

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** CS/CS/HB 273 Pub. Rec./Photographs, Recordings, and Reports of Autopsies of Minor Victims

**SPONSOR(S):** Judiciary Committee and Criminal Justice Subcommittee, Clemons

**TIED BILLS:** IDEN./SIM. BILLS: CS/SB 404

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**FINAL HOUSE FLOOR ACTION:** 116 Y's 0 N's **GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

CS/CS/HB 273 passed the House on April 27, 2023, as CS/SB 404.

In cases of domestic violence resulting in death, an autopsy may be conducted to determine the victim's specific cause of death. Under s. 406.135, F.S., a photograph or video or audio recording of an autopsy held by a medical examiner is confidential and exempt from public record requirements. However, current law does not exempt a medical examiner's written autopsy report from public record requirements. As such, an autopsy report containing graphic details about the nature of the deceased's injuries may be obtained and publicly shared without the surviving family members' knowledge or consent.

Under s. 119.071(2)(p), F.S., a photograph or video or audio recording that depicts or records the killing of a law enforcement officer who was acting in accordance with his or her official duties or the killing of a victim of mass violence is confidential and exempt from public record requirements.

Both exemptions above provide an exception for a surviving spouse, local government entity, or a state or federal agency, to view and copy a photograph or video recording or to listen to or copy an audio recording of such records if certain requirements are met. Additionally, upon a showing of good cause, a court may issue an order authorizing any other person to view or copy a photograph or video recording or to listen to or copy an audio recording of such records under the supervision of the custodian of records and may order any appropriate restrictions or stipulations on such access. If a petition making such a request is filed, the court must provide the surviving spouse or other family member with notice and a copy of the petition and an opportunity to be present and heard at any hearing on the petition.

The bill amends s. 406.135, F.S., creating the Rex and Brody Act, to make an autopsy report of a minor whose death was related to an act of domestic violence confidential and exempt from public record requirements when held by a medical examiner.

The bill further amends s. 119.071(2)(p), F.S., to make a photograph or video or audio recording that depicts or records the killing of a minor confidential and exempt from public record requirements when held by an agency.

The bill includes an exception for both exemptions permitting a surviving parent of the deceased minor to view and copy or to listen to and copy such records. In relation to an autopsy report of a minor, the surviving parent must not have committed the domestic violence which caused the minor's death. Additionally, the bill requires, for both exemptions, the surviving parent to be notified of any petition filed to view or copy or listen to or copy such records, to be given a copy of the petition, and to be given an opportunity to be present and heard at any hearing on such a petition. The bill requires any other person who requests to copy, view, or listen to such records to comply with specified requirements.

The bill provides for retroactive application of the newly-created public record exemptions. The bill provides the public record exemptions are subject to the Open Government Sunset Review Act and will be repealed on October 2, 2028, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill was approved by the Governor on May 12, 2023, ch. 2023-44, L.O.F., and became effective on that date.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0273z.docx

**DATE:** 5/17/2023

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF 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 the right to inspect or copy any public record of the legislative, executive, and judicial branches of government.<sup>1</sup> The Legislature, however, may provide by general law for exemption from public record requirements provided the exemption passes by a two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption, and is no broader than necessary to meet its public purpose.<sup>2</sup>

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person the right to inspect and copy any state, county, or municipal record, unless the record is exempt.<sup>3</sup> Furthermore, the Open Government Sunset Review Act<sup>4</sup> provides that a public record exemption may be created, revised, or maintained only if it serves an identifiable public purpose and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.<sup>5</sup> An identifiable public purpose is served if the exemption meets one of the following purposes:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects 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; or
- Protects trade or business secrets.<sup>6</sup>

Pursuant to the Open Government Sunset Review Act, a new public record exemption or substantial amendment of an existing public record exemption is repealed on October 2<sup>nd</sup> of the fifth year following enactment, unless the Legislature reenacts the exemption.<sup>7</sup>

Furthermore, 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. However, 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.<sup>8</sup>

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<sup>1</sup> Art. I, s. 24(a), Fla. Const.

<sup>2</sup> Art. I, s. 24(c), Fla. Const.

<sup>3</sup> A public record exemption means a provision of general law which provides that a specified record, or portion thereof, is not subject to the access requirements of s. 119.07(1), F.S., or s. 24, Art. I of the State Constitution. S. 119.011(8), F.S.

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

<sup>5</sup> S. 119.15(6)(b), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> S. 119.15(3), F.S.

<sup>8</sup> 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); See Attorney General Opinion 85-62 (August 1, 1985).

## Confidentiality of Autopsy Photographs and Audio and Video Recordings

Section 406.135, F.S., makes a photograph or video or audio recording of an autopsy held by a medical examiner<sup>9</sup> confidential and exempt from public record requirements. However, a surviving spouse may view and copy a photograph or video recording or listen to or copy an audio recording of his or her deceased spouse's autopsy. If the deceased has no surviving spouse, then a surviving parent or adult child may have access to such records.<sup>10</sup>

A local governmental entity, or a state or federal agency, may make a written request to view or copy a photograph or video recording or to listen to or copy an audio recording of an autopsy for the purpose of performing its official duties. The local governmental entity, or state or federal agency, must keep the identity of the deceased confidential, unless disclosure is otherwise required in the performance of its official duties.<sup>11</sup>

Any other person wishing to access such photographs or recordings may petition the court for authorization to view or copy a photograph or video recording or to listen to or copy an audio recording of an autopsy. Upon a showing of good cause, a court may issue an order authorizing any person to view, listen to, or copy such photographs or recordings under the supervision of the custodian of records and may order any appropriate restrictions or stipulations on such access.<sup>12</sup> If a petition making such a request is filed with the court, the surviving spouse or other family member must be given reasonable notice, a copy of the petition, and have the opportunity to be present and heard at any hearing on the petition.<sup>13</sup>

The court must consider specified factors to determine if there is good cause relating to a request to view, listen to, or copy an autopsy photograph or recording, including:

- Whether disclosure is necessary for the public evaluation of governmental performance;
- The seriousness of the intrusion into the deceased's family's right to privacy and whether disclosure is the least intrusive means available; and
- The availability of similar information in other public records.<sup>14</sup>

A custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates s. 406.135, F.S., commits a third-degree felony. Similarly, a person who willfully and knowingly violates a court order regarding any photograph or video or audio recording of an autopsy commits a third-degree felony.<sup>15</sup>

Criminal and administrative proceedings are exempt from s. 406.135, F.S., but must comply with all other requirements of ch. 119, F.S., unless exempted. A court may, however, upon a showing of good cause, restrict or otherwise control the disclosure of an autopsy, crime scene, or similar photograph or video or audio recordings in a criminal or administrative proceeding.<sup>16</sup>

While the photographs or video or audio recordings of an autopsy are protected from public disclosure, generally a medical examiner's case files and autopsy reports are public records and are open for

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<sup>9</sup> Medical examiner is defined as any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to ch. 406, F.S., 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. S. 406.135(1), F.S.

<sup>10</sup> S. 406.135(2), F.S.

<sup>11</sup> S. 406.135(3)(b), F.S.

<sup>12</sup> S. 406.135(3)(c) and (4), F.S.

<sup>13</sup> S. 406.135(5), F.S. If there is no surviving spouse notice must be provided to the parents or adult children of the deceased.

<sup>14</sup> S. 406.135(4)(b), F.S.

<sup>15</sup> S. 406.135(6), F.S.

<sup>16</sup> S. 406.135(7), F.S.

inspection and copying by any person.<sup>17</sup> As such, an autopsy report containing graphic details about the nature of the deceased's injuries may be obtained and publicly shared without the surviving family members' knowledge or consent.<sup>18</sup>

### Domestic Violence

Section 741.28, F.S., defines domestic violence as any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member<sup>19</sup> by another family or household member.<sup>20</sup> In cases of domestic violence resulting in death, an autopsy may be conducted to determine the victim's specific cause of death.<sup>21</sup>

### Confidentiality of Photographs and Audio and Video Recordings of the Killing of Specified Victims

Section 119.071(2)(p), F.S, makes a photograph or video or audio recording that depicts or records the killing of a law enforcement officer who was acting in accordance with his or her official duties or the killing of a victim of mass violence confidential and exempt from public record requirements when held by an agency.<sup>22</sup>

"Killing of a law enforcement officer who was acting in accordance with his or her official duties" means 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.<sup>23</sup>

"Killing of a victim of mass violence" means events that depict either a victim being killed or the body of a victim killed in an incident in which three or more persons, not including the perpetrator, are killed by the perpetrator of an intentional act of violence.<sup>24</sup>

A surviving spouse may view and copy a photograph or video recording or listen to or copy an audio recording of such records. If the deceased has no surviving spouse, then a surviving parent or adult child may have access to such records.<sup>25</sup>

A local governmental entity, or a state or federal agency, may make a written request to view or copy a photograph or video recording or to listen to or copy an audio recording that depicts or records the killing of a law enforcement officer who was acting in accordance with his or her official duties or the killing of a victim of mass violence for the purpose of performing its official duties. The local governmental entity, or state or federal agency, must keep the identity of the deceased confidential, unless disclosure is otherwise required in the performance of its official duties.<sup>26</sup>

Any other person wishing to access such photographs or recordings may petition the court for authorization to view or copy a photograph or video recording or to listen to or copy an audio recording that depicts or records the killing of a law enforcement officer who was acting in accordance with his or

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<sup>17</sup> S. 119.01(1), F.S.; *Campus Commun. Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002) (holding s. 406.135, F.S., only applies to autopsy photographs and audio and video recordings of the autopsy and does not apply to other records of the autopsy such as the written autopsy report which remain unrestricted public records).

<sup>18</sup> Autopsy reports involved in an active criminal investigation may be exempt from public record. S. 119.071(2)(c), F.S.

<sup>19</sup> "Family or household member" means spouses, former spouses, persons related by blood or marriage, persons who are presently residing together as if a family or who have resided together in the past as if a family, and persons who are parents of a child in common regardless of whether they have been married. With the exception of persons who have a child in common, the family or household members must be currently residing or have in the past resided together in the same single dwelling unit. S. 741.28(3), F.S.

<sup>20</sup> S. 741.28(2), F.S.

<sup>21</sup> S. 406.11, F.S.

<sup>22</sup> S. 119.071(2)(p)7., F.S.

<sup>23</sup> S. 119.071(2)(p)1.a., F.S.

<sup>24</sup> S. 119.071(2)(p)1.b., F.S.

<sup>25</sup> S. 119.071(2)(p)2., F.S.

<sup>26</sup> S. 119.071(2)(p)3.b., F.S.

her official duties or the killing of a victim of mass violence. Upon a showing of good cause, a court may issue an order authorizing any person to view, listen to, or copy such photographs or recordings under the supervision of the custodian of records and may order any appropriate restrictions or stipulations on such access.<sup>27</sup> If a petition making such a request is filed with the court, the surviving spouse or other family member must be given reasonable notice, a copy of the petition, and have the opportunity to be present and heard at any hearing on the petition.<sup>28</sup>

The court must consider specified factors to determine if there is good cause relating to a request to view, listen to, or copy a photograph or recording that depicts or records the killing of a law enforcement officer who was acting in accordance with his or her official duties or the killing of a victim of mass violence, including:

- Whether disclosure is necessary for the public evaluation of governmental performance;
- The seriousness of the intrusion into the deceased's family's right to privacy and whether disclosure is the least intrusive means available; and
- The availability of similar information in other public records.<sup>29</sup>

A custodian of a photograph or video or audio recording that depicts or records the killing of a law enforcement officer who was acting in accordance with his or her official duties or the killing of a victim of mass violence who willfully and knowingly violates s. 119.071(2)(p), F.S., commits a third-degree felony.<sup>30</sup> Similarly, a person who willfully and knowingly violates a court order regarding any photograph or video or audio recording of an autopsy commits a third-degree felony.<sup>31</sup>

Criminal and administrative proceedings are exempt from s. 119.071(2)(p), F.S., but must comply with all other requirements of ch. 119, F.S., unless exempted. A court may, however, restrict or otherwise control the disclosure of a killing, crime scene, or similar photograph or video or audio recording in a criminal or administrative proceeding upon a showing of good cause.<sup>32</sup>

## Effect of the Bill

The bill amends s. 406.135, F.S., creating the Rex and Brody Act,<sup>33</sup> to make the autopsy report of a minor child whose death was the result of an act of domestic violence confidential and exempt from s. 119.07(1), F.S., and art. 1, s. 24(a), Fla. Const., when held by a medical examiner.

The bill defines a minor as a person younger than 18 years of age who has not had the disability of nonage removed pursuant to ss. 743.01<sup>34</sup> or 743.015, F.S.<sup>35</sup>

The bill defines domestic violence as the term is defined s. 741.28, F.S., meaning any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member.

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<sup>27</sup> S. 119.071(2)(p)4.a., F.S.

<sup>28</sup> S. 119.071(2)(p)5., F.S. If there is no surviving spouse notice must be provided to the parents or adult children of the deceased.

<sup>29</sup> S. 119.071(2)(p)4.b., F.S.

<sup>30</sup> S. 119.071(2)(p)6.a., F.S.; A third-degree felony is punishable by up to five years in prison and a \$5,000 fine. Ss. 775.082, 775.083, or 775.084, F.S.

<sup>31</sup> S. 119.071(2)(p)6.b., F.S.

<sup>32</sup> S. 119.071(2)(p)6.c., F.S.

<sup>33</sup> Rex and Brody were minor victims of domestic violence whose autopsy reports were obtained by media and the details of which were published regarding the manner of the children's death.

<sup>34</sup> Section 743.01, F.S., provides that a minor who becomes married is no longer considered to have the disability of nonage. As such, the minor is then able to perform all acts that he or she could do if not a minor, such as, assume the management of his or her estate, contract and be contracted with, and sue and be sued.

<sup>35</sup> Section 743.015, F.S., provides that a court may, upon petition by a minor's parent or guardian, remove the disability of nonage for a minor 16 years of age or older. This action allows the minor to be treated as an adult.

Under the bill, a surviving parent of the deceased minor is authorized to view and copy an autopsy report so long as he or she did not commit the act of domestic violence which caused the minor's death. Additionally, such a surviving parent must be given reasonable notice of a petition filed with the court to view or copy the minor's autopsy report, must be provided a copy of the petition, and must be given reasonable notice and the opportunity to be present and heard at any hearing on the petition.

The bill allows a local governmental entity, or a state or federal agency, to view and copy an autopsy report of a minor victim of domestic violence pursuant to a written request submitted for the purpose of performing an official duty. The governmental entity must keep the identity of the minor victim of domestic violence confidential unless disclosure is required in the performance of its official duties.

Additionally, the bill authorizes any other person to petition a court to view an autopsy report of a minor victim of domestic violence under the supervision of the custodian of records and upon a showing of good cause to the court. In considering whether to grant such a petition, a court must consider the current factors under s. 406.135(4)(b), F.S., which include balancing the need for disclosure with the minor's family's right to privacy.

Under the bill, a custodian of records who willfully and knowingly violates s. 406.135, F.S., relating to an autopsy report of a minor victim of domestic violence, commits a third-degree felony. Additionally, any other person who willfully and knowingly violates a court order relating to an autopsy report of a minor victim of domestic violence, commits a third-degree felony.

Although criminal and administrative proceedings are exempt from the requirements of s. 406.135, F.S., the bill allows a court, upon a showing of good cause, to restrict or otherwise control the disclosure of an autopsy, crime scene, or similar report in a criminal or administrative proceeding.

The bill provides for retroactive application of the newly-created public record exemption. The public record exemption created by the bill is subject to the Open Government Sunset Review Act and will automatically repeal on October 2, 2028, unless reviewed and saved from repeal by the Legislature. The bill also provides the constitutionally required public necessity statement<sup>36</sup> which states that the Legislature finds, in part, that based on the graphic and sensitive nature of autopsy reports, the release and publication of such reports of minor victims of domestic violence could cause emotional injury to the minor victim's immediate family and friends.

The bill further amends s. 119.071(2)(p), F.S., to make a photograph or video or audio recording that depicts or records the killing of a minor confidential and exempt from s. 119.07(1), F.S., and art. 1, s. 24(a), Fla. Const.

The bill defines "killing of a minor" to mean any of the following as they relate to a victim under the age of 18:

- All acts or events that cause or otherwise relate to the death;
- Any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of the death;
- Events that depict a victim being killed; and
- Events that depict the body of a victim who has been killed.

Under the bill, a surviving parent of the deceased minor is authorized to view and copy any such photograph or video recording or listen to or copy any such audio recording. A surviving parent must be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording or listen to or copy an audio recording that depicts or records the killing of the minor, must be provided a copy of the petition, and must be given reasonable notice and the opportunity to be present and heard at any hearing on the petition.

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<sup>36</sup> Art. I, s. 24(c), Fla. Const., requires each public record exemption to "state with specificity the public necessity justifying the exemption."

The bill allows a local governmental entity, or a state or federal agency, to view or copy a photograph or video recording or listen to or copy an audio recording that depicts or records the killing of a minor pursuant to a written request submitted for the purpose of performing an official duty. The governmental entity must keep the identity of the minor victim confidential unless disclosure is required in the performance of its official duties.

The bill authorizes any other person to petition a court to view or copy a photograph or video recording or listen to or copy an audio recording that depicts or records the killing of a minor under the supervision of the custodian of records and upon a showing of good cause to the court. In considering whether to grant such a petition, a court must consider the current factors under s. 119.071(2)(p)4.b., F.S., which include balancing the need for disclosure with the minor's family's right to privacy.

Under the bill, a custodian of records who willfully and knowingly violates s. 119.071(2)(p), F.S., relating to a photograph or audio or video recording that depicts or records the killing of a minor, commits a third-degree felony. Additionally, any other person who willfully and knowingly violates a court order relating to a photograph or audio or video recording that depicts or records the killing of a minor, commits a third-degree felony.

Although criminal and administrative proceedings are exempt from the requirements of s. 119.071(2)(p), F.S., the bill allows a court, upon a showing of good cause, to restrict or otherwise control the disclosure of a killing, crime scene, or similar photograph or video or audio recording in a criminal or administrative proceeding.

The bill provides for retroactive application of the newly-created public record exemption. The public record exemption created by the bill is subject to the Open Government Sunset Review Act and will automatically repeal on October 2, 2028, unless reviewed and saved from repeal by the Legislature.

The bill also provides the constitutionally required public necessity statement which states that the Legislature finds, in part, that based on the highly sensitive representations of the deceased in photographs and recordings of the killing of a minor, the release and publication of such materials could cause trauma, humiliation, and emotional injury to the immediate family of the deceased. Additionally, the Legislature finds that release and publication of such photographs and recordings may be harmful to the public and may educe violent acts by persons.

The effective date of this bill is upon becoming a law.

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

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

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

None.

#### **2. Expenditures:**

See Fiscal Comments.

### **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 may have an insignificant negative fiscal impact on entities holding photographs or video or audio recordings that depict or record the killing of a minor or autopsy reports of minor victims of domestic violence, as staff responsible for complying with public record requests may require training related to the newly-created public record exemptions. However, any additional costs will likely be absorbed within existing resources.