

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SPB 7022

INTRODUCER: For consideration by the Criminal Justice Committee

SUBJECT: OGSR/Agency Photograph, Video, or Audio Recording/Killing of a Person

DATE: October 30, 2015

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Dugger	Cannon		Pre-meeting

I. Summary:

SPB 7022 is the result of an Open Government Sunset Review of s. 406.136, F.S., performed by the Criminal Justice Committee. That section makes confidential and exempt photographs and video and audio recordings of the killing of a person when held by an agency. It 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. Additionally, federal, state, and local governmental agencies, upon written request, may have access to these records in the performance of their duties and responsibilities. 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.¹ This exemption is subject to review under the Open Government Sunset Review Act.² It will expire on October 2, 2016, unless the Legislature reviews and reenacts it.

The bill reenacts the exemption.

It does not expand the scope of the public records exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.³ This applies to the official business

¹ Section 406.136, F.S.

² Section 119.15, F.S.

³ FLA. CONST., art. I, s. 24(a).

of any public body, officer or employee of the state, including all three branches of state government, local governmental entities and any person acting on behalf of the government.⁴

In addition to the Florida Constitution, the Florida Statutes provides that the public may access legislative and executive branch records.⁵ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁶ The Public Records Act states that

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁷

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁸ The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”⁹ A violation of the Public Records Act may result in civil or criminal liability.¹⁰

The Legislature may create an exemption to public records requirements.¹¹ An exemption must pass by a two-thirds vote of the House and the Senate.¹² In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.¹³ A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.¹⁴

⁴ FLA. CONST., art. I, s. 24(a).

⁵ The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

⁶ Public records laws are found throughout the Florida Statutes.

⁷ Section 119.01(1), F.S.

⁸ Section 119.011(12), F.S., defines “public record” 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.” Section 119.011(2), F.S., defines “agency” to mean as “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.”

⁹ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

¹⁰ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

¹¹ FLA. CONST., art. I, s. 24(c).

¹² FLA. CONST., art. I, s. 24(c).

¹³ FLA. CONST., art. I, s. 24(c).

¹⁴ *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So.2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹⁵ Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.¹⁶

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.¹⁷ The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁸ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:¹⁹

- 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 so, 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?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.²⁰ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.²¹

¹⁵ If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

¹⁶ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

¹⁷ Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

¹⁸ Section 119.15(3), F.S.

¹⁹ Section 119.15(6)(a), F.S.

²⁰ FLA. CONST., art. I, s. 24(c).

²¹ Section 119.15(7), F.S.

Current Exemption Under Review

In 2011, the Legislature created a public record exemption for photographs and video and audio recordings that depict or record the killing of a person when held by an agency.²² These photographs and video and audio recordings are confidential and exempt from public records requirements, except that the exemption permits a surviving spouse to view, listen, and copy these photographs and video and audio recordings.²³ 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.²⁴ The surviving relative who has the authority to view and copy these records is authorized to designate in writing an agent to obtain them.²⁵

Additionally, federal, state, and local governmental agencies, upon written request, may have access to these records in the performance of their duties and responsibilities. The identity of the deceased must remain confidential and exempt.²⁶

Persons other than those covered by the exceptions above have access to the photographs and recordings only with a court order upon a showing of good cause and are 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.²⁷

The specified family members must be given reasonable notice of a petition requesting access to the photographs and recordings, a copy of the petition, and the opportunity to be present and heard at any hearing on the matter.²⁸ 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.²⁹

It is a third degree felony for any custodian of a photograph, video, or audio recording to willingly and knowingly violate these provisions. The same penalty applies to anyone who willingly and knowingly violates a court order issued under these provisions.³⁰

The exemption does not apply to photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, nothing prohibits a court in such proceedings from restricting the disclosure of a killing, crime scene, or similar photograph or video or audio

²² Ch. 2011-115, s. 1, Laws of Fla. (creating s. 406.136, F.S., effective July 1, 2011). "Killing of a person" is defined to mean "all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death." s. 406.136(1), F.S.

²³ Section 406.136(2), F.S.

²⁴ *Id.*

²⁵ Section 406.136(3), F.S.

²⁶ *Id.*

²⁷ Section 406.136(4), F.S.

²⁸ Section 406.136(5), F.S.

²⁹ Section 406.136(4)(c), F.S.

³⁰ Section 406.136(6), F.S.

recording.³¹ The exemption is retroactive, except that it is not intended to overturn, abrogate, or alter any existing court order in effect on July 1, 2011, that restricts or limits access to any such photograph or recording.³²

The exemption is patterned after the public record exemption created earlier in s. 406.135, F.S., relating to photographs and video and audio recordings of an autopsy held by a medical examiner.³³ The same justification that was used in the public necessity statement for autopsy photographs was also used for the exemption under review:

... photographs or video or audio recordings that depict or record the killing of any person render a visual or aural representation of the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings provide a view of the deceased in the final moments of life, often bruised, bloodied, broken, with bullet wounds or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings that depict or record the killing of any person are highly sensitive representations of the deceased which, if heard, viewed, copied, or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature recognizes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of such photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further recognizes that there continue to be other types of available information, such as crime scene reports, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight.³⁴

The exemption is subject to the Open Government Sunset Review Act and as such, will be repealed on October 2, 2016, unless reviewed and reenacted by the Legislature.³⁵

Based upon the Open Government Sunset Review of the exemption, professional staff of the Senate Criminal Justice Committee recommends that the Legislature retain the public records exemption created in s. 406.136, F.S. This recommendation is made in light of information gathered for the Open Government Sunset Review, indicating that there is a public necessity to continue protecting photographs and video and audio recordings that depict or record the killing of any person when held by an agency because they are highly sensitive and personal representations of the deceased. As such, widespread and continuous display of these

³¹ *Id.* In *State v. Schenecker*, No. 11-CF-001376A (Fla. 13th Cir.Ct. August 3, 2011), *cert. denied sub nom.*, *Media General Operations v. State*, 71 So. 3d 124 (Fla. 2d DCA 2011), the circuit court applied the exemption to crime scene photographs of homicide victims.

³² Section 406.136(7), F.S.

³³ Chapter 2001-1, s. 1, Laws of Fla.

³⁴ Chapter 2011-115, s. 2, Laws of Fla.

³⁵ Section 406.136(9), F.S.

photographs or recordings subjects the surviving family members to unwarranted trauma and emotional distress and harms the memory of the deceased.³⁶

III. Effect of Proposed Changes:

The bill reenacts the public records exemption in s. 406.136, F.S., which provides that photographs and video and audio recordings that depict or record the killing of any person when held by an agency 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 deceased person and public governmental agencies without a court order. The bill also amends s. 406.136, 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 *Campus Communications, Inc., v. Earnhardt*,³⁷ the Fifth District Court of Appeal upheld the law this exemption is patterned after (which exempts autopsy photographs and video and audio recordings) against an unconstitutional overbreadth challenge brought by a newspaper. The court held that the newspaper had not established good cause to view or copy the photographs and that the exemption applied retroactively.³⁸ 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.³⁹ 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.⁴⁰

³⁶ According to the majority of survey responses from state agencies, state universities and colleges, municipalities, and local law enforcement agencies that receive or maintain such records, the exemption should be reenacted because it protects information that is personal and highly sensitive, the release of which subjects the surviving family members to further trauma and emotional distress. The responses were as follows: out of 23 state agencies, 10 recommended reenactment (13 were not applicable); out of 20 state university and colleges, 6 recommended reenactment (14 were not applicable); out of 109 municipalities, including 49 police departments, 34 recommended reenactment (31 were from police departments) (77 were not applicable); and out of 32 sheriff's offices, 26 recommended reenactment (6 were not applicable). Several responses had no recommendation regarding repeal or reenactment. One response recommended repealing the exemption. Several responses recommended clarifying the notification provision. Reenactment was generally recommended to continue protecting the surviving family members from emotional distress and trauma and protecting the memory of the deceased.

³⁷ *Campus Communications, Inc.*, 821 So. 2d 388, 403 (Fla. 5th DCA 2002), *review dismissed* 845 So. 2d 894 (Fla. 2003), *review denied*, 848 So. 2d 1153 (Fla. 2003) *certiorari denied* 540 U.S. 1049 (2003).

³⁸ *Id.*

³⁹ *Id.* at 395.

⁴⁰ *Id.* at 394.

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.⁴¹ 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.⁴²

This bill reenacts and amends an existing public records exemption specified in s. 406.136, F.S. The bill does not expand the scope of the exemption and therefore does not require a two-thirds vote of each house of the Legislature for passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 406.136 of the Florida Statutes.

⁴¹ *Id.* at 403.

⁴² *Campus Communications, Inc. v. Earnhardt*, 845 So. 2d 894 (Fla. 2003), *review denied*, 848 So. 2d 1153 (Fla. 2003) *certiorari denied* 540 U.S. 1049 (2003).

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
