

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 649 Surveillance by a Drone

**SPONSOR(S):** Civil Justice Subcommittee; Criminal Justice Subcommittee; Metz and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 766

| REFERENCE                        | ACTION              | ANALYST | STAFF DIRECTOR or<br>BUDGET/POLICY CHIEF |
|----------------------------------|---------------------|---------|--|
| 1) Criminal Justice Subcommittee | 13 Y, 0 N, As<br>CS | Weber   | Cunningham                               |
| 2) Civil Justice Subcommittee    | 11 Y, 1 N, As<br>CS | Weber   | Bond                                     |
| 3) Judiciary Committee           |                     | Weber   | Havlicak                                 |

### SUMMARY ANALYSIS

In 2013, the Legislature enacted the Freedom from Unwarranted Surveillance Act (Act). The Act regulates the use of drones by law enforcement agencies, provides a civil remedy for an aggrieved party to obtain relief in the event the Act is violated, and prohibits the use of evidence in court if it was obtained or collected in violation of the Act.

The bill amends the Freedom from Unwarranted Surveillance Act to prohibit a person, state agency, or political subdivision from using a drone equipped with an imaging device to:

- Record an image of privately owned or occupied real property or the owner, tenant, occupant, invitee, or licensee of such property;
- With the intent to conduct surveillance on the individual or property in violation of such person's reasonable expectation of privacy; and
- Without that individual's written consent.

The bill creates a presumption that a person has a reasonable expectation of privacy on his or her privately owned or occupied real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

The bill creates a limited exception to the above-described prohibition for a person or entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor of the state only if the drone is used to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license.

The bill creates a civil remedy authorizing an aggrieved party to seek compensatory damages and injunctive relief against a person, state agency, or political subdivision that violates the above described prohibition. The prevailing party in such civil actions is entitled to recover reasonable attorney fees from the nonprevailing party and may recover punitive damages against a person (not a state agency or political subdivision) who violates the above-described prohibition.

The bill provides an effective date of July 1, 2015.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Present Situation**

##### Drones

A drone is an unmanned aircraft that can be flown by remote control or on a predetermined flight path.<sup>1</sup> The size of a drone varies—it can be as small as an insect or as large as a commercial airliner.<sup>2</sup> Drones can be equipped with various devices such as infrared cameras,<sup>3</sup> devices used to intercept electronic transmissions,<sup>4</sup> and devices that can intercept cellular phone message and crack Wi-Fi passwords.<sup>5</sup> It has been reported that the U.S. Army contracted with two corporations in 2011 to develop facial recognition and behavior recognition technologies for drone use.<sup>6</sup>

There are three major markets for drones: military, civil government, and commercial.<sup>7</sup> The majority of drones are operated by the military and have an insignificant impact on U.S. airspace.<sup>8</sup> However, drone use in this country is increasing because of technological advances. In 2011, the Federal Aviation Administration (FAA) estimated that there will be 30,000 drones in U.S. airspace by 2030.<sup>9</sup>

##### Non-Military Drone Use

The FAA, which first allowed drones in U.S. airspace in 1990, is in charge of overseeing the integration of drones into U.S. airspace.<sup>10</sup> In doing so, it must balance the integration of drones with the safety of the nation's airspace.<sup>11</sup> Since 1990, the FAA has allowed limited use of drones for important public missions such as firefighting, disaster relief, search and rescue, law enforcement, border patrol, scientific research, and testing and evaluation.<sup>12</sup> Recently, the FAA limited the type of airspace where drones may operate. For example, the FAA prohibits drone operations over major urban areas.<sup>13</sup>

Flying model aircraft/drones as a hobby or for recreational purpose does not require FAA approval.<sup>14</sup> The FAA authorizes non-recreational drone operations on a case-by-case basis, and there are several ways to gain FAA approval.

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<sup>1</sup> Richard M. Thompson II, *Drones in Domestic Surveillance Operations: Fourth Amendment Implications and Legislative Responses*, Congressional Research Service, April 3, 2013, [www.fas.org/sgp/crs/natsec/R42701.pdf](http://www.fas.org/sgp/crs/natsec/R42701.pdf) (last visited Mar. 12, 2015).

<sup>2</sup> Jeremiah Gertler, *U.S. Unmanned Aerial Systems*, Congressional Research Service, January 3, 2012, [www.fas.org/sgp/crs/natsec/R42136.pdf](http://www.fas.org/sgp/crs/natsec/R42136.pdf) (last visited Mar. 12, 2015).

<sup>3</sup> See, DSLRPros, Nighthawk Thermal P2 Aerial Kit, <http://www.dslrpros.com/dslrpros-products/thermal-aerial-drone-kit.html> (last visited Mar. 12, 2015).

<sup>4</sup> Greg Miller, *CIA flew stealth drones into Pakistan to monitor bin Laden house*, THE WASHINGTON POST (May 17, 2011), [http://www.washingtonpost.com/world/national-security/cia-flew-stealth-drones-into-pakistan-to-monitor-bin-laden-house/2011/05/13/AF5dW55G\\_story.html](http://www.washingtonpost.com/world/national-security/cia-flew-stealth-drones-into-pakistan-to-monitor-bin-laden-house/2011/05/13/AF5dW55G_story.html) (last visited Mar. 31, 2015).

<sup>5</sup> Any Greenberg, *Flying Drone Can Crack Wi-Fi Networks, Snoop on Cell Phones*, FORBES (July 28, 2011), <http://www.forbes.com/sites/andygreenberg/2011/07/28/flying-drone-can-crack-wifi-networks-snoop-on-cell-phones/> (last visited Mar. 31, 2015).

<sup>6</sup> Clay Dillow, *Army Developing Drones that can Recognize Your Face from a Distance and Even Recognize Your Intentions*, POPULAR SCIENCE (Sept. 28, 2011), <http://www.popsi.com/technology/article/2011-09/army-wants-drones-can-recognize-your-face-and-read-your-mind> (last visited Mar. 31, 2015).

<sup>7</sup> *FAA Aerospace Forecast: Fiscal Years 2011-2031*, FEDERAL AVIATION ADMINISTRATION 49 (2011).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> FAA Modernization and Reform Act of 2002, Public Law No. 112-95, 126 Stat. 11 (2012).

<sup>11</sup> Fact Sheet—Unmanned Aircraft Systems (UAS), FEDERAL AVIATION ADMINISTRATION (Feb. 15, 2015), [http://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=18297](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18297) (last visited Mar. 12, 2015).

<sup>12</sup> *Id.*

<sup>13</sup> Fact Sheet—Unmanned Aircraft Systems (UAS), FEDERAL AVIATION ADMINISTRATION (Jan. 6, 2014), [http://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=14153](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=14153) (last visited Mar. 12, 2015).

<sup>14</sup> All model aircraft/drone operators must fly in accordance with the law. Fact Sheet—Unmanned Aircraft Systems (UAS), FEDERAL AVIATION ADMINISTRATION (Feb. 15, 2015), [http://www.faa.gov/news/fact\\_sheets/news\\_story.cfm?newsId=18297](http://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=18297) (last visited Mar. 12, 2015).

Currently, private sector manufacturers and technology developers can obtain a Special Airworthiness Certificate in the experimental category to conduct research and development. Commercial firms that fly drones may also do so under a FAA Restricted Category Type Certificate, which allows limited operations such as wildlife conservation flights, aerial surveying, and oil/gas pipeline patrols.<sup>15</sup> Additionally, commercial entities are able to petition the FAA for exemptions under Section 333 of Public Law 112-95 to permit non-recreational drone operations.<sup>16</sup>

The FAA also may issue a Certificate of Waiver of Authorization (COA), which allows public entities, including governmental agencies, to fly drones in civil airspace.<sup>17</sup> An agency seeking a COA must apply online and detail the proposed operation for the drone.<sup>18</sup> If the FAA issues a COA, it contains a stated time period (usually two years), a certain block of airspace for the drone, and other special provisions unique to the specific operation.<sup>19</sup> In 2013, the FAA issued 423 COAs.<sup>20</sup>

#### Drone Use in Florida

According to the FAA's Freedom of Information Act responses, the Miami-Dade Police Department, the Orange County Sheriff's Office, the Polk County Sheriff's Office, and the University of Florida each held a COA to operate an unmanned aircraft system between November 2006 and June 30, 2011.<sup>21</sup> Additionally, it has been reported that the Daytona Beach Police Department was issued a COA.<sup>22</sup>

- The Miami-Dade Police Department released a COA issued to the department that was effective from July 1, 2011, to June 30, 2012.<sup>23</sup> However, as recently at 2013, the department was using drones in training drills.<sup>24</sup>
- The Orange County Sheriff's Office COA that was released to the public was effective from January 28, 2011, to January 27, 2012.<sup>25</sup> The Sheriff's Office purchased two drones.<sup>26</sup>
- The Polk County Sheriff's Office purchased a quadcopter in 2010, and as of October 2014, reported using it eight times in SWAT situations.<sup>27</sup>

#### Florida Law

In 2013, the Legislature passed the Freedom from Unwarranted Surveillance Act (Act). The Act created section 934.50, F.S., which limits the use of drones by law enforcement agencies. The Act defines a drone as a powered, aerial vehicle that does not carry a human operator, uses aerodynamic forces to

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<sup>15</sup> *Id.* As of October 2014, the FAA has only approved operations using two certificated drones.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> FEDERAL AVIATION ADMINISTRATION, *Freedom of Information Act Responses*,

[https://www.faa.gov/uas/public\\_operations/foia\\_responses/](https://www.faa.gov/uas/public_operations/foia_responses/) (last visited Mar. 12, 2015). Whether these entities have renewed their COAs or whether other Florida state or local agencies have obtained COAs is unknown at this time.

<sup>22</sup> Shawn Musgrave, *Finally, Here's Every Organization Allowed to Fly Drones in the US*, MOTHERBOARD (Oct. 6, 2014), <http://motherboard.vice.com/read/every-organization-flying-drones-in-the-us> (last visited Mar. 12, 2015). In a public records request, the FAA released COA requests submitted between November 2012, and June 2014. *Id.* According to the information released, the Daytona Beach Police Department obtained two COA waivers. *Id.*

<sup>23</sup> ELECTRONIC FRONTIER FOUNDATION, *Miami-Dade PD Drone Certificate of Authorization*, <https://www.eff.org/document/miami-dade-pd-drone-certificate-authorization> (last visited Mar. 12, 2015).

<sup>24</sup> David Sutta, *Unmanned Drones Now Patrolling South Florida Skies*, CBS MIAMI (May 9, 2013), <http://miami.cbslocal.com/2013/05/09/unmanned-drones-now-patrolling-south-florida-skies/> (last visited Mar. 31, 2015).

<sup>25</sup> ELECTRONIC FRONTIER FOUNDATION, *Orange County Sheriff Drone Records*, <https://www.eff.org/document/orange-county-sheriff-drone-records> (last visited Mar. 12, 2015).

<sup>26</sup> *Drone Spotted at Orange County Standoff Scene Raises Questions*, NEWS 96.5.COM (July 24, 2014), <http://www.news965.com/news/news/local/drone-spotted-orange-county-standoff-scene-raises-ngmjJ/> (last visited Mar. 31, 2015).

<sup>27</sup> Howard Altman, *Socom, Polk County Sheriff's Office Among Those with Drone Permits*, THE TAMPA TRIBUNE (Oct. 7, 2014), <http://tbo.com/list/military-news/socom-polk-county-sheriffs-office-among-those-with-drone-permits-20141007/> (last visited Mar. 31, 2015).

provide vehicle lift, can fly autonomously or be piloted remotely, can be expendable or recoverable, and can carry a lethal or nonlethal payload.<sup>28</sup>

Current law prohibits a law enforcement agency from using a drone to gather evidence or other information. However, the act does not prohibit the use of a drone:

- To counter a high risk of a terrorist attack by a specific individual or organization if the United States Secretary of Homeland Security determines that credible intelligence indicates that there is such a risk;
- If the law enforcement agency first obtains a search warrant signed by a judge authorizing the use of a drone; or
- If the law enforcement agency possesses reasonable suspicion that, under particular circumstances, swift action is needed to prevent imminent danger to life or serious damage to property, to forestall the imminent escape of a suspect or the destruction of evidence, or to achieve purposes including, but not limited to, facilitating the search for a missing person.<sup>29</sup>

### **Effect of the Bill**

The bill amends s. 934.50, F.S., to prohibit a person, state agency,<sup>30</sup> or political subdivision<sup>31</sup> from using a drone equipped with an imaging device<sup>32</sup> to:

- Record an image<sup>33</sup> of privately owned or occupied real property or the owner, tenant, occupant, invitee, or licensee of such property;
- With the intent to conduct surveillance on the individual or property in violation of such person's reasonable expectation of privacy; and
- Without that individual's written consent.

The bill creates a presumption that a person has a reasonable expectation of privacy on his or her privately owned or occupied real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

The bill creates an exception to the above-described prohibition for a person or entity engaged in a business or profession licensed by the state, or by an agent, employee, or contractor of the state only if the drone is used to perform reasonable tasks within the scope of practice or activities permitted under such person's or entity's license. However, this exception does not apply to a profession in which the licensee's authorized scope of practice includes obtaining information about the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation, or character of any society, person, or group of persons.

The bill creates a civil remedy authorizing an aggrieved party to seek compensatory damages and injunctive relief against a person, state agency, or political subdivision that violates the above-described

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<sup>28</sup> s. 934.50(2)(a), F.S.

<sup>29</sup> s. 934.50(3) & (4), F.S.

<sup>30</sup> Section 11.45(1)(j), F.S., defines "state agency" as a separate agency or unit of state government created or established by law and includes, but is not limited to, the following and the officers thereof: authority, board, branch, bureau, commission, department, division, institution, office, officer, or public corporation, as the case may be, except any such agency or unit within the legislative branch of state government other than the Florida Public Service Commission.

<sup>31</sup> Section 11.45(1)(i), F.S., defines "political subdivision" as separate agency or unit of local government created or established by law and includes, but is not limited to, the following and the officers thereof: authority, board, branch, bureau, city, commission, consolidated government, county, department, district, institution, metropolitan government, municipality, office, officer, public corporation, town, or village.

<sup>32</sup> The bill defines the term "imaging device" as a mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting an image.

<sup>33</sup> The bill defines the term "image" as a record of thermal, infrared, ultraviolet, visible light, or other electromagnetic waves; sound waves; odors; or other physical phenomena which captures conditions existing on or about real property or an individual located on that property.

prohibition. The prevailing party in such civil actions is entitled to recover reasonable attorney fees from the nonprevailing party.<sup>34</sup>

Additionally, the bill gives an aggrieved party the ability to seek punitive damages against a person (not a state agency or political subdivision) who violates the above-described prohibition.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 934.50, F.S., relating to searches and seizure using a drone.

Section 2. Provides an effective date of July 1, 2015.

**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 bill authorizes an aggrieved party to initiate a civil action and to obtain compensatory damages or injunctive relief against a state agency or political subdivision that violates the bill's newly-created prohibitions on using drones. This remedy could result in monetary damages, which would have a negative fiscal impact on state government.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

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

**2. Expenditures:**

The bill authorizes an aggrieved party to initiate a civil action and to obtain compensatory damages or injunctive relief against a political subdivision that violates the bill's newly-created prohibitions on using drones. This remedy could result in monetary damages, which would have a negative fiscal impact on local governments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill authorizes an aggrieved party to initiate a civil action and to obtain compensatory damages or injunctive relief against a person who violates the bill's newly-created prohibitions on using drones. Additionally, the bill authorizes an aggrieved party to seek punitive damages against a person who commits such violation. The remedies could result in monetary damages, which would have a negative fiscal impact on the private sector.

**D. FISCAL COMMENTS:**

None

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

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<sup>34</sup> The bill specifies that reasonable attorney fees are based on the actual and reasonable time expended by a plaintiff's attorney billed at an appropriate hourly rate and, in cases in which the payment of such a fee is contingent on the outcome, without a multiplier, unless the action is tried to verdict, in which case a multiplier of up to twice the actual value of the time expended may be awarded in the discretion of the trial court.

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill creates a presumption of a reasonable expectation of privacy. According to the bill, a person is presumed to have a reasonable expectation of privacy on his or her privately owned or occupied real property if he or she is not observable by persons located at ground level in a place where they have a legal right to be, regardless of whether he or she is observable from the air with the use of a drone.

Despite this presumption, and depending on the facts of individual cases, the U.S. Supreme Court's<sup>35</sup> and Florida courts'<sup>36</sup> extensive case law regarding an individual's reasonable expectation of privacy would likely be applied in the event the use of a drone is challenged using the civil remedy created by this bill.

In *Katz v. U.S.*, Justice Harlan laid out in his concurring opinion a test to determine whether an individual had a reasonable expectation of privacy. First, the person needs to exhibit an actual (subjective) expectation of privacy, and second, the expectation needs to be one that society is prepared to recognize as 'reasonable.'<sup>37</sup> The U.S. Supreme Court later adopted this test in *Smith v. Maryland*.<sup>38</sup> The Florida Supreme Court has a long history of applying this test to determine whether an individual had a reasonable expectation of privacy in various settings.<sup>39</sup> It is likely that such an analysis would be applied in the event the issue of whether an aggrieved party actually had a reasonable expectation of privacy sufficient to support a civil suit against a person, state agency, or political subdivision arose.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 16, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill as favorable as a committee substitute. The amendment restructured the bill's civil remedy provisions so that

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<sup>35</sup> See, e.g., *Katz v. U.S.*, 389 U.S. 347 (1967) and *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that a thermal imaging device aimed at a private home from a public street in order to detect relative amounts of heat inside the home was an invasion of a reasonable expectation of privacy and constituted a search within the meaning of the Fourth Amendment). In *Kyllo*, the Court reasoned that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search . . ." *Kyllo v. United States*, 533 U.S. 27, 34-35 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)). Most recently, in *United States v. Jones*, 132 S.Ct. 945 (2012), the Court suggested that "[i]t may be that achieving the same result through electronic means, without an accompanying trespass is an unconstitutional invasion of privacy." *Jones*, 132 S.Ct. at 954.

<sup>36</sup> For example, under Florida case law, it is clear that a person does not harbor an expectation of privacy on a front porch where visitors may appear at any time. See *State v. Detlefson*, 335 So.2d 371 (Fla. 1st DCA 1976) and *State v. Belcher*, 317 So.2d 842 (Fla. 2d DCA 1975). An individual's privacy expectation in the backyard, when objects placed there are not visible from outside, is valid. *State v. Morsman*, 394 So.2d 408 (Fla. 1981). An unobstructed view from an individual's neighbor's yard into his or her yard evidences no expectation of privacy from that point. *Lightfoot v. State*, 356 So.2d 331 (Fla. 4th DCA 1978).

<sup>37</sup> *Katz*, 389 U.S. at 361.

<sup>38</sup> *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>39</sup> See, e.g., *Tracey v. State*, 152 So.3d 504 (Fla. 2014), *State v. Titus*, 707 So.2d 706 (Fla. 1998), *State v. Morsman*, 394 So.2d 408 (Fla. 1981).

they only applied to the newly-created prohibitions on using drones (not the existing prohibitions relating to law enforcement use).

On March 24, 2015, the Civil Justice Subcommittee adopted two amendments and reported the bill favorably as a committee substitute. The amendments:

- Created an exception for use of a drone by a licensed person acting in the scope of his or her licensed field (unless that field is the practice of surveillance);
- Created an exception for use of a drone by a property appraiser;
- Expanded the list of property owners protected to include invitees or licensees; and
- Specified that the exceptions in the bill do not authorize a lawful drone user to violate federal law.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.