

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.)

Prepared By: Criminal Justice Committee

BILL: SPB 7046

INTRODUCER: For consideration by Criminal Justice Committee

SUBJECT: Public Records Exemption/Autopsy Records

DATE: October 20, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon		Pre-meeting
2.				
3.				
4.				
5.				
6.				

I. Summary:

Chapter 2001-1, s. 1, L.O.F., created s. 406.135, F.S., a public records exemption for photographs, video and audio recordings of an autopsy held by a medical examiner. These records 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 video and audio recordings is authorized to designate in writing an agent to obtain them. (ch. 2003-184, s. 1, L.O.F.)

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. This section will expire October 2, 2006, unless the Legislature reviews and reenacts it.

This bill reenacts section 406.135 of the Florida Statutes.

II. Present Situation:

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. 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, are public records under s. 119.01(1), F.S., and s. 24, Art. I of the State Constitution.

During the 2001 Legislative Session, the Legislature enacted s. 406.135, F.S., which provided a public records exemption for photographs, video and audio recordings of an autopsy held by a medical examiner. (ch. 2001-1, s. 1, L.O.F.) 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, 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. (ch. 2003-184, s. 1, L.O.F.)

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, 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.

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.

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. AGO 2001-47 at 4.

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:

- 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.

AGO 2003-25 at 2, 3.

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. *Id.* 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. *Id.* at 5, 6.

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. *Id.* at 12.

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. 848 So.2d 1153 (Fla. 2003).

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 as currently written.

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.

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.

VIII. Summary of Amendments:

None.

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