

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 755 Arrest Booking Photographs

SPONSOR(S): Judiciary Committee and Criminal Justice & Public Safety Subcommittee, Fischer and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 1046, HB 967, SB 1398

FINAL HOUSE FLOOR ACTION: 118 Y's

0 N's

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

CS/CS/HB 755 passed the House on April 14, 2021, as CS/SB 1046.

An arrest booking photograph (commonly called a "mugshot") is a photograph taken upon a person's arrest that is generally used by law enforcement, a victim, or the public to identify the person. A law enforcement agency may make such booking photographs available to the public by publishing them on the agency's website. Following an arrest, a person's criminal charge may result in a dismissal or acquittal, making the person eligible to seal or expunge the arrest record. However, a person's booking photograph may remain on a publicly accessible website regardless of the outcome of their criminal case.

Commercial entities use software and artificial intelligence to automatically aggregate arrest booking photographs from law enforcement agency websites to publish on their own websites. Section 901.43, F.S., prohibits a person or entity from soliciting or accepting a fee or other payment in exchange for removing an arrest booking photograph from a publically accessible print or electronic medium. A person whose booking photograph is published, or a legal representative, may make a written request to the publisher's registered agent to remove the photograph. Upon receiving such a request, the publisher must remove the photograph within 10 days and may not charge a fee for doing so. If the entity does not remove the photograph within 10 days, a person may bring a civil action to enjoin the continued publication of the photograph and a court may impose a penalty up to \$1,000 a day for noncompliance with the injunction. Currently, s. 901.43, F.S., only applies to a person or entity that solicits or accepts payment to remove a booking photograph.

The bill expands s. 901.43, F.S., to apply to any person or entity whose primary business model is the publishing and disseminating of arrest booking photographs for a commercial purpose or pecuniary gain. As such, companies that do not solicit or accept payment to remove a person's booking photograph, but rather profit by selling advertisements in the publication or on the electronic medium that publishes and disseminates booking photographs will be subject to the requirements of s. 901.43, F.S. A person whose booking photograph has been published or disseminated by such an entity may make a written request to have his or her photograph removed. If the entity fails to comply, a court may enjoin the continued publication of the photograph and impose a civil penalty.

The bill also prohibits a person or entity from republishing or otherwise disseminating an arrest booking photograph which was previously required to be removed under s. 901.43, F.S. The bill authorizes a person to bring a civil action to enjoin such continued publication or dissemination and authorizes a court to impose a civil penalty up to \$5,000 per day for noncompliance with such injunction as well as attorney fees and costs.

The bill may have a positive indeterminate fiscal impact to state government by increasing the amount of fines recovered for a violation of s. 901.43, F.S., which are deposited into the General Revenue Fund.

The bill was approved by the Governor on June 21, 2021, ch. 2021-132, L.O.F., and will become effective on October 1, 2021.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Dissemination of Arrest Booking Photographs

Florida law does not specifically prohibit mugshot companies from posting arrest booking photographs, but does prohibit charging a fee to remove such postings.¹ Section 901.43, F.S., prohibits any person or entity engaged in the business of publishing arrest booking photographs from soliciting or accepting a fee or other form of payment to remove a photograph.² A person whose booking photograph is published, or a legal representative, may make a written request to the publisher's registered agent to 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; and
- Include specific information identifying the arrest booking photograph to be removed.³

The person or entity that published an arrest booking photograph must remove the photograph within 10 days of receiving the written request for removal.⁴ 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. Any money recovered as a civil penalty must be deposited into the General Revenue Fund.⁵

Section 901.43, F.S., only applies to a person or entity that solicits or accepts payment to remove arrest booking photographs.⁶ As such, websites that aggregate and publish arrest booking photographs, but profit by selling advertisements for services such as mugshot removal or reputation management, rather than by charging a fee to remove the photograph, continue to operate without being subject to the requirements and penalties in s. 901.43, F.S.⁷ Additionally, current law does not prevent or prohibit the republication or redissemination of an arrest booking photograph that has previously been required to be removed under s. 901.43, F.S.

Criminal History Records

All "documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency" are public records and open for public inspection, unless a specific exemption applies.⁸

Arrest and crime reports may be obtained and published by non-governmental publishers. This information includes booking photographs, arrest reports, charging documents, sentencing orders, and

¹ S. 901.43, F.S.

² S. 901.43(1), F.S.

³ S. 901.43(2), F.S.

⁴ *Id.*

⁵ S. 901.43(3), F.S.

⁶ S. 901.43(5), F.S.

⁷ Eumi K. Lee, *Monetizing Shame: Mugshots, Privacy, and the Right to Access*, 70 Rutgers U.L. Rev. 557, 568 (2018).

⁸ Office of the Attorney General (Florida), *Government in the Sunshine Manual* (2020 Edition), at p. 56. (citing to s. 119.011(12), F.S.), [http://myfloridalegal.com/webfiles.nsf/WF/MNOS-B9QQ79/\\$file/SunshineManual.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MNOS-B9QQ79/$file/SunshineManual.pdf) (last visited on Apr. 26, 2021).

criminal history information.⁹ Like all other records prepared by Florida government agencies, arrest and crime reports are subject to public disclosure unless specifically exempted.¹⁰ Arrest record information may be requested through a public records request by members of the public, traditional news media, companies that provide criminal history or criminal record information for a service or subscriber fee, and companies that are often referred to as “mugshot” companies.

Public record information pertaining to a person’s arrest for the alleged commission of a crime includes the arrest report and arrest booking photograph. With few exceptions, arrest record information (including a booking photograph) must be disclosed pursuant to a public records request.¹¹ However, the arrest record information of a juvenile charged with a misdemeanor 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

Expunction and Sealing of Criminal Records

Florida has established mechanisms by which a person may have their criminal record sealed¹⁴ or expunged¹⁵ under certain circumstances. When a record is sealed or expunged, the record is not available to the public in response to a public records request.

A person who meets other specified criteria may be eligible to petition a court to expunge a criminal history record if:

- An indictment, information, or other charging document was not filed or issued in the case giving rise to the criminal history record; or
- An indictment information, or other charging document filed or issued in the case giving rise to the criminal history record, was dismissed or nolle prosequi by the state attorney or statewide prosecutor, or was dismissed by a court of competent jurisdiction or a judgment of acquittal was rendered by a judge, or a verdict of not guilty was rendered by a judge or jury.¹⁶

Similarly, a person who meets other specified criteria may be eligible to petition a court to seal a criminal history record if:

- The criminal history record is not ineligible for court-ordered sealing under s. 943.0584, F.S.;¹⁷ and
- The person has not been adjudicated guilty of, or adjudicated delinquent for committing, any of the acts stemming from the arrest or alleged criminal activity to which the petition to seal pertains.¹⁸

⁹ The Florida Department of Law Enforcement (FDLE) 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. FDLE, Criminal History Information, *Frequently Asked Questions*, <https://cchinet.fdle.state.fl.us/search/app/faq?8> (last visited on Apr. 26, 2021).

¹⁰ Office of the Attorney General (Florida), *supra* n. 8 at 97.

¹¹ Op. Att’y Gen. 94-90 (October 25, 1994) (footnotes omitted),

<http://www.myfloridalegal.com/ago/nsf/Opinions/83A1D5004064269D852562210063168E> (last visited on Apr. 26, 2021).

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

¹³ S. 985.04(2)(a)(2), F.S.

¹⁴ Sealing of a criminal history record means the preservation of a record under such circumstances that it is secure and inaccessible to any person not having a legal right to access the record or the information contained and preserved therein. S. 943.045(19), F.S.

¹⁵ Expunction of a criminal history record means the court-ordered physical destruction or obliteration of a record or portion of a record by any criminal justice agency having custody thereof, or as prescribed by the court issuing the order, except that criminal history records in the custody of FDLE must be retained in all cases for purposes of evaluating subsequent requests by the subject of the record for sealing or expunction, or for purposes of recreating the record in the event an order to expunge is vacated by a court of competent jurisdiction. S. 943.045(16), F.S.

¹⁶ S. 943.0585, F.S.

¹⁷ Criminal history records for offenses including, but not limited to, crimes like terrorism, murder, and certain sexual misconduct are ineligible for court-ordered expunction or sealing. The complete list of ineligible offenses is provided under s. 943.0584, F.S.

¹⁸ S. 943.059, F.S.

In some scenarios, a person who is arrested for a criminal offense and who later obtains a sealing or expunction of the related criminal history record may not enjoy the full benefit of the sealing or expunction if their associated arrest record remains publicly accessible on a website or other publication.

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.¹⁹

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.²⁰

Florida Deceptive and Unfair Trade Practices Act

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) protects consumers from deceptive and misleading acts and protects consumers and legitimate business enterprises from those engaging in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in trade or commerce. FDUTPA applies to any act or practice occurring in the conduct of any trade or commerce, even between purely commercial interests. It also applies to private causes of action arising from single unfair or deceptive acts in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract. The Attorney General may enjoin any person who has violated, is violating, or is otherwise likely to violate any portion of FDUTPA.²¹

Refusal to remove an arrest booking photograph after a person makes a written request under s. 901.43, F.S, constitutes an unfair or deceptive trade practice in accordance with part II of ch. 501, F.S.²²

Effect of the Bill

The bill expands s. 901.43, F.S., to apply to any person or entity whose primary business model is the publishing and disseminating of arrest booking photographs for a commercial purpose or pecuniary gain. As such, companies that do not solicit or accept payment to remove a person's booking

¹⁹ S. 540.08(4), F.S.

²⁰ S. 540.08(2), F.S.

²¹ Whenever the Department of Legal Affairs has reason to believe that a person has been, or is, violating FDUTPA, and it appears that a cease and desist order against such violation would be in the interest of the public, it shall issue and serve upon such person a complaint and order stating its charges in that respect and containing a notice of a hearing upon a day and at the place therein fixed at least 30 days after the service of said complaint, and said hearing shall be held in conformity with the provisions of Ch. 120. S. 501.208, F.S.

²² S. 901.43(4), F.S.

photograph, but rather profit by selling advertisements in a publication or on an electronic medium that publishes and disseminates arrest booking photographs will be subject to the requirements of s. 901.43, F.S. Under the bill, a person whose booking photograph has been published and disseminated by such an entity may make a written request to have the photograph removed. If the entity fails to comply with the written request, a court may enjoin the continued publication of the photograph and impose a civil penalty.²³

Entities such as a law enforcement agency or a legitimate newspaper or television station are not subject to the restrictions and civil remedies established by the bill, as the primary business model of such persons or entities is not the publishing or disseminating of arrest booking photographs for a commercial purpose or pecuniary gain.

The bill also expands s. 901.43, F.S., to prohibit a person or entity who has previously been required to remove an arrest booking photograph from republishing or otherwise redisseminating the arrest booking photograph. The bill authorizes a person whose photograph was republished or redisseminated after previously being required to be removed to bring a civil action to enjoin the person or entity from continuing to publish or disseminate the photograph. The bill authorizes a court to impose a civil penalty of up to \$5,000 per day for noncompliance with such an injunction as well as attorney fees and costs associated with the enforcement of the injunction. Any funds collected from the civil penalties must be deposited in to the General Revenue Fund.

The bill classifies the republication or redissemination of an arrest booking photograph as an unfair or deceptive trade practice under part II of chapter 501.

Subject to the Governor's veto powers, the effective date of this bill is October 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may have a positive indeterminate fiscal impact to state government by increasing the amount of fines recovered for violations of s. 901.43, F.S., which are deposited into the General Revenue Fund.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

²³ 47 U.S. Code § 230 (Section 230) states that "[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," and prohibits all inconsistent causes of action and prohibits liability imposed under any State or local law. The bill may implicate Section 230, in limited circumstances, for potentially holding an online business liable for hosting or not removing arrest booking photographs posted by another.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a negative fiscal impact on the private sector by increasing the number of entities which may be fined for a violation of s. 901.43, F.S

D. FISCAL COMMENTS:

None.