

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 1002

INTRODUCER: Senator Rodriguez

SUBJECT: Subpoenas

DATE: January 13, 2020

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|-----------------|----------------|------------|--------------------|
| 1. | <u>Elsesser</u> | <u>Cibula</u> | <u>JU</u> | <u>Pre-meeting</u> |
| 2. | _____ | _____ | <u>ACJ</u> | _____ |
| 3. | _____ | _____ | <u>AP</u> | _____ |

I. Summary:

SB 1002 expands the methods by which a law enforcement officer may effect service of an investigative subpoena, court order, or search warrant on an out-of-state corporation that provides electronic communication services or remote computing services. As expanded, service of the documents may be had on the corporation’s registered agent under the laws of the state in which service will be effected. The bill also states that out-of-state corporations doing business in Florida through the Internet may be served at any location where the corporation regularly accepts service.

The bill also specifies the means to enforce a subpoena on an in-state or out-of-state corporation that provides electronic communication services or remote computing services. If a corporation fails to comply with a properly-served subpoena, the bill allows a court, upon petition from the authority seeking the subpoena, to hold the non-complying corporation in indirect criminal contempt, and subject the entity to fines.

II. Present Situation:

A subpoena is a written order to compel an individual to give testimony on a particular subject, often before a court, but sometimes in other proceedings.¹ A subpoena duces tecum is a type of subpoena that requires the witness to produce a document or documents pertinent to a proceeding.² Section 27.04, F.S., “allows the state attorney to issue subpoenas duces tecum for records as part of an ongoing investigation.”³ The state does not need to establish the relevance

¹ *Subpoena*, Legal Information Institute (available at <https://www.law.cornell.edu/wex/subpoena>).

² *Subpoena duces tecum*, Legal Information Institute, (available at https://www.law.cornell.edu/wex/subpoena_duces_tecum).

³ *State v. Investigation*, 802 So. 2d 1141, 1144 (Fla. 2d DCA 2001).

and materiality of the information sought through an investigative subpoena,⁴ but the subject matter of the investigation must be confined to violations of criminal law.⁵

Section 92.605(2), F.S., describes subpoenas, court orders, and warrants issued in compliance with the Electronic Communications and Privacy Act.⁶ The federal act and its Florida counterpart, s. 934.23, F.S., authorize law enforcement officer, state attorney, or judge to subpoena the records of an out-of-state corporation that provides electronic communication services or remote computing services to the public.

Upon service of a subpoena, court order, or warrant issued in compliance with s. 92.605, F.S. (and by extension with the Electronic Communications and Privacy Act), a corporation must comply within 20 days after receipt of the subpoena. However, if the recipient cannot comply within that time period, it must notify the law enforcement officer who sought the subpoena within the 20-day time period that the records cannot be provided and comply as soon as possible.⁷ An “out-of-state corporation,” i.e., any corporation qualified to do business in Florida under s. 607.1501, F.S.,⁸ is “properly served,” by subpoena or otherwise, when service is effected on that corporation’s registered agent.⁹

Section 92.605, F.S., does not expressly provide a law enforcement officer with a remedy when an out-of-state corporation fails to comply with a subpoena issued under that section.

III. Effect of Proposed Changes:

The bill expands the avenues for service on an out-state corporation, allowing a law enforcement officer to effect service on an out-of-state corporation through its registered agent in Florida or pursuant to the laws of the state where process is to be served. The bill also states that service on an out-of-state corporation doing business in Florida “through the Internet” may also be made at any location where the corporation routinely accepts service.

If a corporation that provides electronic communication services or remote computing services fails to comply with a properly served subpoena the applicant seeking the subpoena may petition a court to compel compliance. The court may compel compliance by holding the entity in indirect criminal contempt¹⁰ and may punish the entity by a fine of not less than \$100 and not more than \$1,000 per day for a maximum of 60 days.

⁴ *Id.*

⁵ *Morgan v. State*, 309 So. 2d 552, 553 (Fla. 1975).

⁶ 18 U.S.C. § 2701 et seq.

⁷ Section 92.605(2)(b), F.S. If the entity seeking the subpoena shows and the court finds that failure to produce the requested records would produce an “adverse result,” i.e., physical harm, flight from prosecution, destruction of evidence, intimidation of witnesses, or jeopardy to the investigation, the court may order the records be produced earlier than 20 days.

Section 92.605(c), (1)(a), F.S. The court may also extend the time to comply with a subpoena if doing so will not cause an adverse result.

⁸ Section 92.605(1)(e), F.S.

⁹ Section 92.605(1)(h), F.S. Per s. 607.0505, F.S., a foreign corporation doing business in Florida must have a registered agent, and per s. 607.1507, F.S., such agent must be located in or authorized to transact business in Florida.

¹⁰ Section 38.22, F.S., authorizes every court to “punish contempts against it whether such contempts be direct, indirect, or constructive.” As a common law crime, contempt may be punished “by fine or imprisonment, but the fine shall not exceed \$500, nor the imprisonment 12 months,” Section 775.02, F.S.

The bill does not define what activities constitute “transacting business in this state through the Internet.” Section 607.1501(2), F.S., provides a non-exhaustive list of activities that *do not* constitute “transacting business,” a list which includes “transacting business through interstate commerce.” If intended, it may be useful to clarify s. 92.605(2), F.S., to state that transacting business through interstate commerce through the Internet subjects a company to the new service procedures in s. 92.605(1)(h).

The bill takes effect on July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill authorizes the imposition of fines and may cause subpoenaed corporations to incur costs to comply with the subpoenas.

C. Government Sector Impact:

The bill authorizes the imposition of fines and may generate revenues for the Clerks of Court Trust Fund.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 92.605, Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.