

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

The bill requires private consumer reporting agencies to provide up to twelve free credit reports upon the receipt from a victim of identity theft of a police report prepared pursuant to the provisions of the bill. This restricts the ability of credit companies to charge their normal fee for their work product.

B. EFFECT OF PROPOSED CHANGES:

Statewide Grand Jury – Identity Theft

The Sixteenth Statewide Grand Jury of Florida was impaneled on July 17, 2001, and was seated in the Ninth Judicial Circuit to investigate the issues involved in identity theft. The panel was authorized by the Florida Supreme Court at the request of Governor Jeb Bush. The grand jury heard testimony from several law enforcement agencies, representatives of the banking industry, credit card industry and credit reporting industry and from victims of identity theft. The grand jury released two interim reports as well as a final report on November 12, 2002. The reports contained extensive findings and recommendations relating to improving the security of drivers licenses, changing Florida’s public records laws, and increasing governmental assistance to victims of identity theft.

Arrest Information

Section 901.36, F.S. makes it a first degree misdemeanor for a person who has been arrested to give a false name to a law enforcement officer or county jail personnel. If a violation of the section results in another person being adversely affected by the unlawful use of his or her name or other identification, the offense is a third degree felony. In sentencing a person for a violation of this section, a court may issue such orders as are necessary to correct any public record because it contains a false name or other false identification given in violation of this section.

The Florida Department of Law Enforcement maintains the central repository of criminal history information, such as information pertaining to arrests, that is submitted by local or state law enforcement agencies.¹ Section 943.0581, F.S. authorizes the Department of Law Enforcement to promulgate a rule for the administrative expunction of any nonjudicial record of an arrest made “contrary to law or by mistake”. The relevant rule authorizes the chief law enforcement officer of the arresting agency in Florida to request an administrative expunction of a particular record of an arrest made by the agency.² The rules also authorize an individual to request that the chief law enforcement officer request an administrative expunction and provides procedures by which an individual can secure an administrative correction of the criminal history record.³

¹ Section 943.05, F.S.

² Section 11C-7.008, F.A.C.

³ Sections 11C-7.008(5) and 11C-8.001, F.A.C.

FDLE also allows a person who believes that their identity has been used by a person who has been arrested to submit a “compromised identity claim”.⁴ The victim must submit his or her fingerprints to the department who will then compare them against their criminal history files. If the fingerprint check indicates that the victim’s personal information wrongly appears in an arrest record, the department will provide the victim with a certificate and work with local law enforcement to attempt to clear the information from the criminal history records. Additionally, there are currently statutory provisions which govern court ordered expunction and sealing of criminal history records relating to an arrest.⁵

Criminal Use of Personal Identification Information:

Section 817.568, F.S., provides that any person who willfully and without authorization fraudulently uses or possesses with intent to fraudulently use, personal identification information⁶ concerning an individual without first obtaining that person’s consent commits a third degree felony. This offense is commonly known as “identity theft”. The section also provides for enhanced penalties as follows:

- If the value of the pecuniary benefit, services received or injury is \$5,000 or more or if the person fraudulently uses the personal identification information of ten or more individuals without their consent, the offense is a second degree felony and the judge must impose a three year minimum mandatory term of imprisonment.
- If the value of the pecuniary benefit, services received or injury is \$50,000 or more or if the person uses the personal identification information of 20 or more individuals, the offense is a first degree felony and the judge must impose a five year minimum mandatory sentence.
- If the value of the pecuniary benefit, services received or injury is \$100,000 or more or if the person uses the personal identification information of 30 or more individuals, the offense is a first degree felony and the judge must impose of a ten year minimum mandatory sentence.

This section also provides penalties for the offense of harassment⁷ by use of personal identification information as well as using a public record to commit identity theft.⁸ Further, the section provides penalties if an offense prohibited under the section was committed using the personal identification information of a individual less than 18 years of age.⁹

Changes made by HB 741

HB 741 creates a new, undesignated section of statute which is titled “Identity Theft; Criminal Penalty” and provides that:

Every person who willfully obtains personal identifying information of another person and uses that information for any unlawful purpose, including, but not limited to, obtaining or attempting to obtain credit, goods, services, or medical information in the name of the other person without the consent of that person, or

⁴ <http://www.fdle.state.fl.us/ComplD/>

⁵ Sections 943.0585 and 943.059, F.S.

⁶ This section defines “personal identification information” to mean any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any: 1) Name, social security number, date of birth, official state-issued or United States-issued driver’s license or identification number, alien registration number, government passport number, employer or taxpayer identification number, or Medicaid or food stamp account number, or bank account or credit card number; 2) Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation; 3) Unique electronic identification number, address, or routing code; or 4) Telecommunication identifying information or access device.

⁷ The term “harass” means to engage in conduct directed at a specific person that is intended to cause substantial emotional distress to such person and serves no legitimate purpose. s. 817.568(1)(c), F.S.

⁸ 817.568(4) and (5), F.S.

⁹ s. 817.568(6) and (7), F.S.

who, with the intent to defraud, acquires, transfers or retains possession of the personal identifying information of another person, commits identity theft, a misdemeanor of the first degree.....

The bill provides a definition of the term "personal identifying information" that is similar but not identical to the definition contained in section 817.568.¹⁰

The bill provides that, in any case in which a person willfully obtains personal identifying information of another person, uses that information to commit a crime in addition to identity theft and is convicted of that offense, the court records shall reflect that the person whose identity was falsely used to commit the crime did not commit the crime.

The bill also permits a person, who has learned or reasonably suspects that his or her personal identifying information has been unlawfully used by another, to initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over his or her residence. The bill requires the law enforcement agency to make a police report and provide the complainant with a copy and begin an investigation of the facts or refer the matter to the law enforcement agency where the suspected crime was committed.

The bill provides that a person who reasonably believes that he or she is the victim of identity theft may petition a court, or a court on its own motion or upon application of a prosecuting attorney may move for "an expedited judicial determination of such person's factual innocence" when:

1. the perpetrator of the identity theft was arrested for, cited for, or convicted of a crime under the victim's identity;
2. a criminal complaint has been filed against the perpetrator in the victim's name; or
3. the victim's name has been mistakenly associated with a record of a criminal conviction

The bill provides that any judicial determination of factual innocence made pursuant to the section may be heard and determined upon declarations, affidavits, police reports, or other material, relevant, and reliable information submitted by the parties or ordered to be part of the record by the court. If the court determines that the petition or motion is meritorious and that there is no reasonable cause to believe that the victim committed the offense for which the perpetrator of the identity theft was arrested, cited, convicted, or subject to a criminal complaint in the victim's name, or that the victim's identity has been mistakenly associated with a record of criminal conviction, the court shall find the victim factually innocent of that offense. The bill requires the court to issue an order certifying the determination of factual innocence.

The bill provides that after a court has issued a determination of factual innocence, the court may "order the name and associated personal identifying information contained in court records, files and indexes accessible by the public to be deleted, sealed or labeled to show that the data is impersonated and does not reflect the defendant's identity." The bill requires the Florida Supreme Court to develop a form for use in issuing an order pursuant to this provision.

¹⁰ For example, the definition contained in HB 741 does not list a Medicaid or food stamp number. Further, the definition contained in the bill lists a number of terms not contained in s. 817.568 including: address, telephone number, health insurance identification number, school identification number, place of employment, mother's maiden name, demand deposit account number, savings account number, checking account number, personal identification number or password, facial scan identifiers and information contained in a birth or death certificate.

The bill requires every consumer reporting agency¹¹ to provide, upon request, any consumer who has reason to believe he or she has been a victim of identity theft with a description of the legal rights of victims of identity theft. Further, the bill requires every consumer credit reporting agency to supply a free copy of the victim's file, upon receipt from a victim of identity theft of a police report or a investigative report made by a Department of Highway Safety and Motor Vehicles investigator who is a law enforcement officer. The bill requires the consumer reporting agencies to provide the victim, free of charge, with up to 12 copies of his or her file during a consecutive 12 month period, not to exceed one copy per month, following the date of the police report.

The bill further provides that a consumer credit reporting agency that acts only as a reseller of credit information by assembling and merging information contained in the database of another consumer credit reporting agency and that does not maintain a permanent database of credit information from which new credit reports are produced does not have an obligation to provide a victim with a description of his or her legal rights upon request. This type of consumer credit reporting agency would apparently be obligated to provide the free credit reports required by the bill.

C. SECTION DIRECTORY:

Section 1: Creates undesignated section of law providing a criminal penalty for identity theft; authorizes person to initiate law enforcement investigation in certain instances; authorizes victim to petition court for determination of factual innocence; authorizes deletion, sealing, or labeling of court records; requires consumer credit reporting agencies to furnish copies of credit reports free of charge to victim.

Section 2. Provides effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill authorizes a person who to petition for an "expedited judicial determination of such person's factual innocence" in certain instances. This may create additional workload for courts who are obligated to hear and rule on these petitions.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The bill authorizes a person to initiate a law enforcement investigation by contacting the local law enforcement agency that has jurisdiction over the victim's residence and requires the agency to

¹¹ The bill refers to the definition of "credit reporting agency" contained in the federal "Fair Credit Reporting Act" which defines the term to mean:

[A]ny person which, for monetary fees, dues, or on a cooperative basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

Section 603(f) of the Fair Credit Reporting Act; codified at 15 U.S.C. 1681a.

make a police report, provide the complainant with a copy of the report and begin an investigation of the facts. To the extent that this requires local law enforcement to perform tasks that they would not otherwise perform, there may be some fiscal impact on local government.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires a consumer reporting agency, as defined by federal law, to provide, free of charge, up to twelve consumer reports each year upon the receipt of a police report by a victim of identity theft. Currently, these companies are authorized by federal law to charge up to 9 dollars for each copy.

D. FISCAL COMMENTS:

See above.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires the Florida Supreme Court to develop a form for use in issuing an order certifying that a petitioner is "factually innocent" of an offense.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Identity theft provision: The bill creates a first degree misdemeanor offense relating to identity theft which provides that:

Every person who willfully obtains personal identifying information of another person and uses that information for any *unlawful purpose*, including, but not limited to, obtaining or attempting to obtain credit, goods, services, or medical information in the name of the other person without the consent of that person, or who, with the intent to defraud, acquires, transfers or retains possession of the personal identifying information of another person, commits identity theft, a misdemeanor of the first degree.....

Section 817.568, F.S. currently provides the following:

[A]ny person who willfully and without authorization *fraudulently uses* or possesses with intent to fraudulently use, personal identification information concerning an individual without first obtaining that person's consent commits a third degree felony

It is not clear how the newly created provision can be distinguished from current law – one prohibits fraudulently using personal identification information and the other prohibits using personal identifying information for an unlawful purpose. Further, the current provision is a third degree felony while the new language is a first degree misdemeanor.

Judicial proceedings: The bill authorizes a person who reasonably believes that he or she is the victim of identity theft for an “expedited judicial determination of such person’s factual innocence” when the perpetrator of the identity theft was arrested for or convicted of a crime under the victim’s identity. The bill provides that a judicial determination of factual innocence may be heard and determined based on declarations, affidavits and police reports and other information submitted by the parties. It is not clear who, other than the petitioner, would be a “party” to this action and whether the action is to be considered criminal or civil in nature. As written, it would apparently require the petitioner to prove to the court that there is no reasonable cause to believe that he or she was not the person who was arrested or convicted of the crime in question. The bill authorizes the court to issue an order certifying that it has determined that the petitioner is “factually innocent” and order that information contained in court records, files and indexes “accessible by the public to be deleted, sealed or labeled to show that the data is impersonated and does not reflect the defendant’s identity”. It is not clear how this provision is intended to work in conjunction with the current statutes governing sealing and expunging of criminal history records.

Consumer credit reporting agencies: HB 741 requires every consumer credit reporting agency, upon receipt from a victim of identity theft of a police report, to provide the victim, free of charge, with up to 12 copies of his or her file during the one year period following the date of the police report – up to one copy a month for twelve months. In 2003, Congress passed the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) which amended the Fair Credit Reporting Act (FCRA). Under the provisions of this act, a consumer reporting agency must provide a consumer, upon request, with a free copy of his or her credit report once a year.¹² As amended, the FCRA apparently preempts state law in this area.¹³As a result, it does not appear that a state law could require a consumer credit reporting agency to supply a person with additional free copies of his or her credit report.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

¹² See Pub.L. 108-159 (s. 112(a) & 211); Sections 612 (a) and 609(a) of the Fair Credit Reporting Act; codified at 15 U.S.C. 1681 through 15 U.S.C. 1681x.

¹³ Section 625 of the FCRA (codified at 15 U.S.C. 1681t) provides that the federal act does not exempt any person from complying with state law with the respect to the distribution of information on consumers with certain exceptions. The provision states that no requirement may be imposed under the laws of any state with respect to the conduct required by the specific provisions of section 612(a) which is the provision requiring a consumer reporting agency to provide a free copy of a consumer’s file.