

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 Criminal Justice

BILL: SB 1072

INTRODUCER: Senator Soto

SUBJECT: Arrest Booking Photographs

DATE: February 15, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Favorable
2.	_____	_____	JU	_____
3.	_____	_____	RC	_____

I. Summary:

SB 1072 prohibits a person engaged in publishing or otherwise disseminating arrest booking photographs through a publicly accessible print or electronic medium from soliciting or accepting a fee or other consideration to remove, correct, or modify an arrest booking photograph of an arrestee.

An arrestee who is the subject of an arrest booking photograph that has been published may file a civil action against the publisher to enjoin publication of the photograph if the publisher solicits or accepts a fee or other consideration to remove, correct, or modify the photograph. If the court enjoins publication of the photograph, the court must issue an order specifying that the photograph be removed from publication no later than 14 days after the date the order is entered. If, subsequent to the 14-day period for removal, the publisher subject to the injunction demonstrates to the court that it has complied with statutory requirements, the court shall terminate the injunction.

The court must impose a civil penalty of \$1,000 per day for each day of noncompliance with the order issuing the injunction. A prevailing arrestee is entitled to attorney fees and costs relating to issuance of the injunction and any appeal of the order issuing the injunction in which the arrestee is the prevailing party.

The provisions of the bill do not apply to state and local governments or government agencies.

II. Present Situation:

Public Disclosure of Criminal Record Information

Unless a specific exemption applies, 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.¹

Criminal record information may be obtained and published by non-governmental publishers. This information includes, but is not limited to, 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. If the record contains exempt and non-exempt information, the record is provided with exempt information redacted.³ For example, if a law enforcement record contains non-exempt information but also contains active criminal intelligence information or active criminal investigative information, both of which are exempt from public disclosure,⁴ the law enforcement record must be provided upon request with exempt information redacted.⁵

Arrest Record Information

The public record information that is most relevant to the bill is public record information pertaining to a person’s arrest for the alleged commission of a crime.⁶ This information includes, but is not limited to, the arrest report and “booking” photograph (often referred to as a “mugshot” or “mug shot”).⁷

With few exceptions, arrest record information (including booking photographs) must be disclosed pursuant to a public records request.⁸ An example of an exemption would be the name

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 Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980)) and endnote 2 (citing *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979)). This document is 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 February 8, 2016).

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. See <https://web.fdle.state.fl.us/search/app/default> (last visited on February 8, 2016).

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), *review denied*, 651 So.2d 1192 (Fla. 1995)).

⁴ Section 119.071(2)(c)1., F.S.

⁵ Office of the Attorney General (Florida), *Public Records: A Guide for Law Enforcement Agencies*, at p. 5 and endnote 21 (citing *Op. Att’y Gen. 91-74* (Oct. 1, 1991) and *Palm Beach Daily News v. Terlizese* (Fla. 15th Cir. Ct. Apr. 5, 1991)).

⁶ An arrestee is presumed innocent of committing the crime until such time as guilt has been determined in a court of law. However, if guilt is not determined (e.g., the prosecutor does not file a charge) this does not necessarily mean that the arrest itself was invalid.

⁷ There is an intake process involved if an arrestee is to be jailed. Some law enforcement agencies refer to “booking” as one part of a multi-component intake process; others refer to the intake process as “booking.” Regardless of how the term is used, a photograph is taken of the arrestee prior to being jailed and that photograph is referred to as a “booking” photograph.

⁸ “This office has consistently stated that crime and arrest reports are public records that are generally open to inspection. . . . Thus, an arrest report, including the booking photograph, prepared by a law enforcement agency is subject to disclosure. . . .” Office of the Attorney General (Florida), *Op. Att’y Gen. 94-90* (Oct. 25, 1994) (footnotes omitted), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/83A1D5004064269D852562210063168E> (last visited on February 8, 2016).

of an alleged victim of a sexual battery, if that name appeared in an arrest report.⁹ In providing the arrest report pursuant to a public record request, this name would be redacted from the copy of the report provided to the requestor.

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. This information is often available to the public within hours of the booking process being completed.¹⁰ For this reason, an expungement of criminal records relevant to a particular crime would not capture arrest record information that was obtained by the public when access to that information was authorized.

A “mugshot “company” may be described as a business that obtains publicly-available arrest record information (primarily booking photographs) and publishes that information, typically by posting it on a website. Generally, this information remains on the website until a fee is paid to the publisher or the publisher is compensated by a third-party that advertises that it will obtain removal of the information from the website upon payment of a fee to the third-party.¹¹ This practice is not specifically prohibited by Florida law.

Traditional news companies that publish arrest record information (like booking photographs) and private companies that provide arrest record information for a service or subscriber fee may also profit, directly or indirectly, from the publication of arrest record information, but the removal of this information, if it occurs, does not appear to be contingent upon or result from payment of a fee or receipt of compensation. Further, unlike the mugshot companies, this information may only be available to subscribers, or if publicly available, often becomes less accessible after a certain period of time has elapsed.

The charge or fee for removal of the booking photograph and other arrest record information from publication on mugshot companies’ websites varies but may be several hundred dollars to more than one thousand dollars.¹² Even if a mugshot company removes the arrest record information from its website upon payment of fee or receipt of compensation, there is no guarantee that this information will not appear on the website of another mugshot company that

⁹ Section 119.071(2)(j)1., F.S.

¹⁰ Mugshot companies often obtain booking photographs by “web scraping” the photographs from law enforcement websites that publish the photographs. Adam Geller, “Don’t want mug shot online? Then pay up, sites say,” June 23, 2013, Associated Press, available at <http://bigstory.ap.org/article/dont-want-mug-shot-online-then-pay-sites-say> (last visited on February 8, 2016). “Web [s]craping refers to an application that processes the HTML of a Web page to extract data for manipulation such as converting the Web page to another format (i.e. HTML to WML). Web [s]craping scripts and applications will simulate a person viewing a Web site with a browser. With these scripts you can connect to a Web page and request a page, exactly as a browser would do. The Web server will send back the page which you can then manipulate or extract specific information from.” See http://www.webopedia.com/TERM/W/Web_Scraping.html (last visited on February 8, 2016).

¹¹ Since few, if any, mugshot companies appear to provide sufficient information on their company structure, location of company offices, and company officers, it may be difficult to determine whether the mugshot publisher and the third-party offering publication removal services are under the same ownership or are affiliated.

¹² Melody Gutierrez, “California bill would ban website fees for mug shot removal,” August 5, 2014, *San Francisco Chronicle*, available at <http://www.sfgate.com/crime/article/California-bill-would-ban-website-fees-for-mug-5669586.php> (last visited on February 8, 2016).

may or may not be affiliated with the mugshot company that previously removed the information from its website. Therefore, the person who paid to have his or her arrest record information removed from one website may find himself or herself subsequently engaged in what has been described as “an expensive game of Whac-A-Mole.”¹³

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.¹⁴ There are exceptions to the statute 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; and
- 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.¹⁵

The statute also provides that, in the event the necessary consent is not obtained, the person whose name, portrait, photograph, or other likeness is so used may bring an action to enjoin such unauthorized publication, printing, display or other public use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages.

Laws and Legislation of Other States

Some states have passed laws that say public records cannot be used for commercial purposes.¹⁶ This strategy could raise First Amendment concerns since the photographs usually involve records that are obtained legally.¹⁷ Other states have adopted different measures.¹⁸ Oregon, for example, passed a law requiring that a company remove the photograph upon request in instances where the individual can prove that the charges were dismissed or the individual was

¹³ Andrew Knapp, “South Carolina attorneys, lawmakers aim to disrupt business of publishing jail mug shots,” November 17, 2013, *The Post and Courier* (Charleston, S.C.), available at <http://www.postandcourier.com/article/20131117/PC1610/131119492> (last visited on February 8, 2016).

¹⁴ In 2014, a Florida federal district court held that a person stated a cause of action for violation of s. 540.08, F.S., based on her claim that the operator of two websites published her booking photograph and advertised the service of removing booking photographs from a particular website in exchange for payment. It is unknown if the operator was subsequently determined to have violated the statute. *Bilotta v. Citizen Information Associates, LLC, et al.*, 2014 WL 105177 (January 10, 2014), U.S. District Court (Middle District-Tampa Division).

¹⁵ Section 540.08(4), F.S.

¹⁶ National Conference of State Legislatures, “Mug Shots and Booking Photo Websites,” February 17, 2014, available at <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx> (last visited on February 8, 2016).

¹⁷ See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 269-270 (1964) (noting that freedom of expression concerning public issues is secured by the First Amendment and should be “uninhibited, robust, and wide-open”).

¹⁸ National Conference of State Legislatures, “Mug Shots and Booking Photo Websites,” *supra*.

exonerated.¹⁹ Virginia took a different approach, prohibiting parties who disseminate or maintain criminal history information from soliciting, requesting, or accepting compensation for removing the information.²⁰ Because the Oregon and Virginia bills passed in 2013 and 2015,²¹ respectively, the efficacy of these bills has not yet been determined. An American Bar Association article argues that there is no legal solution to this problem, and instead, the solution is going to be in the private sector.²² An example of private sector action is an adjustment of algorithms by Google® so that the mug shot companies will not appear on the first page of Google search results.²³ Also, in 2013, some credit card companies indicated they were “in the process of terminating contracts with mugshot websites.”²⁴

Other Actions

In 2014, the Pinellas County Sheriff’s Office announced that it would no longer post booking photographs on its website.²⁵ The names, addresses, and initial charges of those arrested are still available on the website. The agency still provides access to the mug shots to other law enforcement agencies and the media, but those entities must request access to those photographs and must log into a newly created system to retrieve them. Members of the public may also submit requests for mug shots.

The website for the Lee County Sheriff’s Office indicates that it will remove a booking photograph once notified the arrest record information is sealed or expunged.²⁶

III. Effect of Proposed Changes:

Section 1 of the bill creates s. 119.17, F.S., which prohibits a person engaged in publishing or otherwise disseminating arrest booking photographs through a publicly accessible print or electronic medium from soliciting or accepting a fee or other consideration to remove, correct, or modify an arrest booking photograph of an arrestee.²⁷

¹⁹ H.R. 3467, 77th Leg. Assembly (Or. 2013).

²⁰ S.B. 720, 2015 Sess. (Va. 2015).

²¹ See footnotes 17 and 18.

²² Stephanie Francis Ward, “Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them,” August 1, 2012, *A.B.A. Journal*, 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 February 8, 2016).

²³ Jose Pagliery, “Mug Shot Extortion Sites Still Up and Running ... for Now,” October 16, 2013, *CNN Money*, available at <http://money.cnn.com/2013/10/16/technology/mug-shot-websites/index.html> (last visited on February 8, 2016).

²⁴ “Google, credit card companies combating for-profit mugshot sites,” October 6, 2013, United Press International, available at http://www.upi.com/Top_News/US/2013/10/06/Google-credit-card-companies-combating-for-profit-mugshot-sites/26051381092759/ (last visited on February 8, 2016).

²⁵ Stephen Thompson, “Pinellas Sheriff Limiting Access to Mugshots Online,” January 9, 2014, *The St. Petersburg Tribune*, available at <http://tbo.com/pinellas-county/pinellas-sheriff-targeting-websites-limits-access-to-mug-shots-20140109/> (last visited on February 8, 2016).

²⁶ See <http://www.sheriffleefl.org/main/index.php?r=faqs/index&cat=1&id=524> (last visited on February 8, 2016).

²⁷ The bill does not prohibit a publisher from profiting from publication of an arrest booking photograph, except for the publication removal fee. For example, the bill does not prohibit the publisher from charging a subscriber fee or profiting from advertising on a publication website.

An arrestee²⁸ who is the subject of an arrest booking photograph²⁹ that has been published may file a civil action against the publisher to enjoin publication of the photograph if the publisher solicits or accepts a fee or other consideration³⁰ to remove, correct, or modify the photograph. If the court enjoins publication of the photograph, the court must issue an order specifying that the photograph be removed from publication no later than 14 days after the date the order is entered. If, subsequent to the 14-day period for removal, the publisher subject to the injunction demonstrates to the court that it has complied with statutory requirements, the court shall terminate the injunction.

The court must impose a civil penalty of \$1,000 per day for each day of noncompliance with the order issuing the injunction. A prevailing arrestee is entitled to attorney fees and costs relating to issuance of the injunction and any appeal of the order issuing the injunction in which the arrestee is the prevailing party.

The provisions of the bill do not apply to state and local governments or government agencies.³¹

Section 2 of the bill provides an effective date of October 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

A private publisher of arrest booking photographs who engages in the fee-for-removal practice may be subject to a civil action enjoining publication of an arrest booking photograph until such time as the publisher ceases the fee-for-removal practice.³² Such

²⁸ The bill defines an “arrestee” as an individual who has been arrested for a violation of law in this state.

²⁹ The bill defines an “arrest booking photograph” as a photograph of an arrestee taken for the purpose of recording the arrestee’s image as part of the arrest and booking process.

³⁰ The bill states that a “fee or other consideration” does not include a fee or consideration, including attorney fees, solicited or accepted in connection with the actual or attempted settlement of an actual or threatened lawsuit or arbitration claim or other judicial or quasi-judicial proceeding.

³¹ Specifically, the bill provides that s. 119.17, F.S., the new section created by the bill, does not apply to any state, regional, county, local, or municipal governmental entity of this state, whether executive, judicial, or legislative, or any department, division, bureau, commission, authority, or political subdivision of this state.

³² CS/HB 907 also prohibits the fee-for-removal practice and provides that “an aggrieved person may initiate a civil action ... to obtain all appropriate relief in order to remedy or prevent a future violation...” The House bill specifies some types of relief that would constitute “appropriate relief”: injunctive relief; civil penalty; monetary damages, including actual damages

publisher may challenge enjoining the publication as a violation of the First Amendment of United States Constitution.

A court considering such a challenge would have to determine if the publication constitutes speech protected by the First Amendment and also determine whether the speech is “core” (noncommercial) speech or commercial speech. “Commercial speech’ is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded ‘noncommercial speech.’”³³

If the publication involves “core” speech, “then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order.”³⁴ “Commercial speech that is not false or deceptive and does not concern unlawful activities may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.”³⁵

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

A private publisher of arrest booking photographs who engages in the fee-for-removal practice may be subject to a civil action enjoining publication of an arrest booking photograph until such time as the publisher ceases the fee-for-removal practice. The court must impose a civil penalty of \$1,000 per day for each day of noncompliance with the order issuing the injunction. A prevailing arrestee is entitled to attorney fees and costs relating to issuance of the injunction and any appeal of the order issuing the injunction in which the arrestee is the prevailing party.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

incurred as a result of a violation; and attorney fees and costs. However, it does not specifically mention enjoining publication of a booking photograph until the fee-for-removal practice ceases.

³³ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985).

³⁴ *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979).

³⁵ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. at 638.

VIII. Statutes Affected:

This bill creates section 119.172 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
