

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 905 Arrest Booking Photographs

**SPONSOR(S):** Criminal Justice Subcommittee; DuBose; Murphy and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 1072

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Keegan	White
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

A person's photograph is customarily taken when he or she is arrested. In Florida, as in most states, this photograph (often referred to as a "mug shot") is a public record. Most county and municipal law enforcement agencies post the arrest booking photographs on their respective websites. In recent years, a trend has developed where companies scour the public records of a state and post the photographs on their private websites. While mug shot websites often keep arrest booking photographs online even if the person was found not guilty or the charges were dropped, many of these websites generate a profit by removing the photograph for a fee (often a very expensive one).

The bill prohibits a person engaged in publishing or disseminating arrest booking photographs through publically accessible print or electronic mediums from soliciting or accepting a fee or other consideration to remove, correct or modify an arrest booking photograph of an arrestee. The prohibition does not apply to any state, regional, county, local, or municipal governmental entity of this state, whether executive, judicial, or legislative, or any department, division, bureau, commission, authority, or political subdivision.

A person harmed by a violation may initiate a civil suit to obtain all appropriate relief.

The bill prohibits a criminal justice agency from electronically publishing an arrest booking photograph of an arrestee who is charged with, but not yet convicted of, a criminal offense. The prohibition does not apply to the electronic publication of arrest booking photographs to governmental entities, third parties that provide electronic criminal justice services to criminal justice agencies, or any entity if the criminal justice agency head, or a designee thereof, decides such publication is necessary to protect public safety.

The bill specifies that the above prohibition does not restrict public access to records as provided by s. 119.07, F.S.

The bill may have a direct economic impact on the private sector, as well as a fiscal impact on local government revenues and expenditures. (See Fiscal Comments section.)

The bill has an effective date of October 1, 2016.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

A person's photograph is customarily taken when he or she is arrested. In Florida, as in most states, this photograph (often referred to as a "mug shot") is a public record.<sup>1</sup> Most county and municipal law enforcement agencies post the photographs on their respective websites. In recent years, a trend has developed where companies scour the public records of a state and post the arrest booking photographs on their private websites.<sup>2</sup> The publication of these photographs on the internet can lead to problems and embarrassment for many individuals. For example, if a potential employer conducts an internet search of a potential employee, one of the top results might be an arrest booking photograph.<sup>3</sup>

Private mug shot websites often keep these photographs online even if the person was found not guilty or the charges were dropped;<sup>4</sup> however, many of these websites will remove the photograph for a fee (often a very expensive one).<sup>5</sup> There are also third-party websites that offer to remove photographs from private mug shot websites for a fee.<sup>6</sup> The fees of one of these third party websites range from \$399 to remove one photograph to \$1799 to remove five photographs.<sup>7</sup> The expense is compounded, however, when a photograph is posted on multiple websites, with each charging their own fee for removal.<sup>8</sup> There have also been reported incidents of people paying the fees and their photographs not being removed.<sup>9</sup>

#### Other State Responses

Other states have recently passed laws addressing this problem in various ways.<sup>10</sup> Some have passed laws that say public records cannot be used for commercial purposes.<sup>11</sup> This strategy could raise First Amendment concerns since the photographs usually involve records that are obtained legally.<sup>12</sup> Other states have adopted different measures.<sup>13</sup> Oregon, for example, passed a law requiring that a company remove the photograph upon request in instances where the individual can prove that the charges were dismissed or the individual was exonerated.<sup>14</sup> Virginia took a different approach, prohibiting parties who disseminate or maintain criminal history information from soliciting, requesting, or accepting compensation for removing the information.<sup>15</sup> These bills were passed in 2013<sup>16</sup> and

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<sup>1</sup> "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf..." FLA. CONST. art. I, s. 24.

<sup>2</sup> David Segal, *Mugged by a Mug Shot Online*, THE NEW YORK TIMES (Oct. 5, 2013), [http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&_r=2&).

<sup>3</sup> *Id.*

<sup>4</sup> Steve Osunsami, *Mug Shot Websites: Profiting Off People In Booking Photos?*, ABC NEWS (March 7, 2013), <http://abcnews.go.com/Technology/mug-shot-websites-profiting-off-people-booking-photos/story?id=18669703>.

<sup>5</sup> *Id.*; Segal, *supra* note 2.

<sup>6</sup> Laura C. Morel, *Pinellas County Sheriff's Office to stop posting online mug shots*, TAMPA BAY TIMES (Jan. 9, 2014), <http://www.tampabay.com/news/publicsafety/crime/pinellas-county-sheriffs-office-to-remove-online-mugshots/2160316>; NAT'L CONFERENCE OF STATE LEGISLATURES, *Mug Shots and Booking Photo Websites*, <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx#WY> (last visited Jan. 23, 2016).

<sup>7</sup> Morel, *supra* note 6.

<sup>8</sup> Osunsami, *supra* note 4.

<sup>9</sup> Andrew Knapp, *South Carolina attorneys, lawmakers aim to disrupt business of publishing jail mug shots*, THE POST AND COURIER (Nov. 17, 2013), <http://www.postandcourier.com/article/20131117/PC1610/131119492>.

<sup>10</sup> NAT'L CONFERENCE OF STATE LEGISLATURES, *Mug Shots and Booking Photo Websites*, <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx#WY> (last visited Jan. 23, 2016).

<sup>11</sup> NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 10.

<sup>12</sup> *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 269-270 (1964) (noting that freedom of expression concerning public issues is secured by the First Amendment and should be "uninhibited, robust, and wide-open").

<sup>13</sup> *See* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 10.

<sup>14</sup> H.R. 3467, 77th Leg. Assembly (Or. 2013).

<sup>15</sup> S.B. 720, 2015 Sess. (Va. 2015).

<sup>16</sup> H.R. 3467, 77th Leg. Assembly (Or. 2013).

2015,<sup>17</sup> respectively, so the efficacy of these bills has not yet been determined. An American Bar Association article argues that there is no legal solution to this problem, and instead, the solution is going to be in the private sector.<sup>18</sup>

### Florida Law

Currently, Florida law does not impose civil or criminal penalties on entities that publish mug shots of individuals. There are, however, statutes that create civil remedies for similar behavior. For example, s. 540.08, F.S., prohibits a person from publishing, printing, displaying or otherwise publicly using for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without express written or oral consent. The victim may bring an action to enjoin the unauthorized use, and to recover damages for any loss or injury.<sup>19</sup> Similarly, a person may bring a civil suit alleging invasion of privacy.<sup>20</sup> However, these causes of action would generally not apply in cases where the publication at issue was a public record.

### Effect of the Bill

The bill prohibits a person engaged in publishing or disseminating arrest booking photographs through publicly accessible print or electronic mediums from soliciting or accepting a fee or other consideration to remove, correct or modify an arrest booking photograph of an arrestee. The prohibition does not apply to any state, regional, county, local, or municipal governmental entity of this state, whether executive, judicial, or legislative, or any department, division, bureau, commission, authority, or political subdivision.

A person harmed by a violation may initiate a civil suit to obtain all appropriate relief, including:

- Injunctive relief.
- A civil penalty of up to \$1,000 per day for each day of noncompliance with a court order issued in a civil action under this subsection.
- Monetary damages, to include actual damages incurred as a result of a violation.
- Attorney fees and costs.

The bill prohibits a criminal justice agency from electronically publishing an arrest booking photograph of an arrestee who is charged with, but not yet convicted of, a criminal offense. The prohibition does not apply to the electronic publication of arrest booking photographs to governmental entities, third parties that provide electronic criminal justice services to criminal justice agencies, or any entity if the criminal justice agency head, or a designee thereof, decides such publication is necessary to protect public safety.

The bill specifies that the above prohibition does not restrict public access to records as provided by s. 119.07, F.S.

The bill provides the following definitions:

- "Arrest booking photograph" means a photograph of an arrestee taken for the purpose of recording the arrestee's image as part of the arrest and booking process.
- "Arrestee" means an individual who has been arrested for a violation of law in this state.

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<sup>17</sup> S.B. 720, 2015 Sess. (Va. 2015).

<sup>18</sup> Stephanie Francis Ward, *Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them*, A.B.A. JOURNAL (Aug. 1, 2012),

[http://www.abajournal.com/magazine/article/hoist\\_your\\_mug\\_websites\\_will\\_post\\_your\\_name\\_and\\_photo\\_others\\_will\\_charge\\_yo/](http://www.abajournal.com/magazine/article/hoist_your_mug_websites_will_post_your_name_and_photo_others_will_charge_yo/).

<sup>19</sup> s. 540.08(2), F.S.

<sup>20</sup> The Florida Supreme Court first recognized the tort of invasion of privacy in *Cason v. Baskin*, 20 So. 2d 243 (1944), a recognition reconfirmed in *Cason v. Baskin*, 30 So. 2d 635 (1947). Since then Florida decisions have filled out the contours of this tort right of privacy by accepting the following four general categories recognized by Prosser in his *LAW OF TORTS*, p. 804-14 (4th Ed. 1971): (1) Intrusion, i.e., invading plaintiffs' physical solitude or seclusion; (2) Public Disclosure of Private Facts; (3) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation; and (4) Appropriation, i.e., commercial exploitation of the property value of one's name. *Loft v. Fuller*, 408 So. 2d 619, 622 (Fla. 4th DCA 1981).

- "Fee or other consideration" does not include a fee or consideration, including attorney fees and costs, solicited or accepted in connection with the actual or attempted settlement or compromise of a lawsuit, threatened lawsuit, arbitration claim, threatened arbitration claim, or other judicial or quasi-judicial proceeding.
- "Criminal justice agency" has the same meaning as provided in s. 943.045, including, but not limited to, county and municipal detention facilities.

**B. SECTION DIRECTORY:**

Section 1. Creates s. 501.172, F.S., relating to arrest booking photographs.

Section 2. Amends s. 951.23, F.S., relating to county and municipal detention facilities; definitions; administration; standards and requirements.

Section 3. Provides an effective date of October 1, 2016.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may limit the ability of individuals and businesses to electronically obtain arrest booking photographs. Those in the business of publishing such photographs may be negatively impacted.

**D. FISCAL COMMENTS:**

The bill may lead to more public record requests; thus, generating fees from those requests while also creating an additional workload for county and municipal detention facilities.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

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 February 3, 2016, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute:

- Prohibits a person who is engaged in publishing booking photos through print or electronic medium from soliciting or accepting payment of a fee to remove, correct, or change the booking photo.
- Provides a civil cause of action and civil remedies and penalties to address violations.
- Prohibits a criminal justice agency from electronically publishing the booking photo of an arrestee who has not yet been convicted of a criminal offense.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.