

House Judiciary Committee
Chairman Larry Klemin
Monday, January 25, 2021 @ 11:00

HB 1294 – Booking Photo Civil Action:

This bill is a complimentary bill — intended to supplement HB 1296 which would make booking photos, also known as “mugshots” confidential records until a person has been **convicted** of a crime.

This bill would provide those individuals, whose booking photos have **already** been made public, a private cause of action to sue a company when that company charges money to remove or update information related to a person’s arrest record or booking photo.

Unlike federal authorities, North Dakota authorities **routinely** release booking photographs and contact information for presumptively innocent citizens accused of crimes. If the charge is dismissed or citizen is acquitted, it is impossible to undo the damage done. Earlier today I presented HB 1296 in the Industry, Business and Labor Committee, which would prohibit future releases of booking photos to the public until a person has been convicted, but for many that bell cannot be un-rung. This bill attempts to give them some recourse.

Until 2016, Federal law enforcement routinely released booking photographs. Similar to North Dakota’s open records law, the federal Freedom of Information Act, also known as FOIA, governs the release and dissemination of information collected by governmental employees. In 2016, the United States Court of Appeals for the Sixth Circuit reversed twenty years of precedent, when they determined that citizens “enjoy a **non-trivial** privacy interest in their booking photos” and held routine release of booking photographs during ongoing criminal proceedings violated the FOIA. *Detroit Free Press Inc. v. United States Dept. of Justice*, 829 F.3d 478 (6th Cir. 2016).

The *Free Press* court recognized the FOIA’s competing interests: a “general philosophy of full agency disclosure,” balanced with a need to restrict information compiled for law enforcement purposes when restriction is necessary to protect against “an unwarranted invasion of personal privacy.” Addressing personal privacy, the court described booking photos as:

- Conveying “guilt to the viewer”
- Uniformly interpreted “with guilt and criminality”

- “effectively eliminating the presumption of innocence and replacing it with an unmistakable badge of criminality”

The court went on to note: “A disclosed booking photo casts a long, damaging shadow over the depicted individual.” The court further noted mug-shot collection websites harvest booking photos, posting them online, and demanding a ransom to remove them. Ultimately, recognizing the change in technology and the ubiquity of the internet, in overruling its 1996 decision holding FOIA required the release of booking photographs, the court acknowledged that ten years earlier it “could not have known or expected that a booking photo could haunt the depicted individual for decades.” As a result of this case, federal law enforcement *rarely* releases booking photographs, reserving release only for instances where public safety requires it.

This is great, unless you’ve been arrested in a state or municipal court since the advent of the Internet. Many states are working to protect the confidentiality of booking photos until conviction, and to provide some mechanism for individuals to get their photos and personal information removed from the multiple mugshot extortion websites that exist. There is no good, automatic, way for a person to wipe the internet clean of evidence of a prior arrest, regardless of whether they were convicted or not. However, HB 1294 takes one small step in that direction by allowing a person the opportunity to sue when mugshot extortion websites refuse to remove or update incorrect information without making a person pay a fee. Please send HB 1294 to the floor with a unanimous DO PASS recommendation, and I would be happy to answer any questions.