

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 Rules

BILL: CS/SB 1046

INTRODUCER: Commerce and Tourism Committee, Senator Bean, and others

SUBJECT: Arrest Booking Photographs

DATE: March 23, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Stokes</u>	<u>Jones</u>	<u>CJ</u>	Favorable
2.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Fav/CS
3.	<u>Stokes</u>	<u>Phelps</u>	<u>RC</u>	Favorable

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1046 expands s. 901.43, F.S., to subject any person or entity that publishes or disseminates information relating to arrest booking photographs for a commercial purpose or pecuniary gain as their primary business model to a civil penalty for failing to remove the arrest booking photograph upon written request.

Section 901.43, F.S., prohibits any person or entity engaged in the business of publishing or otherwise disseminating arrest booking photographs from soliciting or accepting a fee to remove the photographs. Additionally, this section requires persons or entities who accept a fee for the removal of such photographs to remove the photographs within ten days of a written request or be subject to a civil penalty.

This bill may have an indeterminate fiscal impact on the courts due to the expansion of what entities are subject to civil penalties. See Section V. Fiscal Impact Statement.

This bill is effective October 1, 2021.

II. Present Situation:

Dissemination of Arrest Booking Photographs

Section 901.43, F.S., provides that any person or entity engaged in the business of publicly publishing arrest booking photographs may not solicit or accept a fee or other form of payment to remove the photographs.¹

A person whose arrest booking photograph is published, or his or her legal representative, may request that a registered agent of the person or entity who published the photograph remove the photograph. The request must:

- Be made in writing.
- Be sent by registered mail.
- Include sufficient proof of identification of the person whose arrest booking photograph was published.
- Include specific information identifying the arrest booking photograph that the request seeks to remove.²

The person or entity that published the arrest booking photograph must remove the photograph within 10 days of receipt of the written request for removal.³ If the photograph is not removed within 10 calendar days, the person seeking removal may bring a civil action to enjoin the continued publication of the photograph. Additionally, the court may impose a civil penalty of \$1,000 per day for noncompliance and must award reasonable attorney fees and court costs. Money recovered for civil penalties must be deposited into the General Revenue Fund.⁴

Refusal to remove an arrest booking photograph after written request has been made constitutes an unfair or deceptive trade practice in accordance with part II of ch. 501, F.S.⁵

Section 901.43, F.S., only applies to a person or entity that solicits or accepts payments to remove arrest booking photographs.⁶

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.⁷

¹ Section 901.43(1), F.S.

² Section 901.43(2), F.S.

³ *Id.*

⁴ Section 901.43(3), F.S.

⁵ Section 901.43(4), F.S.

⁶ Section 901.43(5), F.S.

⁷ Office of the Attorney General (Florida), *Public Records: A Guide for Law Enforcement Agencies* (2019 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/MNOS-BAMQDX/\\$file/2019+Law+Enforcement+Guide+v6.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MNOS-BAMQDX/$file/2019+Law+Enforcement+Guide+v6.pdf) (last visited on Mar. 16, 2021).

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.⁸ Like all other records prepared by Florida government agencies, arrest and crime reports are generally considered to be subject to public disclosure unless specifically exempted.⁹ Statutory exemptions for active criminal investigative and intelligence information, confessions, juvenile offender records, and certain victim information may apply to crime reports and other law enforcement records.¹⁰

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.¹¹ However, the arrest record information of juveniles charged with misdemeanors is confidential and exempt,¹² and a public records custodian may choose to not electronically publish the arrest or booking photograph of a child that is not confidential and exempt.¹³

Arrest record information may be 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. The companies often 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.¹⁴ Florida law does not specifically prohibit mugshot companies from posting booking photographs, but does prohibit charging a removal fee.¹⁵

Laws and Legislation of Other States

Some states have passed laws addressing the issue of publishing booking photographs for commercial gain. Fourteen states, including Florida, have enacted legislation designed to prohibit

⁸ 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*, <https://web.fdle.state.fl.us/search/app/default> (last visited Mar. 16, 2021).

⁹ Office of the Attorney General (Florida), *Public Records: A Guide for Law Enforcement Agencies* (2019 Edition), at p. 6, available at [http://myfloridalegal.com/webfiles.nsf/WF/MNOS-BAMQDX/\\$file/2019+Law+Enforcement+Guide+v6.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MNOS-BAMQDX/$file/2019+Law+Enforcement+Guide+v6.pdf) (last visited Mar. 16, 2021).

¹⁰ *Id.* at 6-7.

¹¹ Op. Att'y Gen. 94-90 (October 25, 1994) (footnotes omitted), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/83A1D5004064269D852562210063168E> (last visited Mar. 16, 2021).

¹² Sections 943.053(3), and 985.04(2), F.S.

¹³ Section 985.04(2)(a)(2), F.S.

¹⁴ National Conference of State Legislatures, *Mug Shots and Booking Photo Websites, Overview*, May 4, 2020, <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx> (last visited Mar. 16, 2021).

¹⁵ Section 901.43, F.S.

commercial website operators from posting mugshot photos on a website and charging a removal fee.¹⁶ Additionally, some states have limited public access to booking photographs. For example, law enforcement in California have the discretion to furnish copies of booking photographs in response to a public request. However, once a copy is furnished to one member of the general public, it must be made available to all who make a request.¹⁷

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.¹⁸ 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.¹⁹

Case Law

Persons whose booking photographs are 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.²⁰

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.”²¹ The Court specifically noted that the key elements of a false claim are nearly identical to the elements required in a defamation case.²² Florida does recognize defamation claims.²³

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:

¹⁶ National Conference of State Legislatures, *supra* note 14. The thirteen states are California, Colorado, Georgia, Illinois, Kentucky, Maryland, Missouri, Oregon, South Carolina, Texas, Utah, Virginia, and Wyoming.

¹⁷ Office of the Attorney General, State of California, Opinion No. 03-205 (July 14, 2003), available at <https://oag.ca.gov/system/files/opinions/pdfs/03-205.pdf> (last visited Mar. 16, 2021).

¹⁸ 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_you (last visited Mar. 16, 2021).

¹⁹ National Conference of State Legislatures, *Mug Shots and Booking Photo Websites, Overview*, May 4, 2020, <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx> (last visited Mar. 16, 2021).

²⁰ 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).

²¹ *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1100 (Fla. 2008).

²² *Id.* at 1105-1106.

²³ *Id.* at 1111-1112. See ch. 770, F.S.

- 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.²⁴

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.²⁵

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.²⁶ 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.²⁷ The class action was not re-filed, nor was the case resolved by trial on the merits. The resolution of the case and whether the plaintiff would have succeeded on the merits of her claim is unknown.

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA)

History and Purpose of FDUTPA

Section 901.43(4), F.S., subjects a person or entity that refuses to remove an arrest booking photograph after a specific request has been made to remove it to prosecution under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

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.²⁸ The FDUTPA is based on federal law.²⁹ 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.³⁰ The Office of the State Attorney may enforce violations of the FDUTPA

²⁴ Section 540.08(4), F.S.

²⁵ Section 540.08(2), F.S.

²⁶ *Bilotta v. Citizen Info. Assocs., LLC*, 2014 U.S. Dist. LEXIS 3229 (M.D. Fla. Jan. 10, 2014).

²⁷ *Bilotta v. Citizen Info. Assocs., LLC*, 2014 U.S. Dist. LEXIS 68495 (M.D. Fla. May 19, 2014).

²⁸ Chapter 73-124, Laws of Fla., and s. 501.202, F.S.

²⁹ 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.

³⁰ 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 Mar. 16, 2021).

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.³¹ Consumers may also file suit through private actions.³²

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.³³

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.³⁴

Arrest Records and Employment

An online mugshot photo can complicate the hiring process for some.³⁵ According to one source, 77 percent of employers google their job applicants.³⁶ The Equal Employment Opportunity Commission (EEOC) has provided guidance that an arrest, in and of itself, is not a job-related consideration consistent with business necessity because the fact of an arrest alone does not establish that the criminal conduct occurred. However, this guidance further states that an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.³⁷

³¹ Section 501.203(2), F.S.

³² Section 501.211, F.S.

³³ 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.

³⁴ Section 501.211(1) and (2), F.S.

³⁵ See, e.g., Samantha Schmidt, *This Site Will Remove Your Mug Shot—For a Price, Authorities Say. Its Owners are Charged with Extortion*, THE WASHINGTON POST, May. 18, 2018, available at <https://www.washingtonpost.com/news/morning-mix/wp/2018/05/18/this-site-will-remove-your-mug-shot-for-a-price-now-its-owners-are-charged-with-extortion/> (last visited Mar. 16, 2021); Ralph Cantave, *Florida's Mugshot Removal Law Isn't Working as Intended. This FAMU Professor Found out the Hard Way*, WFSU NEWS, Jan. 9, 2020, available at <https://wusfnews.wusf.usf.edu/2020-01-09/floridas-mugshot-removal-law-isnt-working-as-intended-this-famu-professor-found-out-the-hard-way> (last visited Mar. 16, 2020).

³⁶ Jason Tashea, *Use Copyright Law to Battle Mugshot Extortion*, ABA JOURNAL, Mar. 27, 2018, available at https://www.abajournal.com/lawscribbler/article/use_copyright_law_to_battle_against_mugshot_extortion (last visited Mar. 16, 2020).

³⁷ Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, No. 915.002 (Apr. 25, 2012), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> (last visited Mar. 16, 2021).

III. Effect of Proposed Changes:

Section 901.43, F.S., prohibits any person or entity engaged in the business of publishing or otherwise disseminating arrest booking photographs from soliciting or accepting a fee to remove the photographs. Additionally, this section provides that persons or entities who accept a fee for the removal of such photographs must remove the photographs within ten days of a written request or be subject to a civil penalty.

The bill amends s. 901.43, F.S., to expand its application to any person or entity that publishes or disseminates information relating to arrest booking photographs when they do so for a commercial purpose or pecuniary gain. Therefore, these persons or entities are subject to a civil penalty for the failure to remove an arrest booking photograph upon written request.

This bill is effective October 1, 2021.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. **Government Sector Impact:**

This bill may have an indeterminate fiscal impact on the courts due to the expansion of what entities are subject to civil penalties.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

None.

VIII. **Statutes Affected:**

This bill substantially amends section 901.43 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 by Commerce and Tourism on March 15, 2021:

The CS removes language that stated that this section did not apply to acts relating to the dissemination of news to the public, including gathering, publishing, or broadcasting information for a news-related purpose, or to any other act performed by a publisher, owner, agent, employee, or retailer of a newspaper, radio station, radio network, television station, television broadcast network, cable television network, or other online news outlet associated with any news organization.

B. **Amendments:**

None.