HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 857 Criminal History Records
SPONSOR(S): Justice Appropriations Subcommittee, Criminal Justice Subcommittee, Plakon
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/CS/SB 118

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	10 Y, 0 N, As CS	Merlin	White
2) Justice Appropriations Subcommittee	15 Y, 0 N, As CS	Welty	Gusky
3) Judiciary Committee			

SUMMARY ANALYSIS

A person's photograph is customarily taken when he or she is arrested. In Florida, as in most states, this photograph (often referred to as a "mug shot") is a public record. Most county and municipal law enforcement agencies post the arrest booking photographs on their respective websites. In recent years, a trend has developed where companies scour the public records of a state and post the photographs on their private websites. While mug shot websites often keep arrest booking photographs online even if the person was found not guilty or the charges were dropped, many of these websites generate a profit by removing the photograph for a fee (often a very expensive one).

The bill prohibits any person or entity that disseminates arrest booking photographs from soliciting or accepting 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 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.

The bill allows the Department of Law Enforcement to administratively seal the criminal history record of a person, upon notification by the clerk of court, that the state attorney declined prosecution, dismissed or nolle prosequi prior to trial, or the result of the trial was an acquittal or verdict of not guilty.

The bill will have an insignificant fiscal impact on the Florida Department of Law Enforcement. The fiscal impact on the Department of Legal Affairs is indeterminate. There is no anticipated fiscal impact on the Clerks of Court.

The bill provides an effective date of July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED 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 often 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 mug shot websites for a fee.[7] The fees of one of these third party websites range from $399 to remove one

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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 Mar. 11, 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 Mar. 11, 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 Mar. 11, 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 Mar. 11, 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 Mar. 11, 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 Mar. 11, 2017); NAT'L CONFERENCE OF STATE LEGISLATURES, *Mug Shots and Booking Photo 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 Mar. 11, 2017).

photograph to $1799 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 of privacy based on unauthorized appropriation of name or likeness, defamation by slander, and unjust enrichment.

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[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 Mar. 11, 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_yo (last visited on Mar. 11, 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 Mar 11, 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.sheriffleefl.org/main/index.php?r=faqs/index&cat=1&id=524 (last visited on Mar. 11, 2017).
[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, 295-296 (Pa. Super. Ct.1993).

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 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

[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).
[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

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]

Effect of a Seal of a Criminal History Record
Section 943.059, F.S., sets forth procedures for sealing criminal history records. The courts have jurisdiction over their own judicial records containing criminal history information and over their procedures for maintaining and destroying those records.[32]

The Department of Law Enforcement can administratively expunge non-judicial records of arrest that are made contrary to law or by mistake.[33] 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.[34]

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 that disseminates arrest booking photographs from soliciting or accepting a fee to remove the photographs. Within ten calendar days of receiving a written request by

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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 FDUPTA 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 Mar. 11, 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, F.S.
[33] s. 943.0581, F.S.
[34] s. 943.059(4), F.S.

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 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 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 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.

Administrative Sealing of Criminal History Records

The bill creates s. 943.0586, F.S., relating to the administrative sealing of criminal history records. The bill allows FDLE to administratively seal an arrest or incident of alleged criminal activity of an adult charged with a felony, misdemeanor, or violation of comparable ordinance by state, county, municipal, of other law enforcement agencies in cases where the state attorney declined prosecution, dismissed or nolle prosequi before trial, or the trial resulted in an acquittal or verdict of not guilty. The FDLE may not seal these records until the clerk of the court provides notification of the outcome of the charges.

The bill provides an effective date of July 1, 2018.

B. SECTION DIRECTORY:

Section 1. Creates an undesignated section of law relating to publishing of booking photographs.

Section 2. Creates s. 943.0586, F.S., relating to the administrative sealing of criminal history records.

Section 3. Provides an effective date of July 1, 2018.

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 the 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 Law Enforcement indicates that as part of the new Computerized Criminal History system, any workload associated with the administrative sealing of criminal histories could be absorbed within existing resources.[35] The new CCH system is currently under design, but should be operational in Fiscal Year 2018-19. The bill provides for an effective date of July 1, 2018 to allow the new system to become fully operational.

   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.

[35] Department of Law Enforcement, 2017 FDLE Legislative Bill Analysis – HB 857, Revised March 20, 2017 (on file with Justice Appropriations Subcommittee).

There is no anticipated fiscal impact to the Clerks of Court.

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 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.

D. FISCAL COMMENTS: None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other: Requiring private entities to remove booking arrest photographs 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.[36]

B. RULE-MAKING AUTHORITY: The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 15, 2017, the Criminal Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute (CS). The CS differs from the bill as filed in that the CS:

- Clarifies that any monies that are recovered for civil penalties as a result of noncompliance with an injunction to remove mugshot photos will be deposited into the General Revenue Fund.

[36] 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).

- 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 changes to conform to other parts of the act.

This analysis is drafted to the CS as passed by the Criminal Justice Subcommittee.

On April 3, 2017, the Justice Appropriations Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The committee substitute differs from the bill as filed by:

- Deleting the provisions expanding eligibility for a criminal history expunction.
- Providing for FDLE to administratively seal criminal history records of a person, upon notification from the clerk of court, where all the charges related to the arrest or incident of alleged criminal activity were:
    - Declined to be filed by the state attorney or statewide prosecutor,
    - Dismissed or nolle prosequi before trial, or
    - Resulted in a judgment of acquittal or verdict of not guilty at trial.
- Changing the effective date from July 1, 2017 to July 1, 2018.

This analysis is drafted to the committee substitute as passed by the Justice Appropriations Subcommittee.