

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1356

SPONSOR: Criminal Justice Committee and Senators King, Posey and others

SUBJECT: Public Records Exemption; Autopsy Photographs and Video and Audio Recordings

DATE: March 14, 2001 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Favorable/CS
2.	_____	_____	GO	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

Under s. 406.11(1)(a)2., F.S., a district medical examiner is required to perform an autopsy when any person dies in the state by accident. Each district medical examiner is appointed by the Governor. As the medical examiner is performing an official duty when conducting an autopsy of an accident victim, the records made during the performance of that duty that perpetuate, communicate or formalize knowledge, are public records under s. 119.01(1), F.S., and s. 24, Art. I of the State Constitution. Public records are not limited to traditional written documents, but may include photos, videos, or other materials, regardless of physical form, characteristics, or means of transmission.

The Legislature is authorized by s. 24(c), Art. I of the State Constitution, to exempt records from public records requirements by general law. A law that creates an exemption must state with specificity the public necessity justifying the exemption and can be no broader than necessary to accomplish the stated purpose of the law.

The CS makes confidential and exempt photographs and video and audio recordings of an autopsy, except that a surviving spouse, parent, or child of the deceased or their legal representative, or a state or federal agency in furtherance of its official duties, may view or copy such photographs or video or audio recordings. Other persons may have access (viewing, duplicating, or publishing) to the autopsy photos and recordings only upon court order showing good cause. Such access, if granted by the court, must be performed under the direct supervision of the custodian of the record.

The CS also notes that photographs and video and audio recordings of an autopsy are highly sensitive depictions of the deceased which, if copied and publicized on the World Wide Web or

in written publications, could result in continuous injury to the immediate family of the deceased, as well as injury to the memory of the deceased. As such, it is a public necessity to make autopsy photos and video and audio recordings confidential and exempt. The written autopsy report, which typically includes drawings, remains subject to public inspection and can be copied, thereby preserving public oversight. The CS makes it a felony of the third degree to knowingly violate the provisions of the section. The CS is effective upon becoming law and is to be applied retroactively.

This CS creates an unnumbered section of the Florida Statutes.

II. Present Situation:

Constitutional Access to Public Records and Meetings – Article I, s. 24 of the State Constitution provides every person with 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. The section specifically includes the legislative, executive and judicial branches and each agency or department created under them. It also includes counties, municipalities, and districts, as well as constitutional officers, boards, and commissioners or entities created pursuant to law or the State Constitution.

The term public records has been defined by the Legislature in s. 119.011(1), F.S., to include:

. . . 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.

This definition of public records has been interpreted by the Florida Supreme Court to include all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.¹ Unless these materials have been made exempt by the Legislature, they are open for public inspection, regardless of whether they are in final form.²

The State Constitution authorizes exemptions to open government requirements and establishes the means by which these exemptions are to be established. Under Article I, s. 24(c) of the State Constitution, the Legislature may provide by general law for the exemption of records. A law enacting an exemption:

1. Must state with specificity the public necessity justifying the exemption;
2. Must be no broader than necessary to accomplish the stated purpose of the law;
3. Must relate to one subject;
4. Must contain only exemptions to public records or meetings requirements; and
5. May contain provisions governing enforcement.

¹ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

² *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).

Exemptions to public records requirements are strictly construed because the general purpose of open records requirements is to allow Florida's citizens to discover the actions of their government."³ The Public Records Act is liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.⁴

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.⁵ If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁶

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding \$500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding \$1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.⁷ For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother *who was a party* to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.⁸ The Second District Court of Appeal also has held that records which are exempt from public inspection may be subject to discovery in a civil action *upon a showing of exceptional circumstances* and if the trial court takes all precautions to ensure the confidentiality of the records.⁹

The Open Government Sunset Review Act of 1995 - Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review and repeal process for exemptions to public records or meetings requirements. Under s. 119.15(3)(a), F.S., a law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years. Further, a law that enacts or substantially amends an exemption must state that the exemption must be reviewed by the Legislature before the scheduled repeal

³ *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997).

⁴ *Krischer v. D'Amato*, 674 So.2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood*, 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); *Tribune Company v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987).

⁵ Attorney General Opinion 85-62.

⁶ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA), *review denied*, 589 SO.1 2d 289 (Fla. 1991).

⁷ *Department of Professional Regulation v. Spiva*, 478 So. 2d 382 (Fla. 1st DCA 1985).

⁸ *B.B. v. Department of Children and Family Services*, 731 So. 2d 30 (Fla. The DCA 1999).

⁹ *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So. 2d 1322 (Fla. 2d DCA 1990).

date. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records. An exemption is not substantially amended if the amendment narrows the scope of the exemption.

In the fifth year after enactment of a new exemption or the substantial amendment of an existing exemption, the exemption is repealed on October 2nd of the 5th year, unless the Legislature acts to reenact the exemption.

Under the requirements of the Open Government Sunset Review Act, an exemption is to be maintained only if:

- (a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.

As part of the review process, s. 119.15(4)(a), F.S., requires the consideration of the following specific questions:

- (a) What specific records or meetings are affected by the exemption?
- (b) Whom does the exemption uniquely affect, as opposed to the general public?
- (c) What is the identifiable public purpose or goal of the exemption?
- (d) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?

Further, under the Open Government Sunset Review Act, an exemption may be created or maintained only if it serves an identifiable public purpose. An identifiable public purpose is served if the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which 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; 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.

Further, the exemption must be no broader than is necessary to meet the public purpose it serves. In addition, the Legislature must find that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.

Medical Examiners and Autopsy Requirements – Ch. 406, F.S., which is entitled the *Medical Examiners Act*, provides for the creation of the Medical Examiners Commission within the Department of Law Enforcement. Commission members are appointed by the Governor. Pursuant to the requirements of the act, the commission has established medical examiner districts within the state. A district medical examiner is appointed by the Governor for each district.

The Medical Examiners Act specifies the circumstances under which a medical examiner of a district is required to perform an autopsy. Under s. 406.11(1)(a) 2., F.S., a medical examiner is required to perform an autopsy when any person dies in the state by accident. 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 of manner of death of the deceased or to obtain evidence necessary for forensic examination.

As 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 videos, are public records open to public inspection and may be copied.¹⁰

Classifications of Felonies and Misdemeanors – Felonies are classified, for the purpose of sentencing and other statutory purposes, in s. 775.081, F.S., into the following categories:

1. Capital felony;
2. Life felony;
3. Felony of the first degree;
4. Felony of the second degree; and
5. 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 5 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 not exceeding \$5,000 is authorized when the conviction is of a felony of the third degree.

¹⁰ 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.

III. Effect of Proposed Changes:

The CS makes confidential and exempt from the inspection and copying requirements of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution, photographs and video and audio recordings of autopsies, except that a surviving spouse, parent, or child of the deceased or their legal representative, or a state or federal agency in furtherance of its official duties, may view or copy such photographs or video or audio recordings. The custodian of the record or his or her designee may not permit any other person to view or duplicate the photo or video or audio recording without a court order.

Under the CS, the court, upon a showing of good cause, may issue an order authorizing any other person to:

- View the photo or video or audio recording of the autopsy, but not to copy it;
- View and copy it, but be required to maintain the confidentiality of it;
- View, copy, or publish it; or prescribe any other restrictions or stipulations that the court deems appropriate, including viewing, copying, or publishing only relevant portions of it.

In all these instances, the viewing, copying, or other handling of the photo or video must be under the direct supervision of the custodian of the record or his or her designee. The CS prescribes criteria that the court must consider when determining what constitutes good cause. A surviving spouse, parent, or child of the deceased or their legal representative must be a party to any proceeding by a third party requesting access to these records and requires the court to appoint counsel to represent an indigent family. The CS also provides that criminal and administrative proceedings are exempt from this section, but shall be subject to all other provisions of ch. 119, F.S.; however, nothing prohibits a court in a criminal or administrative proceeding from restricting the disclosure of autopsy photographs or crime scene video or audio recordings.

The CS makes it a felony of the third degree for any custodian of a photo or video or audio recording of an autopsy to knowingly violate the provisions of the section. It also provides a third degree felony penalty for anyone who knowingly violates a court order issued pursuant to this section. As a result, a person who violates the section could be imprisoned for the statutory maximum term of imprisonment not to exceed 5 years and could be fined up to \$5,000.

The CS makes the exemption subject to the Open Government Sunset Review Act.

In addition, the CS provides a statement of public necessity supporting the exemption. Photographs and videos and audio recordings of an autopsy show the deceased in graphic and often disturbing fashion. The deceased may be depicted nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. The existence of the World Wide Web and the proliferation of personal computers encourages and promotes the wide dissemination of photographs and videos 24-hours a day throughout the world. If autopsy photographs and videos and audio recordings were made generally available for public inspection and copying, they could be placed on the Internet, thereby subjecting the immediate family of the deceased to continuous trauma, sorrow, humiliation, or emotional injury, as well as injuring the memory of the deceased.

Therefore, the CS states that it is a public necessity that such records be made confidential and exempt from inspection and copying requirements. In order to preserve public oversight, the autopsy report, which includes drawings of injuries, remains available for public inspection and copying. Further, the CS permits a court to grant access to the photographs and videos and audio recordings of an autopsy upon a showing of good cause.

The act shall take effect upon becoming a law and shall apply to all autopsy photographs and video and audio recordings whether made before or after the effective date of the act. The CS provides a statement that the Legislature finds that the exemption should be given retroactive application because it is remedial in nature in that it furthers the public policy embodied in s. 382.008, F.S., (that all information on the death certificate relating to the cause of death is confidential). The exemption also mitigates the application of the public records law in circumstances in which the privacy interests of the surviving spouse, parent, or child of the deceased are most implicated.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This CS creates a public records exemption for a photograph or video or audio recording of an autopsy. It appears to meet the requirements of s. 24, Art. I of the State Constitution in that it states with specificity the public necessity justifying the exemption, it relates only to one subject, and it is no broader than necessary to accomplish the stated purpose of the law.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Criminal Justice Estimating Conference met on March 14, 2001, and determined that there is no prison bed impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Under this CS, medical autopsy photographs and video and audio recordings will become unavailable to the general public, except upon court order. Family members of a person who died in a violent way will be spared the additional trauma of having pictures showing that violence publicized.

Retroactive Application of Public Records Exemption - Retroactive or retrospective legislation refers to a law that changes the legal consequences of acts completed before its effective date. Neither the state constitution nor the federal constitution prohibits the enactment of legislation with retroactive effect.¹¹ Such legislation is therefore valid unless it is invalid for a reason other than its retrospective nature.¹² A retrospective law may work to a person's disadvantage, provided it does not deprive the person of any substantial right or protection.¹³

Retroactive or retrospective legislation is invalid if it impairs a substantive, vested right.¹⁴ After substantive rights vest, they cannot be adversely affected by subsequently enacted legislation. Further, due process considerations usually preclude the retroactive application of a law creating a substantive right¹⁵ or a retroactive abrogation of value.¹⁶ In determining the validity of a statute that retroactively abrogates a thing of value, courts weight the strength of the public interest served by the statute, the extent to which the right is abrogated, and the nature of the right affected.¹⁷

Remedial statutes that do not create new rights or take away vested rights, but only operate to further a remedy or confirm rights already existing, are not considered retrospective laws¹⁸ and may apply immediately to pending cases.¹⁹ As a general rule, the Legislature may ratify, validate, or confirm through a curative act anything that it could have authorized initially.²⁰ Curative legislation presumes that the Legislature has knowledge of the nature of the matters done and performed that it purports to validate, ratify, or confirm.²¹ A curative statute that attempts to validate any and all acts and doings of a municipal corporation, however, is too general to be effective as a valid exercise of legislative power. In other words, more specificity is required. In order to determine whether a constitutional change in the law rises to the level of

¹¹ *Yellow Cab Co. v Dade County* (1982, Fla. App. D3), 412 So. 2d 395, petition denied 424 So. 2d 764 (Fla).

¹² *McCord v. Smith* 43 So. 2d 704 (Fla. 1949).

¹³ *Blakenship v. Dugger* 521 So. 2d 1097 (Fla. 1988).

¹⁴ *Commercial Bldg. Co. v. Kelliher* 134 So. 209 (1931); *Serna v. Milanese, Inc.* 643 So. 2d 36 (1994, Fla. App D3 643).

¹⁵ *Florida Patient's Compensation Fund v. Scherer*, 558 So. 2d 411 (Fla. 1991).

¹⁶ *Dep't of Transp. V. Knowles*, 402 So. 2d 1155 (Fla. 1981).

¹⁷ *Dep't of Transp. V Knowles*, 402 So. 2d 1155 (Fla. 1981); *Hernandez v. Dep't of State*, 629 So. 2d 205 (1993, Fla. App. D3).

¹⁸ *North Bay Village v. Miami Beach*, 365 So. 2d 389 (1978, Fla. App. D3).

¹⁹ *El Portal v. Miami Shores*, 362 So. 2d 275 (Fla. 1978); *Florida Birth-Related Neurological Injury Compensation Sass's v. DeMarko*, 640 So. 2d 181 (1994, Fla. App D1).

²⁰ *State v. County of Sarasota*, 155 So. 2d 543 (Fla. 1963); *State v Haines City*, 188 So. 831, 137 Fla. 616 (1939); *Dover Drainage Dist. V. Pancoast*, 102 Fla. 267, 135 So. 518 (1931).

²¹ *Certain Lots, etc. v Monticello*, 159 Fla. 134, 31 So. 2d 905 (1947).

fundamental significance so to warrant retroactive relief, a court must consider the purpose to be served by the new rule, the extent of reliance on an old rule, and the effect on the administration of justice of a retroactive application of the new rule.²²

Normally, in determining whether a newly enacted exemption to the Public Records Act applies to a document, the critical date is the date the request for examination is made, without regard to the date the document came into existence. If, however, after a request for the document is made but before the request is complied with, the Legislature adopts an exemption that is remedial in nature, the exemption should be applied retroactively.²³ The Supreme Court has held that a new exemption to ch. 119, F.S., applies to records created prior to the enactment of the exemption, on the theory that “if a statute is found to be remedial in nature, it can and should be retroactively applied in order to serve its intended purposes.”²⁴

However, in a case filed after the adoption of Art. I, s. 24 of the State Constitution,²⁵ the Florida Supreme Court declined to rule on the constitutionality of an exemption enacted after a public records action had commenced and said “we reject the contention that the amended statute shall apply retroactively.” Nevertheless, the Fifth District Court of Appeal has certified the issue of retroactivity in a public records case to the Florida Supreme Court, noting that in that case, it was “arguable” that the Legislature intended the exemption to be remedial and thus retroactive. As of March 8, 2001, the Florida Supreme Court has not issued an order on the case.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

²² *State v. Oehling*, 750 So. 2d 109 (Fla. 5th DCA 1998), reh'g denied, (July 17, 1998).

²³ *News-Press Pub. Co. v. Kaune* (1987, Fla. App. D2), 511 So. 2d 1023, 12 FLW 1865, 2 BNA IER Cas 889).

²⁴ *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986); *Accord, Roberts v. Butterworth*, 668 So. 2d 580 (Fla. 1996).

²⁵ *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 384 (Fla. 1999).