

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1317 Pub. Rec./Autopsy Records
SPONSOR(S): Oversight, Transparency & Administration Subcommittee; Jacobs
TIED BILLS: IDEN./SIM. **BILLS:** SB 1850

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|---------------------|---------|--|
| 1) Oversight, Transparency & Administration Subcommittee | 10 Y, 0 N, As CS | Toliver | Harrington |
| 2) Judiciary Committee | | | |
| 3) Government Accountability Committee | | | |

SUMMARY ANALYSIS

Current law provides that a photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from public records requirements. A surviving spouse may view and copy a photograph or video recording or listen to or copy the audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents have access to such records. If there is no surviving spouse or parent, then an adult child has access to such records. The surviving relative with whom authority rests to obtain confidential and exempt autopsy records may designate in writing an agent to obtain those records. In addition, pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy. The identity of the deceased must remain confidential and exempt. The custodian of such records may not permit any other person to view or copy an autopsy photograph or video recording or to listen to or copy the audio recording without a court order.

The bill expands the public record exemption for photographs, videos, and audio records of an autopsy to make autopsy reports or related written records that personally identify the deceased and that are held by a medical examiner confidential and exempt for 10 days after the report is completed. The surviving spouse of the deceased may view and copy the records. If there is no surviving spouse, the surviving parents or legal guardians may have access. If there is no surviving spouse, parents, or legal guardians, an adult child will have access to the records.

The bill adds legal guardians to the list of persons, assuming the decedent has no surviving spouse, who have access to photographs, videos, or audio recordings of an autopsy.

The bill provides for retroactive application of the public record exemption. It also provides that the exemption will repeal on October 2, 2023, unless reviewed and saved from repeal by the Legislature. Finally, the bill provides a statement of public necessity as required by the Florida Constitution.

The bill does not appear to have a fiscal impact on the state and may have a minimal impact on local governments.

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill expands the public record exemption for certain records relating to autopsies; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Public Records

The Florida Constitution guarantees every person the right to inspect or copy any public record made or received in connection with the official business of the legislative, executive, or judicial branches of government.¹ The Legislature, however, may provide by general law for the exemption of records from the constitutional requirement.² The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the law.³ A bill enacting an exemption must pass by a two-thirds vote of the members present and voting.⁴

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act⁵ provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a government program, which administration would be significantly impaired without the exemption;
- Protect personal identifying information that, if released, would be defamatory or would jeopardize an individual's safety; or
- Protect trade or business secrets.⁶

The Open Government Sunset Review Act requires the automatic repeal of a newly created exemption on October 2 of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.⁷

Autopsy Records

A photograph, video, or audio recording of an autopsy in the custody of a medical examiner⁸ is confidential and exempt⁹ from public records requirements.¹⁰ However, a surviving spouse may view and copy a photograph or video recording or listen to or copy the audio recording of the deceased spouse's autopsy.¹¹ If there is no surviving spouse, then the surviving parents have access to such records.¹² If there is no surviving spouse or parent, then an adult child has access to such records.¹³ In

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(c).

³ *Id.*

⁴ *Id.*

⁵ Section 119.15, F.S.

⁶ Section 119.15(6)(b), F.S.

⁷ Section 119.15(3), F.S.

⁸ For purposes of the exemption, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to chapter 406, F.S. The term also includes 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. Section 406.135(1), F.S.

⁹ There is a difference between records the Legislature designates exempt from public records requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991) *review denied*, 589 So. 2d 289 (Fla. 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See WFTV, Inc. v. Sch. Bd. of Seminole Cnty*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004); Op. Att'y Gen. Fla. 85-692 (1985).

¹⁰ Section 406.135(2), F.S.

¹¹ *Id.*

¹² *Id.*

addition, the surviving relative with whom authority rests to obtain confidential and exempt autopsy records may designate in writing an agent to obtain those records.¹⁴

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy.¹⁵ The identity of the deceased must remain confidential and exempt.¹⁶

The custodian of such records may not permit any other person to view or copy an autopsy photograph or video recording or to listen to or copy the audio recording without a court order.¹⁷ If such a court proceeding is initiated, the surviving spouse must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter.¹⁸ If there is no surviving spouse, then such notice must be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased.¹⁹ Upon a showing of good cause,²⁰ the court may issue an order authorizing a person to view or copy a photograph or video recording of an autopsy or to listen to or copy the audio recording.²¹

This public records exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding.²²

It is a third degree felony for any:

- Custodian of such photograph or video or audio recording who willfully and knowingly violates the provisions of the exemption.²³
- Person who willfully and knowingly violates a court order issued pursuant to s. 406.135, F.S.²⁴

Effect of the Bill

The bill expands the public record exemption for autopsy records to make autopsy reports or related written records that personally identify the deceased and that are held by a medical examiner confidential and exempt for 10 days after the report is completed. The surviving spouse of the deceased may view and copy the records. If there is no surviving spouse, the surviving parents or legal guardians may have access. If there is no surviving spouse, parents, or legal guardians, an adult child will have access to the records.

The bill adds legal guardians to the list of persons, assuming the decedent has no surviving spouse, who have access to photographs, videos, or audio recordings of an autopsy.

The bill provides that the exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2023, unless saved from repeal through reenactment by the Legislature.

¹³ *Id.*

¹⁴ Section 406.135(3)(a), F.S.

¹⁵ Section 406.135(3)(b), F.S.

¹⁶ *Id.*

¹⁷ Section 406.135(3)(c), F.S.

¹⁸ Section 406.135(5), F.S.

¹⁹ *Id.*

²⁰ In determining good cause, the court must consider whether 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. In all cases, the viewing, copying, or listening must be under the direct supervision of the records custodian. Section 406.135(4)(b)-(c), F.S.

²¹ Section 406.135(4)(a), F.S.

²² Section 406.135(7), F.S.

²³ Section 406.135(6)(a), F.S.

²⁴ Section 406.135(6)(b), F.S.

The bill states the public necessity as required by the Florida Constitution, specifying that the exemption is necessary because the deceased's family may unexpectedly encounter new information obtained from an autopsy report or related written record regarding the death of a loved one which, after its publication, could cause the family to experience trauma, sorrow, humiliation, or emotional injury. As such, the deceased's family should be given a period of time before any highly sensitive autopsy report or related written record is released to the public.

Lastly, the bill provides for retroactive application of the expanded public record exemption.²⁵

B. SECTION DIRECTORY:

Section 1 amends s. 406.135, F.S., relating to the confidentiality afforded to autopsies.

Section 2 provides a public necessity statement.

Section 3 provides an effective date of upon becoming a law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill could have a minimal fiscal impact on local governments because medical examiners responsible for complying with public record requests may require training related to expansion of the public record exemption. In addition, such staff could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of local governments.

²⁵ The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied as such. Access to public records is a substantive right. Thus, a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively. *See Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 784 So. 2d 438, 441 (Fla. 2001).

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record exemption. The bill expands a public record exemption; thus it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record exemption. The bill expands a public record exemption; therefore, it includes a public necessity statement.

Breadth of Exemption

Article I, section 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands a public record exemption for records created during the course of an autopsy. The release of such records could cause the family of the decedent to experience trauma, sorrow, humiliation, or emotional injury. The exemption allows the records to be released at the earlier of 10 days after the date of death or immediately after law enforcement notifies a surviving spouse, parent, legal guardian, or adult child of the deceased of any request to obtain the autopsy report, written record, or name of the deceased person. Thus, the bill does not appear to be in conflict with the constitutional requirement that an exemption be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 30, 2018, the Oversight, Transparency & Administration Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment replaced the requirement that the autopsy report be kept confidential for 10 days following the date of death or until law enforcement notifies the family of a request for the record with the requirement that the record be kept confidential for 10 days following its completion.

The analysis is drafted to the committee substitute as approved by the Oversight, Transparency & Administration Subcommittee.