



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### District Medical Examiners

The Governor appoints a district medical examiner for each medical examiner district from nominees who are practicing physicians in pathology. The Medical Examiners Commission<sup>1</sup> submits the nominations to the Governor.<sup>2</sup>

Each district medical examiner may appoint as many physicians as necessary to serve as associate medical examiners. The associate medical examiner serves at the pleasure of the district medical examiner and, when necessary, provides "service at all times and all places within the district."<sup>3</sup>

The district medical examiner has the authority to perform or have performed whatever autopsies<sup>4</sup> or laboratory examinations he or she deems necessary and in the public interest.<sup>5</sup> 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.<sup>6</sup>

##### District Medical Examiner Records

The district medical examiner must maintain duplicate copies of records and the detailed findings of autopsy and laboratory investigations.<sup>7</sup>

##### Public Records Exemption

A photograph or video or audio recording of an autopsy in the custody of a medical examiner<sup>8</sup> is confidential and exempt<sup>9</sup> from public records requirements.<sup>10</sup> A surviving spouse may view and copy a

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<sup>1</sup> The Medical Examiners Commission is created within the Department of Law Enforcement (s. 406.02(1), F.S.) The commission establishes medical examiner districts within the state (s. 406.05, F.S.)

<sup>2</sup> Section 406.06(1)(a), F.S.

<sup>3</sup> Section 406.06(2), F.S.

<sup>4</sup> A medical examiner is required to perform an autopsy when any person dies 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. Section 406.11(11)(a), F.S.

<sup>5</sup> Section 406.11(2)(a), F.S.

<sup>6</sup> Section 406.15, F.S.

<sup>7</sup> Section 406.13, F.S.

<sup>8</sup> For purposes of the exemption, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to chapter 406, F.S. The term also includes 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. Section 406.135(1), F.S.

<sup>9</sup> There is a difference between records that are exempt from public records requirements and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such record cannot be released by an agency to anyone other than to the persons or entities designated in the statute. See Attorney General Opinion 85-62. If a record is simply made exempt from disclosure

photograph or video recording or listen to or copy the audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents have access to such records. If there is no surviving spouse or parent, then an adult child has access to such records. The surviving relative with whom authority rests to obtain confidential and exempt autopsy records may designate in writing an agent to obtain those records.<sup>11</sup>

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy. The identity of the deceased must remain confidential and exempt.<sup>12</sup>

The custodian of such records may not permit any other person to view or copy an autopsy photograph or video recording or to listen to or copy the audio recording without a court order.<sup>13</sup> A person must file a petition and obtain a court order in order to view, listen to, or copy such records. A surviving spouse must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased.<sup>14</sup> Upon a showing of good cause,<sup>15</sup> the court may issue an order authorizing a person to view or copy a photograph or video recording of an autopsy or to listen to or copy the audio recording.<sup>16</sup>

This public records exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, it appears to apply to such information submitted as part of a civil proceeding.<sup>17</sup> In *Sarasota Herald-Tribune v. State*,<sup>18</sup> the Second District Court of Appeal found that the public records exemption for autopsy photographs and video and audio recordings does not apply to a criminal proceeding because the statute specifically exempts criminal court proceedings from its application.

It is a third degree felony for any:

- Custodian of such photograph or video or audio recording who willfully and knowingly violates the provisions of the exemption.<sup>19</sup>
- Person who willfully and knowingly violates a court order issued pursuant to s. 406.135, F.S.<sup>20</sup>

Pursuant to the Open Government Sunset Review Act,<sup>21</sup> the exemption will repeal on October 2, 2006, unless reenacted by the Legislature.

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requirements, an agency is not prohibited from disclosing the record in all circumstances. See *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

<sup>10</sup> Section 406.135(1), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Section 406.135(2)(b), F.S.

<sup>15</sup> In determining good cause, the court must consider whether 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. In all cases, the viewing, copying, or listening must be under the direct supervision of the records custodian. Section 406.135(2)(a), F.S.

<sup>16</sup> Section 406.135(2)(a), F.S.

<sup>17</sup> Section 406.135(3)(c), F.S.

<sup>18</sup> 2005 WL 3112545 (Fla. App. 2 Dist.)

<sup>19</sup> Section 406.135(3)(a), F.S.

<sup>20</sup> Section 406.135(3)(b), F.S.

<sup>21</sup> Section 119.15, F.S.

## **Effect of Bill**

The bill removes the repeal date, thereby reenacting the public records exemption. It also reorganizes the section and makes editorial changes.

### **C. SECTION DIRECTORY:**

Section 1 amends s. 406.135, F.S., to remove the October 2, 2006, repeal date.

Section 2 provides an October 1, 2006, effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

This bill does not create, modify, amend, or eliminate a state revenue source.

#### **2. Expenditures:**

This bill does not create, modify, amend, or eliminate a state expenditure.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

This bill does not create, modify, amend, or eliminate a local revenue source.

#### **2. Expenditures:**

The bill may represent a minimal non-recurring positive impact on local government expenditures. A bill enacting or amending a public records exemption causes a non-recurring negative fiscal impact in the year of enactment because of training employees responsible for replying to public records requests. In the case of bills reviewed under the Open Government Sunset Review process, training costs are incurred if the bill does not pass or if the exemption is amended, as retraining is required. Because the bill eliminates the repeal of the exemption, local governments may recognize a minimal nonrecurring decrease in expenditures because employee-training activities are avoided.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

### **D. FISCAL COMMENTS:**

None.

## **III. COMMENTS**

### **A. CONSTITUTIONAL ISSUES:**

#### **1. Applicability of Municipality/County Mandates Provision:**

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. The bill does not reduce the percentage of a state tax shared with counties or municipalities. The bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

Article I, s. 24(c) of the State Constitution, requires that an exemption be no broader than necessary to accomplish its stated purpose.

In *Campus Communications, Inc., v. Earnhardt*,<sup>22</sup> the Fifth District Court of Appeal upheld the public records exemption for autopsy photographs and video and audio recordings against an unconstitutional over breadth challenge. The court found that the exemption met the constitutional requirement that the exemption be no broader than necessary to meet its public purpose. The court also found that the legislature stated with specificity the public necessity justifying the exemption.

The Fifth District Court of Appeal certified the question of constitutionality to the Florida Supreme Court. In July 2003, the Florida Supreme Court denied review of the case, leaving in place the appellate court ruling.<sup>23</sup>

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments – Civil Proceedings

The current public records exemption does not apply to autopsy photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, a civil proceeding is not included in the exception. In order to create uniformity, the inclusion of civil proceedings in the list of exceptions is recommended.

Other Comments - Open Government Sunset Review Act

The Open Government Sunset Review Act sets forth a legislative review process for newly created or substantially amended public records or public meetings exemptions. It requires an automatic repeal of the exemption on October 2<sup>nd</sup> of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.

The Act provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following purposes:

- Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protecting sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety. However, only the identity of an individual may be exempted under this provision; or,
- Protecting trade or business secrets.

If, and only if, in reenacting an exemption that will repeal, the exemption is expanded (essentially creating a new exemption), then a public necessity statement and a two-thirds vote for passage are required because of the requirements of Art. 1, s. 24(c), Florida Constitution. If the exemption is reenacted with grammatical or stylistic changes that do not expand the exemption, if the exemption is narrowed, or if an exception to the exemption is created (e.g., allowing another agency access to the confidential or exempt records), then a public necessity statement and a two-thirds vote for passage are not required.

<sup>22</sup> 821 So.2d 388 (Fla. 5<sup>th</sup> DCA 2002), *review denied*, 848 So.2d 1153 (Fla. 2003).

<sup>23</sup> 848 So.2d 1153 (Fla. 2003).

#### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.