

STORAGE NAME: h1083a.sa.doc
DATE: March 14, 2001

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 1083
RELATING TO: Public Records/Autopsy Photographs
SPONSOR(S): Representative(s) Johnson, Miller & others
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION
 - (2)
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

The Medical Examiner's Act provides for the creation of the Medical Examiners Commission. The Medical Examiner's Commission establishes medical examiner districts within the state. A district medical examiner is then appointed by the Governor, for each medical examiner district, from nominations submitted by the Medical Examiners Commission. The district medical examiner may appoint physicians, as necessary, to serve as associate medical examiners.

The district medical examiner has the authority to perform, or have performed, whatever autopsies or laboratory examinations he or she deems as both necessary and in the public interest to determine the identification of or cause of death of the deceased, or to obtain evidence necessary for forensic examination.

Currently, the district medical examiner's records, including autopsy reports, photographs, and video recordings, are public records open to public inspection and may be copied.

The bill creates a public records exemption for a photograph or video recording of an autopsy, but does not state to which agency or agencies the exemption applies. The custodian of the autopsy photographs and video recordings must grant state and federal agencies access to the records. **Any person** in violation of this bill's provisions commits a third degree felony, and, as a result, that person could be imprisoned for a term not to exceed five years and may be fined up to \$5,000.

The stated public purpose of this public records exemption is to protect the immediate family of the deceased from trauma, sorrow, humiliation, or emotional injury that might be endured if the deceased's autopsy photographs and video recordings were made available to the public.

This exemption will repeal on October 2, 2006, unless reviewed and reenacted by the Legislature.

There are a number of constitutional concerns with this bill. See "Constitutional Issues" and "Other Comments" sections of this analysis for further details.

This bill does not appear to have a fiscal impact on state or local governments.

The sponsors have filed an amendment that remediates the concerns addressed in this analysis.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish its purpose.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), F.S., provides:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes, 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:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

Autopsy

Section 872.04(1), F.S., defines "autopsy" as a

postmortem dissection of a dead human body in order to determine the cause, seat, or nature of disease or injury and includes the retention of tissues customarily removed during the course of autopsy for evidentiary, identification, diagnostic, scientific, or therapeutic purposes.

The medical examiner may document the procedure through photographs or video recordings of the autopsy. Such photographs or video recordings of an autopsy may depict the deceased nude, bruised, bloodied, broken, with bullet or other wound, cut open, dismembered, or decapitated. As such, photographs or video recordings of an autopsy are thought to be highly sensitive depictions of the deceased.

Medical Examiners

Chapter 406, F.S., entitled the Medical Examiners Act, provides for the creation of the Medical Examiners Commission within the Department of Law Enforcement. The Governor appoints commission members.

Section 406.05, F.S., directs the Medical Examiners Commission to establish medical examiner districts within the state. When establishing the districts, the Medical Examiners Commission must take into consideration the "population, judicial circuits of the state, geographical size of the area of

coverage, availability of trained personnel, death rate by both natural and unnatural causes, and similar related factors".¹

The district medical examiner is appointed by the Governor, for each medical examiner district, from nominees who are practicing physicians in pathology and whose nomination is submitted to the Governor by the Medical Examiners Commission.²

Each district medical examiner may appoint as many physicians as may be necessary to serve as associate medical examiners.³ The associate medical examiners serve at the pleasure of the district medical examiner and when necessary, will provide "service at all times and all places within the district".⁴

Section 406.11(2)(a), F.S., states that a district medical examiner

shall have the authority in any case coming under subsection (1) to perform, or have performed, whatever autopsies or laboratory examinations he or she deems necessary and in the public interest to determine the identification of or cause or manner of death of the deceased or to obtain evidence necessary for forensic examination.

In the absence of the medical examiner or the associate medical examiner, the state attorney of the county may appoint a competent physician to act in his or her stead.⁵

The Medical Examiners Act specifies the circumstances under which a district medical examiner is to perform an autopsy. A medical examiner is required to perform an autopsy when any person dies:

- By criminal violence;
- By accident⁶;
- 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.⁷

¹ Section 406.05, F.S.

² Section 406.06(1)(a), F.S.

³ Section 406.06(2), F.S.

⁴ *Id.*

⁵ Section 406.15, F.S.

⁶ On February 18, 2001, Dale Earnhardt was killed in a car crash at the Daytona 500. His wife, Teresa Earnhardt, sued Volusia County four days later to block the release of the district medical examiner's photos. A judge has issued a temporary injunction in favor of Mrs. Earnhardt. A hearing is set for March 19, 2001.

⁷ Section 406.11(1)(a), F.S.

District Medical Examiner's Records

The district medical examiner is required to maintain duplicate copies of records and the detailed findings of autopsy and laboratory investigations.⁸ Because a district medical examiner is a public officer performing a statutorily assigned duty, the records made or received as part of the performance of that public duty, including autopsy reports, photographs, and video recordings, are public records. These records are open to public inspection and may be copied.⁹

Criminal Penalties

Felonies are classified, for the purpose of sentencing and other statutory purposes, in s. 775.082, F.S., into the following categories:

- Capital felony;
- Life felony;
- Felony of the first degree;
- Felony of the second degree; and
- Felony of the third degree.

Under s. 775.082(3)(d), F.S., a person who has been convicted of a felony of the third degree may be punished by a term of imprisonment not exceeding five years. Additionally, s. 775.083, F.S., provides that a person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine. A fine of \$5,000 is authorized when the conviction is a felony of the third degree.

C. EFFECT OF PROPOSED CHANGES:

This bill creates a public records exemption for a photograph or video recording of an autopsy. It **does not** however state which public agency is receiving the exemption. **This exemption cannot be applied to all agencies because all agencies do not conduct autopsies.**

This bill provides that a custodian of a photograph or video recording of an autopsy must grant a state or federal agency access to the records as provided by law and in furtherance of the agency's statutory duties.

This public records exemption does not allow local governmental entities access to the records. Thus, local police officers do not have access to autopsy photographs or video recordings. This could hinder a police department's investigation. Additionally, insurance investigators, private investigators, or family members are not allowed access to the records. Furthermore, this bill **does not** allow the district medical examiner, in his or her official capacity, to use the photographs or video recordings of the autopsy for the purposes of seeking another expert medical opinion, for providing professional training, for case-related medical research purposes, or for other purposes related solely to the completion of the district medical examiner's duties. Accordingly, this bill appears to be overly broad in its reach, especially in light of the stated public necessity statement for the exemption.

⁸ Section 406.13, F.S.

⁹ In *State of Florida v. Danny Rolling*, No. 91—3832 CF A (July 27, 1994), the court held that photographs of murder victims were public records as they were taken by officers of the State in the course of an investigation and are in the possession of officers of the State in their official capacities.

The stated public purpose of this public records exemption is to protect the immediate family of the deceased from trauma, sorrow, humiliation, or emotional injury that might be endured if the deceased's autopsy photographs and video recordings are made available to the public.

This bill makes it a felony of the third degree for **any person** who discloses such photographs or video recordings. Since it is unclear who is covered by the exemption requirement, it is equally as unclear as to who may be charged with a felony for disclosing such photographs or video recordings. A person who violates this section could be imprisoned for a term not to exceed five years¹⁰ and may be fined up to \$5,000¹¹. Furthermore, this bill **does not** require "willful or knowing" violation of its provisions in order to trigger the felony provision.

This exemption is subject to the Open Government Sunset Review Act of 1995, and will stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes".

III. 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:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Section 921.001(9)(b), F.S., provides that on or after January 1, 1994, any legislation which creates a felony offense must provide that it will result in a net zero sum impact in the overall prison population, as determined by the Criminal Justice Estimating Conference, unless the legislation

¹⁰ Section 775.082(3)(d), F.S.

¹¹ Section 775.083(1)(c), F.S.

contains a funding source sufficient in its base or rate to accommodate such change or a provision which specifically abrogates the application of the paragraph.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

This bill has a number of constitutional concerns:

1. Article I, s. 24(a), Florida Constitution, states that

[e] very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf.

Article I, s. 24(c), Florida Constitution, provides that a public records exemption "shall be no broader than necessary to accomplish the stated purpose of the law".

This bill exempts access to autopsy photographs and video recordings, including inspection without copying, with one exception for state and federal agencies. There is no exception for local governmental entities, investigators, and family members. Additionally, this exemption also effectively prohibits district medical examiners from seeking another medical expert opinion on an autopsy. Therefore, **this exemption could be construed as overly broad.**

2. **This bill does not state what agency is given the exemption.** The exemption cannot run to all agencies because all agencies do not conduct autopsies. This exemption appears overly broad because it does not specify which agency is affected.

3. This bill also raises constitutional concerns regarding its felony provision. It eliminates the element of scienter¹². This bill makes it a third degree felony for **any person** who violates the provisions of this bill whether it was a violation with guilty knowledge or not.

In *Cohen v. State*¹³, the defendant was convicted of violating a statute, which made it an offense to sell or distribute obscene periodicals. No scienter was required by the statute, and the courts held that

¹² "Scienter" is frequently used to signify the defendant's guilty knowledge. Black's Law Dictionary, 1990, page 1345.

the statute as written makes it a crime to sell or distribute any publication or article of the character described therein irrespective of whether the person selling or distributing has or does not have knowledge of the . . . character of the contents of the publication or article.¹⁴

By the time the case reached the Florida Supreme Court, the State admitted in its brief that if the statute in question was construed as eliminating the requirement of scienter it would probably be unconstitutional under the holding of the United States Supreme Court in *Smith v. People of the State of California*¹⁵. In *Smith v. People of the State of California*, the Court found that if an ordinance eliminates the element of scienter, the ordinance would inhibit constitutionally protected speech.

Additionally, the other provisions in the Florida Statutes that establish a criminal penalty for improper release of records or failure to comply with the public records law require a “willful or knowing” violation.¹⁶ Generally, the criminal penalty is a misdemeanor.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Several news organizations oppose this bill. Some of these news groups include the Society of Professional Journalists, The Associated Press Sports Editors, The Miami Herald, The Tampa Tribune, the Chicago Tribune, the Los Angeles Times, and WFLA-TV in Tampa.¹⁷ Opponents of this bill believe the restrictions being placed on autopsy photos and video recordings are a “big mistake”.¹⁸ Barbara Petersen, Executive Director of the First Amendment Foundation in Tallahassee, said “[t]hese records are critical to the public’s right of oversight”.¹⁹ She went on to say that “public records law provides for oversight over medical examiners who may feel political pressure to render a particular cause of death”.²⁰ Opponents also believe that a total ban is unconstitutional.²¹

The Medical Examiners Commission is also opposed to this bill. They have expressed several concerns with this exemption. The Medical Examiners Commission is concerned that there is no mention of granting local law enforcement, private investigators, or insurance investigators access to the autopsy photographs or video recordings.²² The Chairman of the Medical Examiners Commission, has stated that the largest bulk of the district medical examiner’s requests for autopsy

¹³ 125 So. 2d 560 (Fla. 1960).

¹⁴ *Cohen v. State* at 561.

¹⁵ 691 U.S. 147; 80 S. Ct. 215; 4 L. Ed. 2d 205 (1959).

¹⁶ See s. 119.10(2), F.S.: “Any person willfully and knowingly violating any of the provisions of this chapter is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.”

¹⁷ ESPN.com, “Fans respond with angry calls, e-mails”, March 6, 2001.

¹⁸ ESPN.com, “Fans respond with angry calls, e-mails”, March 6, 2001, quote by Barbara Petersen, Executive Director of the First Amendment Foundation in Tallahassee.

¹⁹ *Tallahassee Democrat*, “Earnhardt Family Protection Act filed in House”, March 8, 2001.

²⁰ ESPN.com, “Fans respond with angry calls, e-mails”, March 6, 2001.

²¹ ESPN.com, “Fans respond with angry calls, e-mails”, March 6, 2001, quote by Barbara Petersen, Executive Director of the First Amendment Foundation in Tallahassee.

²² Dr. Stephen Nelson, Chairman, Medical Examiners Commission, March 9, 2001, telephone conference.

photographs and video recordings come from local governmental entities.²³ The Medical Examiners Commission is also concerned that now they will be unable to use autopsy photographs in training seminars, medical journals, and professional publications.²⁴ The Commission is also opposed to the bill because it suggests that district medical examiners will no longer be permitted to seek another expert medical opinion.²⁵

Proponents of this bill “do not believe that any bereaved family should be forced to allow access to photographs of deceased loved-ones, particularly since complete information is available through written autopsy records”.²⁶ Senate Majority Leader Jim King was quoted as saying, “The possibility of graphic and sensitive photos being leaked and exploited is a major public policy concern”.²⁷ Senator King went on to say, “One may ask where you draw the line on a public records exemption, I can tell you that line has got to be drawn beyond photographs as graphic as these.”²⁸

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Heather A. Williamson, M.S.W.

J. Marleen Ahearn, Ph.D., J.D.

²³ Dr. Stephen Nelson, Chairman, Medical Examiners Commission, March 9, 2001, telephone conference.

²⁴ *Id.*

²⁵ Dr. Stephen Nelson, Chairman, Medical Examiners Commission, March 9, 2001, telephone conference.

²⁶ *Tallahassee Democrat*, “Earnhardt Family Protection Act filed in House”, March 8, 2001, quote from a letter by Teresa Earnhardt.

²⁷ *CNN Sports Illustrated*, “Help from high places”, March 7, 2001, cnsi.com.

²⁸ *Id.*