

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 653 Pub. Rec./Photographs or Video or Audio Recordings that Depict or Record Killing of a Person  
**SPONSOR(S):** Brown  
**TIED BILLS:** IDEN./SIM. **BILLS:** SB 1178

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee	12 Y, 0 N	Moore	Harrington
2) Criminal Justice Subcommittee	12 Y, 1 N	MacNamara	Sumner
3) Government Accountability Committee			

### SUMMARY ANALYSIS

In 2011, the Legislature created a public record exemption for photographs and video and audio recordings held by an agency that depict or record the killing of a person. In 2016, the Legislature narrowed the exemption so that it applies only to photographs and video and audio recordings that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties.

These photographs and video and audio recordings are confidential and exempt from public record requirements, except that the exemption permits a surviving spouse to view, listen to, and copy these records. If there is no surviving spouse, the deceased's surviving parents may access the records, and if there are no surviving parents, an adult child of the deceased may access the records. Access to the confidential and exempt records is also permitted for a local governmental entity or a state or federal agency in furtherance of its official duties and to others who obtain a court order granting access.

HB 653 expands the exemption to apply to photographs and video and audio recordings that depict or record the killing of *any* person. Thus, it reverts back to the exemption that was in place from 2011 to 2016 before the Legislature narrowed it. However, the bill does provide that the term does not include the killing of a person in the care and custody of a state agency. The term "care and custody of a state agency" includes, but is not limited to, a child abuse protective investigation, protective supervision, foster care and related services, a protective investigation or protective supervision of a vulnerable adult, or correctional supervision.

The bill provides for repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a public necessity statement as required by the State Constitution.

The bill may have a minimal fiscal impact on the state and local governments. See Fiscal Comments section.

The bill provides an effective date of October 1, 2018.

**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 a public record exemption; thus, it requires a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

###### Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, section 24(a) of the Florida Constitution.<sup>1</sup> The general law must state with specificity the public necessity justifying the exemption<sup>2</sup> and must be no more broad than necessary to accomplish its purpose.<sup>3</sup> Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record.

###### Open Government Sunset Review Act

The Open Government Sunset Review Act<sup>4</sup> sets forth a legislative review process for newly created or substantially amended public record or public meeting exemptions. It requires an automatic repeal of the exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>5</sup>

The Act provides that a public record or public meeting 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 governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.<sup>6</sup>

###### Exemption for Photographs and Recordings Depicting the Killing of a Person

In 2011, the Legislature created a public record exemption for photographs and video and audio recordings held by an agency<sup>7</sup> that depict or record the killing of a person.<sup>8</sup> Pursuant to the Open Government Sunset Review Act, the exemption was scheduled to repeal on October 2, 2016, unless reenacted by the Legislature.<sup>9</sup> During the 2015 interim, staff of the House of Representatives and Senate conducted a review of the exemption and jointly sent a survey regarding interpretation and implementation of the public record exemption to state agencies, state universities and colleges,

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<sup>1</sup> FLA. CONST. art. I, s. 24(c).

<sup>2</sup> This portion of a public record exemption is commonly referred to as a "public necessity statement."

<sup>3</sup> FLA. CONST. art. I, s. 24(c).

<sup>4</sup> Section 119.15, F.S.

<sup>5</sup> Section 119.15(3), F.S.

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

<sup>7</sup> Section 119.011(2), F.S., defines "agency" 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>8</sup> Section 1, ch. 2011-115, L.O.F. "Killing of a person" was 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."

<sup>9</sup> *Id.*

municipalities, and local law enforcement agencies that received or maintained the records protected by the exemption. Most of the entities that responded recommended reenacting the exemption.<sup>10</sup>

During the 2016 Regular Session, the Legislature narrowed the exemption so that it applies only to photographs and video and audio recordings that depict the killing of a law enforcement officer who was acting in accordance with his or her official duties.<sup>11</sup> These photographs and video and audio recordings are confidential and exempt<sup>12</sup> from public record requirements, except that the exemption permits a surviving spouse to view, listen to, and copy these records.<sup>13</sup> If there is no surviving spouse, the deceased's surviving parents may access the confidential and exempt records, and if there are no surviving parents, an adult child of the deceased may access the records.<sup>14</sup> The surviving relative who has the authority to access these records may designate in writing an agent to obtain them.<sup>15</sup>

In addition, a local governmental entity or a state or federal agency, upon written request, may view, listen to, or copy the confidential and exempt photographs and video and audio recordings in furtherance of its official duties. Unless otherwise required in the performance of the entity's or agency's duties, the identity of the deceased must remain confidential and exempt.<sup>16</sup>

Persons other than those covered by these exceptions may only have access to the confidential and exempt photographs and recordings if they obtain a court order. Upon a showing of good cause, a court may issue an order authorizing any person to view, listen to, or copy a confidential and exempt photograph or video or audio recording. The court is authorized to prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court must consider:

- 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>17</sup>

If a petition is filed with the court to view, listen to, or copy the confidential and exempt photographs or recordings, a surviving spouse must be given reasonable notice that the petition has been filed, a copy of the petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter.<sup>18</sup> If there is no surviving spouse, notice must be given to the parents of the deceased and, if the deceased has no living parent, then to the adult children of the deceased. If the court grants access to the confidential and exempt record, the access must be provided under the direct supervision of the custodian of the record or his or her designee.<sup>19</sup>

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<sup>10</sup> House of Representatives Final Bill Analysis for Senate Bill 7022 (2016), p. 4 (Apr. 13, 2016)(on file with the Oversight, Transparency & Administration Subcommittee).

<sup>11</sup> Chapter 2016-214, L.O.F. The term "killing of a law enforcement officer who was acting in accordance with his or her official duties" is defined to mean all acts or events that cause or otherwise relate to the death of a law enforcement officer who was acting in accordance with his or her official duties, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death. Section 406.136(1), F.S.

<sup>12</sup> There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 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 Attorney General Opinion 85-62 (August 1, 1985).

<sup>13</sup> Section 406.136(2), F.S.

<sup>14</sup> *Id.*

<sup>15</sup> Section 406.136(3)(a), F.S.

<sup>16</sup> Section 406.136(3)(b), F.S.

<sup>17</sup> Section 406.136(4), F.S.

<sup>18</sup> Section 406.136(5), F.S.

<sup>19</sup> Section 406.136(4)(c), F.S.

It is a third degree felony for any custodian of a photograph or video or audio recording to willfully and knowingly violate these provisions.<sup>20</sup> The same penalty applies to anyone who willfully and knowingly violates a court order issued under these provisions.<sup>21</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>22</sup>

The exemption is retroactive, except that it is not intended to overturn, abrogate, or alter any court order in effect on July 1, 2011, that restricts or limits access to any such photograph or recording.<sup>23</sup>

### **Effect of the Bill**

HB 653 expands the public record exemption for photographs and video and audio recordings that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties to apply the exemption to such records that depict or record the killing of *any* person. Thus, it reverts the exemption back to the exemption that was in place from 2011 to 2016 before the Legislature narrowed it. However, the bill does provide that the term does not include the killing of a person in the care and custody of a state agency. The term “care and custody of a state agency” includes, but is not limited to, a child abuse protective investigation, protective supervision, foster care and related services, a protective investigation or protective supervision of a vulnerable adult, or correctional supervision, as defined in chapters 39, 409, 415, or 945, F.S.

The bill provides a public necessity statement as required by the State Constitution, specifying that the photographs and video and audio recordings are highly sensitive representations of the deceased that, if heard, viewed, copied, or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased and detract from the memory of the deceased.

The bill provides for repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill has an effective date of October 1, 2018.

### **B. SECTION DIRECTORY:**

**Section 1:** Amends s. 406.136, F.S., relating to a photograph or video or audio recording that depicts or records the killing of a person.

**Section 2:** Provides a public necessity statement.

**Section 3:** Provides an effective date of October 1, 2018.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill does not appear to impact state government revenues.

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<sup>20</sup> Section 406.136(6)(a), F.S. A third degree felony is punishable by a term of imprisonment up to 5 years and a fine up to \$5,000. Sections 775.082(3)(d) and 775.083(1)(c), F.S.

<sup>21</sup> Section 406.136(6)(b), F.S.

<sup>22</sup> Section 406.136(c), F.S. 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>23</sup> Section 406.136(7), F.S.

2. Expenditures:  
See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:  
The bill does not appear to impact local government revenues.
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 agencies because agency staff responsible for complying with public record requests may require training related to creation of the public record exemption. In addition, agencies could incur costs associated with redacting the exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of agencies.

### 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 State 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 a public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

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

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires a newly created or expanded public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill expands the public record exemption for photographs and video and audio recordings that depict or record the killing of a law enforcement officer who was acting in accordance with his or her official duties to apply the exemption to such records that depict or record the killing of *any* person. As such, the exemption does not appear to be in conflict with the constitutional requirement that it be no broader than necessary to accomplish its purpose.

**B. RULE-MAKING AUTHORITY:**

The bill does not appear to create a need for rulemaking or rulemaking authority.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**