

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: CS/SB 1850

INTRODUCER: Health Policy Committee and Senator Stewart

SUBJECT: Public Records/Photograph, Video, Audio Recording of an Autopsy Held by a Medical Examiner

DATE: February 12, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rossitto-Van Winkle	Stovall	HP	Fav/CS
2.	Brown	Caldwell	GO	Favorable
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1850 expands the public records exemption that currently makes confidential and exempt photographs and video or audio recordings of an autopsy held by a medical examiner. Under the bill, the exemption also applies to reports and related written records that personally identify the deceased person. A time limit is imposed, however, on the exemption for reports and related written records. The exemption would apply to these records for only 10 days after the medical examiner's completion of the report. Still, the records may be released during the 10-day period to the surviving spouse, or other authorized person if there is no surviving spouse.

Current law grants certain family members access to the photographs and video or audio recordings of the autopsy. The bill additionally authorizes a legal guardian to view these materials, as well as reports and related written records.

The bill provides a statement of public necessity supporting the exemption. Additionally, the bill requires an Open Government Sunset Review with a repeal date of October 2, 2023, unless the Legislature saves the exemption from repeal before that time.

A two-thirds vote of each chamber is required for passage of the bill because it expands a public records exemption.

The bill applies retroactively, and takes effect upon becoming law.

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.¹ 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.²

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.³ Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.⁴ 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.⁵

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.⁶ 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.”⁷ A violation of the Public Records Act may result in civil or criminal liability.⁸

The Legislature may create an exemption to public records requirements by passing a general law by a two-thirds vote of the House of Representatives and the Senate.⁹ The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(a).

³ 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 Legislature are primarily located in s. 11.0431(2)-(3), F.S.

⁴ Public records laws are found throughout the Florida Statutes.

⁵ Section 119.01(1), F.S.

⁶ 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” 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.”

⁷ *Shevin v. Byron, Harless, Schaffer, Reid, and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁸ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

⁹ FLA. CONST., art. I, s. 24(c).

necessary to accomplish the stated purpose of the exemption.¹⁰ A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.¹¹

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’¹² 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 under certain circumstances.¹³

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the “OGSR”) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁴ 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.¹⁵ In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁶ An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁷
- Releasing sensitive personal information would be defamatory or would jeopardize an individual’s safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁸ or
- It protects trade or business secrets.¹⁹

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ *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.

¹² 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).

¹³ A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹⁴ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it 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.

¹⁵ Section 119.15(3), F.S.

¹⁶ Section 119.15(6)(b), F.S.

¹⁷ Section 119.15(6)(b)1., F.S.

¹⁸ Section 119.15(6)(b)2., F.S.

¹⁹ Section 119.15(6)(b)3., F.S.

The OGSR also requires specified questions to be considered during the review process.²⁰ In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²¹ 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 provided for by law.²²

Medical Examiners Act

Part I of ch. 406, F.S., the “Medical Examiners Act (Act),”²³ creates the Medical Examiners Commission (MEC) within the Florida Department of Law Enforcement (FDLE).²⁴ The MEC is authorized to establish and oversee medical examiner districts²⁵ and adopt rules to ensure minimum and uniform standards for statewide medical examiner services.²⁶ District medical examiners are required to determine the cause of death of a decedent who died or was found dead in their district:

- If the person died:
 - Of criminal violence;
 - By accident;
 - By suicide;
 - Suddenly, when in apparent good health;
 - Unattended by a practicing physician or other recognized practitioner;
 - In any prison or penal institution;
 - In police custody;
 - In any suspicious or unusual circumstance;
 - By criminal abortion;
 - By poison;
 - By disease constituting a threat to public health; or
 - By disease, injury, or toxic agent resulting from employment.
- When a dead body is brought into the state without proper medical certification; or
- When a dead body is to be cremated, dissected, or buried at sea.²⁷

²⁰ Section 119.15(6)(a), F.S. The specified questions are:

1. What specific records or meetings are affected by the exemption?
2. Whom does the exemption uniquely affect, as opposed to the general public?
3. What is the identifiable public purpose or goal of the exemption?
4. Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
5. Is the record or meeting protected by another exemption?
6. Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

²¹ FLA. CONST. art. I, s. 24(c).

²² Section 119.15(7), F.S.

²³ Section 406.01, F.S.

²⁴ Section 406.02(1), F.S.

²⁵ Section 406.02(4), F.S.

²⁶ Section 406.04, F.S.

²⁷ Section 406.11(1), F.S.

The medical examiner is authorized to make or have performed any examinations, investigations, and autopsies that he or she deems necessary, or that are requested by the state attorney, for the purpose of determining the cause of death.²⁸

Section 406.135(2), F.S., makes confidential and exempt from s. 119.07(1), F.S., and Art. I, s. 24(a), of the State Constitution, any photograph or video or audio recording of an autopsy held by a medical examiner; and defines a “medical examiner” to include a:

- District medical examiner;
- Associate medical examiner;
- Substitute medical examiner;
- Any employee, deputy, or agent of a medical examiner; or
- Any other person who may obtain possession of a photograph or audio recording or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.²⁹

However, a surviving spouse may view and copy a photograph or video recording, or listen to or copy an audio recording, of the deceased spouse’s autopsy. If there is no surviving spouse, then the surviving parents may have access to such records. If there is no surviving spouse or parent, then an adult child may have access to such records.³⁰

The deceased’s surviving relative, as identified above, may designate in writing an agent to obtain the records.³¹ A local governmental entity, or a state or federal agency, in furtherance of its official duties, upon written request, may also have access, and unless otherwise required in the performance of their duties, the identity of the deceased must remain confidential and exempt.³²

Any other person desiring to copy or view confidential and exempt autopsy photographs, or video or audio recordings, must obtain a court order, based on a showing of good cause, and subject to any restrictions or stipulations the court deems appropriate.³³

A surviving spouse must be given reasonable notice and a copy of any petition filed to review or copy a photograph, video recording, or audio recording of an autopsy. If there is no surviving spouse, then notice must be given to the parents of the deceased; and if the deceased has no living parent, then notice is given to the adult children of the deceased.³⁴

In all cases, the viewing, copying, listening to, or other handling of a photograph or video or audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.³⁵

²⁸ *Id.*

²⁹ Section 406.135(1), F.S.

³⁰ Section 406.135(2), F.S.

³¹ Section 406.135(3)(a), F.S.

³² Section 406.135(3)(b), F.S.

³³ Section 406.135(4)(a), F.S.

³⁴ Section 406.135(5), F.S.

³⁵ Section 406.135(4)(c), F.S.

A custodian of records who willfully and knowingly violates these provisions commits a third-degree felony.³⁶

Effect of Proposed Changes:

The bill expands the current public records exemption for photographs and video or audio recordings of an autopsy to make autopsy reports and related written records held by a medical examiner that identify a deceased person confidential and exempt from disclosure for 10 days after the report is completed.

The bill adds legal guardians to the current list of persons who have access to the records. In so doing, records may be released in this order:

- To a surviving spouse; or
- If there is no surviving spouse, to the surviving parents or legal guardians; or,
- If there is no surviving spouse, parent, or legal guardian, to an adult child.

Therefore, the public records exemption applies as follows:

- The exemption makes confidential and exempt from disclosure a photograph, a video recording, and an audio recording, except to the family members or a legal guardian of the deceased in the order delineated above.
- The exemption makes confidential and exempt from disclosure a report or a related record, except to the family members or a legal guardian of the deceased in the order delineated above, for a period of only 10 days after the medical examiner completes the report. After this time, the exemption no longer applies and a report or a related record is subject to disclosure.

As justification for the broadening of the public records exemption to reports and related records, the statement of public necessity provides that a 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 is published or conveyed by word of mouth, causing the family to experience trauma, sorrow, humiliation, or emotional injury.

The bill includes an Open Government Sunset Review and provides a repeal date of October 2, 2023, unless reviewed and saved from repeal by the Legislature before that time.

As the bill expands the public records exemption, a two-thirds vote of each chamber is required for passage.

The bill applies retroactively³⁷ and takes effect upon becoming law.

³⁶ Section 406.135(6), F.S.

³⁷ The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislature clearly expresses intent that the exemption is to be applied retroactively, and that it is constitutionally permissible to do so. 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. *Memorial Hospital-West Volusia, Inc. v. New-Journal Corporation*, 784 So. 2d 438, 441 (Fla. 2001).

III. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

B. Public Records/Open Meetings Issues:**Voting Requirement**

Article I, Section 24(c) of the Florida Constitution requires a two-thirds vote of each chamber for newly created or expanded public records exemptions to pass. This bill expands an existing exemption. Therefore, a two-thirds vote is required.

Public Necessity Statement

Article I, Section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public-records exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption. The public necessity statement provides that autopsy reports and related written records that personally identify the deceased be confidential and exempt from public records for a period of 10 days after completion to protect a deceased's family from any unexpected encounters with new information obtained from an autopsy report or related written record regarding the death of a loved one which could cause the family to experience trauma, sorrow, humiliation, or emotional injury.

Breadth of Exemption

Article I, Section 24(c) of the Florida Constitution requires a newly created public records exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates an exemption for autopsy reports, and related written records that personally identify the deceased for ten days after the medical examiner has completed the report, and includes exceptions for the surviving spouse, or other authorized persons if there is no surviving spouse to view and copy those records during the 10-day exempt period.

The bill appears to be no broader than necessary to accomplish the public necessity for the public records exemption.

C. Trust Funds Restrictions:

None.

IV. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

V. Technical Deficiencies:

None.

VI. Related Issues:

None.

VII. Statutes Affected:

This bill substantially amends section 406.135 of the Florida Statutes.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Health Policy on January 30, 2018:**

Makes the autopsy report and related written records confidential and exempt from public records law for the ten days after the medical examiner has completed the report, with exceptions for the surviving spouse, or other authorized person if there is no surviving spouse, to view and copy those records during the ten day period.

B. Amendments:

None.