

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 265 Arrest Booking Photographs
SPONSOR(S): Criminal Justice Subcommittee; Trujillo and others
TIED BILLS: IDEN./SIM. **BILLS:** CS/SB 298

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	13 Y, 0 N, As CS	Westcott	Cunningham
2) Justice Appropriations Subcommittee	12 Y, 0 N, As CS	McAuliffe	Lloyd
3) Judiciary Committee			

SUMMARY ANALYSIS

When a person is arrested, his or her photograph is taken as part of the booking process. In Florida, as in most states, this photograph (often referred to as a "mug shot") is a public record. Many municipal and county law enforcement agencies post these photographs on their own websites. In recent years, a trend has developed where companies scour the public records of a state, including the municipal and county websites, and post mug shots on their own private websites. Because this is often embarrassing, many individuals seek to have this information removed. However, many of the websites charge a fee to remove the photograph from their website. The expense is compounded when the photograph is posted on multiple websites, with each charging their own removal fee.

The bill amends s. 951.23, F.S., to prohibit a county or municipal detention facility from electronically publishing or disseminating arrest booking photographs prior to a conviction. The bill does not prohibit the electronic publication of arrest booking photographs to: governmental entities; third parties that provide electronic criminal justice services to criminal justice agencies; and to any entity if the sheriff or police chief decides such publication is necessary to protect public safety. Persons may still obtain such photographs through a public records request.

The term "arrest booking photograph" is defined as a photograph of an arrestee taken for the purpose of recording the arrestee's image as part of the arrest and booking process.

The bill does not appear to have a state fiscal impact, but may have an indeterminate fiscal impact on counties and municipalities.

The bill is effective on October 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

When a person is arrested, his or her photograph is taken. 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, including the websites of municipal and county law enforcement agencies, and post the mug shots on their own private websites.¹ 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 a mug shot.²

Generally, private mug shot websites keep a mug shot on their websites even if the person was found not guilty, or even if the charges are dropped.³ Many of these websites will remove the photograph for a fee (often a very expensive one).⁴ There are also third-party websites that offer to remove photographs from private mug shot websites for a fee.⁵ The fees of one of these third party websites range from \$399 to remove one photograph to \$1799 to remove five photographs.⁶ The expense is compounded, however, when a photograph is posted on multiple websites, with each charging their own fee for removal.⁷ There have also been reported incidents of people paying the fees and their photographs not being removed.⁸

Other State Responses

Other states have recently passed laws addressing this problem in various ways. Some have passed laws that say public records cannot be used for commercial purposes.⁹ This strategy could raise First Amendment concerns since the photographs usually involved are obtained legally. Other states have adopted different measures. 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.¹⁰ Oregon’s bill passed during the summer of 2013,¹¹ so its effectiveness is unclear at this point. 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.¹² The article states:

¹ 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& (last visited on Jan. 27, 2014).

² *Id.*

³ National Conference of State Legislatures, *Mug Shots and Booking Photo Websites*, Dec. 4, 2013, <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx?TabId=27534> (last visited on Jan. 27, 2014).

⁴ Segal, *supra* note 1.

⁵ 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> (last visited on Feb. 13, 2014).

⁶ *Id.*

⁷ Andrew Knapp, *South Carolina attorneys, lawmakers aim to disrupt business of publishing jail mug shots*, The Post and Courier (Charleston, S.C.), Nov. 17, 2013, <http://www.postandcourier.com/article/20131117/PC1610/131119492> (last visited on Jan. 27, 2014).

⁸ *Id.*

⁹ National Conference of State Legislatures, *supra* note 3.

¹⁰ Christian Gaston, *John Kitzhaber to sign Oregon law regulating mug shot web sites*, The Oregonian, July 29, 2013, http://www.oregonlive.com/politics/index.ssf/2013/07/john_kitzhaber_to_sign_oregon.html (last visited on Jan. 27, 2014).

¹¹ *Id.*

¹² Stephanie Francis Ward, *Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them*, A.B.A. J., Aug. 2012, http://www.abajournal.com/magazine/article/hoist_your_mug_websites_will_post_your_name_and_photo_others_will_charge_yo/ (last visited on Jan. 27, 2014).

The only true solution is that we as consumers will have to get better at evaluating information that is presented to us. We have to accept that people have taken drugs, been at beer parties and gotten arrested. We have to rewire our brains not to overreact to that information, and realize that all of us have transgressed.¹³

Private Sector Responses

The private sector has addressed the issue to some extent. For example, Google has changed its algorithm in an attempt to push the mug shot websites down in the search results page so the mug-shot is not the first result when searching for someone's name.¹⁴ Additionally, credit card companies, such as American Express, Discover, Visa, and PayPal, have severed ties with the companies that charge to remove the criminal record information.¹⁵ While the private sector responses make it more difficult for these websites to get paid, it is unclear what the long-term effects will be from these actions.

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 the 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.¹⁶ Similarly, a person may bring a civil suit alleging invasion of privacy.¹⁷ However, these causes of action would generally not apply in cases where the publication at issue was a public record.

Recently, a Pinellas County woman sued websites that published her name, photograph, and arrest information online and then charged a fee to remove the information.¹⁸ The published information was from an arrest for domestic battery in which the charges were later dropped.¹⁹ The websites that published her information charged anywhere from \$300-\$1,700 to remove the arrest information.²⁰ The woman sued the websites in federal court alleging a violation of s. 540.08, F.S.,²¹ and common law invasion of privacy.²² The defendants moved to have the Court dismiss the lawsuit for failure to state a cause of action, but the federal district court held that the woman had stated a cause of action for a violation of s. 540.08, F.S.²³ It remains to be determined whether the operator of the websites violated the statute, and if so, what impact such a decision would have on similar suits that might be filed in other federal or state courts.

Florida Law Enforcement Responses

¹³ *Id.* at 21.

¹⁴ Segal, *supra* note 1.

¹⁵ *Id.*

¹⁶ Section 540.08(2), F.S.

¹⁷ 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 (Fla. 4th DCA 1981).

¹⁸ Laura C. Morel, *Lawsuit targets mug shot websites that keep arrests alive*, Tampa Bay Times, Nov.10, 2013, <http://www.tampabay.com/news/publicsafety/crime/lawsuit-targets-mug-shot-websites-that-keep-arrests-alive/2151818> (last visited on Feb. 7, 2014).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Section 540.08(1), F.S., states "No person shall publish, print, display, or otherwise use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use. . ."

²² Order Denying Motion to Dismiss, *Shannon L. Biotta v. Citizen Information Associates, LLC, et al.*, Case No. 8:13-cv-2811-T-30GW, 2014 WL 105177 (M.D. Fla. Jan. 10, 2014).

²³ *Id.*

The Pinellas County Sheriff recently decided to stop posting mug shots on his agency's website.²⁴ The Sheriff cited the private mug shot website's fees for removing photographs as his motivation for this change, saying that charging a fee was "verging on blackmail."²⁵ Public records requests will still be honored by the Pinellas County Sheriff's Office.²⁶

Effect of the Bill

The bill amends s. 951.23, F.S., to prohibit a county or municipal detention facility from electronically publishing or disseminating arrest booking photographs before a conviction is obtained. The bill does not prohibit the electronic publication of arrest booking photographs to: governmental entities; third parties that provide electronic criminal justice services to criminal justice agencies; and to any entity if the sheriff or police chief decides such publication is necessary to protect public safety.

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; and
- "Criminal justice agency" means a court, the Florida Department of Law Enforcement, the Department of Juvenile Justice, the protective investigations component of the Department of Children and Families, which investigates the crimes of abuse and neglect, and any other governmental agency or subunit thereof that performs the administration of criminal justice pursuant to a statute or rule of court and that allocates a substantial part of its annual budget to the administration of criminal justice. The term also includes county and municipal detention facilities.

The bill may make it more difficult for private mug shot websites to obtain arrest booking photographs. The photographs may still be obtained through a public records request.

B. SECTION DIRECTORY:

Section 1. Amends s. 951.23, F.S., relating to county and municipal detention facilities; definitions; administration; standards and requirements.

Section 2. Provides an effective date of October 1, 2014.

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:

²⁴ 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> (last visited on Feb. 13, 2014).

²⁵ *Id.*

²⁶ *Id.*

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may limit the ability of individuals and businesses to electronically obtain mug shots. Those engaged 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 12, 2014, the Criminal Justice Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment prohibits a county or municipal detention facility from electronically publishing or disseminating arrest booking photographs prior to a conviction.

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

On March 11, 2014 the Justice Appropriations Subcommittee adopted a strike-all amendment and reported the bill favorably as a committee substitute. The amendment provides the bill does not prohibit the electronic publication of arrest booking photographs to: governmental entities; third parties that provide electronic criminal justice services to criminal justice agencies; and to any entity if the sheriff or police chief decides such publication is necessary to protect public safety.

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