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Committee on Criminal Justice

Senator Stephen R. Wise, Chair

OPEN GOVERNMENT SUNSET REVIEW OF S. 406.135, F.S., AUTOPSY RECORDS

SUMMARY

Chapter 2001-1, s. 1, L.O.F., created s. 406.135, F.S., a public records exemption for photographs, video and audio recordings of an autopsy held by a medical examiner. These records are confidential and exempt from public disclosure except that a surviving spouse may obtain them. If there is no surviving spouse, then the deceased's surviving parents may view and copy them. If there are no surviving parents, then an adult child of the deceased may view and copy them. Moreover, the surviving relative who has the authority to view and copy these autopsy photographs or video and audio recordings is authorized to designate in writing an agent to obtain them. (ch. 2003-184, s. 1, L.O.F.)

In addition to the next of kin as described above, 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. But 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. This section will expire October 2, 2006, unless the Legislature reviews and reenacts it.

Based upon current case law upholding the statute creating the exemption, the clear legislative intent language concerning the compelling public necessity of this exemption, and the survey responses from medical examiners, it is recommended that s. 406.135, F.S., be reenacted, but with a modification. This modification should allow autopsy photographs, video and audio recordings that have been expunged of all individual identifying features and any individual identification to be used by medical examiners for bona fide teaching, research, and investigative purposes.

BACKGROUND

Constitutional Access to Public Records

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 State Constitution authorizes exemptions to open records and meetings 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 provided that: (1) the law creating the exemption states with specificity the public necessity justifying the exemption; and (2) the exemption is no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption is permitted to contain only exemptions to public records or meetings requirements and must relate to one subject.

The Open Government Sunset Review Act

Section 119.15, F.S., the *Open Government Sunset Review Act*, establishes a review and repeal process for exemptions to public records or meetings requirements. 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. Section 119.15(3), F.S., requires a law that enacts a new exemption or substantially amends a new exemption to state that the exemption is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal 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.” Section 119.15(4)(b), F.S.

In the year before the repeal of an exemption, the Division of Statutory Revision is required to certify to the President of the Senate and the Speaker of the House of Representatives each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in the section. Any exemption that is not identified and certified is not subject to legislative review and repeal under s. 119.15, F.S. If the division fails to certify an exemption that it subsequently determines should have been certified, it is required to include the exemption in the following year’s certification after that determination.

Section 119.15(6)(a), F.S., requires as part of the review process 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?
- (e) Is the record or meeting protected by another exemption?
- (f) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

Additionally, under s. 119.15(6)(b), F.S., an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and it 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:

(a) Does the exemption allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption?

(b) Does the exemption protect 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 paragraph, only information that would identify the individuals may be exempted.

(c) Does the exemption protect 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?

Under s. 119.15(8), F.S., notwithstanding s. 768.28, F.S., or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under the section. The failure of the Legislature to comply strictly with the section does not invalidate an otherwise valid reenactment.

Exemption from Public Records for Photographs, Video and Audio Recordings of an Autopsy

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.

During the 2001 Legislative Session, the Legislature enacted s. 406.135, F.S., which provided a public records exemption for photographs, video and audio recordings of an autopsy held by a medical examiner. (Ch. 2001-1, s. 1, L.O.F.) A “medical examiner” is defined to mean:

. . . any district medical examiner, associate medical examiner, or substitute medical examiner, associate

medical examiner, or substitute medical examiner acting pursuant to ch. 406, 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.

These photographs, video and audio recordings are confidential and exempt from public disclosure except that a surviving spouse may obtain them. If there is no surviving spouse, then the deceased's surviving parents may view and copy them. If there are no surviving parents, then an adult child of the deceased may view and copy them. Moreover, the surviving relative who has the authority to view and copy these autopsy photographs or recordings is authorized to designate in writing an agent to obtain them. (ch. 2003-184, s. 1, L.O.F.)

In addition to the next of kin as described above, 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. But 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.

These other persons who are not covered by the exceptions above may have access to the autopsy 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:

- 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.

Specified family members are required to be given reasonable notice of a petition for access to autopsy photographs, video and audio recordings, 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.

Subsection 406.135(3), F.S., provides that it is a third degree felony for any custodian of a photo, video or audio recording of an autopsy 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. As a result, a violator could be imprisoned for the statutory maximum term of imprisonment not to exceed 5 years and could be fined up to \$5,000.

In enacting ch. 2001-1, s. 1, L.O.F., the Legislature made the following statement of public necessity:

... that the photographs and video and audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased in graphic and often disturbing fashion (nude, bruised, bloodied, broken, cut open, dismembered, or decapitated) that, if copied and publicized on the World Wide Web or in written publications, could result in continuous trauma, sorrow, humiliation, or emotional 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. Further . . . there continue to be other types of available information, such as the written autopsy report (which typically includes drawings), that are less intrusive and injurious to the immediate family of the deceased and continue to provide for public oversight. And . . . the exemption should be given retroactive application because it is remedial in nature.

This section will expire October 2, 2006, unless the Legislature reviews and reenacts it.

METHODOLOGY

Staff reviewed relevant statutory provisions, researched pertinent case law, and surveyed medical examiners during the review process. (The survey responses are on file with the Senate Criminal Justice Committee in Room 510, Knott Building, Tallahassee, Florida.)

FINDINGS

Medical Examiner Survey Responses

Surveys were sent to 22 medical examiners around the state. Out of this number, 15 medical examiners responded to the survey. Essentially, 12 medical examiners indicated that if the exemption is reenacted,

it should be revised to allow them to use autopsy photographs, audio and video recordings for the following bona fide purposes (as long as all identifying information has been expunged and any identifiable features have been made anonymous):

- teaching and training relevant persons including medical and forensic students and other scientific professionals, law enforcement personnel, forensic science practitioners, attorneys, and criminal investigators;
- consulting with medical and scientific experts in the field of forensic science, medical and/or public health; and
- researching and publishing in the field of medicine, forensic science, or public health protection.

Without this recommended modification to the existing exemption, the respondents indicated the exemption is overly broad. The consensus seems to be that the exemption as currently written negatively affects the medical examiners' ability to use these photographs for legitimate scientific and educational purposes, even when the identity of the deceased is adequately protected and concealed. Not being able to use these exempted photographs to teach or educate physicians, nurses, medical and nursing students, law enforcement officers, and emergency medical personnel does a disservice to the public, according to the respondents.

Notwithstanding this suggested modification, the other three medical examiners who responded to the survey did not recommend reenacting the exemption because of its sweeping nature.

Out of the 15 medical examiners who answered the survey, six indicated that the exempted photographs are protected during the time they are part of an active criminal investigation under s. 119, F.S. (Eight respondents indicated that these photographs are not protected by another exemption.) All 15 agreed that there are not multiple exemptions for these photographs that need to be merged. They also agreed that the photographs can not be readily obtained by alternative means (they must be obtained by a court order showing good cause). Several did note that the autopsy report, which typically includes drawings, is available for the public's review.

There was also agreement among all the respondents that this exemption is not necessary for the effective

and efficient administration of a governmental program, nor does it affect confidential information concerning an entity. In contrast, nine medical examiners indicated that the photographs are of a sensitive and/or personal nature concerning individuals (in particular, the family of the deceased); four indicated it depends upon each case and/or the surrounding circumstances; and two indicated the exempted photographs are not personal to the deceased.

When responding to the question about whether the release of such protected information would be defamatory or cause unwarranted damage to the reputation of such individuals or jeopardize the safety of such individuals, 12 medical examiners responded no and three responded yes. Examples of typical comments that were raised in response to this question include the following:

- improper disclosure of the autopsy photographs may be seen by the family or the public as demeaning or defamatory to the deceased (especially photographs showing sexual or unusual tattoos, abnormal genitalia, or particularly deforming injuries or conditions);
- autopsy photographs are not defamatory, they are factual;
- autopsy photographs document factual and physical data and inaccurately or falsely interpreting this data could be construed as harmful;
- in a multi-ethnic, multi-religion and multi-cultured society, the publication of autopsy photographs may not be considered acceptable; and
- this exemption is intended to protect the family of the deceased and while it is useful not to allow these photographs to be put on the Internet or in tabloid newspapers, these photographs are not defamatory or personal or sensitive to the deceased, but to the next of kin.

According to the respondents, during the course of a death investigation, photographs of the deceased's body are taken to document any identifying features such as tattoos, scars, jewelry, and clothing. Photographs are also taken to document any wounds and their pathways, as well as diseases in organs. Pictures of the body are taken before and after the cleaning process. It is common practice to photograph

the whole body, including the front and back of the body, as well as any injuries or diseases (which usually necessitates close up internal and/or external pictures).

These autopsy photographs are then identified by their case number, which is included on the photograph, and then made part of the retained case file. Respondents indicated they most commonly use extrachrome transparencies or print film for an autopsy photograph, although digital photography is also being used instead of the traditional transparencies.

Most medical examiners dictate their findings onto recording tape which is transcribed to a typed report. The tapes are then erased and are available to be used again for transcription. According to the respondents, it is not common practice for medical examiners in Florida to use videography to record an autopsy, nor to use audio recordings as a permanent record of an autopsy.

Pertinent Legal Research

The Office of the Attorney General has authored two opinions that are relevant to the exemption for autopsy photographs, video and audio recordings. In the first opinion, AGO 2001-47, 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. AGO 2001-47 at 4.

The second opinion, AGO 2003-25, 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.

The Attorney General Opinion, citing *In Campus Communications, Inc., v. Earnhardt*, 821 So.2d 388 (Fla. 5th DCA 2002), *review denied*, 848 So.2d 1153 (Fla. 2003), 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;
- whether disclosure is the least intrusive means available; and
- the availability of similar information in other public records.

AGO 2003-25 at 2, 3.

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 went on to hold that the newspaper had not established good cause to view or copy the photographs and that the exemption applied retroactively. *Id.* 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.

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. *Id.* at 5, 6.

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. *Id.* at 12. 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. 848 So.2d 1153 (Fla. 2003).

RECOMMENDATIONS

It is recommended that s. 406.135, F.S., creating an exemption for autopsy photographs, video and audio recordings, be reenacted, but with a modification. This statutory modification should allow autopsy photographs, video and audio recordings that have been expunged of all individual identifying features and any individual identification to be used by medical examiners for bona fide teaching, research, and investigative purposes. This recommendation is based upon current case law upholding the constitutionality of the statute creating the exemption, the clear legislative intent language concerning the compelling public necessity for this particular exemption, and the survey responses received from medical examiners.