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 Appropriations

BILL:	CS/CS/SB 766
INTRODUCER:	Appropriations Committee; Judiciary Committee; and Senator Hukill
SUBJECT:	Surveillance by a Drone
DATE:	April 10, 2015
REVISED:	4/13/15

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stearns	Yeatman	CA	**Favorable**
2.	Procaccini	Cibula	JU	**Fav/CS**
3.	Davis	Kynoch	AP	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 766 generally prohibits a person, state agency, or political subdivision from using a drone to record an image of privately owned real property of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance on the individual or property, if reasonable expectations of privacy exist without that individual's written consent. The bill provides a definition of the term surveillance.

However, the bill also allows limited exceptions to the prohibition. A person or entity engaged in a business or profession licensed by the state, may use a drone to perform reasonable tasks within the scope of his or her license. Additionally, tax collectors may use drones for assessing property for ad valorem taxes. Lastly, a drone may be used to capture images by or for an electric, water, or natural gas utility.

The bill authorizes an aggrieved party to initiate a civil action and obtain compensatory damages or injunctive relief against a person, state agency, or political subdivision that violates the bill's prohibitions on using drones. This remedy may result in monetary damages, which may have an indeterminate negative fiscal impact on state and local governments.

This bill provides an effective date of July 1, 2015.

II. Present Situation:

History of Drones

Drones are unmanned aircraft, capable of being operated remotely or autonomously on a preprogrammed path. A drone can be the size of a mosquito or as large as a commercial airplane.[1] Additional drone features include thermal scanners, license plate readers, tracking, crop dusting, and an array of continuously developing technologies.[2] The Federal Aviation Administration (FAA) authorized drones as far back as 1990 for a broad array of domestic uses by governmental entities including firefighting, disaster relief, search and rescue, law enforcement, border patrol, and scientific research.[3] In recent years, drones have been increasingly operated by members of the public (in addition to governmental actors), for commercial and recreational purposes. One prominent drone manufacturer estimates that more than 500,000 personal drones have been sold in the United States alone.[4]

As drones have become more commonplace and drone technologies have improved, their universe of potential commercial uses has broadened. Drones are being used by commercial photographers and filmmakers, due to their high-power cameras and aerial picture perspective.[5] Additional commercial uses for drones are being explored by Google and Amazon, which have made significant investments in development of drone parcel delivery systems.[6]

The use of a drone for commercial operation is prohibited unless the drone operator has received prior approval from the FAA through one of three certificate programs:[7]

- Section 333 exemption and a Certificate of Waiver or Authorization (COA). This certificate may be used for commercial operations in low-risk, controlled environments.
- Special Airworthiness Certificate – Experimental Category. This certificate is for experimentation and research on new drone designs. "For-hire" operations are prohibited under this certificate.
- Special Airworthiness Certificate – Restricted Category. For a special purpose or a type certificate for production of the drone.

All public (governmental) drone operators must go through the Public COA process.[8] Model aircraft operators do not need permission from the FAA to fly.[9] While the number of authorized

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[1] Taly Matiteyahu, 48 COLUM. J.L. & SOC. PROBS. 265, 1 (Winter, 2015).
[2] *Id.*
[3] Federal Aviation Administration, *Fact Sheet – Unmanned Aircraft Systems (UAS)* (Feb. 15, 2015), http://www.faa.gov/news/fact_sheets/news_story.cfm?newsid=18297.
[4] David Rose, THE ATLANTIC, *Dudes with Drones* (Nov. 2014), http://www.theatlantic.com/magazine/print/2014/11/dudes-with-drones/380783/.
[5] *Id.*
[6] Alexis Madrigal, THE ATLANTIC, *Inside Google's Secret Drone-Delivery Program* (Aug. 2014) http://www.theatlantic.com/technology/print/2014/08/inside-googles-secret-drone-delivery-program/379306/.
[7] Federal Aviation Administration, *Civil Operations (Non-Governmental)*, http://www.faa.gov/uas/civil_operations/ (Page last modified Mar. 4, 2015).
[8] Federal Aviation Administration, *Unmanned Aircraft Systems – Frequently Asked Questions*, http://www.faa.gov/uas/faq/ (Page last modified Mar. 4, 2015).
[9] Federal Aviation Administration *Model Aircraft Operations*, http://www.faa.gov/uas/model_aircraft/ (Page last modified Mar. 4, 2015).

commercial operators is still small (24), the FAA continues to grant more regulatory exemptions, including one recent exemption for "flare stack inspections."[10] Those numbers will increase exponentially soon, as the FAA is nearing completion of an initial rule related to the use of small (under 55 pounds) drones, pursuant to the FAA Modernization and Reform Act of 2012.[11] The rule would allow "routine use of certain small unmanned aircraft systems," clearing the way for much wider commercial use of drones by the private sector.[12] The draft rule for small drones was released on February 15, 2015, opening a 60-day period for public comment prior to finalization of the rule.[13]

While drones have already been put to a wide array of uses, their potential uses are practically boundless. Researchers in France have found that drones are very useful for monitoring birds without disturbing them and have "a lot of potential to revolutionize bird censuses."[14] Developers at Google believe that, at best, drones could be the foundation of a new "access society" that relies on principles similar to the burgeoning "sharing economy" underpinning companies such as Uber and Airbnb, rather than today's "ownership society."[15] At worst, drones represent a much faster, cheaper and safer option for shipping packages.[16] One successful drone developer believes that drones will be able to respond to speech commands and may even be able to walk your dog. Another developer predicts that they will be so ubiquitous that in developed countries there will be one drone per person.[17] As a result, *Business Insider* predicts that the drone industry will generate $10 billion in new spending over the next decade.[18]

Privacy Issues Related to Drones

As stated prior, drones are manufactured in all shapes and sizes, from the 6.5 inch, 19 gram AeroVironment's Nano Hummingbird to massive drones with wingspans up to 150 feet and weights over 30,000 pounds.[19] Some drones are powered by batteries with lifespans of a few minutes, while others are designed to stay aloft for days at a time.[20] Some drones are built to last, while others are built to decompose.[21] Some drones are designed to fly like an airplane, some use

[10] Federal Aviation Administration, *FAA Grants Eight More UAS Exemptions*, http://www.faa.gov/news/updates/?newsId=81565 (Page last modified Feb. 3, 2015).
[11] Office of the Press Secretary, The White House, *Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems* (Feb. 15, 2015), https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua/ .
[12] Federal Aviation Administration, *Press Release – DOT and FAA Propose New Rules for Small Unmanned Aircraft Systems* (Feb. 15, 2015), http://www.faa.gov/news/press_releases/news_story.cfm?newsId=18295.
[13] *Id.*
[14] Nicholas St. Fleur, THE ATLANTIC, *Birds Are Mostly Cool with Drones* (Feb. 2015), http://www.theatlantic.com/technology/print/2015/02/drones-might-not-disrupt-birds-after-all/385338/.
[15] Madrigal, *supra* note 6.
[16] *Id*.
[17] Rose, *supra* note 4.
[18] Matt Schiavenza, THE ATLANTIC, *FAA Drone Regulations Deal Blow to Amazon* (Feb. 15, 2015), http://www.theatlantic.com/business/archive/2015/02/faa-drone-regulations-deal-blow-to-amazon/385529/.
[19] Jonathan Olivito, 74 OHIO STATE L.J., 670, *Beyond the Fourth Amendment: Limiting Drone Surveillance Through the Constitutional Right to Informational Privacy* (2013).
[20] *Id.*
[21] Shirley Li, THE ATLANTIC, *A Drone for the Environment* (Nov. 2014), http://www.theatlantic.com/technology/print/2014/11/a-drone-for-the-environment/382776/.

rotors similar to a helicopter, while others have the ability to enter "perch and stare" mode.[22] Perhaps even more relevant to a discussion of their potential privacy implications, drones can be equipped with a wide array of sensory equipment, including high-magnification lenses, infrared, ultraviolet and see-through imaging devices, acoustical eavesdropping devices, laser optical microphones, and face and body recognition software.[23]

This variety of designs and technology means that drones possess capabilities which could be used by private individuals or commercial organizations to breach reasonable expectations of privacy, including the voyeuristic actions of spying on and recording private acts. Because of their ability to stay aloft for long durations, drones could track a person's every move, if not indefinitely, then at least over a period of days. While larger drones may be more useful for following a person in more rural areas, smaller drones work better in urban areas. A drone could be programed to watch a specific piece of property for a period of time, or could have its facial recognition software programmed so that it automatically focused on a single person in a crowd. One drone could watch a building (or look inside the building), while another listens to conversations taking place inside. Or one drone outfitted with the proper equipment could perform all three tasks at once.

The prospect of constant monitoring, whether performed by a government entity or some private entity (perhaps a potential employer, insurance company, private detective, etc.), may have a chilling effect on associational and expressive freedoms enjoyed by the American populace. Some commentators argue that such constitutional rights, in addition to an "assumed" (but not decided) constitutional right to privacy, are not adequately protected by currently existing laws. A discussion of those laws (both statutory and common) and their possible shortcomings as applied to privacy in the context of drones, is presented below.

Nuisance Law

In ancient common law doctrine, ownership of the land "extended to the periphery of the universe."[24] However, the Supreme Court abrogated the common law in 1946 when it held that flights over property only constitute a taking if they are "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[25] Due to the relatively high altitude and relatively quiet operation of drones, it is unlikely that the isolated use of a drone would support a nuisance claim.[26] However, if a property owner were regularly subjected to the interference of the enjoyment of his land by a low-flying drone, then that owner might be able to maintain a nuisance claim.[27]

[22] Olivito, *supra* note 18 at 677.
[23] *Id.*
[24] *United States v. Causby*, 328 U.S. 256, 260 (1946) (The Court explained the common law doctrine with the Latin sentence, "Cujus est solum ejus est usque ad coelom," which means whoever owns soil, is theirs all the way to Heaven and to Hell.
[25] *Id.* at 265.
[26] Olivito, *supra* note 18 at 680.
[27] *See* Y. Douglas Yang, *Big Brother's Grown Wings: The Domestic Proliferation of Drone Surveillance and the Law's Response*, 23 B.U. PUB. INT. L.J. 343, note 266 (Summer 2014).

Trespass Law

A claim of trespass might be supported against an aircraft if the aircraft flies so low as to interfere substantially with the owner's use and enjoyment of the land.[28] However, drones often fly at an altitude lower than low-flying airplanes and yet well above a property owner's land. This airspace has been described as a property rights no-man's land for which courts have not defined a property owner's property interest.[29]

Intrusion upon Seclusion

The tort of intrusion upon seclusion must be supported by two findings:

- That a person intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, and
- The intrusion would be highly offensive to a reasonable person.

The key to successfully alleging an intrusion upon seclusion is that the victim had a "reasonable expectation of privacy."[30] As will be discussed more fully in relation to the inadequacy of Fourth Amendment protections, it is very difficult for a person to maintain a reasonable expectation of privacy outside of their private home or car. The fact that the intrusion must be "highly offensive to the reasonable person" narrows the scope of protection provided by this common law further.[31] However, "[c]onduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion."[32]

Publication of Private Facts

To commit the tort of publication of private facts, a person must publish or broadcast private information about someone else and the disclosure of that information would be highly offensive to the reasonable person and the information is not a matter of legitimate public concern.[33] Again, the scope of protection is limited by the fact that the disclosure must be highly offensive to the reasonable person. Also significant, the private information must be actually published to trigger the tort. Should the person collecting the information through the drone never actually widely disseminate any of the information, the victim may be prevented from asserting an injury under this doctrine.

Section 810.14, Florida Statutes – Voyeurism

A person commits the offense of voyeurism when he or she, with lewd, lascivious, or indecent intent:

- Secretly observes another person when the other person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy.

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[28] United States v. Causby, 328 U.S. 256, 1068 (1946).
[29] Colin Cahoon, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. AIR L. & COM. 157, 197-198 (Fall 1990).
[30] Restatment (Second) of Torts s. 652B.
[31] *Beyond the Fourth Amendment* at 680.
[32] *Goosen v. Walker*, 714 So. 2d 1149, 1150 (Fla. 4th DCA 1998) (quoting *Wolfson v. Lewis*, 924 F.Supp 1413 (E.D. Pa. 1996)).
[33] *Heath v. Playboy Enterprises, Inc.*, 732 F.Supp. 1145, 1148 (S.D. Fla. 1990).

- Secretly observes another person's intimate areas in which the person has a reasonable expectation of privacy, when the other person is located in a public or private dwelling, structure, or conveyance. As here, the term "intimate area" means any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view.

Wiretapping

Section 934.03, F.S., restricts people from intentionally intercepting wire, oral, or electronic communications. This statute in its current form appears applicable to drones. However, the protection from the statute is qualified by the requirement that a victim has a reasonable expectation of privacy.[34]

Fourth Amendment Jurisprudence

The Fourth Amendment to the United States Constitution protects against "unreasonable searches and seizures" by the government. The amendment provides some protection against drone surveillance directed at a private home, particularly when the drone uses a sense-enhancing technology; however, recent Supreme Court decisions have greatly circumscribed those protections.[35] Furthermore, the Fourth Amendment provides almost no protection against drone surveillance conducted in public places, which effectively is anywhere outside of a home.[36]

In *California v. Ciraolo*¸ 476 U.S. 207 (1986), the U.S. Supreme Court held that it was not a violation of the Fourth Amendment for a police department to fly in a plane 1,000 feet over a person's backyard (which was surrounded by a six-foot fence and a second ten-foot fence) in order to observe that person's property. The Court's holding was based on the fact that the backyard was visible from a "public vantage point," in this case, a plane flying 1,000 feet above the backyard.

In *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), the Supreme Court extended its holding in *Ciraolo*, holding that it was not a violation of the Fourth Amendment prohibition on searches and seizures for the Environmental Protection Agency to charter a private plane equipped with a camera with a magnification capability of 240x to take aerial photographs of a chemical manufacturing plant to which it had been denied access by the landowner.

Finally, in *Florida v. Riley*, 488 U.S. 445 (1989), a police department used a helicopter to fly 400 feet above a private greenhouse that was missing two panels on the roof. A deputy on board the helicopter looked through the uncovered portion of the roof and saw marijuana growing in the greenhouse. The U.S. Supreme Court held this was not a violation of the Fourth Amendment because the defendant did not have a reasonable expectation of privacy in the portion of his greenhouse that was partially exposed to aerial observation.

[34] *Jatar v. Lamaletto*, 758 So. 2d 1167, (Fla. 3d DCA 2000).
[35] Olivito, *supra* note 18 at 682.
[36] *Id.*

In summary, the Fourth Amendment may only protect a private landowner from drone surveillance if that person is within a portion of his or her home that is not observable from the air. Once that person is out in a public (or private) area that does not provide that person with a reasonable expectation of privacy, the government likely could observe that person via a drone without violating the Fourth Amendment. The Fourth Amendment does not provide any protection against actions taken by private actors, unless those actions were pursuant to governmental direction.[37]

Section 934.50, Florida Statutes – Searches and Seizure Using a Drone

The Freedom from Unwarranted Surveillance Act, passed by the Legislature in 2013, prohibits a law enforcement agency from using a drone to gather evidence or other information, subject to certain exceptions. The law does not restrict the use of drones to engage in surveillance by private actors.

III. Effect of Proposed Changes:

General Prohibition on the Use of Drones for Surveillance

This bill prohibits a person, state agency or political subdivision from using a drone equipped with an imaging device[38] to record an image[39] of privately owned real property or of the owner, tenant, occupant, invitee, or licensee of such property with the intent to conduct surveillance[40] on the property or person. The surveillance must be in violation of the person's reasonable expectation of privacy and without his or her written consent. The bill provides that a person is presumed to have a reasonable expectation of privacy if the person is not observable by a person at ground level, regardless of whether the person is observable by a drone in the air. However, the bill expressly provides that it is not intended to limit or restrict the application of federal law to the use of drones.

Authorized Users of Drones

The bill includes the following exceptions to those who may use a drone.

- The first exception is for a person or entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor of the state only if the drone is used to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license. However, this exception does not apply to a profession in which

[37] Findlaw, *When the Fourth Amendment Applies*, http://criminal.findlaw.com/criminal-rights/when-the-fourth-amendment-applies.html (last visited Mar. 14, 2015).
[38] The bill defines the term "imaging device" as a mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting an image.
[39] The bill defines the term "image" as a record of thermal, infrared, ultraviolet, visible light, or other electromagnetic waves; sound waves; odors; or other physical phenomena which captures conditions existing on or about real property or an individual located on that property.
[40] The bill creates a definition of "surveillance". The bill defines surveillance with respect to an owner, tenant, occupant, invitee, or licensee of privately owned real property as to observe, with visual clarity that is sufficient to be able to obtain information about, the identity, habits, conduct, movements, or whereabouts of such person or persons. The bill defines surveillance with respect to privately owned real property as to observe, with visual clarity that is sufficient to be able to obtain information about, the property's physical improvements, unique identifying features, or occupancy by one or more persons.

the licensee's authorized scope of practice includes obtaining information about the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons.

- The second exception is for an employee or a contractor of a property appraiser who uses a drone solely for the purposes of assessing property for ad valorem taxes.
- The third exception is for an electric, water, or natural gas utility to capture images for:
  - Operations and maintenance of utility facilities, including facilities used in the generation, transmission, or distribution of electricity, gas, or water, for the purpose of maintaining utility system reliability and integrity;
  - Inspecting utility facilities, including pipelines, to determine construction, repair, maintenance, or replacement needs before, during, and after construction of such facilities;
  - Assessing vegetation growth for the purpose of maintaining clearances on utility rights-of-way;
  - Utility routing, siting, and permitting for the purpose of constructing utility facilities or providing utility services; or
  - Conducting environmental monitoring, as provided by federal, state, or local law, rule, or permit.

Enforcement of Privacy Rights

The bill provides that an owner, tenant, occupant, invitee, or licensee of privately owned real property may receive compensatory damages and seek an injunction against future surveillance. A prevailing party is entitled to recover reasonable attorney fees under the bill. Additionally, if a case is tried to verdict, a contingency fee multiplier of up to two times the actual value of the attorney's time spent may be awarded to the plaintiff at the discretion of the court. A contingency fee multiplier is designed to promote access to the courts by providing an incentive to lawyers to take cases they might not otherwise accept.[41] The bill also authorizes punitive damages for a violation of the bill's prohibition on use of drones and provides that the remedies provided in the bill are cumulative to other existing remedies.

Effective Date

The bill provides an effective date of July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

[41] *See e.g.*, *Lane v. Head*, 566 So. 2d 508, 513 (Fla. 1990) (Grimes, J., concurring).

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A person who uses a drone to conduct surveillance of persons or property may be liable for damages under CS/CS/SB 766.

C. Government Sector Impact:

The bill authorizes an aggrieved party to initiate a civil action and obtain compensatory damages or injunctive relief against a state agency or political subdivision that violates the bill's prohibitions on using drones. This remedy may result in monetary damages, which may have an indeterminate negative fiscal impact on state and local governments.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 934.50 of the Florida Statutes.

IX. Additional Information:

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

CS/CS by Appropriations on April 9, 2015:
The committee substitute:

- Defines the term "surveillance."
- Creates an exception for the use of a drone by an electric, water, or natural gas utility in certain circumstances.
- Removes "occupied" real property as a property that is protected from surveillance by drones.

CS by Judiciary on March 24, 2015:
The committee substitute differs from the underlying bill by:

- Adding licensees and invitees on private property to the list of individuals whose privacy is protected by the bill.
- Generally authorizing the use of a drone by a person or entity engaged in a business or profession licensed by the state, within the scope of a license.
- Authorizing tax collectors to use drones for assessing property for ad valorem taxes.

B. Amendments:

None.