

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.)

Prepared By: Governmental Oversight and Productivity Committee

BILL: SB 308

SPONSOR: Senator Fasano

SUBJECT: Law Officer/Investigative Interview

DATE: April 22, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Wilson</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

The bill amends current law relating to the rights of law enforcement and correctional officers while under investigation by his or her own agency. The bill requires the investigating agency to interview all identifiable witnesses, whenever possible, and provide the officer with all witness statements and the complaint, before interviewing the accused officer.

This bill substantially amends section 112.532 of the Florida Statutes.

II. Present Situation:

Under the provisions of ss. 112.531 through 112.535, F.S., law enforcement officers and correctional officers are accorded certain rights when they are faced with an investigation by their own agency. This part of ch. 112, F.S., is commonly referred to as the "Law Enforcement Officers' Bill of Rights."

Section 112.532(1), F.S., sets forth the conditions under which an officer may be interrogated "whenever a law enforcement officer or correctional officer is under investigation and subject to interrogation by members of his or her agency for any reason which could lead to disciplinary action, demotion, or dismissal."

Section 112.532(2), F.S., sets forth the requirements for composition of a Complaint Review Board.

Section 112.532(4), F.S., requires that an officer be given notice of any action that may be considered a punitive measure, including dismissal, transfer, demotion, reassignment, or loss of

pay or benefits, prior to the effective date of the action. The officer must also be advised of the reasons for the action.

Subsection (5) of s. 112.532, F.S., prohibits discrimination against an officer by reason of his or her exercise of rights.

Section 112.533, F.S., specifically addresses the processing, investigation, and determination of complaints against an officer. Subsection (1) of s. 112.533, F.S., states:

“Every law enforcement *agency* and correctional agency *shall establish and put into operation a system for the receipt, investigation, and determination of complaints* received by such agency from any person, which shall be the procedure for investigating a complaint against a law enforcement and correctional officer and for determining whether to proceed with disciplinary action or to file disciplinary charges, *notwithstanding any other law or ordinance to the contrary.*” (emphasis added)

The complaint and information gathered during the investigation of the complaint are confidential and exempt from the provisions of s. 119.07(1), F.S., until the investigation ceases to be active or is concluded. Section 119.07(1), F.S., makes public records accessible to the public upon request. An investigation is presumed to be inactive if no finding is made within 45 days after the complaint is filed. s. 112.533 (2)(b), F.S.

The confidential nature of the information gathered during the investigation is protected by the potential for the criminal prosecution of a person who is a participant in the investigation (complainant, officer under investigation or his or her lawyer or other representative, investigator, witness) who willfully discloses the information. s. 112.533(4), F.S.

The officer who is the subject of the complaint, along with legal counsel or any other representative of his or her choice, has the right, under s. 112.533(2)(a), F.S., to review the complaint and all statements made by the complainant and witnesses immediately prior to the beginning of the investigative interview.

The information that has been gathered during the investigation is exempt from disclosure, both from the public and from the officer under investigation, if it is active criminal intelligence or criminal investigative information. s. 119.07(6), F.S. Subsection (2) of s. 112.533, F.S., *specifically invokes this exemption as it relates to the officer’s access to investigative information. (Palm Beach County PBA v. Neumann, 796 So.2d 1278 (Fla. 4th DCA 2001))*

A careful reading of subsection (2) indicates the following:

- The general rule is that the complaint and all information obtained pursuant to the investigation is confidential and exempt from public disclosure
 - until the investigation ceases to be active (presumed inactive 45 days after the complaint is filed and no finding is made; presumed active when the investigation is continuing with a reasonable, good faith anticipation that an administrative finding will be made in the foreseeable future. s. 112.533(2)(b), F.S.) *or*

- the officer under investigation is notified that the agency has *concluded its investigation with a finding not to proceed with disciplinary action or to file charges or*
- the officer is notified that the agency has made a finding to proceed with disciplinary action or to file charges.
- Notwithstanding the *foregoing*, the officer that is the subject of the complaint, and his or her attorney or other representative, may review the complaint and all statements made by the complainant and witnesses immediately prior to the investigative interview. (Note that where a witness is incarcerated and subject to the supervision of the officer under investigation, that witness's statement is not made available to the officer – only the name of the witness. s. 112.533(2)(a)2, F.S.)
- The provisions set forth above *do not apply to any public record exempt from disclosure under s. 119.07(6), F.S.* - active criminal intelligence information or active criminal investigation.

The Palm Beach County PBA case cited above involved an officer who was the subject of a disciplinary proceeding *and* who had been indicted by the grand jury for the misdemeanor offense of failure to report child abuse. The grand jury had not indicted on the proposed felony charge. The PBA filed a public records request for copies of the internal investigation file and the Palm Beach County Sheriff's Office refused to produce the records, citing the s. 119.07(6), F.S., *active criminal investigation* exemption. The trial court and the appeal court agreed that the PBA could not have the internal investigation records.

On appeal, the PBA acknowledged the exemption but argued that it requested records that went beyond the misdemeanor charge to the felony charge on which the grand jury did not indict. The court found, however, that all of the charges arose from the same facts, therefore the information was as pertinent to the misdemeanor as the felony and the exemption applied. *Id.* at 1281.

The case also addresses the issue of when an internal investigation is "concluded" with regard to disclosure of the investigation file outside the public records exemption recognized in s. 112.533(2)(a), F.S. In the Palm Beach County PBA case, the officer under investigation was offered a "pre-disposition" meeting – an opportunity to respond to the charges under investigation. The officer's union representative requested copies of the investigative file. The sheriff's office responded that the investigation was not concluded, under the provisions of s. 112.533(2)(a), F.S., and refused to provide the requested files.

The court found, after reviewing the internal investigation procedures followed by the sheriff's office, that the file was still subject to the exemption of s. 112.533(2), F.S. The court based its ruling on the following facts: "[T]he meeting with the investigated officer is part of the information gathering process. What the officer tells the investigators will be evaluated. Discipline is not an accepted fact at this point. There is no 'finding to proceed with disciplinary action or to file charges.' Therefore...the internal investigation file was still subject to the exemption of section 112.533(2)." *Id.* at 1280.

It should also be noted that the provisions of subsection (4) of s. 112.532, F.S., were amended by the Legislature in 2003 to include a new paragraph which states, in part:

“(b) *Notwithstanding the provisions of s. 112.533 (2), whenever a law enforcement officer or correctional officer is subject to disciplinary action consisting of suspension with loss of pay, demotion, or dismissal, the officer shall, upon request, be provided with a complete copy of the investigative report and supporting documents and with the opportunity to address the findings...prior to the disciplinary action.*” (emphasis added)

The Attorney General has opined that the 2003 amendment set forth above ensures that an “officer who is called to testify *before other witnesses in an internal investigation* has an opportunity to review and address *subsequent testimony* before any disciplinary action is taken” by the agency which involves suspension with loss of pay, demotion or dismissal. *Op. Att’y Gen. Fla. 2003-60, 2003 WL 22977530.* (emphasis added)

III. Effect of Proposed Changes:

Current law does not contain a particular order in which an agency must interview witnesses in an internal investigation, but it does give the officer under investigation the right to review and address statements made *both before and after* he or she has been interviewed.

The bill would require that an agency interview all identifiable witnesses in an internal investigation before the officer under investigation is interviewed, whenever possible. This could have the effect of limiting agency discretion in how it conducts its investigation. It could also eliminate the need for a second interview, or opportunity for the officer to respond to subsequent witness statements, as provided for in current law (the 2003 revision of ss. 112.532 and 112.533, F.S.).

The bill also requires the investigating agency to provide the officer under investigation with the complaint and all witness statements prior to the investigative interview of the officer.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

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