

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 103 Subpoenas

SPONSOR(S): Civil Justice Subcommittee, Gottlieb, Fernandez-Barquin

TIED BILLS: **IDEN./SIM. BILLS:** SB 1002

FINAL HOUSE FLOOR ACTION: 117 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 103 passed the House on February 20, 2020, and subsequently passed the Senate on March 11, 2020.

A subpoena is an order requiring attendance at a particular time and place to give testimony or bring certain documents, records, or other tangible evidence. When a witness is subpoenaed in a criminal case, he or she must remain available until the case is resolved or he or she is excused by the court. If a witness departs without the court's permission or intentionally fails to produce the required tangible evidence, he or she may be held in contempt of court. A person may commit indirect criminal contempt when he or she intentionally obstructs or interferes with the administration of justice by violating a court order, including an investigative subpoena.

A law enforcement officer (LEO), including an assistant state attorney, is authorized to issue an investigative subpoena to obtain information relating to criminal activity which is occurring or has occurred. When investigating criminal activity relating to electronic communications, such as homicide involving electronically stored surveillance footage, internet child pornography, or vehicular homicide due to careless cell phone usage, a LEO may issue an investigative subpoena to an out-of-state corporation (OOSC), and the following guidelines apply:

- An OOSC's registered agent must be properly served with a subpoena.
- An OOSC's response to the subpoena is due within 20 business days of receipt, unless a longer time period is provided.
- If a court finds that failing to produce records within 20 business days will cause an adverse result, a shorter time period may be provided.
- A court may reasonably extend the time period if an extension will not cause an adverse result.
- If an OOSC cannot produce the requested records within the time period provided, it must notify the issuer of the subpoena within the 20-day time period and agree to produce the documents at the earliest possible time.

Florida law does not provide a specific consequence for when an OOSC fails to timely comply with a subpoena, and as such, contempt of court is the only available remedy.

The bill provides that subpoena service on an OOSC is proper when served:

- On a registered agent in this state;
- As authorized by the state where process is to be served; or
- At a location routinely used to accept service, if the corporation is doing business in Florida through the internet.

The bill authorizes an applicant who sought a subpoena to petition a court to compel compliance through indirect criminal contempt and a daily fine of between \$100 and \$1,000, for up to 60 days.

The bill does not appear to have a fiscal impact on state or local governments, but may have a fiscal impact on Florida businesses and OOSC's that fail to comply with subpoenas. The bill may generate revenues for the Clerks of the Court Trust Fund within the Justice Administrative Commission.

The bill was approved by the Governor on June 18, 2020, ch. 2020-43 L.O.F., and will become effective on July 1, 2020.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Subpoenas in General

A subpoena is an order directed to a person requiring attendance at a particular time and place. A subpoena ad testificandum requires attendance to testify as a witness, while a subpoena duces tecum orders a witness to appear and bring certain documents, records, or other tangible evidence that may be introduced as evidence in a case.¹ Subpoenas may be issued in a criminal investigation,² a criminal prosecution during discovery,³ or for trial⁴ by a defendant, his or her counsel,⁵ or the state attorney. Generally, a subpoena must state the name of the court, title of action, and time and place the witness is ordered to give testimony or produce other evidence.⁶ When a witness is subpoenaed by either party in a criminal case, he or she must remain available for attendance until the case is resolved or until he or she is excused by the court.⁷ If a witness departs without permission of the court or intentionally fails to produce requested tangible evidence, he or she may be held in contempt of court.⁸

Contempt of Court

Contempt is a refusal to obey a court's legal order, mandate or decree.⁹ There are two main types of contempt: civil and criminal. Civil contempt occurs when a person intentionally fails to do something ordered by the court in a civil case. Civil contempt is intended to compel a party's compliance or compensate a party for losses resulting from the contemptuous conduct.¹⁰ Criminal contempt results from conduct that tends to intentionally obstruct or interfere with the administration of justice, and its purpose is to punish offensive conduct, vindicate the court's authority, and deter such conduct.¹¹ Both main types of contempt may also be:

- Direct: when committed in the immediate presence of the court, such as an assault of a testifying witness; or
- Indirect: when committed away from the presence of the court, such as disobeying a court order.

A person commits indirect criminal contempt when he or she intentionally obstructs or interferes with the administration of justice by violating a court order, such as an investigative subpoena.¹² While authorized by statute,¹³ criminal contempt is not specifically classified as a felony or misdemeanor, and

¹ *Black's Law Dictionary* (11th ed. 2019).

² Florida law authorizes certain entities to use subpoenas to conduct 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 the Department of Financial Services to subpoena witnesses and records related to a public assistance fraud investigation).

³ Fla. R. Civ. 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.

⁴ A subpoena for testimony before the court and subpoenas for production of tangible evidence before the court may generally be issued by the clerk of the court or by any attorney of record in the case. Fla. R. Civ. P. 3.361(a).

⁵ The United States Constitution guarantees a defendant in a criminal case the right to compulsory processes for obtaining witnesses in his or her favor; U.S. Const. amend. 6.

⁶ *Id.*

⁷ S. 914.03, F.S.

⁸ *Id.*

⁹ S. 38.23, F.S.; See also *Black's Law Dictionary*, (11th ed. 2019).

¹⁰ *Elliott v. Bradshaw*, 59 So. 3d 1182 (Fla. 4th DCA 2011); *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985).

¹¹ *Elliott*, 59 So. 3d at 1184; *Berlow v. Berlow*, 21 So. 3d 81 (Fla. 3d DCA 2009); *In re Steffens*, 988 So. 2d 142 (Fla. 5th DCA 2008).

¹² *Elliott*, 59 So. 3d at 1184; *Sando v. State*, 972 So. 2d 271 (Fla. 4th DCA 2008).

¹³ S. 38.22, F.S.

is instead classified as a common law crime,¹⁴ punishable by up to twelve months in county jail and a fine up to \$500.¹⁵ ¹⁶ Due process of law requires that a party accused of indirect contempt be advised of the charge and provided an opportunity to defend himself or herself.¹⁷

Investigative Subpoenas in Criminal Cases

Within the criminal justice system, law enforcement is typically responsible for investigating a crime and an assistant state attorney prosecutes the offender. However, the State is often called upon to conduct or assist in an investigation which may lead to the filing of criminal charges. Under these circumstances, an ASA is authorized to issue an investigative subpoena.¹⁸ Specifically, s. 27.04, F.S., allows an ASA to issue a subpoena for records¹⁹ as part of any ongoing investigation.²⁰ An investigative subpoena allows the State to obtain information necessary to determine whether criminal activity is occurring or has occurred. When issuing an investigative subpoena, the State is not required to prove relevancy or materiality of the records sought,²¹ but may only gather information that may lead to criminal charges.²²

Records Subpoenas to Florida Businesses and Out-Of-State Corporations

When investigating a crime relating to the use of electronic communications, such as homicide involving electronically stored surveillance footage, internet child pornography, or vehicular homicide due to careless cell phone usage, ASAs frequently require out-of-state corporations (OOSCs)²³ to produce electronic records under strict time constraints. If such records are not produced timely, electronic records may be destroyed, witnesses' memories may fade, and public safety may be compromised. Under these circumstances, s. 92.605, F.S., permits an ASA, or other qualified law enforcement personnel, to issue an investigative subpoena to an OOSC.²⁴

If an ASA issues an investigative subpoena to an OOSC providing electronic communication services or remote computing services to the public, and such records reveal a customer's identity, stored data, or usage of such services, or the destination or recipients of communications sent to or from a customer, the following requirements apply:²⁵

- An OOSC's registered agent must be properly served with a subpoena.²⁶
- An OOSC's response to the subpoena is due within 20 business days of receipt, unless a longer time period is provided.
 - If a court finds that failing to produce records within 20 business days will cause an adverse result,²⁷ a shorter time period may be provided.²⁸

¹⁴ A common law crime is one which is not separately reclassified by statute as either a felony or a misdemeanor, See S. 775.01, F.S. (2005).

¹⁵ S. 775.02, F.S.

¹⁶ County courts and circuit courts possess the same power to punish contempt. S. 900.04, F.S.

¹⁷ U.S. Const. amend. 5; Fla. R. Civ. P. 3.840.

¹⁸ *State v. Investigation*, 802 So. 2d 1141, 1144 (Fla. 2d DCA 2001).

¹⁹ See *Imparato v. Spicola*, 238 So. 2d 503 (Fla. 2d DCA 1970).

²⁰ S. 16.56(3), F.S., provides the same authority to a statewide prosecutor.

²¹ *State*, 802 So. 2d 1141 at 1144.

²² *Morgan v. State*, 309 So. 2d 552 (Fla. 2d DCA 1975).

²³ Out-of-state corporation means any corporation that is qualified to do business in this state under s. 607.1501, F.S.; S. 92.605(1)(e), F.S.

²⁴ Section 92.605, F.S. permits service on an OOSC by any law enforcement officer seeking a court order or subpoena under ss. 16.56, 27.04, 905.185, or 914.04, F.S., or who is issued a search warrant under s. 933.01, or anyone who is authorized to issue a subpoena under the Florida Rules of Criminal Procedure.

²⁵ S. 92.605(2), F.S.

²⁶ Properly served means delivery by hand or in a manner reasonably allowing for proof of delivery if delivered by mail or facsimile. S. 92.605(1)(h), F.S.

²⁷ An adverse result includes the potential: danger to the life or physical safety of an individual; risk of flight from prosecution; destruction of or tampering with evidence; intimidation of potential witnesses; or serious jeopardy to an investigation or undue delay of a trial. S. 92.605(1)(a), F.S.

²⁸ S. 92.605(2)(c), F.S.

- A court may also reasonably extend the time period provided if an extension will not cause an adverse result.
- If an OOSC cannot produce the requested records within the time period provided, it must notify the ASA within the 20-day time period and agree to produce the documents at the earliest possible time.

While explicitly requiring compliance or notification of inability to comply within 20 days, the law does not provide a specific consequence for when an OOSC fails to comply with a subpoena issued under s. 92.605, F.S. As such, contempt of court is the only available remedy an ASA may seek. Because an OOSC is not a single, identifiable person who may be sent to jail, and a one-time \$500 fine is unlikely to incentivize timely compliance by a large corporation, a contempt proceeding is neither practical nor useful in punishing or deterring an OOSC's intentional violation or untimely compliance with a subpoena.

Effect of the Bill

The bill amends s. 92.605, F.S., by providing that subpoena service on an OOSC is proper when served:

- On a registered agent in this state;
- As authorized by the state where process is to be served; or
- At a location routinely used to accept service, if the corporation is doing business in Florida through the internet.

When an OOSC fails to comply with a subpoena, the bill authorizes an applicant who sought a subpoena to petition a court to compel compliance through indirect criminal contempt and a daily fine of between \$100 and \$1,000, for up to 60 days.

The bill provides a specific remedy for an applicant to seek compliance with and enforcement of a subpoena issued to Florida businesses and OOSCs, which may increase compliance with subpoenas issued under strict timelines and aid in preventing the destruction of essential evidence.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may generate revenues for the Clerks of the Court Trust Fund within the Justice Administrative Commission.²⁹

2. Expenditures:

None.

²⁹ All revenues received by the clerk from court-related fees, fines, costs, and service charges are considered state funds and are remitted monthly to the Department of Revenue for deposit into the Clerks of the Court Trust Fund within the Justice Administrative Commission. S. 142.01(2), F.S.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a fiscal impact on Florida businesses and OOSC's that fail to comply with subpoenas issued under s. 92.605, F.S.

D. FISCAL COMMENTS:

None.