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HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIME PREVENTION, CORRECTIONS, AND SAFETY
ANALYSIS

BILL #: HB 261

RELATING TO: Law Officer/Background Investigation

SPONSOR(S): Representative Jordan

TIED BILL(S): None

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

(1) JUDICIAL OVERSIGHT YEAS 9 NAYS 0
(2) CRIME PREVENTION, CORRECTIONS, AND SAFETY
(3) SMARTER GOVERNMENT
(4)
(5)

I. SUMMARY:

HB 261 requires the current and former employers of an applicant seeking employment as a law enforcement officer, correctional officer, or correctional probation officer to provide the officer who is conducting a background investigation of the applicant with employment information concerning the applicant. The bill 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, except information that any other state or federal law prohibits disclosing."

The bill 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 when requesting employment information from the employer. 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.

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

The bill creates a presumption that an employer who releases information pursuant to the bill acted in good faith and is not liable for that action unless the employer maliciously falsified the information.

The bill does not require employers to maintain employment information other than that kept in the ordinary course of business.

The bill takes effect upon becoming a law.

The Committee on Judicial Oversight adopted an amendment to clarify that employers do not have to provide information that is protected by a legally recognized privilege. The amendment is traveling with the bill.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No [x]	N/A []
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

For any principle that received a "no" above, please explain:

The bill requires employers to provide information that, under current law, an employer could refuse to provide. It creates a cause of action to enforce the requirement.

B. PRESENT SITUATION:

Section 943.13, F.S., 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." See ss. 943.13(7), 943.133, F.S. Before employing or appointing an officer, the employing agency must conduct a background investigation to determine, among other things, whether the applicant has a good moral character. See s. 943.13(7), F.S. These background investigations are conducted using procedures established by the Criminal Justice Standards and Training Commission (commission). See s. 943.133, F.S., Rule 11B-27.0022(2), F.A.C. 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. These items include any firing, termination, resignation, retirement, or voluntary or involuntary extended leave of absence from any salaried or nonsalaried position. See s. 943.133(3), F.S.

To implement current law, the commission has adopted rules that provide minimum background investigation procedures. These minimum procedures include attempting to have a contact interview with at least three neighbors of the applicant within the previous three years, obtaining previous employment data from prior employers, obtaining records from local, state, and national law enforcement, questioning of the applicant regarding any history of prior unlawful conduct, and questioning of the applicant regarding any unlawful drug use. See Rule 11B-27.022(2), F.A.C.

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 chapter 119, F.S.

Employers that disclose information about current or former employees have qualified immunity from civil liability. 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. See s. 768.095, F.S.

C. EFFECT OF PROPOSED CHANGES:

The bill 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 bill 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, except information that any other state or federal law prohibits disclosing."

The bill 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 when requesting employment information from the employer. The form is to be 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 bill defines the term "employing agency" to have the same meaning as that term is currently defined in s. 943.10, F.S. The bill 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.

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

The bill creates a presumption that an employer who releases information pursuant to the bill acted in good faith and is not liable for that action unless the employer maliciously falsified the information.

The bill does not require employers to maintain employment information other than that kept in the ordinary course of business.

The bill permits an employer to charge a reasonable fee to cover the actual costs incurred by the employer in copying and furnishing the documents to law enforcement agencies.

The bill takes effect upon becoming a law.

D. SECTION-BY-SECTION ANALYSIS:

See Section II.C. Effect of Proposed Changes

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill permits employers to charge a reasonable fee to cover the actual costs in copying and furnishing documents to employing agencies so the economic impact on the private sector should be minimal.

D. FISCAL COMMENTS:

The fiscal impact on state and local governments is indeterminate. It is not known whether payment of the costs for copying and furnishing documents to the agency would be significant.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities 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 municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

First Amendment

The United States Supreme Court has 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, 319 U.S. 624 (1943), a state regulation requiring public school students to salute the flag was challenged. Similarly, in Wooley v. Maynard, 430 U.S. 705 (1977), a statute making it a crime to obscure the state motto "Live Free or Die" on state license tags was challenged. In these cases, the 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." Wooley, 430 U.S. at 714.

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, 372 U.S. 539 (1963), a legislative committee asked the president of the Miami branch of the NAACP to identify the organization's members and the president was held in contempt when he refused to disclose this information. The 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.

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." Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 797-798 (1988). While the bill 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 might be subject to the same scrutiny.

Based on these First Amendment cases, it may be argued the bill's requirement that an employer disclose "employment information concerning the applicant" is compelled speech that unconstitutionally burdens 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 like that created by the bill.

However, it can be argued that this bill is distinguishable from the regulations discussed in Barnette and Wooley. First, unlike the regulations in Barnette and Wooley, the bill 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 bill 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 bill 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 bill requires to be disclosed have routinely been available by subpoenas issued through the judiciary and regulatory agencies. Based on these distinguishing factors, it can be argued that the bill does not violate the First Amendment.

Further, 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. See State by Butterworth v. Republican Party of Florida, 604 So. 2d 477 (Fla. 1992). 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 bill 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.

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." 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. See Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998).

Under the bill, 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." The Florida courts have not 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 bill 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 court has upheld the Florida Bar's requirement that bar applicants must disclose prior psychiatric treatment history. See Florida Board of Bar Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1983). 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." 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 bill uses 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 bill 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 may only be available from the employer.

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

The bill creates a presumption that an employer who reveals information pursuant to the bill acts in good faith. In order to overcome the presumption, the bill requires a plaintiff to show that the employer maliciously falsified the information. However, it does not say what standard of proof that a plaintiff must meet in order to prevail. Section 768.095, F.S., says that an employer who provides employment information is immune from civil liability unless it is shown by clear and convincing evidence that the information was knowingly false or violated a civil right protected by Chapter 760, Florida Statutes. It could be argued that the "clear and convincing" evidence standard would apply

under this bill. In Linafelt v. Beverly Enterprises, 745 So. 2d 386 (Fla 1st DCA 1999), the court noted that that a version s. 760.095, which included the clear and convincing standard, was a codification of common law. See also Thomas v. Tampa Bay Downs, Inc., 761 So. 2d 401, 405 (Fla. 2d DCA 2000)(noting that s. 760.095 is a codification of the common law). It can be argued that since this bill is silent on the standard, it is intended that the common law standard of clear and convincing evidence should be applied. See s. 2.01, F.S. (common law in force in Florida unless in conflict with constitution or statute).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The Committee on Judicial Oversight adopted an amendment when it considered the bill on March 29, 2001. The amendment clarified that employers do not have to provide information that is protected by a legally recognized privilege and made technical changes. The amendment is traveling with the bill.

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:	Staff Director:
L. Michael Billmeier	Lynne Overton

AS REVISED BY THE COMMITTEE ON CRIME PREVENTION, CORRECTIONS, AND SAFETY:

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