

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 265 Criminal Record Information
SPONSOR(S): Trujillo and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 298

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Westcott	Cunningham
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

When a person is arrested, his or her photograph is taken. In Florida, as in most states, this photograph (often referred to as a "mug shot") is a public record. In recent years, a trend has developed where companies scour the public records of a state and post mug shots on their own private websites. Because this is often embarrassing, many individuals seek to have this information removed. However, many of the websites charge a fee to remove the photograph from their website. The expense is compounded when the photograph is posted on multiple websites, with each charging their own removal fee.

The bill creates s. 836.12, F.S., which makes it a first degree misdemeanor for a person engaged in publishing or otherwise disseminating criminal record information through a print or electronic medium to solicit or accept payment of a fee or other consideration to remove, correct, or modify such information.

The term "criminal record information" includes the following:

- Descriptions or notations of an arrest, a formal criminal charge, and the disposition of the criminal charge, including, but not limited to, information made available under ch. 119, F.S.;
- Photographs of a person taken pursuant to an arrest or other involvement in the criminal justice system; or
- Personal identifying information when published or disseminated in connection with information described above, including, but not limited to, a person's name, address, date of birth, photograph, and social security number or other government-issued identification number.

These changes are designed to eliminate some of the financial incentives of engaging in this practice. Obtaining the photographs as a public record will still be legal, as well as posting them or publishing them.

The bill may have an insignificant negative jail bed impact.

The bill is effective on October 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

When a person is arrested, his or her photograph is taken. In Florida, as in most states, this photograph (often referred to as a “mug shot”) is a public record. In recent years, a trend has developed where companies scour the public records of a state and post mug shots on their own private websites.¹ While criminal history and arrest information is requested on individuals for legitimate purposes by many entities, the publication of these photographs on the Internet can lead to problems and embarrassment for many individuals. For example, if a potential employer conducts an Internet search of a potential employee, one of the top results might be a mug shot.²

Generally, mug shots remain on most of these websites whether the person is found guilty or not guilty, or even if the charges are dropped.³ Many of the websites and some third party websites charge a fee (often a very expensive one) to remove the photograph from their website.⁴ The expense is compounded when the photograph is posted on multiple websites, with each charging their own fee for removal.⁵ There have also been reported incidents of people paying the fees and their photographs not being removed.⁶

Recently, a Pinellas County woman sued websites that published her name, photograph, and arrest information online and then charged a fee to remove the information.⁷ The published information was from an arrest for domestic battery in which the charges were later dropped.⁸ The websites that published her information charged anywhere from \$300-\$1,700 to remove the arrest information.⁹ The woman sued the websites in federal court alleging a violation of s. 540.08, F.S.¹⁰, and common law invasion of privacy.¹¹ The defendants moved to have the Court dismiss the lawsuit for failure to state a cause of action, but the federal district court held that the woman had stated a cause of action for a violation of s. 540.08, F.S.¹² It remains to be determined whether the operator of the websites violated the statute, and if so, what impact such a decision would have on similar suits that might be filed in other federal or state courts.

¹ David Segal, *Mugged by a Mug Shot Online*, The New York Times, Oct. 5, 2013, http://www.nytimes.com/2013/10/06/business/mugged-by-a-mug-shot-online.html?pagewanted=all&_r=2& (last visited Jan. 27, 2014).

² *Id.*

³ National Conference of State Legislatures, *Mug Shots and Booking Photo Websites*, Dec. 4, 2013, <http://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx?TabId=27534> (last visited Jan. 27, 2014).

⁴ Segal, *supra* note 1.

⁵ Andrew Knapp, *South Carolina attorneys, lawmakers aim to disrupt business of publishing jail mug shots*, The Post and Courier (Charleston, S.C.), Nov. 17, 2013, <http://www.postandcourier.com/article/20131117/PC1610/131119492> (last visited on Jan. 27, 2014).

⁶ *Id.*

⁷ Laura C. Morel, *Lawsuit targets mug shot websites that keep arrests alive*, Tampa Bay Times, Nov. 10, 2013, <http://www.tampabay.com/news/publicsafety/crime/lawsuit-targets-mug-shot-websites-that-keep-arrests-alive/2151818> (last visited Feb. 7, 2014).

⁸ *Id.*

⁹ *Id.*

¹⁰ Section 540.08(1), F.S., states “No person shall publish, print, display, or otherwise use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use. . .”

¹¹ Order Denying Motion to Dismiss, *Shannon L. Biotta v. Citizen Information Associates, LLC, et al.*, Case No. 8:13-cv-2811-T-30GW, 2014 WL 105177 (M.D. Fla. Jan. 10, 2014).

¹² *Id.*

Other State Responses

Other states have recently passed laws addressing this problem in various ways. Some have passed laws that say public records cannot be used for commercial purposes.¹³ This strategy could raise First Amendment concerns since the photographs usually involved are obtained legally. Other states have adopted different measures. 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 exonerated.¹⁴ Oregon's bill passed during the summer of 2013,¹⁵ so its effectiveness is unclear at this point. 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.¹⁶ The article states:

The only true solution is that we as consumers will have to get better at evaluating information that is presented to us. We have to accept that people have taken drugs, been at beer parties and gotten arrested. We have to rewire our brains not to overreact to that information, and realize that all of us have transgressed.¹⁷

Private Sector Responses

The private sector has addressed the issue to some extent. For example, Google has changed its algorithm in an attempt to push the mug shot websites down in the search results page so the mug-shot is not the first result when searching for someone's name.¹⁸ Additionally, credit card companies, such as American Express, Discover, Visa, and PayPal, have severed ties with the companies that charge to remove the criminal record information.¹⁹ While the private sector responses make it more difficult for these websites to get paid, it is unclear what the long-term effects will be from these actions.

Florida Law

Currently, Florida law does not impose civil or criminal penalties on entities that publish mug shots of individuals. There are, however, statutes that create civil remedies for similar behavior. For example, s. 540.08, 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 express written or oral consent. The victim may bring an action to enjoin the unauthorized use, and to recover damages for any loss or injury.²⁰ Similarly, a person may bring a civil suit alleging invasion of privacy.²¹ However, these causes of action would generally not apply in cases where the publication at issue was a public record.

Effect of the Bill

The bill creates s. 836.12, F.S., which makes it a first degree misdemeanor²² for a person engaged in publishing or otherwise disseminating criminal record information through a print or electronic medium

¹³ National Conference of State Legislatures, *supra* note 3.

¹⁴ Christian Gaston, *John Kitzhaber to sign Oregon law regulating mug shot web sites*, The Oregonian, July 29, 2013, http://www.oregonlive.com/politics/index.ssf/2013/07/john_kitzhaber_to_sign_oregon.html (last visited Jan. 27, 2014).

¹⁵ *Id.*

¹⁶ Stephanie Francis Ward, *Hoist Your Mug: Websites Will Post Your Name and Photo; Others Will Charge You to Remove Them*, A.B.A. J., Aug. 2012, http://www.abajournal.com/magazine/article/hoist_your_mug_websites_will_post_your_name_and_photo_others_will_charge_yo/ (last visited Jan. 27, 2014).

¹⁷ *Id.* at 21.

¹⁸ Segal, *supra* note 1.

¹⁹ *Id.*

²⁰ Section 540.08(2), F.S.

²¹ The Florida Supreme Court first recognized the tort of invasion of privacy in *Cason v. Baskin*, 20 So.2d 243 (1944), a recognition reconfirmed in *Cason v. Baskin*, 30 So.2d 635 (1947). Since then Florida decisions have filled out the contours of this tort right of privacy by accepting the following four general categories recognized by Prosser in his *Law of Torts*, p. 804-14 (4th Ed. 1971): (1) Intrusion, i.e., invading plaintiffs' physical solitude or seclusion; (2) Public Disclosure of Private Facts; (3) False Light in the Public Eye, i.e., a privacy theory analogous to the law of defamation; and (4) Appropriation, i.e., commercial exploitation of the property value of one's name. *Loft v. Fuller*, 408 So.2d 619 (Fla. 4th DCA 1981).

²² A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

to solicit or accept payment of a fee or other consideration to remove, correct, or modify such information.

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- Personal identifying information when published or disseminated in connection with information described above, including, but not limited to, a person's name, address, date of birth, photograph, and social security number or other government-issued identification number.

These changes are designed to eliminate some of the financial incentives of engaging in this practice. Obtaining the photographs as a public record will still be legal, as well as posting them or publishing them.

B. SECTION DIRECTORY:

Section 1. Creates s. 836.12, F.S., relating to criminal record information.

Section 2. Provides an effective date of October 1, 2014.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government expenditures.

2. Expenditures:

The bill may have a negative jail impact on local governments because it creates a new first degree misdemeanor offense.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill limits the ability of certain Florida businesses to charge to remove photographs or information from their website.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

The Commerce Clause of the United States Constitution²³ limits the ability of states to regulate commerce between the states.²⁴ The “Dormant Commerce Clause” represents the theory that, where Congress has not acted to regulate or deregulate a specific form of commerce between the states, it is presumed that Congress would prohibit unreasonable restrictions upon that form of interstate commerce.²⁵ Under this theory, Florida’s ability to regulate businesses without a presence in Florida is limited. Therefore, the provisions of the bill may not apply to businesses outside the state.

B. RULE-MAKING AUTHORITY:

This 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

²³ Art. I, Sec. 8, U. S. CONST.

²⁴ *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

²⁵ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).