

BOOKING PHOTOGRAPHS LEGISLATION "THE MUGSHOT BILL"

On April 12, 2019, the Governor signed legislation, as part of the fiscal year 2020 Public Protection and General Government Article VII Budget Bill, to amend the Freedom of Information Law (FOIL). This amendment adds a new subparagraph ("viii.") to the non-exclusive list of examples of unwarranted invasion of personal privacy (§89(2)(b) of FOIL) and will permit law enforcement agencies to deny access to arrest and booking photographs, or "mugshots," on that ground (§87(2)(b) of FOIL).

The original legislation, which was included as part of the Governor's budget proposal, applied to all booking information. However, the provision that was ultimately passed and signed by the Governor is more limited in scope and applies only to arrest and booking photographs.

As a general matter, the grounds for denial set forth in FOIL are permissive. Stated differently, even though an agency **may** withhold records in accordance with the grounds for denial listed in §87(2), **it is not required to do so** unless disclosure is prohibited by another state or federal statute [see *Capital Newspapers v. Burns*, 109 AD2d 92, aff'd 67 NY2d 562 (1986)]. As such, a local law enforcement agency, such as a County Sheriff's Office or City, Town, or Village Police Departments, will continue to be able to disclose copies of arrest and booking photographs if it wishes to do so.

State law enforcement agencies, such as the New York State Police are also bound by the requirements of the Personal Privacy Protection Law (Public Officers Law Article 6-A), which applies only to state agencies and contains the following language:

"(1) No agency may disclose any record or personal information unless such disclosure is:

...

(c) subject to disclosure under article six of this chapter unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter ..." (§96(1)(c) of PPPL) (emphasis added)

As such, State law enforcement agencies are, in our opinion, prohibited from disclosing arrest and booking photographs unless public release of the photographs will serve a specific law enforcement purpose.

The amendment to FOIL, codified as Chapter 59 of the Laws of 2019 reads as follows:

"Part GGG

Section 1. Section 1 of subpart K of part II of a chapter of the laws of 2019 amending the public officers law relating to prohibiting disclosure of law enforcement booking information and photographs, as proposed in legislative bill numbers S.1505-C and A.2005-C, is amended to read as follows:

Section 1. Legislative findings. The legislature finds that law enforcement [~~booking information and~~] photographs, otherwise known as "mugshots," are published on the internet and other public platforms with impunity. An individual's mugshot is displayed publicly even if the arrest does not lead to a conviction, or the conviction is later expunged, sealed, or pardoned. This practice presents an unacceptable invasion of the individual's personal privacy. While there is a well-established Constitutional right for the press and the public to publish government records which are in the public domain or that have been lawfully accessed, arrest and booking information have not been found by courts to have the same public right of access as criminal court proceedings or court filings. Therefore, each state can set access to this information through its Freedom of Information laws. The federal government has already limited access to booking photographs through privacy formulations in its Freedom of Information Act, and the legislature hereby declares that New York will follow the same principle to protect its residents from this unwarranted invasion of personal privacy, absent a specific law enforcement purpose, such as disclosure of a photograph to alert victims or witnesses to come forward to aid in a criminal investigation.

§ 2. Paragraph (b) of subdivision 2 of section 89 of the public officers law, as amended by section 2 of subpart K of part II of a chapter of the laws of 2019 amending the public officers law relating to prohibiting disclosure of law enforcement booking information and photographs, as proposed in legislative bill numbers S.1505-C and A.2005-C, is amended to read as follows:

- (b) An unwarranted invasion of personal privacy includes, but shall not be limited to:
- i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
 - ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
 - iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
 - iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
 - v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
 - vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; [or]
 - vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law[.]; or
 - viii. disclosure of law enforcement ~~booking information about an individual, including~~ arrest or booking photographs **of an individual**, unless public release of such ~~information~~ **photographs** will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

§ 3. This act shall take effect on the same date and in the same manner as subpart K of part II of a chapter of the laws of 2019 amending the public officers law relating to prohibiting disclosure of law enforcement booking information and photographs, as proposed in legislative bill numbers S.1505-C and A.2005-C, takes effect.

Section 3 of subpart K of part II, referenced above, states that "This act shall take effect immediately."