

# 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.)

BILL: CS/SB 1856

SPONSOR: Criminal Justice Committee and Senator Diaz de la Portilla

SUBJECT: Law Enforcement Officers and Correctional Officers

DATE: April 3, 2003

REVISED: \_\_\_\_\_

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

## I. Summary:

The bill would amend s. 112.532(1), F.S., with regard to the interrogation of law enforcement or correctional officers. The bill limits the total number of interrogating officers asking questions during the interrogation to one officer.

The bill amends s. 112.532(3), F.S., to specifically provide for the right of an officer to file suit against a person who files a false complaint against the officer.

Under circumstances where there is a "proposed disciplinary action" against a law enforcement or correctional officer, the bill would change current law with regard to the confidential nature of the agency's investigation.

By amending s. 112.532(4), F.S., the bill requires the investigating agency to give the officer a copy of the complete investigative report and supporting documents, upon request, and provide the officer an opportunity to address the findings of the report before the imposition of a disciplinary action.

The bill amends s. 112.533, F.S., to provide that an officer's legal counsel or other representative is authorized to review the complaint and witness statements just prior to the investigative interview of the officer. The legal counsel or representative may be prosecuted for a misdemeanor if he or she willfully discloses information obtained pursuant to the investigation before it becomes public record.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 112.532 and 112.533.

## 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 Chapter 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.

Subsection (3) of s. 112.532, F.S., specifically provides that law enforcement officers or correctional officers have the right to bring civil suit for damages suffered during the performance of the officer’s official duties or for abridgment of the officer’s civil rights. In addition to this specific statutory right, there is other precedent under which an officer may bring suit where he or she has been the subject of a false complaint.

Under Florida law, the tort of defamation exists as a means to sue for publication of false statements to a third party that expose the subject person to hatred, contempt, or ridicule, or injure a person in his business or occupation. Defamation includes either spoken publication or “slander,” or written publication, termed “libel.”

In addition, a falsely accused law enforcement officer could use the common law provision of negligence per se. Florida law permits the consideration of the violation of criminal statutes in determining civil rights and liabilities. Under negligence per se, the person suing must be within the class of persons a particular statute proscribing an activity was designed to protect and suffer an injury the statute was designed to prevent. In such instances, a prima facie case of negligence would exist. Because criminal statutes exist to punish perjury under s. 837.011, F.S., and making false reports and statements to law enforcement under ss. 837.05 and 837.06, F.S., there would appear to be sufficient applicable criminal statutes proscribing this activity which an officer could use to establish the negligence of the false complaint.

Moreover, a law enforcement official who is falsely accused may also sue for a false complaint under an abuse of process action. Abuse of process is “the malicious misuse or misapplication of process to accomplish some purpose not warranted or commanded by the writ; it is a willful intentional issue of criminal or civil legal process for some wrongful or unlawful object or purpose other than that for which it was designed.” There are three elements to abuse of process: (1) that the defendant made an illegal, improper, or perverted use of process; (2) the defendant had an ulterior motive or purpose in making the illegal, improper, or perverted use of process; and (3) that the plaintiff was injured as a result of the defendant’s actions. Insofar as the formal filing of a complaint with a law enforcement agency may be viewed as process, abuse of process may be another common law cause of action that currently exists in Florida law.

Section 112.531(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. 112.531, 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. 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 is concluded. Section 119.07(1), F.S., makes public records accessible to the public upon request.

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

The officer who is the subject of the complaint 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. This right has been narrowly interpreted to the extent that legal counsel retained to assist or defend the officer, or the officer's representative are not extended the right to review the complaint and statements. *Advisory Legal Opinion, AGO 2001-17, March 13, 2001*. Nor is the officer currently entitled to review *all* evidence or information obtained during the investigative process. *Advisory Legal Opinion, AGO 2000-64, November 13, 2000*.

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(3), 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. 4<sup>th</sup> 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 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(3), 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 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(3), 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. An officer 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.” *Id.* at 1280.

### III. Effect of Proposed Changes:

The bill would amend s. 112.532(1), F.S., with regard to the interrogation of law enforcement or correctional officers. The bill limits the total number of interrogating officers asking questions during the interrogation to one officer.

The bill amends s. 112.532(3), F.S., to specifically provide for the right of an officer to file suit against a person who files a false complaint against the officer.

Under circumstances where there is a “proposed disciplinary action” against a law enforcement or correctional officer, the bill would change current law with regard to the confidential nature of the agency's investigation.

The bill requires the investigating agency to give the officer a copy of the complete investigative report and supporting documents, upon request, and provide the officer an opportunity to address the findings of the report before the imposition of a disciplinary action.

As noted in the Present Situation section, s. 112.531(4), F.S., currently 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.

The officer who is the subject of the complaint 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. This bill would extend the right to review complaints and statements made by the complainant and witnesses against a law enforcement or correctional officer to his or her legal counsel or designated representative, immediately prior to the beginning of an investigative interview whenever the interview relates to the officer's continued fitness for law enforcement or correctional service. The attorney or other representative would also be subject to a misdemeanor prosecution if he or she willfully disclosed information obtained pursuant to the investigation before it becomes a public record.

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., (Public Records Law) until the investigation is concluded. This *general exemption* from the Public Records Law is recognized in s. 112.533(2), F.S. A more *specific exemption* from the Public Records Law exists in s. 112.533(2), F.S., for active criminal intelligence information or active criminal investigations.

As it is currently written, the bill would effectively nullify the Public Records exemptions and make the complete investigative report available to the officer under investigation, at a time when the investigation may still be active. As in the situation of one of the officers in the Palm Beach County PBA case cited above, the open investigation may actually be criminal in nature. The effect of the bill could be to require an agency to provide a suspect under investigation in a criminal case with a copy of its complete investigation, if the outcome of the investigation might result in disciplinary action.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

Section 112.533(2)(a), F.S., exempts active investigations of complaints against law enforcement and correctional officers from Florida's Public Records law until the investigation ceases to be active or is concluded, at which time the record is open to public scrutiny. Under current law, a limited exception to the aforementioned exemption is provided for the officer under investigation to review the complaint and witness statements just prior to the beginning of any investigative interview on the subject of the

complaint. This would not include information relating to an active criminal investigation, however. This bill would effectively nullify both the general Public Records exemption and the more specific *active criminal investigation* exemption currently recognized in s. 112.533(2), F.S.

This bill does not seek to restrict or limit the public's access to records which would otherwise be available to the public under the Public Records law.

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:**

The language on page 4, lines 14-20 of the bill appears to nullify the Public Records exemptions as they currently exist, with regard to the confidential nature of active disciplinary investigations and criminal investigations involving law enforcement and correctional officers, insofar as the bill would require the agency to provide a copy of the complete investigative report to the officer under investigation at a time when the investigation is still active.

If the intent of the bill is to provide an officer under investigation by his or her employing agency with an opportunity to be apprised of the nature of accusations, and the opportunity to address those accusations *before a decision is made as to disciplinary action*, it is suggested that the intent could be accomplished by more narrowly drafted language.

For example, the officer's right to review the complaint and witness statements just prior to the investigatory interview of the officer currently exists. s. 112.533(2)(a), F.S. *Requiring* an investigatory review *prior to* the disciplinary investigation being closed may accomplish the goal of the bill without sacrificing the confidentiality of the entire investigation.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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

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