

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: SB 7022

INTRODUCER: Criminal Justice Committee

SUBJECT: OGSR/Depictions or Recordings of the Killing of a Law Enforcement Officer

DATE: February 23, 2016

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Dugger</u>	<u>Cannon</u>		<b>CJ Submitted as Committee Bill</b>
1.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	<b>Favorable</b>
2.	<u>Dugger</u>	<u>Phelps</u>	<u>RC</u>	<b>Favorable</b>

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**I. Summary:**

SB 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 from public disclosure 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.<sup>1</sup>

This exemption is subject to review under the Open Government Sunset Review Act.<sup>2</sup> It will expire on October 2, 2016, unless the Legislature reviews and reenacts it.

The Criminal Justice Committee voted on February 1, 2016, to reenact the exemption but limit it to photographs and video and audio recordings held by an agency that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties.<sup>3</sup>

Since the bill narrows the scope of the public records exemption, it does not require a two-thirds vote of each house of the Legislature for passage.

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<sup>1</sup> Section 406.136, F.S.

<sup>2</sup> Section 119.15, F.S.

<sup>3</sup> Committee members discussed and weighed heavily that the genesis for the exemption's creation was the killing of a police officer during a traffic stop in Tampa that was captured on the patrol car's video camera.

## 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.<sup>4</sup> This applies to the official business 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.<sup>5</sup>

In addition to the Florida Constitution, the Florida Statutes provides that the public may access legislative and executive branch records.<sup>6</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.”<sup>10</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>11</sup>

The Legislature may create an exemption to public records requirements.<sup>12</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>13</sup> 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.<sup>14</sup> A statutory

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<sup>4</sup> FLA. CONST., art. I, s. 24(a).

<sup>5</sup> FLA. CONST., art. I, s. 24(a).

<sup>6</sup> 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.

<sup>7</sup> Public records laws are found throughout the Florida Statutes.

<sup>8</sup> Section 119.01(1), F.S.

<sup>9</sup> 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.”

<sup>10</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>11</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>12</sup> FLA. CONST., art. I, s. 24(c).

<sup>13</sup> FLA. CONST., art. I, s. 24(c).

<sup>14</sup> FLA. CONST., art. I, s. 24(c).

exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>15</sup>

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>16</sup> 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.<sup>17</sup>

### **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.<sup>18</sup> 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.<sup>19</sup> 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:<sup>20</sup>

- 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?

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<sup>15</sup> *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.

<sup>16</sup> 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).

<sup>17</sup> 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).

<sup>18</sup> 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).

<sup>19</sup> Section 119.15(3), F.S.

<sup>20</sup> Section 119.15(6)(a), F.S.

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.<sup>21</sup> 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.<sup>22</sup>

### **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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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>26</sup>

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.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup>

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<sup>21</sup> FLA. CONST., art. I, s. 24(c).

<sup>22</sup> Section 119.15(7), F.S.

<sup>23</sup> 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.

<sup>24</sup> Section 406.136(2), F.S.

<sup>25</sup> *Id.*

<sup>26</sup> Section 406.136(3), F.S.

<sup>27</sup> *Id.*

<sup>28</sup> Section 406.136(4), F.S.

<sup>29</sup> Section 406.136(5), F.S.

<sup>30</sup> Section 406.136(4)(c), F.S.

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.<sup>31</sup>

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 recording.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> The same justification that was used in the public necessity statement for autopsy photographs was also used for the exemption under review, and provides in part:

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.<sup>35</sup>

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.<sup>36</sup>

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<sup>31</sup> Section 406.136(6), F.S.

<sup>32</sup> *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.

<sup>33</sup> Section 406.136(7), F.S.

<sup>34</sup> Chapter 2001-1, s. 1, Laws of Fla.

<sup>35</sup> Chapter 2011-115, s. 2, Laws of Fla.

<sup>36</sup> Section 406.136(9), F.S.

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 photographs or recordings subjects the surviving family members to unwarranted trauma and emotional distress and harms the memory of the deceased.<sup>37</sup>

The Senate Criminal Justice Committee voted on February 1, 2016, to reenact the exemption but limit it to photographs and video and audio recordings held by an agency that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties.<sup>38</sup>

### **III. Effect of Proposed Changes:**

The bill narrows 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. Under the bill, the exemption will only apply to photographs and video and audio recordings held by an agency that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties.

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.

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<sup>37</sup> 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.

<sup>38</sup> Committee members discussed and weighed heavily that the genesis for the exemption's creation was the killing of a police officer during a traffic stop in Tampa that was captured on the patrol car's video camera.

## B. Public Records/Open Meetings Issues:

In *Campus Communications, Inc., v. Earnhardt*,<sup>39</sup> 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.<sup>40</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, Laws of Fla.<sup>41</sup> 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>42</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>43</sup> 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.<sup>44</sup>

Since the bill narrows the scope of the public records exemption in s. 406.136, F.S., it does not require a two-thirds vote of each house of the Legislature for passage.

## C. Trust Funds Restrictions:

None.

## D. Constitutional Issues:

In a federal civil rights case filed against the County of San Diego, a federal appeals court found that the U.S. Constitution protects the right of a family not to have images of a deceased family member be publically disseminated.<sup>45</sup> The plaintiff in the case was a

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<sup>39</sup> *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).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 395.

<sup>42</sup> *Id.* at 394.

<sup>43</sup> *Id.* at 403.

<sup>44</sup> *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).

<sup>45</sup> The lawsuit was filed under 42 U.S.C. s. 1983, which states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

mother whose two year old son died of a severe head injury while in the care of her paramour. During the investigation an autopsy was performed and photographs of the child's body were taken. The paramour was convicted of second degree murder, but the conviction was ultimately set aside.<sup>46</sup> The prosecutor in the case kept some of the photos after the case concluded. After retiring, the former prosecutor gave one of the photos and an article he wrote to the media.

In *Marsh v. County of San Diego*, the US District Court of Appeals for the Ninth Circuit found that “the common law right to non-interference with a family’s remembrance of a decedent is so ingrained in our traditions that it is protected” by the United States Constitution.<sup>47</sup> This constitutional right arises out of the right to privacy derived from the 14th Amendment.<sup>48</sup> The U.S. District Court of Appeals for the Ninth Circuit found that:

A common law right rises to the level of a constitutional right if it is “deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty.” ...The *Favish* Court considered our history and traditions, and found that “th[e] well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law.” For precisely the same reasons, we conclude that this right is also protected by substantive due process. (internal citations omitted).<sup>49</sup>

The court found that the publication of a child’s autopsy photographs was an intrusion of a mother’s grief “without any legitimate government purpose – “shocks the conscience”” and therefore violated the plaintiff’s substantive due process rights.<sup>50</sup> In addition, the court also found that a parent has a constitutionally protected right to control a deceased child’s remains and the images of the child’s death.<sup>51</sup>

In addition to constitutionally protected substantive due process rights to privacy, the *Marsh* court also found that in the California law governing the images of autopsy photos had created a federal liberty interest which was protected by federal procedural due process rights.<sup>52</sup> The 14th Amendment of the U.S. Constitution prohibits the deprivation of liberty without procedural due process. A state law may create a federally protected liberty interest if the state law contains:

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citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief shall be considered to be a statute of the District of Columbia.

<sup>46</sup> *Marsh v. County of San Diego*, 680 F.3d 1148, 1152 (9th Cir. 2012).

<sup>47</sup> *Id.* at 1154

<sup>48</sup> *Id.* at 1153.

<sup>49</sup> *Id.* at 1154.

<sup>50</sup> *Id.* at 1155.

<sup>51</sup> *Id.* at 1154.

<sup>52</sup> *Id.* at 1155-1158.



(1) substantive predicates governing official decision making, and (2) explicitly mandatory language specifying the outcome that must be reached if the substantive predicates have been met.’ In order to contain the requisite substantive predicates. (internal citations and quotation marks omitted).<sup>53</sup>

The *Marsh* court found that the California law met the requirements for creating a liberty interest protected by the U.S. Constitution and concluded:

California consciously and deliberately gave its citizens the right not to have government officials engage in unwarranted reproduction of autopsy photographs or other death images of deceased relatives. Once a state law creates that right, the [U.S.] Constitution steps in to protect it against deprivations without due process of law.<sup>54</sup>

Ultimately, the defendants prevailed in the civil rights lawsuit because the *Marsh* court determined that the state attorney who gave the autopsy photo to the press was not acting under color of law because he had retired at the time he disseminated the photo. The *Marsh* court also found that at the time the former prosecutor kept the photo for personal use, there was no court had yet found that a federally protected constitutional right to privacy existed for images of a deceased family member.<sup>55</sup>

The United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit have not opined on whether a family has a constitutionally protected privacy interest in controlling the death related images of a deceased family member. It is unclear whether those courts would concur with and follow the reasoning in *Marsh*.<sup>56</sup> Under Florida law, there exists a constitutional right to privacy along with a statutory exemption protecting photographs and video and audio recordings of the killing of a person from disclosure. Given *Marsh* and Florida’s privacy protections, the Legislature may wish to consider the following questions on this policy:

- Are images of the killing of a person sufficiently similar to an autopsy photo to be protected under the substantive due process privacy rights afforded by the U.S. Constitution?

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<sup>53</sup> *Id.* at 1155-1156.

<sup>54</sup> *Id.* at 1157-1158.

<sup>55</sup> *Id.* at 1159-1160.

<sup>56</sup> The United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit, which includes Florida, have considered similar cases regarding the right of a family to control the publication of images of a deceased family member, however, none of those courts have considered whether such privacy rights were protected by the U.S. Constitution. A federal district court in the Wisconsin, which is located in the United States Court of Appeals for the Seventh Circuit, considered the question and expressly found that “the *Marsh* holding represents an expansion in substantive due process law not augured in Seventh Circuit precedent.” *Olejnik v. England*, 14-CV-88-JDP, 2015 WL 7588502, at \*10 (W.D. Wis. 2015). The court in *Olejnik* found that the “[t]he Seventh Circuit has not recognized any constitutionally protected interest in the “right to remembrance” or to the non-interference with a loved one’s remains. Rather, the Seventh Circuit has recognized that the [United States] Supreme Court has emphasized how limited the scope of substantive due process is, and that substantive due process is “a modest limitation that prohibits government action only when it is random and irrational.” (internal citation omitted). *Id.*

- Does the current state constitutional privacy right and public record exemption regarding the killing of a person create a privacy interest which may be protected by procedural due process clause under the Fourteenth Amendment to the U.S. Constitution?

It is possible that a court could find that this bill conflicts with the constitutional privacy rights found in *Marsh*. Generally, federal law prevails over state laws when there is a conflict between the two because of the supremacy clause of the U.S. Constitution.<sup>57</sup>

It should be noted that the Florida Constitution protects privacy, but those rights sometimes conflict with the right to public access which is also protected by the Florida Constitution. Article 1, section 23, of the Florida Constitution provides:

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Courts will look to the Legislature to balance these competing interests.<sup>58</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

None.

### C. Government Sector Impact:

Indeterminate.

## VI. Technical Deficiencies:

None.

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<sup>57</sup> Article VI, clause 2 of the U.S. Constitution provides: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

<sup>58</sup> See *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388, 402-403 (Fla. 5th DCA 2002) (“Thus our function here has not been to weigh these two constitutional rights with respect to autopsy photographs and determine whether the right that helps ensure an open government freely accessible by every citizen is more significant or profound than the right that preserves individual liberty and privacy. Rather, our function has been to determine whether the Legislature has declared that the latter prevails over the former in a manner that is consistent with the constitutional provisions that bestow upon it the power to do so.”); see also *Wallace v. Guzman*, 687 So. 2d 1351, 1354 (Fla. 3d DCA 1997) (noting “[t]he [L]egislature has balanced the private/public rights by creating the various exemptions from public disclosure contained in section 119.07, Florida Statutes (1995).”).

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends section 406.136 of the Florida Statutes.

**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.

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

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