

**HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS**

BILL #:	CS/CS/CS/HB 857	FINAL HOUSE FLOOR ACTION:		
SUBJECT/SHORT TITLE	Criminal History Records	118	Y's 0	N's
SPONSOR(S):	Judiciary Committee; Justice Appropriations Subcommittee; Criminal Justice Subcommittee; Plakon and others	GOVERNOR'S ACTION:	Approved	
COMPANION BILLS:	CS/CS/CS/SB 118; CS/CS/HB 369; HB 395; CS/CS/CS/HB 450			

SUMMARY ANALYSIS

CS/CS/CS/HB 857 passed the House on April 28, 2017, as CS/CS/CS/SB 118.

In Florida, a person's arrest booking photograph (often referred to as a "mug shot") is a public record. In recent years, private companies have created websites for the purpose of publishing these photographs online. Such websites typically keep the photographs online even if the charges were dismissed or a not guilty verdict was entered, and charge fees to remove a photograph.

The bill prohibits a person or entity engaged in the business of publishing or otherwise disseminating arrest booking photographs from soliciting or accepting a fee to remove a photograph. Under the bill, a person whose arrest booking photograph has been published or his or her legal representative may request in writing that the photograph be removed. Within 10 calendar days after receipt of such written request, the publisher must remove the photograph without charge. Failure to remove the photograph may subject the publisher to civil penalties of \$1,000 per day, as well as actual damages and penalties under the Florida Deceptive and Unfair Trade Practices Act (FDUPTA).

The bill also creates a new section of law that requires the Florida Department of Law Enforcement (FDLE) to administratively seal the criminal history record of a person upon notification that the state attorney declined prosecution, the case was dismissed or nolle prossed, or an acquittal or verdict of not guilty was entered. This section of the bill, however, will not become law because the effectiveness of the section was contingent on the passage of HB 369 or similar legislation, which did not pass during the 2017 Regular Session.

The bill may have a positive fiscal impact on the General Revenue Fund. Additionally, the Department of Legal Affairs may see a workload increase to review and file the FDUTPA actions against publishers that refuse to remove booking photographs. The bill does not appear to have a fiscal impact on local governments.

The bill was approved by the Governor on June 16, 2017, ch. 2017-130, L.O.F., and will become effective on July 1, 2018.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Present Situation

Disclosure of Criminal Record Information

In Florida, 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, unless a specific exemption applies.¹

Criminal record information may be obtained and published by non-governmental publishers. This information includes 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.³

Arrest Record Information

Public record information pertaining to a person’s arrest for the alleged commission of a crime includes the arrest report and booking photograph (commonly known as a “mugshot”). With few exceptions, arrest record information (including booking photographs) must be disclosed pursuant to a public records request.⁴

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 “mugshot companies.”

Mugshot companies operate commercial websites that repost booking photographs. Such companies typically keep these photographs online even if the person was found not guilty or the charges were dropped;⁵ however, many of these websites will remove the photograph for a fee (often a very expensive one).⁶ There are also third-party websites that offer to remove photographs from private mugshot company websites for a fee.⁷ The fees of one of these third party websites range from \$399 to

¹ Office of the Attorney General (Florida), *Public Records: A Guide for Law Enforcement Agencies* (2012 Edition), at p. 1. and endnote 1 (citing *Shevin v. Byron, Harless, Schaffer, Reid and Assocs., Inc.*, 379 So. 2d 633, 640 (Fla. 1980)) and endnote 2 (citing *Wait v. Fla. Power & Light Co.*, 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 visited on April 28, 2017).

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. Florida Department of Law Enforcement, Criminal History Information, *Search Florida’s Criminal Histories*, available at <https://web.fdle.state.fl.us/search/app/default> (last visited on April 28, 2017).

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

⁴ 94-90 Fla. Op. Att’y Gen. (1994) (footnotes omitted), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/83A1D5004064269D852562210063168E> (last visited on April 28, 2017).

⁵ Steve Osunsami, *Mug Shot Websites: Profiting Off People In Booking Photos?*, ABC NEWS (March 7, 2013), available at <http://abcnews.go.com/Technology/mug-shot-websites-profiting-off-people-booking-photos/story?id=18669703> (last viewed April 28, 2017).

⁶ 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=2& (last viewed April 28, 2017).

⁷ Laura C. Morel, *Pinellas County Sheriff’s Office to stop posting online mug shots*, TAMPA BAY TIMES (“Morel Report”) (Jan. 9, 2014), available at <http://www.tampabay.com/news/publicsafety/crime/pinellas-county-sheriffs-office-to-remove-online-mugshots/2160316> (last visited April 28, 2017); NAT’L CONFERENCE OF STATE LEGISLATURES, *Mug Shots and Booking Photo*

remove one photograph to \$1,799 to remove five photographs.⁸ The expense is compounded, however, when a photograph is posted on multiple websites, with each charging their own fee for removal.⁹ There have also been reported incidents of people paying the fees and their photographs not being removed.¹⁰

The companies make a profit by charging a fee to remove the image. Photos posted on one site may also be reposted to other sites, causing continuing harm to the reputation of the individual. Florida law does not specifically prohibit this practice.¹¹

Laws and Legislation of Other States

According to the National Conference of State Legislatures (“NCSL”), several states have passed laws that say public records cannot be used for commercial purposes. Thirteen states have enacted legislation designed to prohibit commercial website operators from posting mugshot photos on a website and charging a removal fee.¹²

An American Bar Association article suggests that there is no legal solution to this problem, and instead, the solution will develop through private sector activity.¹³ For example, Google has adjusted its algorithms so that the mugshot companies will not appear as prominently in the search results. In addition, some credit card companies such as MasterCard, American Express, and Discover are cutting ties with these types of websites.¹⁴

Other Actions

In 2014, the Pinellas County Sheriff’s Office announced that it would no longer post booking photographs on its website. The names, addresses, and initial charges of those arrested are still available on the website. The agency still provides access to the mugshots to other law enforcement agencies and the media, but those entities must request access to those photographs. Members of the public may also submit requests for mugshots.¹⁵

The Lee County Sheriff’s Office website indicates that it will remove a booking photograph once notified the arrest record information is sealed or expunged.¹⁶

Case Law

Persons having their booking photographs posted by commercial entities have sought relief based on various causes of action. These include claims for an invasion of privacy based on false light,¹⁷ invasion

Websites (“NCSL Mugshot Overview”), available at <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx#WY> (last visited April 28, 2017).

⁸ Morel Report, *supra* note 7.

⁹ Osunsami, *supra* note 5.

¹⁰ Andrew Knapp, *South Carolina attorneys, lawmakers aim to disrupt business of publishing jail mug shots*, THE POST AND COURIER (Nov. 17, 2013), available at <http://www.postandcourier.com/article/20131117/PC1610/131119492> (last viewed April 28, 2017).

¹¹ NCSL Mugshot Overview, *supra* note 7.

¹² *Id.* The thirteen states are California, Colorado, Georgia, Illinois, Kentucky, Maryland, Missouri, Oregon, South Carolina, Texas, Utah, Virginia, and Wyoming.

¹³ Stephanie Francis Ward, *Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them*, ABA Journal, Aug. 1, 2012, available at http://www.abajournal.com/magazine/article/hoist_your_mug_websites_will_post_your_name_and_photo_others_will_charge_you (last visited on April 28, 2017).

¹⁴ NCSL Mugshot Overview, *supra* note 7.

¹⁵ Stephen Thompson, *Pinellas Sheriff Limiting Access to Mugshots Online*, The Tampa Tribune, Jan. 10, 2014, available at <http://tbo.com/pinellas-county/pinellas-sheriff-targeting-websites-limits-access-to-mug-shots-20140109/> (last visited on April 28, 2017).

¹⁶ Lee County Sheriff’s Office, *FAQ, How can I have my arrest photo or information removed from the Lee County Sheriff’s Office website?*, Oct. 22, 2015, available at <http://www.sherifl.eefl.org/main/index.php?r=faqs/index&cat=1&id=524> (last visited on April 28, 2017).

of privacy based on unauthorized appropriation of name or likeness, defamation by slander, and unjust enrichment.

In 2008, the Florida Supreme Court indicated that Florida does not recognize tort claims based on false light, “because we conclude that false light is largely duplicative of existing torts, but without the attendant protections of the First Amendment.”¹⁸ The Court specifically noted that the key elements of a false claim are nearly identical to the elements required in a defamation case.¹⁹ Florida does recognize defamation claims.²⁰

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 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;
- 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; and
- Any photograph of a person solely as a member of the public and where such person is not named or otherwise identified in or in connection with the use of such photograph.²¹

When necessary consent is not obtained, the person whose name, portrait, photograph, or other likeness is used may bring an action to enjoin the unauthorized publication, printing, display, or other public use, and to recover damages for any loss or injury sustained, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.²²

In 2014, a Florida federal district court denied the defendant’s motion to dismiss a cause of action alleging a violation of s. 540.08, F.S., for publishing the plaintiff’s booking photograph without her consent and advertising “unpublishing services” that required the payment of a fee to remove the photograph.²³ In a later proceeding, the court denied the plaintiff’s Motion to Certify Class (to allow the case to proceed as a class action) without prejudice.²⁴ The case did not have a trial on the merits of the cases, so it is unknown whether the plaintiff would have succeeded on her claim.

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

History and Purpose of FDUTPA

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is a consumer and business protection measure that prohibits unfair methods of competition, unconscionable acts or practices, and

¹⁷ A claim of false light is a type of a claim of invasion of privacy based in tort. For example, to prevail in a false light claim in Pennsylvania, a defendant must establish that a highly offensive false statement was publicized by a defendant with knowledge or in reckless disregard of its falsity. *Santillo v. Reedel*, 430 Pa. Super. 290, 295-96 (Pa. Super. Ct. 1993).

¹⁸ *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100 (Fla. 2008).

¹⁹ *Id.* at 1105-06.

²⁰ *Id.* at 1111-12. See ch. 770, F.S.

²¹ s. 540.08(4), F.S.

²² s. 540.08(2), F.S.

²³ *Bilotta v. Citizen Info. Assocs., LLC*, 2014 U.S. Dist. LEXIS 3229 (M.D. Fla. Jan. 10, 2014).

²⁴ *Bilotta v. Citizen Info. Assocs., LLC*, 2014 U.S. Dist. LEXIS 68495 (M.D. Fla. May 19, 2014).

unfair or deceptive acts or practices in trade or commerce.²⁵ The FDUTPA is based on federal law.²⁶ The state attorney or the Department of Legal Affairs may bring actions when it is in the public interest on behalf of consumers or governmental entities.²⁷ The Office of the State Attorney may enforce violations of the FDUTPA if the violations take place in its jurisdiction. The Department of Legal Affairs has enforcement authority if the violation is multi-jurisdictional, the state attorney defers in writing, or the state attorney fails to act within 90 days after a written complaint is filed.²⁸ Consumers may also file suit through private actions.²⁹

Remedies under the FDUTPA

The Department of Legal Affairs and the State Attorney, as enforcing authorities, may seek the following remedies:

- Declaratory judgments;
- Injunctive relief;
- Actual damages on behalf of consumers and businesses;
- Cease and desist orders; and
- Civil penalties of up to \$10,000 per willful violation.³⁰

Remedies for private parties are limited to a:

- Declaratory judgment and an injunction where a person is aggrieved by a FDUTPA violation; and
- Actual damages, attorney fees, and court costs, where a person has suffered a loss due to a FDUTPA violation.³¹

Sealing of Criminal History Records

Under current law, a court may order a person's criminal history record to be sealed. A person who petitions the court to have a criminal history record sealed must first obtain a certificate of eligibility (COE)³² from the Florida Department of Law Enforcement (FDLE). Section 943.059(2), F.S., provides that FDLE shall issue a COE for sealing to a person who is the subject of a criminal history record provided that such person:

- Has submitted to FDLE a certified copy of the disposition of the charge to which the petition to seal pertains;
- Remits a \$75 processing fee to the department for placement in the FDLE Operating Trust Fund, unless such fee is waived by the executive director;
- Has never, before the date on which the application for a COE is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b), F.S.;

²⁵ Chapter 73-124, L.O.F., and s. 501.202, F.S.

²⁶ D. Matthew Allen, et. al., *The Federal Character of Florida's Deceptive and Unfair Trade Practices Act*, 65 U. MIAMI L. REV. 1083 (Summer 2011).

²⁷ s. 501.207(1)(c) and (2), F.S.; see s. 501.203(2), F.S. (defining "enforcing authority" and referring to the office of the state attorney if a violation occurs in or affects the judicial circuit under the office's jurisdiction; or the Department of Legal Affairs if the violation occurs in more than one circuit; or if the office of the state attorney defers to the department in writing; or fails to act within a specified period.); see also David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLORIDA BAR JOURNAL 52, Dec. 2002 (analyzing the merits of FDUTPA and the potential for deterrence of anticompetitive conduct in Florida), available at http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0.business.Division* (last visited on April 28, 2017).

²⁸ s. 501.203(2), F.S.

²⁹ s. 501.211, F.S.

³⁰ ss. 501.207(1), 501.208, and 501.2075, F.S. Civil Penalties are deposited into general revenue. Enforcing authorities may also request attorney fees and costs of investigation or litigation. s. 501.2105, F.S.

³¹ s. 501.211(1) and (2), F.S.

³² s. 943.059(2), F.S.

- Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never secured a prior sealing or expunction of a criminal history record; and
- Is no longer under court supervision applicable to the disposition of the arrest or alleged criminal activity to which the petition to seal pertains.³³

A petition to a court to seal a criminal history record is complete only when accompanied by a valid COE issued by FDLE and a sworn statement attesting that the petitioner:

- Has never, before the date on which the petition is filed, been adjudicated guilty of a criminal offense or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b), F.S.;
- Has not been adjudicated guilty of or adjudicated delinquent for committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains;
- Has never secured a prior sealing or expunction of a criminal history record; and
- Is eligible for such a sealing to the best of his or her knowledge or belief and does not have any other petition to seal or any petition to expunge pending before any court.³⁴

Section 943.059(4), F.S., provides that when a record is sealed, it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes. A person may lawfully deny or fail to acknowledge the sealed arrest, except in specific circumstances.³⁵

Records that have been sealed are confidential and exempt from the public records law. It is a first-degree misdemeanor to divulge their existence, except to specific entities for licensing or employment purposes.

Effect of the Bill

Arrest Booking Photographs

The bill prohibits any person or entity engaged in the business of publishing or disseminating arrest booking photographs from soliciting or accepting a fee to remove the photographs. A person whose arrest booking photograph was published, or a legal representative of that person, may make a request in writing for the removal of the photograph. The written request must be by registered mail and must include sufficient proof of identification of the person whose photograph was published and specific information identifying the photograph to be removed. Within 10 calendar days after receiving a written request, the publisher of the photograph must remove the photograph without charge.

If the publisher does not remove the photograph within 10 calendar days after receipt of the written request for removal, the person whose arrest booking photograph was published or otherwise disseminated may bring a civil action to have the court issue an injunction that enjoins the continued publication or dissemination of the photograph. The court may impose a civil penalty of \$1,000 per day for noncompliance with the injunction and must award reasonable attorney fees and court costs related to the issuance and enforcement of the injunction. Any money recovered for the civil penalties must be deposited into the General Revenue Fund. Additionally, refusal to remove an arrest booking photograph after a written request constitutes an unfair or deceptive trade practice and subjects the publisher to additional penalties under FDUPTA.

³³ s. 943.059(2)(a)-(f), F.S.

³⁴ s. 943.059(1)(a)-(b), F.S.

³⁵ s. 943.059(4)(a)1.-10., F.S.

The bill states that the provisions discussed above do not apply to a person or entity that publishes or disseminates information relating to arrest booking photographs, unless the person or entity solicits or accepts a fee to remove the information.

Administrative Sealing of Criminal History Records

The bill creates s. 943.0586, F.S., to require the FDLE to administratively seal the criminal history record of a person upon notification by the clerk of the court that the state attorney declined prosecution, the case was dismissed or nolle prossed, or an acquittal or verdict of not guilty was entered. This section of the bill, however, will not become law because the effectiveness of the section was contingent on the passage of HB 369 or similar legislation, which did not pass during the 2017 Regular Session.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: The bill allows a court to impose a civil penalty of \$1,000 per day on a publisher for noncompliance with an injunction requiring the removal of a posted photograph. If a court orders this civil penalty, the funds would be deposited in the General Revenue Fund.
2. Expenditures: The Department of Legal Affairs may see a workload increase to review and file the FDUTPA actions against publishers that refuse to remove booking photographs.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: The bill does not appear to have any impact on local government revenues.
2. Expenditures: The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: The bill may reduce costs for a person who wants his or her booking photograph removed from a mugshot company website because the bill authorizes a civil injunctive action, with an entitlement to reasonable attorney fees and costs, and actual damages under the FDUPTA against publisher that fails to remove a photograph after written request.

D. FISCAL COMMENTS: None.