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 118
INTRODUCER:	Criminal Justice Committee; Judiciary Committee; and Senator Steube
SUBJECT:	Criminal History Records
DATE:	March 15, 2017 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Cibula	JU	**Fav/CS**
2.	Jones	Hrdlicka	CJ	**Fav/CS**
3.	Harkness	Hansen	AP	**Pre-meeting**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 118 prohibits any person or entity that publishes arrest booking photographs to solicit or accept a fee to remove the photographs. Within ten calendar days of receiving a written request by the person in the photograph or his or her legal representative, the publisher of the photograph must remove the photograph.

If the publisher does not remove the photograph, the person whose arrest booking photograph was published or otherwise disseminated may bring a civil action to have the court issue an injunction. The court may also 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 issuing and enforcing the injunction. Any money recovered for the civil penalties must be deposited into the General Revenue Fund.

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 the Florida Deceptive and Unfair Trade Practices Act.

Currently, criminal history records relating to charges disposed of by a trial are ineligible for expunction, regardless of the verdict in the case. Under the bill, a case resolved by a judgment of acquittal or a not guilty verdict is eligible for expunction.

The bill also allows a person to seek expunction of a criminal history record if he or she has not been adjudicated guilty for a misdemeanor offense or been adjudicated delinquent for committing a misdemeanor specified in section 943.051(3)(b), Florida Statutes, in the past ten years.

The provisions of the bill relating to expunction will have minimal fiscal impact on the Florida Department of Law Enforcement (FDLE) and an indeterminate impact on the court system. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2017.

II. Present Situation:

Public Disclosure of Criminal Record Information

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 ("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

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[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 (last visited on February 13, 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 February 13, 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] Op. Att'y Gen. 94-90 (October 25, 1994) (footnotes omitted), available at http://www.myfloridalegal.com/ago.nsf/Opinions/83A1D5004064269D852562210063168E (last visited on February 13, 2017).

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. 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.[5]

Laws and Legislation of Other States

Some 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.[6]

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.[7] 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.[8]

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.[9]

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.[10]

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[5] National Conference of State Legislatures, *Mug Shots and Booking Photo Websites, Overview*, February 3, 2017, available at http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx (last visited on February 13, 2017).
[6] *Id*. The thirteen states are California, Colorado, Georgia, Illinois, Kentucky, Maryland, Missouri, Oregon, South Carolina, Texas, Utah, Virginia, and Wyoming.
[7] Stephanie Francis Ward, *Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them*, ABA Journal, August 1, 2012, available at http://www.abajournal.com/magazine/article/hoist_your_mug_websites_will_post_your_name_and_photo_others_will_charge_yo (last visited on February 13, 2017).
[8] *Supra* note 5.
[9] Stephen Thompson, *Pinellas Sheriff Limiting Access to Mugshots Online*, The Tampa Tribune, January 10, 2014, available at http://tbo.com/pinellas-county/pinellas-sheriff-targeting-websites-limits-access-to-mug-shots-20140109/ (last visited on February 13, 2017).
[10] Lee County Sheriff's Office, *FAQ, How can I have my arrest photo or information removed from the Lee County Sheriff's Office website?*, October 22, 2015, available at http://www.sheriffleefl.org/main/index.php?r=faqs/index&cat=1&id=524 (last visited on February 13, 2017).

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, invasion of privacy based on unauthorized appropriation of name or likeness, defamation by slander, and unjust enrichment. [11]

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."[12] The Court specifically noted that the key elements of a false claim are nearly identical to the elements required in a defamation case.[13] Florida does recognize defamation claims.[14]

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.[15]

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.[16]

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.[17] In a later proceeding, the court denied the plaintiff's Motion to Certify

[11] 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, 295-296 (Pa. Super. Ct.1993).
[12] *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100 (Fla. 2008).
[13] *Id*. at 1105-1106.
[14] *Id*. at 1111-1112. *See* ch. 770, F.S.
[15] Section 540.08(4), F.S.
[16] Section 540.08(2), F.S.
[17] *Bilotta v. Citizen Info. Assocs., LLC*, 2014 U.S. Dist. LEXIS 3229 (M.D. Fla. Jan. 10, 2014).

Class (to allow the case to proceed as a class action) without prejudice.[18] 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 unfair or deceptive acts or practices in trade or commerce.[19] The FDUTPA is based on federal law.[20] 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.[21] 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.[22] Consumers may also file suit through private actions.[23]

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.[24]

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.[25]

[18] *Bilotta v. Citizen Info. Assocs., LLC*, 2014 U.S. Dist. LEXIS 68495 (M.D. Fla. May 19, 2014).
[19] Chapter 73-124, L.O.F., and s. 501.202, F.S.
[20] 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.
[21] Section 501.207, F.S. David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLA. B.J. 52, December 2002, available at http://www.floridabar.org/divcom/jn/jnjournal01.nsf/c0d731e03de9828d852574580042ae7a/99aa165b7d8ac8a485256c8300791ec1!OpenDocument&Highlight=0,business,Division* (last visited on February 13, 2017).
[22] Section 501.203(2), F.S.
[23] Section 501.211, F.S.
[24] Sections 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. Section 501.2105, F.S.
[25] Section 501.211(1) and (2), F.S.

Expunction of Criminal Records

A court may order a criminal record to be expunged.[26] A person seeking to have a criminal record expunged must first obtain a valid certificate of eligibility from the FDLE. To do so, the person must provide the FDLE:

- A written, certified statement from the appropriate state attorney or statewide prosecutor that:
  - An indictment, information, or other charging document was not filed or issued in the case.
  - An indictment, information, or other charging document, if filed or issued in the case, was dismissed or dropped by the state attorney or the court, and that none of the charges resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt.
  - The applicant does not have a criminal history record relating to certain delineated violations.[27]
- A $75 processing fee, unless the fee is waived.
- A certified copy of the disposition of the charge.[28]

The person also must not:

- Before the date the application for a certificate of eligibility is filed, have 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.[29]
- Have been adjudicated guilty or delinquent of committing any of the acts stemming from the arrest or alleged criminal activity to which the petition to expunge pertains.
- Be under court supervision for the arrest or crime to which the petition to expunge pertains.
- Have secured a prior sealing or expunction other than the required 10-year sealing for the offense sought to be expunged.[30]

Additionally, the person must have had the record sealed for at least 10 years by court order. The requirement for the record to have been sealed for 10 years does not apply if a plea was not entered or all charges related to the arrest or offense to which the petition to expunge pertains were dismissed before trial.[31]

[26] "Expunction of a criminal history record" is defined in s. 943.045(16), F.S.
[27] These violations include sexual misconduct, luring or enticing a child, sexual battery, lewd or lascivious offenses, voyeurism, violations of the Florida Communications Fraud Act, sexual performance by a child, offenses by public officers or employees, acts in connection with obscenity and minors, pornography, traveling to meet a minor, selling or buying of minors, drug trafficking, a pretrial detention violation, and any violation specified as a predicate offense for registration as a sexual predator or sexual offender. Section 943.0585(2)(a)3., F.S.
[28] Section 943.0585(2)(a)-(c), F.S.
[29] These crimes include assault; battery; carrying a concealed weapon; unlawful use of destructive devices or bombs; neglect of a child; assault or battery on a law enforcement officer, firefighter, or certain other officers; open carry of a weapon; exposure of sexual organs; unlawful possession of a firearm; petit theft; cruelty to animals; arson; and unlawful possession or discharge of a weapon or firearm at a school-sponsored event or school property. Section 943.051(3)(b), F.S.
[30] Section 943.0585(2)(d)-(g), F.S.
[31] Section 943.0585(2)(h), F.S.

After receiving the certificate of eligibility, the person must file a petition with the court to expunge the record. The petition must include a sworn statement attesting that he or she:

- Has never been adjudicated guilty of a crime or comparable ordinance violation, or been adjudicated delinquent for committing any felony or a misdemeanor specified in s. 943.051(3)(b), F.S;[32]
- Has never been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest of alleged criminal activity to which the petition pertains;
- Has never secured a prior sealing or expunction of a criminal history record unless the petition for expunction is for a criminal history record previously sealed for 10 years, provided the record is otherwise eligible for expunction; and
- Is eligible for such an expunction and does not have any other petition to expunge or petition to seal before any court.[33]

Effect of an Expunction of a Criminal History Record

If the court grants a petition to expunge, several entities are required to forward copies of the expunction order to relevant persons or entities. The clerk of the court must provide the expunction order to the state attorney or statewide prosecutor, the arresting agency, and any entity that previously received the criminal history record from the court. The arresting agency must provide the expunction order to any entity to which the agency previously disseminated the criminal history record information. Finally, the FDLE must provide the expunction order to the Federal Bureau of Investigation.[34]

Any criminal justice agency that has a record that is expunged must physically destroy or obliterate the record. The FDLE, however, must maintain the record. The record is protected as confidential and exempt from disclosure requirements under the public records laws.[35]

A person who has had a record expunged may deny or fail to report the arrests expunged, unless the person is:

- Seeking appointment as a guardian, a position with a criminal justice agency, a license by the Division of Insurance Agent and Agent Services of the Department of Financial Services, or a position with an agency which is responsible for the protection of vulnerable persons, including children, disabled persons, and elderly persons;
- A defendant in a criminal prosecution;
- Petitioning for an expunction of a criminal history record, or of an offense as a victim of human trafficking, or a sealing of a criminal history record; or
- Applying for admission to The Florida Bar.[36]

[32] *Supra* note 27.
[33] Section 943.0585(1)(b), F.S.
[34] Section 943.0585(3), F.S.
[35] Section 943.0585(4), F.S.
[36] Section 943.0585(4)(a), F.S.

III. Effect of Proposed Changes:

Arrest Booking Photographs

The bill prohibits any person or entity that disseminates arrest booking photographs to solicit or accept a fee to remove the photographs. Within ten calendar days of receiving a written request by the person in the photograph or his or her legal representative, the publisher of the photograph must remove the photograph without charge.

If the publisher does not remove the photograph, the person whose arrest booking photograph was published or otherwise disseminated may bring a civil action to have the court issue an injunction. The court may also impose a civil penalty of $1,000 per day for noncompliance with the injunction. The court must also award reasonable attorney fees and court costs related to the issuance and enforcement of the injunction. Any money recovered for the civil penalties shall be deposited into the General Revenue Fund.

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 the FDUTPA.

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.

Eligibility for Expunction

The bill enables a person to seek expunction of a criminal history record associated with a judgment of acquittal or a not guilty verdict. [37] Currently, the criminal history records of cases disposed of by a judgement of acquittal or in a trial are ineligible for expunction, regardless of the verdict in the trial.

The bill also allows a person to seek expunction of a criminal history record if he or she has not been adjudicated guilty for a misdemeanor offense or been adjudicated delinquent for committing a misdemeanor specified in s. 943.051(3)(b), F.S., in the past ten years. Currently, a person cannot seek the expunction of a criminal history record if he or she has ever been adjudicated of a misdemeanor or adjudicated delinquent for a misdemeanor specified in s. 943.051(3)(b), F.S.

The bill is effective July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

[37] A judgment of acquittal may occur after the state concludes its case if the evidence in the light most favorable to the state is insufficient for conviction. BLACK'S LAW DICTIONARY, 6th ed.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Requiring private entities to remove booking arrest photos may result in a constitutional challenge based on the First Amendment to the extent that the bill regulates protected speech. However, the absence of a sufficiently analogous case on point makes the potential outcome of a First Amendment challenge speculative.[38]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

CS/CS/SB 118 may reduce costs for people who have their booking photographs published and want the photographs removed because the bill prohibits publishers of the photographs from charging removal fees. The bill also authorizes a civil cause of action, with an entitlement to reasonable attorney fees and costs, against those who, after a written request, fail to remove the photographs.

C. Government Sector Impact:

The bill allows a court to impose a civil penalty of $1,000 per day on the publisher for noncompliance with an injunction requiring the removal of a posted photograph. If a court orders this civil penalty, the monies will be remitted to the General Revenue Fund. Any workload increases for the courts because of the civil cause of action created by the bill are not expected to require additional judicial resources and are therefore expected to have no fiscal impact.

The bill allows a person to seek expunction of a criminal history record associated with a judgment of acquittal or a not guilty verdict. The bill also allows a person to seek expunction of a criminal history record if he or she has not been adjudicated for a misdemeanor offense or been adjudicated delinquent for committing a misdemeanor specified in s. 943.051(3)(b), F.S., in the past ten years. This will require the FDLE to

[38] For comparison, *see Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (holding that a newspaper was not liable for disclosing a victim's identity obtained from a police report released by law enforcement in violation of law, and further that the matter was of public concern and that imposing damages on the newspaper violated the First Amendment); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001), (holding that if a publisher lawfully obtains the information in question, the speech is protected by the First Amendment provided it is a matter of public concern, even if the source recorded it unlawfully).

make information system changes but the FDLE estimates these changes will have a minimal fiscal impact.[39]

The Office of the State Courts Administrator expects an increase in judicial workload because more people will be eligible for expunction of their criminal history records. However, the fiscal impact of these changes is indeterminate due to the unavailability of data needed to determine the increase in judicial workload.[40]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates an undesignated section of Florida Statutes.

This bill substantially amends section 943.0585 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 Criminal Justice on March 6, 2017:
The Committee Substitute:

- Allows a person to seek expunction of a criminal history record if they have not been adjudicated for a misdemeanor offense or been adjudicated delinquent for committing a misdemeanor specified in s. 943.051(3)(b), F.S., in the past ten years; and
- Makes technical and stylistic changes.

CS by Judiciary on January 24, 2017:
The CS clarifies that a case in which a judge renders a judgment of acquittal or a case that the jury returns a not guilty verdict is eligible for expunction. The CS also:

- Removes the expunction requirement for cases for which a person may get an arrest booking photograph removed from publication or dissemination by a private publisher;
- Reduces from 14, to 10, the number of calendar days in which a publisher has to remove the photographs before a person can seek an injunction;

[39] Florida Department of Law Enforcement, *2017 FDLE Legislative Bill Analysis for SB 118*, December 19, 2016 (on file with the Senate Criminal Justice Committee).
[40] Office of the State Courts Administrator, *2017 Judicial Impact Statement for SB 118*, January 23, 2017 (on file with the Senate Criminal Justice Committee).

- Removes criminal penalties but increases from $500 to $1,000, the civil fine that a court may impose on a publisher who fails to comply with removal of the photographs; and
- Subjects the publisher to additional penalties under the Florida Deceptive and Unfair Trade Practices Act, including a civil penalty of up to $10,000 per willful violation.

B. Amendments:

None.