

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Governmental Oversight and Productivity Committee

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BILL: CS/SB 1052

INTRODUCER: Governmental Oversight and Productivity Committee and Criminal Justice Committee,  
Senator Wise and others

SUBJECT: Public Records Exemption/Autopsy Records

DATE: April 19, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Dugger</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill is the result of an Open Government Sunset Review of s. 406.135, F.S., performed by the Criminal Justice Committee. That section makes confidential and exempt photographs and video and audio recordings of an autopsy held by a medical examiner. The section permits a surviving spouse to view and copy these records. If there is no surviving spouse, then the deceased's surviving parents may view and copy them. If there are no surviving parents, then an adult child of the deceased may view and copy them. The surviving relative who has the authority to view and copy these records is authorized to designate in writing an agent to obtain them.<sup>1</sup> Additionally, federal, state, and local governmental agencies, upon written request, may have access to these records in the performance of their duties. Other than these exceptions, the custodian is prohibited from releasing the records to any other person not authorized under the exemption without a court order. This section will expire October 2, 2006, unless the Legislature reviews and reenacts it. In *Interim Project Report 2006-209*, the Criminal Justice Committee recommended that the exemption be saved from repeal.

The committee substitute makes no substantive changes to the exemption. The CS makes organizational and conforming changes to the exemption.

This bill reenacts section 406.135 of the Florida Statutes.

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<sup>1</sup> Section 1, ch. 2003-184, L.O.F.

## II. Present Situation:

**Public Records** – Florida has a long history of providing public access to government records. The Legislature enacted the first public records law in 1892.<sup>2</sup> The Florida Supreme Court has noted that ch. 119, F.S., the Public Records Act, was enacted

. . . to promote public awareness and knowledge of government actions in order to ensure that governmental officials and agencies remain accountable to the people.<sup>3</sup>

In 1992, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>4</sup> Article I, s. 24 of the State Constitution, provides that:

(a) Every person<sup>5</sup> has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. . . .

Unless specifically exempted, all agency<sup>6</sup> records are available for public inspection. The term “public record” is broadly defined to mean:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.<sup>7</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.<sup>8</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</sup> Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to

<sup>2</sup> Sections 1390, 1391, F.S. (Rev. 1892).

<sup>3</sup> *Forsberg v. Housing Authority of the City of Miami Beach*, 455 So.2d 373, 378 (Fla. 1984).

<sup>4</sup> Article I, s. 24 of the State Constitution.

<sup>5</sup> Section 1.01(3), F.S., defines “person” to include individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.

<sup>6</sup> The word “agency” is defined in s. 119.011(2), F.S., to mean “. . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

<sup>7</sup> Section 119.011(11), F.S.

<sup>8</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>9</sup> *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

<sup>10</sup> Article I, s. 24(c) of the State Constitution.

accomplish the stated purpose of the law.<sup>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup> A bill creating an exemption must be passed by a two-thirds vote of both houses.<sup>14</sup>

The Public Records Act<sup>15</sup> specifies conditions under which public access must be provided to records of the executive branch and other agencies. Section 119.07(1) (a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

If a record has been made exempt, the agency must redact the exempt portions of the record prior to releasing the remainder of the record.<sup>16</sup> The records custodian must state the basis for the exemption, in writing if requested.<sup>17</sup>

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt.<sup>18</sup> If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>19</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>20</sup>

In *Ragsdale v. State*,<sup>21</sup> the Florida Supreme Court held that the applicability of a particular exemption is determined by the document being withheld, not by the identity of the agency possessing the record. Quoting from *City of Riviera Beach v. Barfield*,<sup>22</sup> a case in which documents were given from one agency to another during an active criminal investigation, the *Ragsdale* court refuted the proposition that inter-agency transfer of a document nullifies the exempt status of a record:

“We conclude that when a criminal justice agency transfers protected information to another criminal justice agency, the information retains its exempt status. We believe that such a conclusion fosters the underlying purpose of section 119.07(3)(d), which is to prevent premature *public* disclosure of criminal investigative information since disclosure could impede an ongoing investigation

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<sup>11</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

<sup>12</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>13</sup> Art. I, s. 24(c) of the State Constitution.

<sup>14</sup> *Ibid.*

<sup>15</sup> Chapter 119, F.S.

<sup>16</sup> Section 119.07(1)(b), F.S.

<sup>17</sup> Section 119.07(1)(c) and (d), F.S.

<sup>18</sup> *WFTV, Inc., v. The School Board of Seminole, etc., et al*, 874 So.2d 48 (5<sup>th</sup> DCA), rev. denied 892 So.2d 1015 (Fla. 2004).

<sup>19</sup> *Ibid* at 53, *see also*, Attorney General Opinion 85-62.

<sup>20</sup> *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5<sup>th</sup> DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>21</sup> 720 So.2d 203 (Fla. 1998).

<sup>22</sup> 642 So.2d 1135, 1137 (Fla. 4<sup>th</sup> DCA 1994).

or allow a suspect to avoid apprehension or escape detection. In determining whether or not to compel disclosure of active criminal investigative or intelligence information, *the primary focus must be on the statutory classification of the information sought rather than upon in whose hands the information rests.* Had the legislature intended the exemption for active criminal investigative information to evaporate upon the sharing of that information with another criminal justice agency, it would have expressly provided so in the statute.” Although the information sought in this case is not information currently being used in an active criminal investigation, the rationale is the same; that is, that the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands. Thus, if the State has access to information that is exempt from public records disclosure due to confidentiality or other public policy concerns, that information does not lose its exempt status simply because it was provided to the State during the course of its criminal investigation.<sup>23</sup>

It should be noted that the definition of “agency” provided in the Public Records Law includes the phrase “and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*” (emphasis added). Agencies are often authorized, and in some instances are required, to “outsource” certain functions. Under the current case law standard, agencies are not required to have explicit statutory authority to release public records in their control to their agents. Their agents, however, are required to comply with the same public records custodial requirements with which the agency must comply.

**The Open Government Sunset Review Act** - The Open Government Sunset Review Act<sup>24</sup> provides for the systematic review of an exemption five years after its enactment. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

The act states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. An identifiable public purpose is served if the exemption:

- [a]llows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

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<sup>23</sup> *Ragsdale*, 720 So.2d at 206 (quoting *City of Riviera Beach*, 642 So.2d at 1137) (second emphasis added by *Ragsdale* court).

<sup>24</sup> Section 119.15, F.S.

- [p]rotects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- [p]rotects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>25</sup>

The act also requires consideration of the following:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If yes, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act that are only statutory as opposed to constitutional, do not limit the Legislature because one session of the Legislature cannot bind another.<sup>26</sup> The Legislature is only limited in its review process by constitutional requirements.

Further, s. 119.15(4) (e), F.S., makes explicit that:

... notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

**Autopsies Performed By Medical Examiners** - Under s. 406.11(1)(a)2., F.S., a district medical examiner is required to perform an autopsy when any person dies in the state by accident.<sup>27</sup> Each district medical examiner is appointed by the Governor. As the medical examiner is performing an official duty when conducting an autopsy of an accident victim, the records made during the performance of that duty that perpetuate, communicate or formalize knowledge, and are public records under s. 119.01(1), F.S., and s. 24, Art. I of the State Constitution.

<sup>25</sup> Section 119.15(4) (b), F.S.

<sup>26</sup> *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974).

<sup>27</sup> A medical examiner must perform an autopsy when any person dies in the state: (1) of criminal violence; (2) by accident; (3) by suicide; (4) suddenly, when in apparent good health; (5) unattended by a practicing physician or other recognized practitioner; (6) in any prison or penal institution; (7) in police custody; (8) in any suspicious or unusual circumstance; (9) by criminal abortion; (10) by poison; (11) by disease constituting a threat to public health; or (12) by disease, injury, or toxic agency resulting from employment.

During the 2001 Legislative Session, the Legislature enacted s. 406.135, F.S., which provided a public records exemption for photographs and video and audio recordings of an autopsy held by a medical examiner.<sup>28</sup> A “medical examiner” is defined to mean:

. . . any district medical examiner, associate medical examiner, or substitute medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to ch. 406, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.

These photographs and video and audio recordings are confidential and exempt from public disclosure except that a surviving spouse may obtain them. If there is no surviving spouse, then the deceased’s surviving parents may view and copy them. If there are no surviving parents, then an adult child of the deceased may view and copy them. Moreover, the surviving relative who has the authority to view and copy these autopsy photographs or recordings is authorized to designate in writing an agent to obtain them.<sup>29</sup>

In addition to the next of kin as described above, local governmental entities and state and federal agencies may have access to these autopsy records by requesting in writing to view and copy them when such records are necessary in furtherance of that governmental agency’s duties. But other than these exceptions, the custodian of the photographs or video and audio recordings is prohibited from releasing them to any other person not authorized under the exemption without a court order.

These other persons who are not covered by the exceptions above may have access to the autopsy photos and recordings only with a court order upon a showing of good cause, and limited by any restrictions or stipulations that the court deems appropriate. In determining good cause, the court must consider the following:

- whether such disclosure is necessary for the public evaluation of governmental performance;
- the seriousness of the intrusion into the family’s right to privacy and whether such disclosure is the least intrusive means available; and
- the availability of similar information in other public records, regardless of form.

Specified family members are required to be given reasonable notice of a petition for access to autopsy photographs and video and audio recordings, as well as a copy of the petition and the opportunity to be heard. Such access, if granted by the court, must be performed under the direct supervision of the custodian of the record or his or her designee.

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<sup>28</sup> Section 1, ch. 2001-1, L.O.F

<sup>29</sup> Section 1, ch. 2003-184, L.O.F

Subsection 406.135(3), F.S., provides that it is a third degree felony for any custodian of a photo, video or audio recording of an autopsy to willingly and knowingly violate the provisions of this section. It also provides a third degree felony penalty for anyone who willingly and knowingly violates a court order issued under this section. As a result, a violator could be imprisoned for the statutory maximum term of imprisonment not to exceed 5 years and could be fined up to \$5,000.

Subsection 406.135(3)(c), F.S., provides that

[a] criminal or administrative proceeding is exempt from the section, but unless otherwise exempted, is subject to all other provisions of chapter 119, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime scene, or similar photograph or video or audio recordings in the manner prescribed herein.

In enacting ch. 2001-1, s. 1, L.O.F., the Legislature provided a strong public necessity statement justifying the exemption as follows:

...that the photographs and video and audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased in graphic and often disturbing fashion (nude, bruised, bloodied, broken, cut open, dismembered, or decapitated) that, if copied and publicized on the World Wide Web or in written publications, could result in continuous trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. As such, it is a public necessity to make autopsy photos and video and audio recordings confidential and exempt. Further . . . there continue to be other types of available information, such as the written autopsy report (which typically includes drawings), that are less intrusive and injurious to the immediate family of the deceased and continue to provide for public oversight.

The Office of the Attorney General has authored two opinions that are relevant to the exemption for autopsy photographs, video and audio recordings. In the first opinion, AGO 2001-47, the Attorney General concluded that a medical examiner is authorized under s. 406.135, F.S., to show autopsy photographs or videotapes to public agencies for purposes of professional training or educational efforts if the identity of the deceased is protected, and the agency has made a written request.<sup>30</sup>

The second opinion, AGO 2003-25, reiterated this finding and expressly concluded that these photographs or videotapes may not be shown to private entities unless a court has made the requisite finding that good cause exists and the family of the deceased has received the proper notification and opportunity to be heard at any hearing on the matter.

The Attorney General Opinion, citing *In Campus Communications, Inc., v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002), *review denied*, 848 So.2d 1153 (Fla. 2003), concluded that the court can allow any person access to the autopsy photographs or videotapes when good cause is established, after evaluating the following criteria:

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<sup>30</sup> AGO 2001-47 at 4.

- whether disclosure is necessary to assess governmental performance;
- the seriousness of the intrusion on the deceased's family's right to privacy;
- whether disclosure is the least intrusive means available; and
- the availability of similar information in other public records.<sup>31</sup>

In *Earnhardt*, the Fifth District Court of Appeal upheld the law exempting autopsy photographs against an unconstitutional overbreadth challenge brought by a newspaper. The court went on to hold that the newspaper had not established good cause to view or copy the photographs and that the exemption applied retroactively.<sup>32</sup> The court found that s. 406.135, F.S., met constitutional and statutory requirements that the exemption is no broader than necessary to meet its public purpose, even though not all autopsy recordings are graphic and result in trauma when viewed. The court also found that the Legislature stated with specificity the public necessity justifying the exemption in ch. 2001-1, L.O.F.

Furthermore, the court found the statute provides for disclosure of written autopsy reports, allows for the publication of exempted records upon good cause if the requisite statutory criterion is met, and is supported by a “thoroughly articulated public policy to protect against trauma” that is likely to result upon disclosure to the public.<sup>33</sup>

The court concluded that it is the prerogative of the Legislature to determine that autopsy photographs are private and need to be protected and that this privacy right prevails over the right to inspect and copy public records. The court also stated that its function is to determine whether the Legislature made this determination in a constitutional manner. Finding that the statute was constitutionally enacted and that it was properly applied to the facts in this case, the Fifth District Court of Appeal affirmed the lower court's finding of constitutionality.<sup>34</sup>

The Fifth District Court of Appeal went on to certify the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.<sup>35</sup>

Section 406.135, F.S., will expire October 2, 2006, unless the Legislature reviews and reenacts it pursuant to the Open Government Sunset Review Act under s. 119.15, F.S.

The Senate Criminal Justice Committee reviewed the public record exemption created in s. 406.135, F.S., during the interim (see *Interim Project Report 2006-209*) and recommended that it be reenacted.

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<sup>31</sup> AGO 2003-25 at 2, 3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 5, 6.

<sup>34</sup> *Id.* at 12.

<sup>35</sup> 848 So.2d 1153 (Fla. 2003).



### III. Effect of Proposed Changes:

The bill reenacts the public records exemption in s. 406.135, F.S., which provides that photographs and video or audio recordings of an autopsy in the custody of a medical examiner are confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, except they are accessible to certain specified family members of the decedent and public governmental agencies without a court order. This bill also amends s. 406.135, F.S., to remove the sentence that requires its repeal. No substantive changes are made to the bill.

Additionally, the bill moves the definition of “medical examiner” to the beginning of the exemption. Currently, instead of being located at the beginning of the section to which it applies, this definition is in a section of the exemption prohibiting the custodian from releasing information without a court order.

Additionally, the bill adds subsections and paragraphs for clarity.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

In *In Campus Communications, Inc., v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002), review denied, 848 So.2d 1153 (Fla. 2003), the Fifth District Court of Appeal upheld the law exempting autopsy photographs against an unconstitutional overbreadth challenge brought by a newspaper ( see details in Present Situation). The court went on to certify the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court’s holding. 848 So.2d 1153 (Fla. 2003).

#### C. Trust Funds Restrictions:

None.

### V. Economic Impact and Fiscal Note:

#### A. Tax/Fee Issues:

None.

#### B. Private Sector Impact:

None.

#### C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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