

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 Rules

BILL: CS/SB 298

INTRODUCER: Criminal Justice Committee and Senators Soto and Dean

SUBJECT: Arrest Booking Photographs

DATE: April 1, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	Fav/CS
2.	<u>Siples</u>	<u>Hrdlicka</u>	<u>CM</u>	Favorable
3.	<u>Erickson</u>	<u>Phelps</u>	<u>RC</u>	Favorable

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.

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 must issue an order specifying that the photograph be removed from publication no later than 14 days after the order is entered. A civil penalty of \$1,000 per day will be imposed by the court for each day of noncompliance with the order.

A prevailing 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 will terminate the injunction.

The provisions of the bill do not apply to state and local governments or government agencies.

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, or formalize knowledge” are public records and open for public inspection.¹

Criminal record information may be 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 Office of the Attorney General Pam Bondi, *Public Records: A Guide for Law Enforcement Agencies* (2012 Edition), 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) 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 Feb. 28, 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 Feb. 28, 2014).

³ Office of the Attorney General, *Public Records*, 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 Office of the Attorney General, *Public Records*, at p. 5 and endnote 21, citing *Op. Att’y Gen. 91-74* (Oct. 1, 1991), and *Palm Beach Daily News v. Terlizze* (Fla. 15th Cir. Ct. Apr. 5, 1991).

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...” *Op. Att’y Gen. 94-90* (Oct. 25, 1994) (footnotes omitted), Office of the Attorney General (Florida), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/83A1D5004064269D852562210063168E> (last viewed on Feb. 28, 2014).

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 the 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 may only be 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 person who paid to have his or her arrest record information removed from one website may find

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., Adam Geller, Don't Want Arrest Mug Shot Online? 'Pay us,' Sites Say*, MSN NEWS, June 23, 2013, available at <http://news.msn.com/crime-justice/dont-want-arrest-mug-shot-online-pay-us-sites-say> (last viewed on Feb. 28, 2014) and David Segal, *Mugged by a Mug Shot Online*, THE NEW YORK TIMES, Oct. 5, 2013, available at http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&_r=0 (last visited Mar. 4, 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 Mar. 3, 2014).

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 used by mug shot companies as described above is not a first degree misdemeanor or felony in Florida.

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 on or in connection with the initial sale or distribution.¹²

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 violation of s. 540.08, F.S.¹³ It remains to be determined whether the operator violated the

¹¹ 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, available at <http://www.postandcourier.com/article/20131117/PC1610/131119492> (last viewed on Mar. 3, 2014).

¹² Section 540.08(4), F.S.

¹³ 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 Commerce and Tourism).

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.

Laws and Legislation of Other States

The National Conference of State Legislatures (NCSL) 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.”¹⁴ According to the NCSL, Georgia, Illinois, Oregon, Texas, and Utah have passed legislation to prohibit commercial sites from charging fees for removing inaccurate mug shots upon request or by prohibiting law enforcement from releasing mug shots to sites that charge a fee.

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 Response

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.¹⁵

Florida Law Enforcement Response

The Pinellas County Sheriff’s Office announced that it would no longer post booking photographs on its agency’s website.¹⁶ The names, addresses, and initial charges of those arrested will still be available on the website. The agency will still provide access to the mug shots to other law enforcement agencies and the media, but those entities must request access to those photographs and must log into a newly created system to retrieve them. Members of the public may also submit requests for mug shots.

III. Effect of Proposed Changes:

Section 1 creates s. 119.17, F.S., to establish a procedure for the removal of arrest booking photographs that are publicly accessible through a print or electronic medium and makes the fee-for-removal practice unlawful.¹⁷

¹⁴ National Conference of State Legislatures, “Mug Shots and Booking Photo Websites” (Feb. 17, 2014), available at <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx> (last visited Mar. 6, 2014).

¹⁵ See David Segal, *Mugged by a Mug Shot Online*, and Jose Pagliery *Mug Shot Extortion Sites Still Up and Running ... for Now*, CNN Money, Oct. 16, 2013, available at <http://money.cnn.com/2013/10/16/technology/mug-shot-websites/index.html> (last viewed on Mar. 3, 2014).

¹⁶ Stephen Thompson, *Pinellas Sheriff Limiting Access to Mugshots Online*, THE ST. PETERSBURG TRIBUNE, Jan. 9, 2014, available at <http://tbo.com/pinellas-county/pinellas-sheriff-targeting-websites-limits-access-to-mug-shots-20140109/> (last visited Mar. 4, 2014).

¹⁷ The practice under the bill is not a crime.

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 consideration to remove, correct, or modify an arrest booking photograph of an arrestee.¹⁸

The bill's prohibition is directed at the 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 must order that the photograph be removed from publication no later than 14 days after entry of the order. 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 reasonable 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.

The provisions of this bill do not apply to state and local governments or government agencies.¹⁹

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

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

¹⁸ "Fee or other consideration" does not include a fee or consideration, including attorney fees, solicited or accepted in connection with the actual or attempted settlement of an actual or threatened lawsuit or arbitration claim or other judicial or quasi-judicial proceeding.

¹⁹ 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.

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 the fee-for-removal practice. The bill does not authorize a civil action for simply publishing the photograph or information.²⁰ 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 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 may be ordered to pay attorney fees and costs to the prevailing arrestee(s). Additionally, those publishers who fail to comply with an injunction may incur civil penalties.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

²⁰ 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 541. 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.'" *Innovative Database Systems v. Morales*, 990 F.2d 217, 220 (5th Cir. 1993) (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985)).

VIII. Statutes Affected:

This bill creates section 119.172 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.)

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.