

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1429 Child Predators
SPONSOR(S): Criminal Justice Subcommittee; Harrison
TIED BILLS: **IDEN./SIM. BILLS:** SB 1244

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	9 Y, 0 N, As CS	Homburg	White
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A subpoena is an order directed to a person which requires his or her attendance at a particular time and place to testify as a witness. A subpoena may also require the witness to bring documents or other tangible evidence which may be introduced as evidence in a case. The Sixth Amendment to the United States Constitution guarantees the defendant in a criminal case the right to have compulsory process for obtaining witnesses in his or her favor. Subpoenas may be issued in a criminal investigation or a criminal prosecution.

In some cases, federal and state law authorizes investigating authorities to issue a subpoena and require the recipient of the subpoena to not disclose the existence or contents of the subpoena. Such authority is provided in limited circumstances where disclosure of the subpoena could result in the destruction of evidence or other harm to the investigation.

This bill addresses the issuance of subpoenas in investigations involving sexual offenses against children. When issuing subpoenas in such investigations, the bill authorizes a criminal justice agency to impose a nondisclosure requirement on the recipient of the subpoena if the agency certifies in writing that disclosure of the subpoena could result in:

- Endangering a person's life or physical safety;
- Encouraging a person's flight from prosecution;
- Destruction of or tampering with evidence;
- Intimidation of potential witnesses; or
- Otherwise seriously jeopardizing an investigation or unduly delaying a trial.

A recipient of a subpoena that has a nondisclosure requirement, as authorized by the bill, may seek judicial review to have the subpoena or nondisclosure requirement modified or set aside.

The bill may have an indeterminate fiscal impact on the state court system. The bill does not appear to have a fiscal impact on local government. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra*.

This bill has an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Law

Subpoenas

A subpoena is an order directed to a person which requires his or her attendance at a particular time and place to testify as a witness. A subpoena may also require the witness to bring documents or other tangible evidence which may be introduced as evidence in a case.¹ The Sixth Amendment to the United States Constitution guarantees the defendant in a criminal case the right to have compulsory process for obtaining witnesses in his or her favor.² Subpoenas may be issued in a criminal investigation³ or in a criminal prosecution during discovery⁴ or for trial⁵ by the defendant, his or her counsel, or the state attorney. Generally, a subpoena must state the name of the court and the title of action and the time and the place at which the witness is commanded to give testimony or produce evidence.⁶ Once a witness is subpoenaed by either party, he or she must remain available for attendance until the case is resolved or until he or she is excused by the court hearing the case.⁷ A witness's failure to do so could result in being held in contempt of court.⁸

In some cases, a subpoena may require the recipient of the subpoena to not disclose the existence or contents of the subpoena. For example, Florida statute authorizes an agency that is investigating⁹ a violation of Florida's Racketeer Influenced and Corrupt Organizations (RICO) Act¹⁰ to issue a civil investigative subpoena for testimony or documents.¹¹ This subpoena is confidential for 120 days, meaning the recipient of the subpoena may not disclose its contents or existence to any person or entity other than his or her attorney during that period.¹² The 120-day period may be extended by a circuit court upon showing of good cause by the investigative agency.¹³ For good cause to exist, there must be a showing:

- Of sufficient factual grounds to reasonably indicate a violation of ss. 895.01 – 895.06, F.S.;
- That the documents or testimony requested appear reasonably calculated to lead to the discovery of admissible evidence; and
- Of facts that reasonably indicate that disclosure of the subpoena would hamper or impede the investigation, or would result in a flight from prosecution.¹⁴

¹ BLACK'S LAW DICTIONARY, *What is Subpoena?*, <http://thelawdictionary.org/subpoena/> (last visited March 20, 2017).

² U.S. Const. am. 6

³ Florida law authorizes certain entities to use subpoenas for the purpose of conducting criminal investigations, including, but not limited to, s. 409.920, F.S. (authorizing the Attorney General to subpoena witnesses or materials, including medical records, during an investigation for Medicaid fraud); s. 415.107, F.S. (authorizing a criminal justice agency investigating a report related to abuse, neglect, or exploitation of a vulnerable adult to subpoena related records); and s. 414.411, F.S. (authorizing Department of Financial Services to subpoena witnesses and records related to a public assistance fraud investigation).

⁴ Fla. R. Crim. P. 3.220 (h), allows any party to conduct a deposition by oral examination of any person authorized by the rule, generally including listed witnesses, co-defendants, or unlisted witnesses who have information relevant to the offense charged. The rule provides that the issuance of the subpoena for deposition is the same as provided for in the Florida Rules of Civil Procedure.

⁵ Fla. R. Crim. P. 3.361(a), provides that subpoenas for testimony before the court and subpoenas for production of tangible evidence before the court may be issued by the clerk of the court or by any attorney of record in the case.

⁶ *Id.*

⁷ s. 914.03, F.S.

⁸ *Id.*

⁹ In order to issue a subpoena, the level of proof required is that there must be "something more than a fishing expedition, and something less than probable cause." *Check 'n Go of Florida, Inc. v. State* 790 So.2d 454,458 (Fla. 5th DCA 2001).

¹⁰ The Racketeer Influenced and Corrupt Organizations Act was passed by Congress in 1970 as part of the Organized Crime Control Act of 1970. Florida passed its own RICO Act in 1977.

¹¹ s. 895.06, F.S.

¹² s. 895.06(2), F.S.

¹³ *Id.*

¹⁴ *Id.*

Upon failure of the person or enterprise to comply with the subpoena, the investigative agency may apply to the circuit court to enforce the subpoena.¹⁵

Similarly, federal law authorizes the Federal Bureau of Investigation (FBI) to issue a National Security Letter (NSL), which is an administrative subpoena that allows the FBI to require records from wire or electronic communication service providers if the records are relevant to investigations related to terrorism or clandestine intelligence activities.¹⁶ For such subpoenas, the FBI may require nondisclosure if the FBI certifies that disclosure may result in (i) a danger to the national security of the United States; (ii) interference with a criminal counterterrorism, or counterintelligence investigation; (iii) interference with diplomatic relations; or (iv) danger to the life or physical safety of any person.¹⁷

To avoid potential First Amendment concerns with such a restraint on speech, Congress passed the USA FREEDOM Act of 2015, which in relevant part authorizes a recipient of a NSL/subpoena to notify the Government or file a petition for judicial review if the recipient wishes to have a court review a nondisclosure requirement in such subpoena.¹⁸ Courts have upheld the FBI's authority to issue the subpoenas and the accompanying nondisclosure requirements because of the government interest in protecting national security and the provisions for judicial review included in the Act.¹⁹

Effect of the Bill

Definitions

The bill defines:

- "Child" as a person who is less than 18 years of age.
- "Criminal justice agency" as a law enforcement agency, court, or prosecutor in this state.
- "Sexual exploitation or abuse of a child" as a criminal offense based on any conduct described in s. 39.01(70), F.S. This definition includes sexual abuse of a child, engaging in sexual acts in front of or with a child, and engaging in human trafficking of a child.
- "Sexual offender" as a person who has been convicted of a sexual offense²⁰ against a child.

Issuing a Subpoena

Under the bill, a criminal justice agency is authorized to issue a subpoena for any investigation of an offense involving:

- The sexual exploitation or abuse of a child;
- A sexual offense alleged to have been committed by a sexual offender who has not properly registered; or
- An offense under ch. 847, F.S., involving a child that doesn't qualify under the first two prongs.

¹⁵ s. 895.06(4), F.S.

¹⁶ 18 U.S.C. § 2709(b)(1).

¹⁷ *Id.* at § 2709(c)(1)(B).

¹⁸ 18 U.S.C. § 3511(b)(1)(A).

¹⁹ *See, In re Nat'l Sec. Letters*, 2016 WL 7017215 (D.D.C. July 25, 2016); *In re Nat'l Sec. Letter*, 165 F.Supp.3d 352 (D. Md. 2015).

²⁰ The specified sexual offenses are the offenses for which a person must register as a sexual offender. These offenses include: s. 393.135(2), F.S. (sexual misconduct with an individual with a developmental disability); s. 394.4593(2), F.S. (sexual misconduct with a patient); ss. 787.01, (kidnapping), 787.02, (false imprisonment), or 787.025(2)(c), F.S. (luring or enticing a child), where the victim is a minor; s. 787.06(3)(b),(d),(f),(g), or former (h), F.S. (relating to human trafficking); s. 794.011, F.S. (sexual battery) excluding s. 794.011(10), F.S.; s. 794.05, F.S. (unlawful activity with certain minors); former s. 796.03, F.S. (procuring a person under the age of 18 for prostitution); former s. 796.035, F.S. (selling or buying of minors into sex trafficking or prostitution); s. 800.04, F.S. (lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age); s. 810.145(8), F.S. (relating to video voyeurism); s. 825.1025, F.S. (lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled person); s. 827.071, F.S. (sexual performance by a child); s. 847.0133, F.S. (prohibition of certain acts in connection with obscenity); s. 847.0135, F.S. (computer pornography and traveling to meet a minor) excluding s. 847.0135(6), F.S.; s. 847.0137, F.S. (transmission of pornography by electronic device or equipment); s. 847.0138, F.S. (transmission of material harmful to minors to a minor by electronic device or equipment); s. 847.0145, F.S. (selling or buying of minors); s. 916.1075(2), F.S. (sexual misconduct with a forensic client); or s. 985.701(1), F.S. (sexual misconduct with a juvenile offender).

s. 943.0435(1)(h)1.a.(I), F.S.

The subpoena may require the production of any relevant record, object, or other information relevant to the investigation and may also require the custodian of the record to testify as to its authenticity. The subpoena must identify and describe any record, object, or other information that is required to be produced or testified to and provide a reasonable return date by which the record, object, or information must be submitted.

Nondisclosure Requirement

The bill also allows a criminal justice agency to require that the recipient of the subpoena not disclose the existence or contents of the subpoena. In order for the subpoena to be subject to a nondisclosure requirement, it must be accompanied by a written certification that disclosure of the subpoena may result in one of the following circumstances:

- Endangering a person's life or physical safety;
- Encouraging a person's flight from prosecution;
- Destruction of or tampering with evidence;
- Intimidation of potential witnesses; or
- Otherwise seriously jeopardizing an investigation or unduly delaying a trial.

Upon such written certification, the recipient is prohibited from disclosing the contents or existence of the subpoena for 180 days, except that a recipient may disclose the subpoena and its contents to:

- A person to whom disclosure is necessary in order to comply with the subpoena;
- An attorney to obtain legal advice or assistance regarding the subpoena; or
- Any other person authorized by the state official issuing the subpoena.

A person to whom such disclosure is made is bound by the same nondisclosure requirements as the original recipient. A criminal justice agency may require the person disclosing the subpoena to provide the identity of the person to whom he or she is disclosing. If a person refuses to comply with the subpoena, the state official may request that the circuit court issue an order to comply. The circuit court may then issue an order, a violation of which may be punishable as contempt of court.

Petition Process and Judicial Review

The bill allows the person who receives the subpoena to challenge the requirements of the subpoena at any time before the return date by petitioning the circuit court of the county in which he or she lives. The bill also allows the subpoena recipient to challenge a nondisclosure requirement by filing a petition for judicial review in the circuit court or notifying the criminal justice agency that issued the subpoena. The petition may be for an order to modify or set aside the subpoena, or to modify or set aside the prohibition of disclosure of information.

Other Effects

Witnesses subpoenaed to testify are reimbursed for fees and mileage at the same rate at which witnesses Florida courts are reimbursed.²¹ A subpoena issued under the bill must not require the production of anything that is protected from production with a subpoena duces tecum issued by a Florida court.²²

The bill allows criminal justice agencies to require the production of documents as soon as possible, but the recipient of the subpoena must be given at least 24 hours after he or she is served to comply. The criminal justice agency must return any original documents or objects upon request, within a reasonable time, if prosecution does not occur.

²¹ Section 92.142, F.S. establishes the amount that witnesses in a court in Florida will be reimbursed for their time. Consideration is given to the length of testimony, the distance traveled, and the reason testifying.

²² A subpoena may request evidence that is relevant and admissible or is reasonably calculated to lead to admissible evidence. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995). Certain documents, such as materials prepared for trial or work products, are not discoverable under the Florida Rules of Civil Procedure. Fla. R. Civ. P. 1.280.

The bill provides that the service of a subpoena under this section may be served as provided in ch. 48, F.S.

The bill provides immunity from civil liability for persons disclosing information requested in the subpoena. This allows persons with information needed by the criminal justice agency to disclose it without fear that the person being investigated may sue them for disclosing the information.

B. SECTION DIRECTORY:

Section 1. Creates s. 794.10, F.S., relating to investigative subpoenas in certain cases involving child victims.

Section 2. Provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: This bill does not appear to have any impact on state government revenues.
2. Expenditures: The bill's provisions authorizing judicial review of the subpoenas and nondisclosure requirements may increase judicial workload. The fiscal impact of such increase is indeterminate.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: This bill does not appear to have any impact on local government revenues.
2. Expenditures: This bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: This 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: This bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 21, 2017, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute (CS). The amendment:

- Added definitions for the terms “child” and “criminal justice agency.”
- Clarified that a failure to comply with the nondisclosure requirements of a subpoena under the section is punishable by contempt of court.
- Eliminated duplicative text through the use of internal cross-references.

This analysis is drafted to the CS as passed by the Criminal Justice Subcommittee