

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE
 Revised

House Bill 744
 Economic Matters

(Delegate Carter, *et al.*)

Finance

Commercial Law - Consumer Protection - "Mug Shot" Web Sites

This bill applies to operators of websites that charge a fee for the removal of an arrest or detention photograph or digital image. It authorizes an individual to request an operator of a website to remove the individual’s photograph or digital image from the operator’s website if (1) the photograph or digital image was taken during the arrest or detention of the individual for a criminal or traffic charge or a suspected violation of a criminal or traffic law and (2) the court record or police record that contained the photograph or digital image was expunged, shielded or otherwise removed from public inspection, or the resulting judgment was vacated. The bill establishes procedures for the individual to make the request and for the website operator to remove the photograph or digital image. Violation of the bill is an unfair or deceptive trade practice under the Maryland Consumer Protection Act (MCPA), subject to MCPA’s civil and criminal penalty provisions.

Fiscal Summary

State Effect: The bill’s imposition of existing penalty provisions does not have a material impact on State finances or operations. If the Consumer Protection Division of the Office of the Attorney General receives fewer than 50 complaints per year stemming from the bill, the additional workload can be handled with existing resources.

Local Effect: The bill’s imposition of existing penalty provisions does not have a material impact on local government finances or operations.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: To request that a website operator remove the individual's photograph or digital image from the website, the individual must send the website operator a written request by certified mail or by electronic mail using an electronic postmark (if a secure electronic mail connection is available on the website).

The website operator must remove the photograph or digital image within 30 days after receiving the request. Additionally, within 5 days after removing the photograph or digital image, the website operator must send a written confirmation of the removal to the individual. The website operator may not charge for the removal of the photograph or digital image.

Current Law:

Maryland Consumer Protection Act

An unfair or deceptive trade practice under MCPA includes, among other acts, any false, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers. The prohibition against engaging in any unfair or deceptive trade practice encompasses the offer for or actual sale, lease, rental, loan, or bailment of any consumer goods, consumer realty, or consumer services; the extension of consumer credit; the collection of consumer debt; or the offer for or actual purchase of consumer goods or consumer realty from a consumer by a merchant whose business includes paying off consumer debt in connection with the purchase of any consumer goods or consumer realty from a consumer.

The Consumer Protection Division is responsible for enforcing MCPA and investigating the complaints of aggrieved consumers. The division may attempt to conciliate the matter, issue a cease and desist order, or file a civil action in court. A merchant who violates MCPA is subject to a fine of up to \$1,000 for the first violation and up to \$5,000 for each subsequent violation. In addition to any civil penalties that may be imposed, any person who violates MCPA is guilty of a misdemeanor and, on conviction, is subject to a fine of up to \$1,000 and/or imprisonment for up to one year.

Court and Police Records – Shielding, Vacated Judgments, and Expungement

Generally, court records and police records are not eligible for shielding. State law does authorize, under specified circumstances, the shielding of court records pertaining to domestic violence proceedings if the petition has been dismissed and upon the respondent's written request.

Under the Courts and Judicial Proceedings Article and the Maryland Rules, a criminal defendant generally has the right to an appeal of a final judgment entered in a criminal case, even if imposition or execution of the sentence has been suspended. An appeal of a final judgment may result in a vacated (*e.g.*, voided) judgment, among other possible dispositions.

Under the Criminal Procedure Article, for arrests, detentions, or confinements occurring before October 1, 2007, a person who is arrested, detained, or confined by a law enforcement unit for the suspected commission of a crime and then is released without being charged with the commission of a crime may request the expungement of the police record. The request must be made within eight years after the incident, and if found to be eligible, the person is entitled to expungement of the applicable records related to the arrest. An individual who is entitled to this type of expungement is not required to pay any fee or costs in connection with the expungement.

A person who has been charged with the commission of a crime may file a petition for expungement listing the relevant facts of a police record, court record, or other record maintained by the State or a political subdivision of the State, under various circumstances listed in the statute. These grounds include acquittal, dismissal of charges, entry of probation before judgment, entry of *nolle prosequi*, stet of charge, and gubernatorial pardon. An individual convicted or found not criminally responsible of specified public nuisance crimes is also eligible for expungement of the associated criminal records under certain circumstances.

If two or more charges, other than one for a minor traffic violation, arise from the same incident, transaction, or set of facts, they are considered to be a unit. If a person is not entitled to expungement of one charge or conviction in a unit, the person is not entitled to expungement of any other charge in the unit.

A person is not entitled to expungement if he/she is a defendant in a pending criminal proceeding or has been convicted of a crime (other than a minor traffic violation) since the disposition on which the expungement petition is based.

Expungement of a court record means removal from public inspection:

- by obliteration;
- by removal to a separate secure area to which persons who do not have a legitimate reason for access are denied access; and
- if access to a court record or police record can be obtained only by reference to another such record, by the expungement of that record, or the part of it that provides access.

Background: Mug shots of arrested individuals are widely and freely available from State and local law enforcement agencies and are frequently published online, including by news organizations. In a 2007 opinion, the Attorney General stated that mug shots in the possession of a police department are not protected “criminal history record information” under the Maryland Public Information Act (MPIA); a law enforcement agency, therefore, must disclose mug shots in response to MPIA requests. A law enforcement agency may, however, refuse to disclose mug shots if the agency determines that disclosure would be contrary to public interest; this may include instances where the individual was acquitted or the charges were dropped.

According to a 2013 *New York Times* exposé, the number of for-profit “mug shot websites” has been increasing since 2010, with more than 80 mug shot sites available as of 2013. These websites gather mug shots from law enforcement agencies and publish them on their sites. The websites claim to provide the mug shots as a public service; the public can easily investigate and become aware of individuals in their communities who have been accused of engaging in criminal conduct. However, these sites often charge a fee to remove an individual’s mug shot from the site – a practice that many critics claim constitutes extortion, especially when the mug shot relates to a relatively minor charge or a charge that was later dropped or expunged. These fees can range from \$30 to \$400 and vary from site to site. In response to this trend, Oregon passed a law that gives mug shot websites 30 days to remove a mug shot image (for free) if the individual can prove that the individual was exonerated or the record was expunged; Georgia passed a similar law, and Utah prohibits county sheriffs from distributing booking photographs to a site that will charge a fee to delete them. Such legislation has been met with resistance from journalists who claim that mug shots, as matters of public record, should remain public and that restricting availability impinges on First Amendment rights.

Small Business Effect: The bill requires websites that publish mug shots and charge fees for their removal to remove mug shots for free upon a valid request by qualifying individuals. Websites that publish mug shots and charge fees for their removal are likely negatively impacted, but the extent of the impact is dependent on the number and frequency of requests received and the amount the website charges, which varies from site to site.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): *New York Times*, Office of the Attorney General (Consumer Protection Division), Department of Legislative Services

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