

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 Criminal Justice

BILL: CS/SB 298

INTRODUCER: Criminal Justice Committee and Senator Soto

SUBJECT: Booking Photographs

DATE: February 3, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.			CM	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 298 prohibits a person engaged in publishing or otherwise disseminating arrest booking photographs through a publicly accessible print or electronic medium from soliciting or accepting a fee or other consideration to remove, correct, or modify an arrest booking photograph of an arrestee. This prohibition does not apply to state and local governments or government agencies.

An arrestee who is the subject of an arrest booking photograph that has been published may file a civil action enjoining publication of the photograph if the publisher solicits or accepts a fee or other consideration to remove, correct, or modify that photograph. If the court enjoins publication, the court shall order that the photograph be removed from publication no later than 14 days after the order is entered. The court shall impose a civil penalty of \$1,000 per day for each day of noncompliance with the order.

If the court enjoins publication, the arrestee is entitled to attorney fees and costs relating to issuance of the injunction and any appeal of the injunction in which the arrestee is the prevailing party.

If, subsequent to the 14-day period for removal, the publisher subject to the injunction demonstrates to the court that it has complied with statutory requirements, the court shall terminate the injunction.

II. Present Situation:

Public Disclosure of Criminal Record Information

Unless a specific exemption applies, all “materials made or received by an agency in connection with official business which are used to perpetuate, communicate formal knowledge” are public records and “open for public inspection.”¹

Criminal record information is obtained and published by non-governmental publishers. This information includes, but is not limited to, booking photographs, arrest reports, charging documents, sentencing orders, and criminal history information.² Like all other records prepared by Florida government agencies, criminal record information is subject to public disclosure unless specifically exempted. If the record contains exempt and non-exempt information, the record is provided with exempt information redacted.³ For example, if a law enforcement record contains non-exempt information but also contains active criminal intelligence information or active criminal investigative information, both of which are exempt from public disclosure,⁴ the law enforcement record must be provided upon request with exempt information excised.⁵

Arrest Record Information

The public record information that is perhaps most relevant to the bill is public record information pertaining to a person’s arrest for the alleged commission of a crime.⁶ This information includes, but is not limited to the arrest report and “booking” photograph (often referred to as a “mug shot”).⁷

With few exceptions, arrest record information (including booking photographs) is not exempt from public disclosure.⁸ An example of an exemption would be the name of an alleged victim of

¹ Public Records: A Guide for Law Enforcement Agencies (2012 Edition), Office of Attorney General (Florida), at p.1. and endnote 1, citing *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980) and endnote 2, citing *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979). This publication is available at [http://myfloridalegal.com/webfiles.nsf/WF/RMAS-935PV5/\\$file/2012LEGuide.pdf](http://myfloridalegal.com/webfiles.nsf/WF/RMAS-935PV5/$file/2012LEGuide.pdf) (last viewed on January 27, 2014).

² The Florida Department of Law Enforcement is the central repository of criminal history information for the State of Florida. For a fee, a search of Florida criminal history information regarding a person may be performed. Excluded from the search is sealed or expunged information. See <https://web.fdle.state.fl.us/search/app/default> (last viewed on January 27, 2014).

³ Public Records: A Guide for Law Enforcement Agencies (2012 Edition), Office of Attorney General (Florida), at p. 15 and endnote 67, citing *City of Riviera Beach v. Barfield*, 642 So.2d 1135, 1137 (Fla. 4th DCA 1994), *review denied*, 651 So.2d 1192 (Fla. 1995).

⁴ Section 119.071(2)(c)1., F.S.

⁵ Public Records: A Guide for Law Enforcement Agencies (2012 Edition), Office of Attorney General (Florida), at p. 5 and endnote 20, citing *Wooling v. Lamar*, 764 So.2d 76, 768 (Fla. 5th DCA 2000), *review denied*, 786 So.2 1186 (Fla. 2001).

⁶ An arrest does not establish that a person committed the crime for which he or she is arrested. An arrestee is presumed innocent of committing the crime until such time as guilt has been determined in a court of law. However, if guilt is not determined, e.g., the prosecutor does not file a charge or the arrestee is acquitted, this does not necessarily mean that the arrest itself was invalid.

⁷ There is an intake process involved if an arrestee is to be jailed. Some law enforcement agencies refer to “booking” as one part of a multi-component intake process; others refer to the intake process as “booking.” Regardless of how the term is used, a photograph is taken of the arrestee prior to being jailed and that photograph is referred to as a “booking” photograph.

⁸ “This office has consistently stated that crime and arrest reports are public records that are generally open to inspection.... Thus, an arrest report, including the booking photograph, prepared by a law enforcement agency is subject to disclosure.”

sexual battery that appears in the arrest report.⁹ In providing the arrest report pursuant to a public record request, this name would be redacted from the copy of the report provided to the requestor.

Arrest record information is requested by many persons and entities, including members of the public, traditional news companies, companies that provide criminal history or criminal record information for a service or subscriber fee (e.g., so that a private employer may determine if a job applicant has a criminal history), and companies that are often referred to as “mug shot companies.” This information is often available to the public within hours of the booking process being completed.¹⁰ For this reason, an expungement of criminal records relevant to a particular crime would not capture arrest record information that was obtained by the public when access to that information was authorized.

A “mug shot company” may be described as a business that obtains publicly-available arrest record information (primarily booking photographs) and publishes that information, typically by posting it on a website. Generally, this information remains on the website until a fee is paid to the publisher or the publisher is compensated by a third-party that advertises that it will obtain removal of the information from the website upon payment of a fee to the third-party. Since few, if any, mug shot companies appear to provide sufficient information on their company structure, location of company offices, and company officers, it may be difficult to determine whether the mug shot publisher and the third-party offering publication removal services are under the same ownership or are affiliated.

Traditional news companies that publish arrest record information (like booking photographs) and private companies that provide arrest record information for a service or subscriber fee may also profit, directly or indirectly, from publication of arrest record information, but the removal of this information, if it occurs, is neither contingent upon nor results from payment of a fee or receipt of compensation. Further, unlike the mug shot companies, this information is often only available to subscribers, or if publicly available, often becomes less accessible after a certain period of time has elapsed.

The charge or fee for removal of the booking photograph and other arrest record information from publication on mug shot companies’ websites varies but is typically in the hundreds of dollars. Even if the mug shot company removes the arrest record information from its website upon payment of fee or receipt of compensation, there is no guarantee that this information will not appear on the website of another mug shot company that may or may not be affiliated with the mug shot company that previously removed the information from its website. Therefore, the

Advisory Legal Opinion 94-90 (October 25, 1994) (footnotes omitted), Office of the Attorney General (Florida), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/83A1D5004064269D852562210063168E> (last viewed on January 27, 2014).

⁹ Section 119.071(2)(j)1., F.S.

¹⁰ Recent news articles have reported that mug shot companies often obtain booking photographs by “web scraping” the photographs from law enforcement websites that publish the photographs. *See, e.g.*, “Don’t want arrest mug shot online? ‘Pay us’” (June 23, 2013), *MSN News*, available at <http://news.msn.com/crime-justice/dont-want-arrest-mug-shot-online-pay-us-sites-say> (last viewed on January 27, 2014). Techopedia® defines “web scraping” as “a term for various methods used to collect information from across the Internet. Generally, this is done with software that simulates human Web surfing to collect specified bits of information from different websites.” This information is available at <http://www.techopedia.com/definition/5212/web-scraping> (last viewed on January 27, 2014).

person who paid to have his or her arrest record information removed from one website may find himself or herself subsequently engaged in what has been described as “an expensive game of Whac-A-Mole.”¹¹

Criminal Use of Public Records

Section 817.569, F.S., provides that a person who knowingly uses any public record, or who knowingly uses information obtainable only through such public record, to facilitate or further the commission of:

- A first degree misdemeanor, commits a first degree misdemeanor; or
- A felony, commits a third degree felony.

The fee-for-removal practice described in the bill is not a first degree misdemeanor or felony in Florida. The bill makes this practice unlawful, but does not make it a first degree misdemeanor or felony.

Right of Publicity

Section 540.08(1), 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 person’s express written or oral consent to such use. There are exceptions to the statute for:

- Publication, printing, display, or use of the name or likeness of any person in any newspaper, magazine, book, news broadcast or telecast, or other news medium or publication as part of any bona fide news report or presentation having a current and legitimate public interest and where such name or likeness is not used for advertising purposes; and
- The use of such name, portrait, photograph, or other likeness in connection with the resale or other distribution of literary, musical, or artistic productions or other articles of merchandise or property where such person has consented to the use of her or his name, etc., on or in connection with the initial sale or distribution of the name, etc.

The statute also provides that, in the event the necessary consent is not obtained, the person whose name, portrait, photograph, or other likeness is so used may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

Recently, a Florida federal district court held that a person who claimed that the operator of two websites who published her booking photograph and advertised the service of removing booking photographs from a particular website in exchange for payment stated a cause of action for

¹¹ “South Carolina attorneys, lawmakers aim to disrupt business of publishing jail mug shots” (November 17, 2013), *The Post and Courier* (Charleston, S.C.), available at <http://www.postandcourier.com/article/20131117/PC1610/131119492> (last viewed on January 27, 2014).

violation of s. 540.08, F.S.¹² It remains to be determined whether the operator violated the statute, and if so determined, what impact the decision would have on any similar suits that might be filed in other federal district courts or in the state courts.

III. Effect of Proposed Changes:

The bill prohibits a person engaged in publishing or otherwise disseminating arrest booking photographs through a publicly accessible print or electronic medium from soliciting or accepting a fee or other consideration¹³ to remove, correct, or modify an arrest booking photograph¹⁴ of an arrestee.¹⁵ This prohibition does not apply to state and local governments or government agencies.¹⁶

The bill's prohibition is directed at this fee-for-removal practice and not at publication of an arrest booking photograph if the publisher is not engaged in the fee-for-removal practice. Nothing in the bill prohibits a publisher from profiting from publication of arrest booking photographs (such as through subscriber fees or advertising). What the bill prohibits is the publisher profiting from unpublishing the arrest booking photographs.

An arrestee who is the subject of an arrest booking photograph that has been published may file a civil action enjoining publication of the photograph if the publisher solicits or accepts a fee or other consideration to remove, correct, or modify that photograph. If the court enjoins publication, the court shall order that the photograph be removed from publication no later than 14 days after the order is entered. The court shall impose a civil penalty of \$1,000 per day for each day of noncompliance with the order.

If the court enjoins publication, the arrestee is entitled to attorney fees and costs relating to issuance of the injunction and any appeal of the injunction in which the arrestee is the prevailing party.

If, subsequent to the 14-day period for removal, the publisher subject to the injunction demonstrates to the court that it has complied with statutory requirements, the court shall terminate the injunction. Consistent with the bill's approach to prohibit the fee-for-removal practice, if the publisher demonstrates to the court that it has ceased to engage in this practice ("cured" the statutory violation), the injunction is terminated and the publisher is free to publish the photographs.

¹² Order (January 10, 2014), *Shannon L. Bilotta v. Citizen Information Associates, LLC, et al.*, Case No. 8:13-cv-2811-T-30GW, U.S. District Court (Middle District-Tampa Division) (on file with the Senate Committee on Criminal Justice). Information for this paragraph is from this order.

¹³ The term "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.

¹⁴ The bill defines "arrest booking photograph" as a photograph of an arrestee taken for the purpose of recording the arrestee's image as part of the arrest and booking process

¹⁵ The bill defines an "arrestee" as an individual who has been arrested for a violation of law in this state.

¹⁶ Specifically, the bill provides that s. 119.17, F.S., the new section created by the bill, 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 of this state.

The bill takes effect on October 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

An arrestee who is the subject of an arrest booking photograph that has been published may file a civil action enjoining publication of the photograph if the publisher solicits or accepts a fee or other consideration to remove, correct, or modify that photograph. The bill's prohibition is directed at this fee-for-removal practice. The bill does not authorize a civil action for simply publishing the photograph or information.¹⁷ Staff did not find any case in which a civil action for engaging in a similar fee-for-removal practice was held to be unconstitutional.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Private publishers of arrest booking photographs who engage in the prohibited fee-for-removal practice may be subject to a civil action enjoining publication of an arrest booking photograph. Publishers subject to an order enjoining publication who fail to comply with that order incur civil penalties.

¹⁷ See e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (imposing damages on a Florida newspaper that lawfully obtained and published the name of a rape victim violated the First Amendment). In *Florida Star*, the Court opined: "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." 491 U.S. at 540. In regard to commercial speech (rather than "core" speech), "the Supreme Court held that '[c]ommercial free speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial government interest, and only through means that directly advance that interest.' *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638, 105 S.Ct. 2265, 2275, 85 L.Ed.2d 652 (1985)." *Innovative Database Systems v. Morales*, 990 F.2d 217, 221 (5th Cir. 1993).

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:**Laws and Legislation of Other States**

The National Conference of State Legislatures (NCSL) has provided the following information¹⁸ relevant to laws and legislation addressing access to or publication of booking photographs or criminal record information:

Other states' public records laws specifically address booking/arrest photographs or mug shots, such as the following:

- Minnesota Stat. §13.82 (26) (e.g., provides that a booking photo is public data, but may be withheld if the agency determines that access will adversely affect an active investigation)
- Virginia Code § 2.2-3706 (e.g., adult arrestee photographs taken during the initial intake following the arrest and as part of the routine booking procedure must be released, except when necessary to avoid jeopardizing an investigation in felony cases)

Other state laws also address the release of mug shots by law enforcement agencies. For example:

- South Carolina Code § 17-1-40(A) (records, including photographs must be destroyed and not retained by law enforcement agencies if an arrest record is dismissed or expunged)
- Haw. Rev. Stat. § 831-3.2(e) (provides that any person entitled to an expungement order hereunder may by written application also request return of all fingerprints or photographs taken in connection with the person's arrest....)

The NCSL further states that “[s]ince 2012, several states have considered or passed legislation related to the release of booking photographs or mug shots, including legislation that requires removal of mug shots if criminal charges are dropped or prohibits charges for removing photographs.” According to the NCSL, Georgia, Illinois, Oregon, Texas, and Utah have passed legislation relevant to booking photographs.

¹⁸Unless otherwise indicated, information and quoted remarks in the “Related Issues” section of this analysis are from “Mug Shots and Booking Photo Websites” (December 4, 2013), National Conference of State Legislatures, available at <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx> (last viewed on January 27, 2014).

The Georgia bill (H.B. 150) “changes provisions relating to prohibited telemarketing and Internet activities” and “prohibits certain persons from collecting a fee for removing certain individuals’ arresting booking photographs from a website.”¹⁹

The Illinois bill (S.B. 115) amends Illinois’ Consumer Fraud and Deceptive Business Practices Act, State Records Act, and Local Records Act to provide “that it is an unlawful practice for any person engaged in publishing or otherwise disseminating criminal record information through a print or electronic medium to solicit or accept the payment of a fee or other consideration to remove, correct, or modify said criminal record information.”

The Oregon bill (H.B. 3467) “[r]equires [an] individual seeking disclosure of photographic records of [an] arrested person from [a] law enforcement agency to submit [a] written request to [the] agency, in person and with payment of fees,” “limits [the] scope of each request to photographic records of one arrested person,” and “prohibits law enforcement agencies from publishing photographic records of arrested persons on [the] Internet.”

The Texas bill (S.B. 1289) “[r]egulates business entities engaged in the publication or other dissemination of mug shots and other personal identifying information regarding the involvement of an individual in the criminal justice system” and “provides a civil penalty for violations.”

Finally, the Utah bill (H.B. 408) “prohibits county sheriffs from providing a copy of a booking photograph to a person if the photograph will be placed in a publication or posted on a website that requires a payment in order to remove the photograph.” The bill also “requires a person requesting a copy of a booking photograph to sign a statement that the photograph will not be placed in a publication or on a website that requires payment in order to remove the photograph.”

All of these bills were enacted into law in 2013. Therefore, it is too early to know if these bills will be challenged in court, and if so, whether they will pass constitutional scrutiny.

Private Sector Actions

According to recent news reports, the private sector is also taking steps to address the fee-for-removal practice. Google® has adjusted algorithms so that the mug shot companies will not appear on the first page of Google search results. Mastercard®, Visa®, Discover®, American Express®, PayPal®, and Wells Fargo® appear to be in the process of terminating or determining whether to terminate their relationship with mug shot companies.²⁰

VIII. Statutes Affected:

This bill creates section 119.172 of the Florida Statutes.

¹⁹ Legislative staff reviewed Georgia law. It appears that the legislation builds upon previously-existing public records exemptions that limit public access to arrest record information.

²⁰ Information for this paragraph is from “Mugged by a Mug Shot Online” (October 5, 2013), *New York Times*, available at http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&_r=0 (last viewed on January 27, 2014) and “Mug shot extortion sites still up and running ... for now” (October 16, 2013), *CNN Money*, available at <http://money.cnn.com/2013/10/16/technology/mug-shot-websites/index.html> (last viewed on January 27, 2014).

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Criminal Justice on February 3, 2014:

- Provides that an arrestee who is the subject of an arrest booking photograph that has been published may file a civil action enjoining publication of the photograph if the publisher solicits or accepts a fee or other consideration to remove, correct, or modify that photograph.
- Provides that, if the court enjoins publication, the court shall order that the photograph be removed from publication no later than 14 days after the order is entered.
- Provides that the court shall impose a civil penalty of \$1,000 per day for each day of noncompliance with the order.
- Provides that if the court enjoins publication, the arrestee is entitled to attorney fees and costs relating to issuance of the injunction and any appeal of the injunction in which the arrestee is the prevailing party.
- Provides that, if, subsequent to the 14-day period for removal, the publisher subject to the injunction demonstrates to the court that it has complied with statutory requirements, the court shall terminate the injunction.

- B. **Amendments:**

None.