



**City of Gainesville
Clerk of the Commission
Office of the City Commission**

PO Box 490, Station 19
Gainesville, FL 32627-0490
200 E. University Avenue
P: (352) 334-5015
F: (352) 334-2036

City of Gainesville Policy Program Preliminary Research & Analysis

TOPIC: Privacy of Arrested Persons
PREPARED BY: Lindsay Hoffman, Policy Oversight Administrator
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REQUESTED BY: Commissioner Hayes-Santos

OBJECTIVE

How can the City of Gainesville ensure that the privacy of arrested persons is protected?

EXECUTIVE SUMMARY

Images have power. And, on the internet, images live forever.

The tension between a community's right to access arrest records and the privacy rights of the arrested is not new. Booking photos, or mugshots, have always been released upon request. Most states consider them to be public records and, as such, accessible. Many law enforcement agencies also proactively publish all of their booking photos, even for the most minor arrests, on the internet. Media and private companies scoop up these images, publishing them in other places and ensuring their longevity.

Staged "perp walks," are when the media is notified when a handcuffed arrestee will be paraded by law enforcement in front of cameras. The most historic perp walk was Lee Harvey Oswald's, which famously ended with gunfire. But mugshots and perp walks skew the public's image of an arrestee who has not been convicted of a crime and, in many cases, has not even yet been charged.

Law enforcement agencies generally, but not always, hold that the release of mugshots and staged perp walks offer transparency into their work. Advocates like the ACLU agree, in part. Law

enforcement accountability is important. Mugshots are also useful when law enforcement needs the public's help in locating a person or to otherwise move an investigation forward. But, mugshots and staged perp walks arguably take an extra step and result in public shaming before someone is convicted of a crime or even, in many cases, has been before a judge. The legal standard for arrest is one of the lowest: probable cause. Many arrests result in dropped charges and ultimate acquittals and, therefore, the arrestee ends up with no criminal record. Here is where publishing mugshots on the internet becomes troublesome. Once an image is published online, it is there in perpetuity, creating and affirming biases.

There is a difference between providing a mugshot pursuant to a public records request and affirmatively publishing all mugshots online.

One consequence of this affirmative publishing is the proliferation of privately-run mugshot websites that profit off this practice. These websites build algorithms that collect the mugshots posted online by law enforcement agencies and republish them on their own pages. Many of these websites demand payment before they will remove an image, though Florida has now banned this practice. Even still, once an image has been hosted online, it often appears anytime a person's name is searched, even years after the arrest. There are well-documented examples of former arrestees, with no resulting criminal record, being fired when their employer discovers these posted mugshots, losing relationships and other opportunities, and even dying by suicide when their mugshot image continued to prevent them from moving on with their lives.

In Florida, mugshots are public records but there is no rule governing whether mugshots can be proactively published online. The decision to do this is a police one made by law enforcement, courts, and corrections agencies. A goal could be to find the balance between privacy and transparency which reduces shame tactics that would follow arrestees into the future.

Similarly, there is no law governing the practice of staged perp walks. From a logistics perspective, law enforcement can rarely control where media gathers or avail themselves of hidden pathways to transport arrestees. It is, however, a policy decision whether law enforcement alerts the media when an arrestee is being transported

HISTORY/BACKGROUND INFORMATION

Federal Law

In 2016, a federal appeals court found that arrested persons have a privacy interest in their booking photos, which has been amplified by the proliferation of the internet. This decision overturned a previous ruling that access to booking photos was guaranteed under the Freedom of Information Act (FOIA). "A disclosed booking photo casts a long, damaging shadow over the depicted individual," wrote Judge Cook in the majority opinion of that 6th Circuit case, "...[and] convey guilt to the viewer." She went on to note that, "[i]n 1996...booking photos appeared on television or in the newspaper

and then, for all practical purposes, disappeared. Today, an idle internet search reveals the same booking photo that once would have required a trip to the local library's microfiche collection." ¹

Quoting another court case in her decision, Judge Cook explained why FOIA was not applicable here. She said, "[t]he public's interest in disclosure depends on 'the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'"²

Since that decision, the media has been able to access all of the information they need for their new stories on federal criminal matters via arrest records without being granted the photographs to go with them.

State of Florida

The State of Florida's version of the Freedom of Information Act is our public records law, which is one of the broadest in the country. A 1994 Attorney General Opinion affirms that booking photographs are subject to disclosure as public records.³ But that opinion governs how a law enforcement agency must act if a booking photo is requested as a public record. There has been no guidance offered on the legality of proactively publishing mugshots online before any request has been made.

Mugshot websites, as noted above, are prolific and Florida is known as a hot spot for them. For a time, they were described as virtual games of "whack-a-mole."⁴ An arrestee would find their mugshot on one of these websites and pay a fee to have it removed, only to find it the next day on another mugshot website demanding another fee, and so on. This is one place where the Florida legislature has acted. F.S. 901.43 stemmed from a 2017 bill aimed at mugshot websites and other entities "engaged in the business of publishing through a publicly accessible print or electronic medium or otherwise disseminating" mugshots. In essence, the statute prohibits any website in the business of publishing mugshots from charging a fee for removing a mugshot. If one of these websites demands a fee in order to remove the photograph, then the depicted person must send a letter by registered mail demanding removal without a fee. The website then has 10 days from receipt to comply or else the depicted person may sue. At each stage, the burden is placed on the person whose mugshot has been published. They must make the initial demand, then send a registered letter and, finally, absorb the cost of a lawsuit if they wish to pursue the matter. The statute also specifies that it only applies to persons or entities that solicit/accept fees to remove the photographs. Presumably, there is no remedy when a website publishes a mugshot and outright refuses to remove it.

¹ *Detroit Free Press Inc. v. United States Dep't of Justice*, 829 F.3d 478 (6th Cir. 2016)
<https://www.opn.ca6.uscourts.gov/opinions.pdf/16a0164p-06.pdf>

² *Id.*

³ <http://www.myfloridalegal.com/ago.nsf/Opinions/83A1D5004064269D852562210063168E>

⁴ <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/>

Juvenile arrest records are exempt from Florida's public records law.⁵

Local:

The Alachua County Sheriff's Office posts mugshots of everyone housed at the Alachua County Jail, which includes those held without conviction.⁶

Locally, the websites mugshotsgainesville.com and mugshots.gainesville.com are run by the Gainesville Sun using booking information collected from the Alachua County Jail system. The websites do not provide guidance for those wishing their photos to be removed, though the homepage does include the statement, "To report issues with this site, email online@gvillesun.com." TV20 also publishes mugshots weekly.⁷

PRELIMINARY RESEARCH AND FINDINGS

The proliferation of the internet has reinvigorated privacy discussions of all kinds. Because items posted online will follow a person forever, they have the power to truly disrupt one's life, from their ability to get a job to their ability to acquire housing and attract a romantic partner. Often a search of one's name brings that image, however outdated and irrelevant, to the first page of results, haunting an arrested person forever. The decision of whether to proactively publish booking photos is often a policy decision as few jurisdictions have addressed it legislatively.

Other Jurisdictions

For many states and law enforcements agencies, the publishing of mugshots is a long-standing practice they've felt no compulsion to modify. The Vermont State Police has a clear policy on the release of the "name, hometown and age of the person or persons arrested/cited, the type of charge, details that support the charge, the booking photo (mugshot) of the individual arrested and details of the incident." They further state that their "policy reasonably balances, on the one hand, the public's right to know and, on the other hand, the privacy of crime victims, the integrity of criminal investigations and the protection of an offender's Constitutional right to a fair trial." The privacy right of the arrested person is not one of the balanced factors.⁸

Other law enforcement agencies see this differently. In 2015, the police department in South Burlington, VT, ended their practice of posting mugshots on their Facebook page. In announcing the shift, Police Chief Whipple said, "posting on the internet is kind of like a bell you can't unring."⁹ Last year, the State of New York ended its practice of publishing mugshots. Now, mugshots may only be

⁵ <https://www.ncsl.org/research/telecommunications-and-information-technology/mug-shots-and-booking-photo-websites.aspx>

⁶ <http://asosite.alachuasheriff.org/ASOInmateViewAll.aspx>

⁷ <https://www.wcjb.com/content/news/Alachua-County-Booking-Report-March-18-2020-568891381.html>

⁸ <https://vsp.vermont.gov/public>

⁹ <https://www.nytimes.com/2015/06/27/us/after-arrests-quandary-for-police-on-posting-booking-photos.html>

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released if the action serves a specific law enforcement goal.¹⁰ Although some local New York agencies wished for more definitive language, the New York State Police has announced that they will only release mugshots when doing so helps an ongoing investigation.¹¹ Interestingly, the New York ACLU was conflicted about whether the practice of releasing mugshots should be discontinued. They worried that the resulting loss of transparency would make it harder ensure police were acting fairly but, ultimately, supported the measure.¹²

Many law enforcement agencies have opted for policies that offer transparency and balance the public's right to know with an arrestee's rights to privacy and to be free from public shaming. California's public records law "requires law enforcement agencies to provide information the public has the right to know and, at the same time, to withhold information if the release would jeopardize an individual's right to privacy." Booking photos are not routinely released by California law enforcement agencies. In Washington State, an Attorney General opinion states that booking photos may only be provided to the media if the image is of a fugitive.¹³

Both Georgia and Utah have laws similar to Florida, which address websites that charge a fee to remove mugshots from publication. Georgia law prohibits the release of a booking photo to an entity that will publish said photo and charge a fee for its removal. Mugshots may still be generally requested as a public record.^{14 15} Utah law says the same.¹⁶

Much farther afield, a court in South Africa found that the publication of a defendant's arrest photo was so prejudicial that it affected a jury and warranted a new trial.¹⁷

Last year, an Austin, TX, woman sued to prevent the publication of her booking photo. According to the lawsuit and media reports, she was arrested on an intoxicated driving charge and was very upset before her booking photo was taken, resulting in a particularly embarrassing image. She claims that publishing her booking photo online, which is the practice of the Austin Police Department unless it would jeopardize an investigation, would violate her privacy without serving a legitimate public interest.¹⁸ The case is pending in Travis County Court with a next hearing date of July 27, 2020.¹⁹ The outcome of this matter would offer interesting precedent on the issue.

¹⁰ <https://www.democratandchronicle.com/story/news/politics/albany/2019/03/31/cuomo-lawmakers-keep-arrest-information-public/3325914002/>

¹¹ https://www.pressrepublican.com/news/local_news/new-law-requires-police-to-limit-release-of-mugshots/article_e6f3ec67-776a-57a6-a6f4-21ecf136c5ae.html

¹² <https://www.scribd.com/document/403523864/Mugshot-Ban-Leg-Memo-2019-03-27-FINAL>

¹³ <https://www.atg.wa.gov/ago-opinions/arrested-persons-rights-privacy-police-photographs-publication-television>

¹⁴ <http://www.chathamsheriff.org/Corrections/Bookings-24hrs>

¹⁵ <https://www.gjp.org/online-mugshot-removal-in-georgia/>

¹⁶ Utah Code Ann. § 17-22-30 (2017)

¹⁷ <https://rekordeast.co.za/151737/dont-publish-photos-suspected-criminals-social-media-says-police/>

¹⁸ https://www.austintexas.gov/police/mug_shots/index.cfm,
<https://www.statesman.com/news/20191025/woman-suing-to-stop-austin-police-city-from-sharing-her-mug-shot>

¹⁹ <https://www.traviscountytexas.gov/district-clerk/online-case-information>, Case #D-1-GN-19-007388, Jane Doe v Manley, filed 10/23/19.

The Media

As consumers of published mugshots, some elements of the media have taken their own stands on the propriety of the practice. Scripps Media, which owns 60 news stations in 40 markets, has discontinued publishing booking photos. The Houston Chronicle, Biloxi Sun Herald, New Haven Independent, and WRAL in North Carolina have also announced that they will no longer publish booking photos in the regular course of business. These outlets acknowledge that booking photos serve as nothing more than “clickbait” to the detriment of members of their communities.

They also acknowledge that an arrested person has been convicted of no crime, and to shame them at this stage is unfair. Further, the internet ensures that this public shaming continues in perpetuity, even if charges are never filed or dropped or the accused is acquitted. The managing editor of the Houston Chronicle explained, “[m]ugshot slideshows whose primary purpose is to generate page views will no longer appear on our websites.”²⁰ Florida Today in Brevard County ended their practice of “dumping” all mugshots onto their website in 2018. They still use arrest photos in their reporting when they feel it’s important but no longer is every photo automatically published.

Staged Perp Walks

The practice of staged “perp walks” is not governed by law or written policy in any of the researched locations. But, when law enforcement alerts media of a potentially-embarrassing photo opportunity, the same issues of privacy and public shaming arise.

Over the past two decades, there have been multiple efforts in New York City to discontinue the practice, even going as far as the recent introduction of an ordinance bill. In 2018, a councilmember from Queens introduced a measure that would prohibit “staged perp walks,” defined as “escorting an arrestee, defendant or suspect into a public place at a particular time or in a particular manner with the purpose of allowing the arrestee, defendant or suspect to be photographed or filmed for the benefit of the media.”²¹ The New York Police Department has opposed the measure by arguing that they shouldn’t be punished if they accidentally let the media capture a photo. Similarly, they argue that the media can independently learn when an arrestee is being transported and that alternative walking routes to vehicles are often limited. The bill, however, does specify that “nothing herein shall prevent any law enforcement officer from transporting an arrestee, defendant or suspect in the normal course of performing one’s duties and responsibilities.” Advocates for the measure argue that the bill targets staged perp walks, where law enforcement notifies the media or purposely parades an arrestee, and does not create an unreasonable burden.

The text of the New York City bill is as follows:

²⁰ <https://www.poynter.org/ethics-trust/2020/newsrooms-are-rethinking-their-use-of-mugshots-in-crime-reporting/>

²¹ <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3371664&GUID=5D701663-51E2-4B5C-8A3A-4D698AC9F043&Options=ID|Text|&Search=dromm+arrestee>

By Council Member Dromm

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting staged perp walks

Be it enacted by the Council as follows:

Section 1. Chapter 1 of title 14 of the administrative code of the city of New York is amended by adding a new section 14-175 to read as follows:

§ 14-175 Perp walks. a. Definitions. As used in this section, the term “staged perp walk” means escorting an arrestee, defendant or suspect into a public place at a particular time or in a particular manner with the purpose of allowing the arrestee, defendant or suspect to be photographed or filmed for the benefit of the media.

b. It is unlawful to enable or conduct a staged perp walk.

c. Notwithstanding subdivision b of this section, nothing herein shall prevent any law enforcement officer from transporting an arrestee, defendant or suspect in the normal course of performing one’s duties and responsibilities.

§ 3. This local law takes effect immediately after it becomes law.

The Bill was heard by the City Council’s Committee on Public Safety on June 27, 2019, and has seen no action since. There are no future dates scheduled.

PRELIMINARY COST/BENEFIT ANALYSIS

Potential Costs of Stopping the Practice of Publishing Mugshots and Perp Walks

- Reduction in transparency into law enforcement activity
- The City Commission has little control over most of the agencies who primarily act in this space locally, like the Sheriff’s department and county jail.

Potential Benefits of Stopping the Practice of Publishing Mugshots and Perp Walks

- Ends cycle of public shaming arrestees who have not been convicted of any crime
- Photos are still available via public records request
- Mugshot websites are unable to mine for photos to publish
- Reduction in affirming biases

PRELIMINARY AND ILLUSTRATIVE LIST OF POTENTIAL STAKEHOLDERS

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- Gainesville Police Department
- Alachua County Sheriff's Office
- Alachua County Jail and 8th Circuit Court System
- City, County, and State's Attorney's Offices
- Public Defender's Office
- Legal aid and other advocacy organizations