

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 787 Computer or Electronic Device Harassment

SPONSOR(S): Goodson and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 946

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	12 Y, 0 N	Jones	Cunningham
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

A recent survey found that one in ten people have threatened to expose risqué photos of their ex-partners online, and that these threats were carried out nearly 60 percent of the time. In Florida, there are no criminal laws that specifically prohibit the posting of nude adult photos or videos on the Internet.

The bill creates s. 847.0042, F.S., to criminalize the non-consensual transmission or posting of nude adult photographs and videos that include personal information to websites or social networking services. Specifically, the bill makes it a third degree felony for a person to knowingly use a computer (or other device capable of electronic data transmission or distribution) to transmit or post to a website or any other social networking service, or cause to be posted to a website or any other social networking service, any photograph or video of an individual which depicts nudity and contains the depicted individual's personal identification information (as defined above), or counterfeit or fictitious information purporting to be such personal identification information, without first obtaining the depicted person's written consent (unless the victim was photographed or videotaped in public and a lack of objection to the photography or videotaping could reasonably be implied by the victim's conduct).

The bill makes it a second degree felony if the person is 18 years old or older when they transmit or post the nude photo or video and the individual in the photo or video is younger than 16 when the photo or video was created.

The Criminal Justice Impact Conference has not met to determine the prison bed impact of the bill. However, because the bill creates a new felony offense, it may have a negative prison bed impact on the Department of Corrections.

The bill provides an effective date of October 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

McAfee, an Internet security provider, recently published the results of a survey exploring the connection between romantic breakups and loss of privacy online.¹ Among other results, the survey found that 1 in 10 ex-partners have threatened to expose risqué photos online, and that these threats were carried out nearly 60 percent of the time.² Men reported being threatened with such exposure more often than women, and also reported that a higher proportion of the threats were carried out.³ Some victims of such activity have been so emotionally affected that they have committed or attempted suicide.⁴

Recently, nude photographs and videos of a young woman in Brevard County were posted online by the woman's ex-boyfriend.⁵ Along with the photos, her name, e-mail address, and the name of the city where she lived were also posted.⁶ The woman said she called the Brevard County Sheriff's Office for help and was told it's not a crime to post nude photos without a person's consent, even if the person and the person's address are identified.⁷

In Florida, there are no criminal laws that specifically prohibit the posting of nude adult photos on the Internet. However, in some circumstances posting such pictures could be an element of the offenses of stalking (s. 784.048, F.S.), or extortion (s. 836.05, F.S.). Additionally, s. 817.568(4), F.S., makes the non-consensual use of a person's personal identification information to harass⁸ that person a first degree misdemeanor.⁹ "Personal identification information" is defined as any name or number that may be used, alone or in conjunction with any other information, to identify a specific individual, including any:

- Name, postal or electronic mail address, telephone number, social security number, date of birth, mother's maiden name, official state-issued or United States-issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number, Medicaid or food assistance account number, bank account number, credit or debit card number, or personal identification number or code assigned to the holder of a debit card by the issuer to permit authorized electronic use of such card;
- Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
- Unique electronic identification number, address, or routing code;
- Medical records;
- Telecommunication identifying information or access device; or
- Other number or information that can be used to access a person's financial resources.¹⁰

¹ *Lovers Beware: Scorned Exes May Share Intimate Data And Images Online*, McAfee.com, <http://www.mcafee.com/us/about/news/2013/q1/20130204-01.aspx> (last viewed on March 25, 2013).

² *Id.*

³ *Id.*

⁴ *Supra* note 1.

⁵ See <http://www.wftv.com/news/news/local/9-investigates-issue-nude-photos-posted-online-wit/nWgdb/> (last viewed March 25, 2013).

⁶ *Id.*

⁷ *Id.*

⁸ Section 817.568, F.S., defines "harass" as engaging in conduct directed at a specific person that is intended to cause substantial emotional distress to such person and serves no legitimate purpose.

⁹ A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

¹⁰ Section 817.568, F.S.

Effect of the Bill

The bill creates s. 847.0042, F.S., to criminalize the non-consensual transmission or posting of nude photographs or videos that include personal information to websites or social networking services.

The bill makes it a third degree felony¹¹ for a person to knowingly use a computer (or other device capable of electronic data transmission or distribution) to transmit or post to a website or any other social networking service, or cause to be posted to a website or any other social networking service, any photograph or video of an individual which depicts nudity¹² and contains the depicted individual's personal identification information (as defined above), or counterfeit or fictitious information purporting to be such personal identification information, without first obtaining the depicted person's written consent (unless the victim was photographed or videotaped in public and a lack of objection to the photography or videotaping could reasonably be implied by the victim's conduct).

The bill makes it a second degree felony¹³ if the person is 18 years old or older when they transmit or post the nude photo or video and the individual in the photo or video is younger than 16 when the photo or video was created.

The offense is considered to be committed in Florida if any conduct that is an element of the offense or any harm to the depicted person, including harm to the depicted person's privacy interests, resulting from the offense occurs within Florida.

The bill also amends s. 921.244, F.S.,¹⁴ to add s. 847.0042, F.S., to the list of offenses for which a court must issue a no contact order with the victim.

B. SECTION DIRECTORY:

Section 1. Creates s. 847.0042, F.S., relating to nude depictions with personal identifying information.

Section 2. Amends s. 921.244, F.S., relating to order of no contact; penalties.

Section 3. Provides an effective date of October 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

The Criminal Justice Impact Conference has not met to determine the prison bed impact of the bill. However, because the bill creates a new third degree felony offense, it may have a negative prison bed impact on the Department of Corrections.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

¹¹ A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

¹² Section 847.001(9), F.S., defines "nudity" as the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state. A mother's breastfeeding of her baby does not under any circumstance constitute "nudity," irrespective of whether or not the nipple is covered during or incidental to feeding.

¹³ A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

¹⁴ Section 921.244, F.S., requires a court to order a defendant not to have contact with a victim, directly or indirectly, including through a third person, if the defendant was convicted for violating ss. 794.011, 800.04, 847.0135(5), or 775.084(1)(b)1.a. - o., F.S. A violation of this court order is a third degree felony.

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Private individuals or companies who engage in the behavior prohibited by the bill for profit will face criminal penalties for doing so.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18, of the Florida Constitution because it is a criminal law.

2. Other:

The First Amendment to the United States Constitution and Article I, Section 4, of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."¹⁵ Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct.¹⁶

When legislation is drafted so that it may be applied to conduct that is protected by the First Amendment, it is said to be unconstitutionally overbroad. The overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially "because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."¹⁷ The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected speech.¹⁸ If statutes are not narrowly constructed they may be challenged as being overbroad.

In *Reno v. American Civil Liberties Union*, the United States Supreme Court stated:

[T]he growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.¹⁹

¹⁵ *NAACP v. Button*, 371 U.S. 415, 433 (1963).

¹⁶ *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

¹⁷ *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

¹⁸ *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

¹⁹ 521 U.S. 844 (1997).

The bill makes it a crime to knowingly transmit or post to a website or social networking service any photograph or video that depicts nudity of an individual, contains the personal identification information of that individual, and is transmitted or posted without the individual's consent. To the extent that the bill regulates content of speech protected by the First Amendment, it could be challenged as being unconstitutional.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES