

custodian is prohibited from releasing the records to any other person not authorized under the exemption without a court order. Knowingly violating these provisions is a third degree felony.

The public records exemption created in the bill is given retroactive application, with exceptions. The public records exemption created in the bill does not apply to any order in effect on July 1, 2011, which was duly entered by a court of this state and which restricts or limits access to any photograph or video or audio recording that depicts or records the killing of a person.

This bill creates an unnumbered section of the Florida Statutes.

II. Present Situation:

During the 2001 Legislative Session, the Legislature enacted s. 406.135, F.S., which provides a public records exemption for photographs, video and audio recordings of an autopsy held by a medical examiner.¹ These photographs, video and audio recordings are confidential and exempt from public disclosure except that a surviving spouse and other enumerated family members may obtain them.² In addition to the family members, local governmental entities and state and federal agencies may have access to these autopsy records by requesting in writing to view and copy them when such records are necessary in furtherance of that governmental agency's duties. Other than these exceptions, the custodian of the photographs or video and audio recordings is prohibited from releasing them to any other person not authorized under the exemption without a court order.

The Office of the Attorney General has issued a couple of opinions relating to the exemption for autopsy photographs, video and audio recordings. In one of the opinions, the Attorney General concluded that a medical examiner is authorized under s. 406.135, F.S., to show autopsy photographs or videotapes to public agencies for purposes of professional training or educational efforts if the identity of the deceased is protected, and the agency has made a written request.³

Another opinion reiterated this finding and expressly concluded that these photographs or videotapes may not be shown to private entities unless a court has made the requisite finding that good cause exists, and the family of the deceased has received the proper notification and opportunity to be heard at any hearing on the matter.⁴

The Attorney General Opinion, citing the Fifth District Court of Appeal case of *Campus Communications, Inc., v. Earnhardt*,⁵ concluded that the court can allow any person access to the autopsy photographs or videotapes when good cause is established, after evaluating the following criteria:

- whether disclosure is necessary to assess governmental performance;
- the seriousness of the intrusion on the deceased's family's right to privacy;

¹ Chapter 2001-1, s. 1, L.O.F.

² Chapter 2003-184, s. 1, L.O.F.

³ 2001-47 Fla. Op. Att'y Gen. 4 (2001).

⁴ 2003-25 Fla. Op. Att'y Gen. (2003).

⁵ 821 So. 2d 388 (Fla. 5th DCA 2002), *review dismissed* 845 So. 2d 894 (Fla. 2003), *review denied*, 848 So. 2d 1153 (Fla. 2003) *certiorari denied* 540 U.S. 1049 (2003).

- whether disclosure is the least intrusive means available; and
- the availability of similar information in other public records.⁶

In *Earnhardt*, the Fifth District Court of Appeal upheld the law exempting autopsy photographs against an unconstitutional overbreadth challenge brought by a newspaper. The court held that the newspaper had not established good cause to view or copy the photographs and that the exemption applied retroactively.⁷ The court found that s. 406.135, F.S., met constitutional and statutory requirements that the exemption is no broader than necessary to meet its public purpose, even though not all autopsy recordings are graphic and result in trauma when viewed. The court also found that the Legislature stated with specificity the public necessity justifying the exemption in ch. 2001-1, L.O.F.⁸

Furthermore, the court found the statute provides for disclosure of written autopsy reports, allows for the publication of exempted records upon good cause if the requisite statutory criterion is met, and is supported by a thoroughly articulated public policy to protect against trauma that is likely to result upon disclosure to the public.⁹

The court concluded that it is the prerogative of the Legislature to determine that autopsy photographs are private and need to be protected and that this privacy right prevails over the right to inspect and copy public records. The court also stated that its function is to determine whether the Legislature made this determination in a constitutional manner. Finding that the statute was constitutionally enacted and that it was properly applied to the facts in this case, the Fifth District Court of Appeal affirmed the lower court's finding of constitutionality.¹⁰

The Fifth District Court of Appeal certified the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.¹¹

Article I, s. 23 of the Florida Constitution provides that every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. Article I, s. 23 of the Florida Constitution also expressly states that the section "shall not be construed to limit the public's right of access to public records and meetings as provided by law." The public's right of access to public records and meetings in Florida is based in Article I, s. 24 of the Florida Constitution and is difficult to compare to the statutory federal right of access to public records and meetings under the Freedom of Information Act.¹²

Despite the substantial differences between state and federal law on the public's right of access to records and meetings, it is significant to note that relational or derivative privacy of families has also been asserted under federal law. The United States Supreme Court held that the Freedom of Information Act recognizes surviving family members' right to personal privacy

⁶ 2003-25 Fla. Op. Att'y Gen. 2, 3 (2003).

⁷ *Campus Communications, Inc.*, *supra* note 5.

⁸ *Id.* at 395.

⁹ *Id.* at 394.

¹⁰ *Id.* at 403.

¹¹ 848 So. 2d 1153 (Fla. 2003).

¹² 5 U.S.C.A. § 552.

with respect to their close relative's death-scene images and that the decedent's family's privacy interest outweighed public interest in disclosure.¹³ The Freedom of Information Act provides an exemption for information if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁴ The U.S. Supreme Court articulated a two-prong test for a person requesting disclosure under the Freedom of Information Act when privacy concerns addressed by the exemption are present: 1) the person requesting the information must show that a significant public interest in the requested information exists, and 2) the person requesting the information must demonstrate that disclosure of the information is likely to advance that significant public interest.¹⁵ If the requester fails to meet the test, "the invasion of privacy is unwarranted."¹⁶

III. Effect of Proposed Changes:

This bill creates an exemption from public records requirements for photographs and video and audio recordings that depict or record the killing of a person. The exemption is comparable to the public record exemption in s. 406.135, F.S., relating to photographs and video and audio recordings of an autopsy held by a medical examiner.

Section 1 of the bill:

- Defines "killing of a person" to mean "all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death."
- Permits a surviving spouse to view, listen to, and copy these photographs and video and audio recordings. If there is no surviving spouse, then the deceased's surviving parents may view, listen to, and copy them. If there are no surviving parents, then an adult child of the deceased may view, listen to, and copy them. The surviving relative who has the authority to view, listen to, and copy these records is authorized to designate in writing any person to view, copy, or publish them.
- Allows access to these records by federal, state, and local governmental agencies, upon written request, in the performance of their duties. Other than these exceptions, the custodian is prohibited from releasing the records to any other person not authorized under the exemption without a court order.
- Allows other persons who are not covered by the exceptions above to have access to the photos and recordings only with a court order upon a showing of good cause, and limited by any restrictions or stipulations that the court deems appropriate. In determining good cause, the court must consider the following:

¹³ *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). See Samuel A. Terilli and Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL'Y 313, 323-26 (Summer 2005).

¹⁴ 5 U.S.C.A. § 552(b)(7).

¹⁵ *National Archives and Records Administration*, 541 U.S. at 172.

¹⁶ *Id.*

- whether such disclosure is necessary for the public evaluation of governmental performance;
- the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and
- the availability of similar information in other public records, regardless of form.
- Requires that specified family members are given reasonable notice of a petition for access to photographs, video and audio recordings that depict or record the killing of a person, as well as a copy of the petition and the opportunity to be heard. Such access, if granted by the court, must be performed under the direct supervision of the custodian of the record or his or her designee.
- Provides that it is a third degree felony for any custodian of a photo, video or audio recording that depicts or records the killing of a person to willingly and knowingly violate the provisions of this section. It also provides a third degree felony penalty for anyone who willingly and knowingly violates a court order issued under this section. (A third degree felony is punishable by imprisonment not to exceed five years and/or a fine up to \$5,000.)
- 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 a killing, crime scene, or similar photograph or video or audio recording.
- Provides for retroactive application of the exemption because it is remedial in nature.
- Provides an exception to the retroactive application of the public records exemption created in the bill for any order in effect on July 1, 2011, which was duly entered by a court of this state and which restricts or limits access to any photograph or video or audio recording that depicts or records the killing of a person.
- Makes the exemption subject to the Open Government Sunset Review Act and, as such, repeals it on October 2, 2016, unless reviewed and reenacted by the Legislature.

Section 2 of the bill provides a similar public necessity statement justifying the exemption as was used when creating the autopsy photographs and recordings exemption. The justification statement is as follows:

... photographs or video or audio recordings that depict or record the killing of any person render a visual or aural representation of the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings provide a view of the deceased in the final moments of life, often bruised, bloodied, broken, with bullet wounds or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings that depict or record the killing of any person are highly sensitive representations of the deceased which, if heard, viewed, copied, or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature recognizes

that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of such photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further recognizes that there continue to be other types of available information, such as crime scene reports, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight.

The Legislature additionally finds that the exemption provided in this act should be given retroactive application, except as otherwise provided in the act, because it is remedial in nature.

Section 3 of the bill provides an effective date of July 1, 2011.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

In *Campus Communications, Inc., v. Earnhardt*,¹⁷ the Fifth District Court of Appeal upheld a similar law exempting autopsy photographs and video and audio recordings against an unconstitutional overbreadth challenge brought by a newspaper (see details in Present Situation). The court went on to certify the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.¹⁸

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

¹⁷ *Campus Communications, Inc.*, 821 So. 2d at 403.

¹⁸ *Campus Communications, Inc. v. Earhardt*, 845 So. 2d 894 (Fla. 2003), *review denied*, 848 So. 2d 1153 (Fla. 2003) *certiorari denied* 540 U.S. 1049 (2003).

C. Government Sector Impact:

Senate Bill 416 was on the March 2nd Criminal Justice Impact Conference agenda, and the fiscal impact was deemed insignificant because of low volume and because of the unranked third degree felonies.¹⁹

The Office of the State Courts Administrator has indicated that the bill will likely increase the number of hearings where parties will attempt to gain access to the material exempted under the bill. An additional workload is expected in providing surviving family members with notice of the hearing on disclosure. The fiscal impact of the bill cannot be accurately determined because it unclear how many hearings may be requested for the material exempt from disclosure under the bill.²⁰

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation has expressed concerns with the bill, primarily that it will result in restricted oversight of governmental action and less accountability:

As you may recall, in January of 2006, Martin Lee Anderson, a resident of the Bay County Boot Camp, which was operated by the Bay County Sheriff's Office, died a day after entering boot camp from suffocation. A videotape of the events surrounding his death, specifically the activities of boot camp employees, resulted in the Legislature closing boot camps, but only after the news media and others made the video public. Also, in 1990, the execution of Jesse Joseph Tafero was botched causing his head to catch fire. Videos or photos of this event would be protected under this bill, also limiting oversight. Further, under the bill, traffic stops by law enforcement officers which end up with the officer, driver or other passengers being killed would be protected, making it more difficult to determine what really resulted in any of their deaths....

While we do not wish to disparage government officers or employees, experience has shown us that private citizens and the news media are sometimes required to ensure that bad actors are caught and punished or policies changed. This bill restricts that opportunity by requiring activists and the media to have to go to court to view or copy the records, to rely upon a judge to grant them their right to view or copy the record, and by requiring requestors to have to pay court costs and fees to exercise a constitutional right of access.²¹

¹⁹ Office of Economic and Demographic Research, The Florida Legislature, Criminal Justice Impact Conference (Mar. 2, 2011) (The Criminal Justice Impact Conference Results are available at: <http://edr.state.fl.us/Content/conferences/criminaljusticeimpact/index.cfm> (last visited on Apr. 10, 2011).

²⁰ Office of the State Courts Administrator, Judicial Impact Statement on SB 416, (Feb. 3, 2011) (on file with the Senate Committee on Judiciary). (Subsequent amendments adopted on SB 416 do not appear to significantly change the fiscal impact of the legislation on the courts).

²¹ Letter from the First Amendment Foundation to Senator Bogdanoff Re SB 416, dated February 25, 2011 (on file with the Senate Committee on Criminal Justice).

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on April 12, 2011:

The committee substitute provides an exception to the retroactive application of the public records exemption created in the bill. The public records exemption does not apply to any order in effect on July 1, 2011, which was duly entered by a court of this state and which restricts or limits access to any photograph or video or audio recording that depicts or records the killing of a person.

CS by Criminal Justice on March 28, 2011:

Allows the surviving relative who has the authority to view, listen to, and copy these records to designate in writing any other person to view, copy, or publish them (rather than the current authorization to designate an agent to obtain the records for the surviving relative).

- B. **Amendments:**

None.