

**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.)

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Prepared By: The Professional Staff of the Committee on Criminal Justice

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BILL: SB 298

INTRODUCER: Senator Soto

SUBJECT: Booking Photographs

DATE: January 28, 2014

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	<b>Pre-meeting</b>
2.			CM	
3.			RC	

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**I. Summary:**

SB 298 makes it unlawful to solicit, charge, or collect compensation for the removal of a booking photograph or criminal record information from an Internet website or other public medium.

The bill also requires an individual or business entity that publishes a booking photograph or criminal record information on an Internet website or other public medium to publish contact information so a person may submit a request to have his or her photograph or information removed from the website or other public medium.

Finally, the bill provides that a person who has been the subject of solicitation, charge, or collection of compensation for the removal of his or her criminal record information may file a civil action for actual damages and attorney fees against an individual or business entity that engages in the unlawful fee-for-removal practice or fails to provide required contact information.

**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.”<sup>1</sup>

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<sup>1</sup> 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.2d420 (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).

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.<sup>2</sup> 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.<sup>3</sup> 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,<sup>4</sup> the law enforcement record must be provided upon request with exempt information excised.<sup>5</sup>

### **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.<sup>6</sup> This information includes, but is not limited to the arrest report and "booking" photograph (often referred to as a "mug shot").<sup>7</sup>

With few exceptions, arrest record information (including booking photographs) is not exempt from public disclosure.<sup>8</sup> An example of an exemption would be the name of an alleged victim of sexual battery that appears in the arrest report. 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

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<sup>2</sup> 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 (excluding sealed or expunged information) may be performed. See <https://web.fdle.state.fl.us/search/app/default> (last viewed on January 27, 2014).

<sup>3</sup> 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).

<sup>4</sup> Section 119.071(2)(c)1., F.S.

<sup>5</sup> 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).

<sup>6</sup> 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.

<sup>7</sup> 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 this photograph is referred to as a "booking" photograph.

<sup>8</sup> "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." 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).

being completed.<sup>9</sup> 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 is almost impossible to determine whether the mug shot publisher and the third-party offering publication removal services are under the same ownership or 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 which may or may not be affiliated with the mug shot company that previously removed the information from its website. Therefore, the 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.”<sup>10</sup>

### **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:

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<sup>9</sup> 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).

<sup>10</sup> “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).

- 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., in part, 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, in part, 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 violation of s. 540.08, F.S.<sup>11</sup> 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 makes it unlawful to solicit, charge, or collect compensation for the removal of a booking photograph or criminal record information from an Internet website or other public medium. Publication of the photograph or information without engaging in the fee-for-removal practice is not unlawful.

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<sup>11</sup> 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.

The bill also requires an individual or business entity that publishes a booking photograph or criminal record information on an Internet website or other public medium to publish contact information so a person may submit a request to have his or her photograph or information removed from the website or other public medium. This provision would apply to any publisher of the photograph or other information, regardless of whether the publisher engages in the fee-for-removal practice.

Finally, the bill provides that a person who has been the subject of solicitation, charge, or collection of compensation for the removal of his or her criminal record information may file a civil action for actual damages and attorney fees against an individual or business entity that engages in the unlawful fee-for-removal practice or fails to provide required contact information. The bill also does not authorize the court to order that a violator remove the information from publication.

The bill takes effect 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:**

The bill provides that a person who has been the subject of solicitation, charge, or collection of compensation for the removal of his or her criminal record information may file a civil action for actual damages and attorney fees against an individual or business entity that engages in the unlawful fee-for-removal practice or fails to provide required contact information. The bill does not authorize a civil action for simply publishing the photograph or information.<sup>12</sup> Staff did not find any case in which a court has held that a civil action for similar violations is unconstitutional.

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<sup>12</sup> 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*

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Some private publishers of arrest record information may be subject to a civil action for punitive damages and attorney fees.

**C. Government Sector Impact:**

A question may arise whether state and local governments and government agencies are excluded from the provisions of the bill, and if not, whether they could be subject to a civil action for a violation of a provision of the bill (See “Technical Deficiencies” section of this analysis).

**VI. Technical Deficiencies:**

A question may arise whether the bill’s prohibition against the fee-for-removal practice applies to government agency practices. For example, the Florida Department of Law Enforcement (FDLE) provides a service through which certain criminal records can be expunged (removed from its records) if the applicant for expungement meets criteria to have the records expunged. A nonrefundable money order or cashier’s check for \$75.00 made payable to the FDLE must accompany the application. The bill should contain a specific exception for state and local governments and government agencies.

It appears that the intent of the bill sponsor is to authorize a person to file a civil action against the publisher of his or her booking photograph or criminal record information if the publisher either charges a fee or accepts compensation for the removal of that photograph or fails to provide required contact information. If this is the intent, the current language in the bill does not indicate that the publisher who committed the violation of the new section must have published the booking photograph or criminal record information of the person filing the civil action.

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

The National Conference of State Legislatures (NCSL) has provided the following information<sup>13</sup> relevant to laws and legislation addressing access to or publication of booking photographs or criminal record information:

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*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).

<sup>13</sup>Unless 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).

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.

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.”<sup>14</sup>

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 individual seeking disclosure of photographic records of 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.”

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<sup>14</sup> 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.

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®, PayPal®, American Express®, and Wells Fargo® appear to be in the process of terminating or determining whether to terminate their relationship with mug shot companies.<sup>15</sup>

## **VIII. Statutes Affected:**

This bill creates section 836.12 of the Florida Statutes.

## **IX. Additional Information:**

### **A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

### **B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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<sup>15</sup> 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](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).