

California Department of Justice
Office of the Attorney General



Legal Alert

Subject:

Guidance on Sharing of Booking Photographs on Social Media

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TO: ALL CALIFORNIA STATE AND LOCAL LAW ENFORCEMENT AGENCIES

The Office of the California Attorney General issues this legal alert to provide guidance regarding the sharing of booking photographs on social media to ensure that California state and local law enforcement agencies (collectively California LEAs) are complying with California Law.

Penal Code section 13665, subdivision (a) prohibits a police department or sheriff's office from sharing on social media¹ "booking photos" of an individual arrested on suspicion of committing a nonviolent crime,² unless one of three enumerated circumstances exists. Consequently, "booking photographs" cannot be shared on social media **at all** unless: (1) the individual has been arrested for a violent crime, or (2) an exception applies under Penal Code section 13665, subdivision (a)(1)-(3).

A legislative history analysis of Penal Code section 13665 makes clear that the phrase booking photos as used in the statute includes not only headshots taken of an arrestee at a police station, commonly referred to as "mugshots," but also photographs of the arrestee taken during or immediately after their arrest. This includes, for example, photographs of the arrestee being handcuffed or transported to a police station.

Further, Penal Code section 13665, subdivision (b)(2) requires that within 14 days LEAs remove any and all booking photographs that are shared on social media, including booking photos of individuals arrested for a violent crime and booking photos of individuals arrested on suspicion of committing a nonviolent crime for which one of the three enumerated circumstances exists under Penal Code section 13665, subdivision (a)(1)-(3), unless one of the three enumerated circumstances continues to exist under Penal Code section 13665, subdivision (a)(1)-(3). The 14-day removal requirement applies retroactively to any booking photograph shared on social media by California LEAs.

Guidance Regarding Penal Code Section 13665, subdivision (a), and the Definition of Booking Photos:

Penal Code section 13665, subdivision (a), enacted in 2021 by Assembly Bill (AB) 1475 and amended in 2023 by AB 994, provides:

¹ Penal Code section 13665 defines "social media" to have "the same meaning as in [Penal Code] Section 632.01, except that social media does not include an internet website or an electronic data system developed and administered by the police department or sheriff's office." (Pen. Code, § 13665, subd. (d)(2).) Penal Code section 632.01 defines social media as "an electronic service or account, or electronic content, including, but not limited to, videos or still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations." (Pen. Code, § 632.01, subd. (a)(1).)

² Penal Code section 13665 defines a "nonviolent crime" as "a crime not identified in subdivision (c) of [Penal Code] Section 667.5." (Pen. Code, § 13665, subd. (d)(1).) Penal Code section 667.5 identifies multiple violent felonies.

(a) A police department or sheriff's office shall not share, on social media, booking photos of an individual arrested on suspicion of committing a nonviolent crime unless any of the following circumstances exist:

- (1) A police department or sheriff's office has determined that the suspect is a fugitive or an imminent threat to an individual or to public safety and releasing or disseminating the suspect's image will assist in locating or apprehending the suspect or reducing or eliminating the threat.
- (2) A judge orders the release or dissemination of the suspect's image based on a finding that the release or dissemination is in furtherance of a legitimate law enforcement interest.
- (3) There is an exigent circumstance that necessitates the dissemination of the suspect's image in furtherance of an urgent and legitimate law enforcement interest.

(Pen. Code, § 13665, subd. (a)(1)-(3).)

Thus, Penal Code section 13665, subdivision (a) allows California LEAs to share booking photographs on social media of individuals **only** when:

- (1) The individual has been arrested for a violent crime under Penal Code section 667.5, or
- (2) One of the following three enumerated circumstances exists:
 - (1) the suspect is a fugitive or an imminent threat to an individual or to public safety and releasing or disseminating the photograph will assist in locating or apprehending the suspect or reducing or eliminating the threat;
 - (2) a judge orders release or dissemination of the photograph based on a finding of a legitimate law enforcement interest; or
 - (3) an exigent circumstance necessitates the dissemination of the photograph in furtherance of an urgent and legitimate law enforcement interest.

(Pen. Code, § 13665, subd. (a)(1)-(3).)

Legislative History Analysis

Penal Code section 13665 uses the term "booking photograph." While Penal Code section 13665 does not itself define this term, Civil Code section 1798.91.1 defines a booking photograph as a photograph of an arrested individual "taken pursuant to an arrest or other involvement in the criminal justice system." (Civ. Code, § 1798.91.1, subds. (a)(1), (b).) Committee reports associated with both the initial enactment and 2023 amendment of Penal Code section 13665 make repeated references to the pre-existing definition of booking photograph found in Civil Code section 1798.91.1, subdivision (a)(1). (Assem. Com. on Privacy and Consumer Protection, Rep. on Assem. Bill. No. 994 (2023-2024 Reg. Sess.) as amended March 16, 2023, at p. 3; Sen. Com. on Pub. Saf., Rep. on Assem. Bill. No. 994 (2023-2024 Reg. Sess.) as amended May 2, 2023, at p. 1; Assem. Com. on Pub. Saf., Rep. on Assem. Bill. No. 1475 (2021-2022 Reg. Sess.) as amended March 25, 2021, at p. 2.) By repeatedly tying Penal Code section 13665 to Civil Code section 1798.91.1, the Legislature expressed its clear intent to incorporate that existing definition of booking photograph into a Penal Code section 13665 prohibition. That existing definition of booking photograph plainly includes any photographs taken during or immediately after arrest, not only mugshots. It would also include, for example, a photograph of a handcuffed arrestee sitting on a curb, since that photograph would be taken pursuant to an arrest, or pursuant to other involvement in the criminal justice system.

The clear purpose of Penal Code section 13665 underscores this reading. Penal Code section 13665 was enacted to safeguard arrested individuals' presumption of innocence and right to a fair trial, and to mitigate the long-term adverse effects of a publicized arrest. (Stats. 2021, ch. 126, § 1, subds. (a)-(i).) The Legislature intended to eliminate the "great personal harm" associated with publication of an arrest that "can follow a person for life," coloring the views of their "employers, clients, family members, and friends." (Assem. Com. on Pub. Saf., Rep. on Assem. Bill. No. 1475 (2021-2022 Reg. Sess.) as amended March 25, 2021, at p. 3.) Posting such photographs rarely impacts ongoing threats to public safety, and instead, is often meant to "shame and ridicule suspects, many of whom are dealing with serious drug addiction and mental health issues." (*Ibid.*) Such posts also "perpetuate harmful racial stereotypes and foster implicit bias in a community

and police force.” (*Ibid.*) When Penal Code section 13665 was amended in 2023, the Legislature expressed similar concerns, explaining that booking photographs posted by law enforcement were analogous to a “modern-day scarlet letter,” and carried the risk of “long term consequences because they can be revealed much later by an internet search of a person’s name.” (Assem. Com. on Pub. Saf., Rep. on Assem. Bill No. 994 (2023-2024 Reg. Sess.) as amended March 16, 2023, at p. 3.) A narrow reading of the statute allowing a Law Enforcement Agency to circumvent the law by posting a second, informal photograph of an arrested individual on social media is not consistent with the clear intent of the law.

Consequently, booking photos include not only mugshots, but also any and all photographs of the arrestee taken during or immediately after their arrest.

Guidance Regarding Penal Code Sections 13665, subdivisions (b)-(c), and Mandatory 14-Day Removal of Booking Photographs:

In 2023, Penal Code section 13665 was amended by AB 994, which deleted a provision in the law allowing arrested individuals to request removal of their photograph upon a showing of certain circumstances and replaced it with the mandatory 14-day removal requirement that currently exists in the statute. (Stats. 2023, ch. 224, § 1.) Specifically, Penal Code section 13665, subdivision (b) now requires in relevant part:

...(b) With respect to an individual who has been arrested for any crime, including crimes defined in subdivision (c) of Section 667.5, a police department or sheriff’s office that shares, on social media, an individual’s booking photo shall do both of the following:

(1) Use the name and pronouns given by the individual. A police department or sheriff’s office may include other legal names or known aliases of an individual if using the names or aliases will assist in locating or apprehending the individual or reducing or eliminating an imminent threat to an individual or to public safety or an exigent circumstance exists that necessitates the use of other legal names or known aliases of an individual due to an urgent and legitimate law enforcement interest.

(2) Remove the booking photo from its social media page within 14 days unless any of the circumstances described in paragraphs (1) to (3), inclusive, of subdivision (a) exist.

(Pen. Code, § 13665, subd. (b)(1)-(2).)

California LEAs are reminded that any booking photographs shared on social media must be removed within 14 days unless one of the following three circumstances continues to exist: (1) the suspect is a fugitive or an imminent threat to an individual or to public safety and releasing or disseminating the photograph will assist in locating or apprehending the suspect or reducing or eliminating the threat; (2) a judge orders release or dissemination of the photograph based on a finding of a legitimate law enforcement interest; or (3) an exigent circumstance necessitates the dissemination of the photograph in furtherance of an urgent and legitimate law enforcement interest. (Pen. Code, § 13665, subd. (a)(1)-(3), (b)(2).)

Additionally, Penal Code section 13665, subdivision (c) provides that “[s]ubdivision (b) shall apply *retroactively* to any booking photo shared on social media.” (Emphasis added.) Consequently, California LEAs are also reminded to remove any such photographs that were posted prior to the 2023 amendment of Penal Code section 13665.