]

Using similar reasoning to these compelled speech cases, the United States Supreme Court has also invalidated government regulations requiring disclosure of information from certain groups on the grounds that these regulations violated the First Amendment freedoms of assembly and association. For example, in *Gibson v. Florida Legislative Investigation Committee*, a legislative committee asked the president of the Miami branch of the National Association for the Advancement of Colored People (NAACP) to identify the organization's members, and the president was held in contempt when he refused to disclose this

[16] *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71 (Fla. 1983).

[17] *Id*. at 75.

[18] *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); *see also Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (holding that the utilities commission could not require Pacific Gas & Electric to distribute correspondence in customer bills).

[19] *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977).

[20] *Id*., 430 U.S. at 714, 97 S. Ct. at 1435 (quoting *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 637, 63 S. Ct. 1178, 1185, 87 L. Ed. 1628 (1943)).

information.[21] The Supreme Court reversed the contempt adjudication, holding the legislative inquiry unconstitutional because requiring the organization to disclose its membership list was a significant encroachment on the organization's freedom of association and because the state could not prove that disclosure of the information served a compelling state interest.[22]

The United States Supreme Court has also ruled that First Amendment concerns over government regulations that involve compelled statements of opinion are not distinguishable from concerns about regulations that compel disclosure of facts. "[E]ither form of compulsion," the Court wrote, "burdens protected speech."[23] While the committee substitute does not require an employer to express his or her opinion through a subjective job recommendation, compelled disclosure of factual employment information in the employer's records, thus it appears, is subject to the same scrutiny.

Based on these First Amendment cases, it may be argued the committee substitute's requirement that an employer disclose "employment information concerning the applicant" is compelled speech that unconstitutionally impinges on the right to refrain from speaking. Such an argument would be one of first impression because it appears the courts have not heard a challenge to a regulation exactly like that created by the committee substitute. Several factors, however, militate against a finding that the committee substitute's regulation is unconstitutional like those in the cases discussed above.

First, unlike the regulations in *West Virginia* and *Wooley*, the committee substitute does not require individuals to convey a certain message; rather, it only requires disclosure of employment information, the content of which is left to the discretion of the employer. Further, the committee substitute specifically directs that employers are not required to maintain employment information other than that kept in the ordinary course of business. Second, unlike *Gibson*, the committee substitute does not require disclosure of an organization's membership; instead, it only requires disclosure of information about an applicant who has given his or her express authorization to the disclosure. Third, the types of information the committee substitute requires to be disclosed have routinely been available by subpoenas issued through the judiciary and regulatory agencies. Based on these distinguishing factors, the committee substitute does not appear to violate the First Amendment; however, given the lack of case law on the specific issue presented by the committee substitute, how the courts would rule if presented with a First Amendment challenge cannot be positively stated.

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[21] *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963).

[22] *Id.*; *see also Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960) (holding unconstitutional a statute that required schoolteachers to annually report the organizations to which they belong as a condition of employment); *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (reversing state requirement that NAACP identify its membership).

[23] *Riley v. National Fed'n of the Blind of North Carolina*, 487 U.S. 781, 797-98, 108 S. Ct. 2667, 2678, 101 L. Ed. 2d 669 (1988).

Even if the courts found that the committee substitute infringes upon the right to refrain from speaking, the committee substitute would not necessarily be unconstitutional.[24] The Florida Supreme Court has ruled a statute that infringes upon the freedoms of speech and association is constitutional if the statute serves a compelling state interest and is narrowly tailored to serve that interest.[25] This test is very similar to the strict scrutiny test applied when a regulation impinges upon the right of privacy, as discussed above. Here it may be argued the state has a compelling interest in ensuring that only those applicants who are fit to be officers should be employed by law enforcement agencies. It may also be argued that the committee substitute uses the narrowly tailored means of requiring the employer to produce the employment information, thereby ensuring the information has not been altered by the applicant.

Finally, with regard to both the right of privacy and First Amendment concerns, even if the courts were to rule that certain types of employment information may not be disclosed, the committee substitute exempts from disclosure "information that any other state or federal law prohibits disclosing," as well as "information that is subject to a legally recognized privilege the employer is otherwise entitled to invoke."

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The committee substitute allows employers to charge a reasonable fee to cover the actual costs incurred by the employer in copying and furnishing documents.

C. Government Sector Impact:

The Florida Department of Law Enforcement describes the fiscal impact of the committee substitute as nominal. The committee substitute allows employers to charge a reasonable fee to cover the actual costs incurred by the employer in copying and furnishing documents. These charges will, presumably, be paid by the employing agencies. Conversely, the committee substitute should reduce the time necessary for employing agencies to conduct background investigations and should eliminate or reduce the need to obtain employment information from sources other than employers.

VI. Technical Deficiencies:

None.

[24] *State by Butterworth v. Republican Party of Florida*, 604 So. 2d 477 (Fla. 1992).

[25] *Id*. at 480.

VII. Related Issues:

None.

VIII. Amendments:

None.