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 Community Affairs

BILL:	SB 766
INTRODUCER:	Senator Hukill
SUBJECT:	Surveillance by a Drone
DATE:	March 9, 2015
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stearns	Yeatman	CA	**Pre-meeting**
2.			JU	
3.			AP	

I. Summary:

SB 766 prohibits a person, state agency or political subdivision from using a drone to record an image of privately owned or occupied real property or of the owner, tenant, or occupant of such property with the intent to conduct surveillance on the individual or property. The bill authorizes compensatory damages, injunctive relief, attorney's fees and punitive damages.

II. Present Situation:

History of Drones

Drones, sometimes referred to as unmanned aerial vehicles or unmanned aerial systems, are often thought of as a relatively new invention used exclusively by the military in distant countries. However, the Federal Aviation Administration (FAA) authorized drones as far back as 1990 for a broad array of domestic uses by governmental actors including firefighting, disaster relief, search and rescue, law enforcement, border patrol, and scientific research.[1] In recent years, drones have been increasingly utilized by members of the public (in addition to governmental actors), most often for recreational purposes but also on occasion for technically-illegal commercial uses.[2] One prominent drone manufacturer estimates that more than 500,000 personal drones have been sold in the United States alone.[3]

As drones have become more commonplace and drone technologies have improved, their universe of potential commercial uses has broadened. Drones are increasingly being used by

[1] *Fact Sheet – Unmanned Aircraft Systems*, Federal Aviation Administration, February 15, 2015, *available at* http://www.faa.gov/news/fact_sheets/news_story.cfm?newsid=18297.
[2] *Dudes with Drones*, David Rose, The Atlantic, November 2014, *available at* http://www.theatlantic.com/magazine/print/2014/11/dudes-with-drones/380783/.
[3] *Id.*

commercial photographers and filmmakers,[4] Google and Amazon have made significant investments in development of drone parcel delivery systems,[5] Lady Gaga appeared in a "wearable drone,"[6] and TGI Fridays used drones in a promotion involving a "Togethermas Mistletoe Drone."[7]

As touched upon earlier, some of these uses of drones may be more legal than others due to the federal regulatory system governing the commercial operation of drones. Commercial operation of a drone is prohibited unless the drone operator has received prior approval from the FAA through one of three certificate programs:[8]

- 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.[9] Model aircraft operators do not need permission from the FAA to fly.[10] While the number of authorized commercial operators is still small (24), the FAA continues to grant more regulatory exemptions, including one recent exemption for "flare stack inspections."[11] 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.[12] The rule would allow "routine use of certain small unmanned aircraft systems," clearing the way for much wider commercial utilization of drones by the private sector.[13] 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.[14]

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[4] *Id.*
[5] *Inside Google's Secret Drone-Delivery Program*, Alexis Madrigal, The Atlantic, August 2014, *available at* http://www.theatlantic.com/technology/print/2014/08/inside-googles-secret-drone-delivery-program/379306/.
[6] *Dudes with Drones.*
[7] *TGI Fridays' Drone Delivers Bloody 'Mistletoe Mischief,'* Karma Allen, December 9, 2014, CNBC, *available at* http://www.cnbc.com/id/102250262#. While the mistletoe drone stunt was successful at garnering attention, it probably was not the type the restaurant chain was seeking. The drone made headlines after taking off part of a photographer's nose and slicing her chin.
[8] *Civil Operations (Non-Governmental)*, Federal Aviation Administration, February 9, 2015, *available at* http://www.faa.gov/uas/civil_operations/.
[9] *Unmanned Aircraft Systems – Frequently Asked Questions*, Federal Aviation Administration, March 2, 2015, *available at* http://www.faa.gov/uas/faq/.
[10] *Model Aircraft Operations*, Federal Aviation Administration, February 10, 2015, *available at* http://www.faa.gov/uas/model_aircraft/.
[11] *FAA Grants Eight More UAS Exemptions.*
[12] *Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, The White House – Office of the Press Secretary, February 15, 2015, *available at* http://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua/.
[13] *Press Release – DOT and FAA Propose New Rules for Small Unmanned Aircraft Systems*, Federal Aviation Administration, February 15, 2015, *available at* http://www.faa.gov/news/press_releases/news_story.cfm?newsId=18295.
[14] *Id.*

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."[15] 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" that underpins companies such as Uber and Airbnb, rather than today's "ownership society," and at worst, they represent a much faster, cheaper and safer option for shipping packages.[16] One successful drone developer believes that, within five years, drones will be able to respond to speech commands and may even be able to walk your dog, while another 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

Drones present so many potential uses because of their great diversity. They come 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 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 incredible variety of designs and equipment means that drones present very real dangers to individual privacy. 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 trained 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

[15] *Birds Are Mostly Cool with Drones*, Nicholas St. Fleur, The Atlantic, February 2015, *available at* http://www.theatlantic.com/technology/print/2015/02/drones-might-not-disrupt-birds-after-all/385338/.
[16] *Inside Google's Secret Drone-Delivery Program.*
[17] *The Drone Dudes.*
[18] *FAA Drone Regulations Deal Blow to Amazon*, Matt Schiavenza, The Atlantic, February 2015, *available at* http://www.theatlantic.com/business/print/2015/02/faa-drone-regulations-deal-blow-to-amazon/285529/.
[19] *Beyond the Fourth Amendment: Limiting Drone Surveillance Through the Constitutional Right to Informational Privacy*, Jonathan Olivito, Ohio State L.J., Vol 74, 670 (2013).
[20] *Id.*
[21] *A Drone for the Environment*, Shirley Li, The Atlantic, November 2014, *available at* http://www.theatlantic.com/technology/print/2014/11/a-drone-for-the-environment/382776/.
[22] *Beyond the Fourth Amendment* at 677.
[23] *Id.*

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 actor (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

At common law, property ownership "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 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 may be able to maintain a nuisance claim.[27]

Trespass Law

A claim of trespass may 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] Again, drones typically fly an altitude that would prevent this common law doctrine from applying.

Intrusion Upon Seclusion

The tort of intrusion upon seclusion must be supported by two findings:
1. That a person intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, and
2. 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."[29] As will be discussed more fully in relation to the inadequacy of Fourth Amendment protections, it is very difficult for a person to maintain that they had a reasonable expectation of privacy outside of their private home or car. The fact that the intrusion must be

[24] *Drones and Laws of General Applicability*, Michael Berry and Nabiha Syed, The Volokh Conspiracy, The Washington Post, September 25, 2014, *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/25/drones-and-laws-of-general-applicability/.
[25] *United States v. Causby*, 328 US 256, 266 (1946).
[26] *Beyond the Fourth Amendment* at 680.
[27] *Drones and Laws of General Applicability*.
[28] *Id.*
[29] *Id.*

"highly offensive to the reasonable person" narrows the scope of protection provided by this common law further.[30]

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.[31] 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.

State Wiretap and Peeping Tom Statutes

State wiretap statutes restrict people from using drones to intentionally intercept audio communications while "Peeping Tom" statutes prohibit the filming, photographing or observation of others. Importantly though, both protections are qualified by the requirement that the victims have a reasonable expectation of privacy.[32]

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.[33] Furthermore, the Fourth Amendment provides almost no protection against drone surveillance conducted in public places, which effectively is anywhere outside of a home.[34]

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 held that to be the case because 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.

[30] *Beyond the Fourth Amendment* at 680.
[31] *Drones and Laws of General Applicability.*
[32] *Id.*
[33] *Beyond the Fourth Amendment* at 682.
[34] *Id.*

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.

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.[35]

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

The Freedom from Unwarranted Surveillance Act, passed 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:

Section 1 amends s. 934.50, F.S., to prohibit a person, state agency or political subdivision from using a drone equipped with an imaging device to record an image of privately owned or occupied real property or of the owner, tenant, or occupant of such property with the intent to conduct surveillance 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 for purposes of this law, 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. The bill reaches many if not all of the potential modes of information capture by a drone by providing expansive definitions for the terms "image" and "imaging device."

The bill provides that an owner, tenant, or occupant of 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. The bill also authorizes punitive damages and provides that the remedies provided in this section are cumulative to other existing remedies.

Section 2 provides an effective date of July 1, 2015.

[35] *When the Fourth Amendment Applies*, Findlaw *available at* http://criminal.findlaw.com/criminal-rights/when-the-fourth-amendment-applies.html.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The language used by the bill to describe the parties that could bring an action under this section may not include all potential plaintiffs. The bill only protects the "owner, tenant, or occupant" of private property. The term occupant may be construed as requiring some period of sustained presence at a specific property. As such, it may not include social guests (invitees) or others (licensees) that visit private property for relatively short periods of time.

VII. Related Issues:

According to the Department of Revenue (DOR) staff analysis, the bill as drafted could affect land surveying and mapping activities currently regulated by ch. 472, F.S. The DOR suggests adding an exception to the prohibitions enacted by the bill for aerial photography used by land surveyors and mappers or a narrower exception for property appraisers who use aerial photography for use in the assessment of property. Alternatively, if the sponsor defined "surveillance" within the bill, aerial photography as used by property appraisers could be excluded from the definition.

VIII. Statutes Affected:

This bill substantially amends section 934.50 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.