

2001

Session Law 01-001

Florida Senate & House of Representatives

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DATE: August 2, 2001

****AS PASSED BY THE LEGISLATURE****
CHAPTER #: 2001-1, Laws of Florida

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

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

19
3312
HB 1083

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

- (1) STATE ADMINISTRATION YEAS 3 NAYS 2
- (2)
- (3)
- (4)
- (5)

I SUMMARY

On March 29, 2001, HB 1083 was approved by the Governor and became law as Chapter 2001-1, Laws of Florida (the "act"). The effective date of the act is March 29, 2001.

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 and audio recordings, are public records open to public inspection and may be copied.

This act creates a public records exemption for autopsy photographs, video recordings, or audio recordings in the custody of a medical examiner, defines "medical examiners," and provides for exceptions to the exemption.

A person must file a petition and obtain a court order in order to view, listen to, or copy such exempt information. A surviving spouse must be given 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 children of the deceased.

This act makes it a felony of the third degree for a custodian of an autopsy photograph, video recording, or audio recording, to willfully and knowingly violate the provisions of this act. Any person who willfully and knowingly violates a court order commits a felony of the third degree.

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.

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

II SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES

- 1 Less Government Yes No N/A
- 2. Lower Taxes Yes No N/A
- 3. Individual Freedom Yes No N/A
- 4 Personal Responsibility Yes No N/A
- 5 Family Empowerment Yes No N/A

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 or audio recordings of the autopsy. Such photographs or video or audio 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 or audio 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 accident;⁶
- 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 agreed to temporarily block their release The judge then ordered the parties to meet and to try to resolve their dispute After 18 hours of negotiations over two days, the parties involved reached a settlement that allowed an independent expert to view the autopsy photos of the racing legend before they were permanently sealed

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 investigations⁸. 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 copied⁹.

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 act creates a public records exemption for a photograph or video or audio recording of an autopsy in the custody of a medical examiner. This act defines "medical examiner" as

any district 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

This act provides that a surviving spouse may view and copy a photograph or video recording or listen to or copy an 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 must have access to such records.

In addition, this act provides that a local governmental entity or a state or federal agency may view or copy such photograph or video or may listen to or copy such audio recording pursuant to written request. The identity of the deceased must remain confidential and exempt unless otherwise required in the performance of their duties.

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.

A custodian of such records, or his or her designee, may not permit any other person to view or copy such photograph or video recording or listen to or copy such audio recording without a court order

A person must file a petition and obtain a court order in order to view or copy such confidential and exempt information. A surviving spouse must be given 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 children of the deceased.

Upon a showing of good cause, the court may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy. The act states that in determining good cause, the court must consider

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

In addition, the court may prescribe any restrictions or stipulations that it deems appropriate

This act provides that a criminal or administrative proceeding is exempt from this section,

but unless otherwise exempted, is subject to all provisions of Chapter 119, Florida Statutes, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime-scene, or similar photograph or video or audio recordings in the manner prescribed herein

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 and audio recordings are made available to the public

This act makes it a felony of the third degree for any custodian of a photograph or video or audio recording of an autopsy who "willfully and knowingly" violates the provisions provided herein. In addition, this act makes it a felony of the third degree for any person who "willfully and knowingly" violates a court order as described herein. A person who violates this section could be imprisoned for a term not to exceed five years¹⁰ and may be fined up to \$5,000.¹¹

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 "

¹⁰ Section 775.082(3)(d), F.S.

¹¹ Section 775.083(1)(c), F.S.

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 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 act 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 act 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 act does not reduce the percentage of a state tax shared with counties or municipalities

V COMMENTS

A. CONSTITUTIONAL ISSUES

None

B. RULE-MAKING AUTHORITY

None.

C. OTHER COMMENTS:

On July 11, 2001, the Attorney General issued Attorney General Opinion (AGO) 2001-47, in response to a request from the Hillsborough County Attorney, regarding this act. AGO 2001-47 stated

- Upon receipt of a written request from the agency, the medical examiner may show autopsy photographs as part of professional training for public agencies, provided that such training furthers the official duties of the agency. Unless otherwise required in the furtherance of the agency's duties, the identity of the deceased is shielded
- When showing autopsy photographs for professional training, the medical examiner should not disclose the name of the deceased and should take steps to shield the decedent's identity
- The term "autopsy photographs and recordings" does not include crime scene photographs
- The exemption applies to autopsy photographs and recordings whether the next of kin of the decedent has been located or not. A petitioner seeking a court order to obtain access to an autopsy photograph or recording is responsible for providing such reasonable notification to next of kin as may be required by the court.
- Those seeking to have access to autopsy photographs and recordings for civil proceedings must obtain a court order unless they are a surviving family member entitled to obtain such record without a court order

Several news organizations oppose this act. 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.¹² Opponents of this act believe the restrictions being placed on autopsy photos and video recordings are a "big mistake."¹³ Barbara Petersen, Executive Director of the First Amendment Foundation in Tallahassee, said "[t]hese records are critical to the public's right of oversight."¹⁴ 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."¹⁵

¹² ESPN.com, "Fans respond with angry calls, e-mails," March 6, 2001

¹³ 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.

¹⁴ *Tallahassee Democrat*, "Earmhardt Family Protection Act filed in House," March 8, 2001

¹⁵ ESPN.com, "Fans respond with angry calls, e-mails," March 6, 2001

The Medical Examiners Commission is also opposed to this act. They have expressed a major concern with this exemption. The Medical Examiners Commission is concerned that now they will be unable to use autopsy photographs in training seminars, medical journals, and professional publications.¹⁶

Proponents of this act "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."¹⁷ 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."¹⁸ 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."¹⁹

VI AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES

On March 15, 2001, the Committee on State Administration heard HB 1083 and adopted a strike-all amendment. This strike-all amendment is traveling with the bill.

The strike-all amendment also creates a public records exemption for autopsy photographs and video recordings, however, the exemption applies to records held by the district medical examiner. It provides exceptions to the exemption for certain family members, local government, state agencies, and federal agencies, whereas the bill only provides exceptions to state and federal agencies.

The amendment allows a person to petition the court for an order to inspect the autopsy photographs and video recordings. The petitioner must show good cause, and certain notice provisions must be met. The bill did not grant access for inspection by means of court order and it did not provide certain notice provisions.

The amendment allows both the district and associate medical examiner to use the autopsy photographs or video recordings for the purpose of seeking another expert medical opinion. It also allows them to use the records when providing professional training or performing case-related medical or scientific research, so long as the identity of the deceased remains confidential and exempt. The bill did not allow a medical examiner to seek another expert medical opinion, nor did it allow a medical examiner to use autopsy photos and video recordings for purposes of training and research.

The amendment makes it a third degree felony for any person who "willfully or knowingly" violates the provisions of this strike-all amendment. Any person who "willfully or knowingly" violates these provisions could be imprisoned for a term not to exceed five years and may be fined up to \$5,000. The bill made it a third degree felony for any person who violated the provisions of the bill, whether or not it was "willfully and knowingly."

The amendment expressly states that its provisions are to be given retroactive application.²⁰ The exemption is made subject to the Open Government Sunset Review Act of 1995, and, accordingly, the exemption will repeal on October 2, 2006, unless reviewed and reenacted by the Legislature.

¹⁶ Dr. Stephen Nelson, Chairman, Medical Examiners Commission, March 9, 2001, telephone conference.

¹⁷ *Tallahassee Democrat*, "Eamhardt Family Protection Act filed in House," March 8, 2001, quote from a letter by Teresa Eamhardt.

¹⁸ *CNN Sports Illustrated*, "Help from high places," March 7, 2001, cnn.com.

¹⁹ *Id.*

²⁰ In the case of *City of Orlando v. Desjardins*, the judge found that "[i]f a statute is found to be remedial in nature it can and should be retroactively applied in order to serve its intended purposes." In addition, the judge found that "[t]he statutory exemption, according temporary protection from the disclosure of sensitive documents, is addressed to precisely the type of '[r]emedial rights [arising] for the purpose of protecting or enforcing substantive rights.'" 493 So. 2d 1028 (Fla. 1986). See also *Cebrian v. Klein*, 614 So. 2d 1209 (Fla. 4th DCA 1993).

On March 22, 2001, HB 1083 was read a second and third time on the floor, and a strike-all amendment was adopted. Please refer to the *House Journal*, page 337, for further details.

VII SIGNATURES

COMMITTEE ON STATE ADMINISTRATION

Prepared by

Staff Director

Heather A. Williamson, M.S.W.

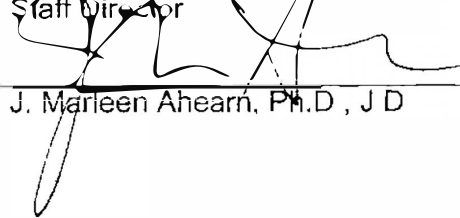
J. Marleen Ahearn, Ph.D., J.D.

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON STATE ADMINISTRATION:

Prepared by

Staff Director


Heather A. Williamson, M.S.W.


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

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 SB 1356
SPONSOR Senators King and Posey
SUBJECT Public Records Exemption, Autopsy Photographs and Videos
DATE March 9, 2001 REVISED _____

FILE COPY

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1	Dugger <i>D.W.</i>	Cannon <i>[Signature]</i>	CJ	
2.			GO	
3.				
4				
5.				
6.				

18 2462

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 bill makes confidential and exempt photographs and videos of an autopsy. The bill notes that photographs and video 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 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 bill makes it a felony of the third degree to violate the provisions of the section. The bill is effective upon becoming law.

This bill 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.

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

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

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

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. 2^d DCA 1986) *review denied sub nom., Gillum v. Tribune Company*, 503 So. 2d 327 (Fla. 1987)

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.

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 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:

⁵ Attorney General Opinion 85-62

⁶ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA) review denied, 589 So. 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. 1st DCA 1999)

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

- (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. Under s. 406.11(2)(a), F.S., 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,
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.

III.- **Effect of Proposed Changes:**

The bill 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 videos of autopsies. A state or federal agency that is authorized to have access to the documents by any provision of law must be granted access in furtherance of that agency's statutory duties.

The bill also makes it a felony of the third degree to violate the provisions of the section. As a result, a person who violates the section could be imprisoned for a term not to exceed 5 years and be fined up to \$5,000.

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.

The bill also makes the exemption subject to the Open Government Sunset Review Act

The bill also provides a statement of public necessity supporting the exemption. Photographs and videos 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 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, 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 bill permits a court to grant access to the photographs and videos of an autopsy upon a showing of good cause.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues

This bill creates a public records exemption for a photograph or video 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 and it relates only to one subject.

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

Because the bill creates an unranked third degree felony, the Criminal Justice Estimating Conference (CJEC) customarily finds that there is no prison bed impact because the recommended sentence for an unranked third degree felony will be a non-state prison sanction. The CJEC is planning to officially review the bill after the writing of this analysis

VI. Technical Deficiencies:

None.

VII. Related Issues:

Under this bill, medical autopsy photographs and video recordings will become unavailable to the general public. Family members of a person who died in a violent way will be spared the additional trauma of having the 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 fundamental significance so to warrant retroactive relief, a court must consider the purpose to be

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 Kellher* 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 Suss'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)

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. Ochling*, 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).

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Re: CS SB 1356: The Earnhardt Family Protection Act

Dear Senator Burt:

When the Senate Committee on Governmental Oversight and Productivity considers this bill on Wednesday, I hope that the members will give serious consideration to the version suggested by the First Amendment Foundation. The suggestion is a variation of the strike-everything amendment that you submitted last week

The FAF variation of your amendment continues to allow inspection of the records while forbidding the copying of these records without court approval, and it differs from your amendment primarily in that it makes a violation a third degree felony and provides a more explicit balancing standard to be applied to a petition for the right to obtain copies of the records. While this amendment itself is not free of constitutional doubt, and involves a serious restriction on the public right of access, it is a political compromise that is largely supported by the freedom of information community.

That support will be important to the ultimate success of the effort to create an exemption protecting families of the deceased from widespread dissemination of these photographs. As the bill now stands, it is strongly opposed by advocates of open government and it is vulnerable to constitutional attack on several grounds. If the legislature enacts such a bill, it is sure to be challenged and likely to be held unconstitutional on its face. It will continue the traumatic litigation and legislative issues for several years. That is a result that all sides to this conversation ought to dread.

Because these questions inevitably will be litigated, I want to offer my comments on the constitutional issues implicated in the present version of the bill, beginning with a brief comment on the constitutional rules that now control the process of creating exceptions to the constitutional right of access to public records. These are arguments that will inevitably be levied at this bill, and if there is any concern for the ultimate success of this project on the part of its sponsors, now is the time to consider them carefully.

The constitutional standard under Article I, section 24(c)

In 1992, the people of Florida elevated their traditional rights of access to records and meetings of government to the stature of a fundamental right. See Article I, § 24, Fla. Const. This "Sunshine Amendment" reserves to the people of Florida an express and self-executing right of access to public records and meetings, declaring that "[e]very person has the right to inspect or copy any public record [and] all meetings of any collegial public body shall be open and noticed to the public." art. I, § 24(a) & (b), Fla. Const. The purpose of the Sunshine Amendment is to "elevate[] the public's right to government in the sunshine to constitutional proportions." *Zore v City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998). See also *Frankermuth Mut. Ins. Co v Mugaha*, 769 So. 2d 1012 (Fla. 2000) (sunshine law "is of both constitutional and statutory dimension")

The Sunshine Amendment contains no exemptions. Instead, it grants the legislature a limited power to create exemptions in general laws pertaining solely to the right of access. This power is qualified by the provision "that such law shall state with specificity the public necessity which justifies the exemption and shall be no broader than necessary to accomplish the stated purpose of the law" art. I, § 24(c), Fla. Const. In its first review of an exemption under the Sunshine Amendment, the Supreme Court held that section 24(c) creates an "exacting constitutional standard . . . of specificity as to stated public necessity and limited breadth to accomplish that purpose." *Halifax Hosp. Medical Center v News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999) (holding exemption unconstitutional as overbroad)

The public right of access is a fundamental right. The Sunshine Amendment reserves to the people a self-executing right against government, grants the legislature only a limited power to balance this right against competing public necessities, places the onus of justifying such abridgement directly upon the legislature, and requires that the abridgement be no broader than necessary to meet the competing necessity.

Thus, an act creating an exemption from the public records or public meetings law must state with specificity the public necessity justifying the exemption and tailor the exemption no broader than necessary to meet that stated necessity. The express constitutional duty to justify an exemption with a specific statement of public necessity may not be discharged simply by verbalizing the existence of a need to effect closure. An exemption must be justified by a concrete and reviewable statement of necessity and *Halifax* holds that an exemption is subject to exacting scrutiny in light of this standard.

In the trial court decision that was affirmed in *Halifax*, Judge Doyle explained the constitutional standard as follows:

[The Sunshine Amendment] establishes a two-pronged test for validity of an exemption. First, the law must state with specificity the public necessity justifying the exemption. This requires that the legislature identify a public necessity and define it with specificity. Such a necessity must logically or rationally relate to the exemption in such manner as to justify the creation of an exception to the constitutional right of access. Second, the exemption must be no broader than necessary to accomplish the stated purpose of the law. This permits an exemption to carve out of the constitution only so much of the public right of access as is necessary to achieve the stated public necessity. This establishes a meaningful requirement of narrow tailoring because the standard is one of necessity. The legislature may close only so much of the public records or public meetings as is necessary to achieve the stated purpose.

News-Journal Corp. v. Halifax Hospital Medical Center, 25 Med. L. Rptr. 1776, 1779-80 (Fla. 7th Jud. Cir. Nov. 1, 1996).

The constitutional duty to narrowly tailor an exemption falls directly upon the legislature. In *Halifax*, the defendant agency asked the Court to cure the constitutional defect of overbreadth by adopting a narrowing or "saving" construction. The Court refused, holding:

[I]n enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose. Thus the task of enacting a more limited statutory exemption appropriately belongs to the legislature in this case. For these reasons, we decline to afford a narrowing construction to the language of the statutory exemption.

Halifax at 570

Under this doctrine, when the legislature adopts an overly broad exemption, the exemption will be stricken in its entirety even though the legislature might have adopted a more narrow exemption that would survive constitutional scrutiny. Overbreadth thus becomes an "all-or-nothing" proposition.

The exemption is broader than necessary.

I believe this bill is overbroad in several dimensions and therefore likely to result in "nothing" for its proponents.

It suppresses all public access to these records in order to prevent public dissemination of certain images. No distinction is made between offensive photographs and inoffensive photographs of the deceased, and no distinction is made between access that would harm the familial interest and access that would not harm or would serve that interest. As the staff of the House Committee has observed, the bill prevents all sorts of useful and appropriate access solely in order to forestall certain offensive uses.

It is impossible to contend that all access to these photographs should be banned. The revelation last Saturday that a representative of NASCAR actually had examined these very photographs before the injunction proves that the request for a total ban is radically irrational and overbroad. I read in the newspaper that Tom Rhumberger justified the examination by Dr. Bohannon on the ground that the doctor was acting in his capacity as the attending physician. However, the CS does not allow the attending physician to examine such photographs, and if that is a reasonable basis for examination, the bill is admittedly overbroad on that very ground.

The bill itself belies this overbreadth because it provides for access by leave of the court. Inherent in the provision for judicially granted access is the concession of the obvious: the bill restricts far more access than is justifiable. Otherwise, why would the legislature give the courts authority to grant relief from the overbreadth through this balancing test? Though I have subscribed to a limited form of judicial balancing here, I emphasize that this is a political concession and not an agreement on constitutional principle.

In fact, the judicial balancing standard is of very doubtful constitutionality. Consider what the Court said in *Hulifax*. "[T]he task of enacting a more limited statutory exemption appropriately belongs to the legislature." In this case, the legislature is painting the exemption with the broadest possible brush while implicitly acknowledging that the exemption is radically overbroad and defaulting to the courts the responsibility to edit and narrow the exemption through an endless process of case-by-case, frame-by-frame, family-by-family balancing of private interests against public interests. There is no conceptual difference between the overbroad exemption in *Hulifax* and the overbroad exemption here, and there is no obvious reason why the Court should look any more favorably on this particular form of overbreadth as opposed to that in *Hulifax*. Therefore, I have grave doubt that the legislature may overtly delegate the power to narrow exemptions as this bill has done. Narrow tailoring of exemptions is the responsibility of the legislature, not the courts.

In fact, the bill creates a *per se* right to be free of that emotional distress that comes from any exposure whatsoever to images of the deceased. This broad interest is something that the law of Florida has never recognized. To be sure, the Fifth District Court of Appeals has on two occasions held that display of visual images of the deceased could give rise to a cause of action by family members for intentional infliction of emotional distress, but the standard of liability is extreme and outrageous conduct, and the emotional harm suffered must be severe. See *Williams v. City of Minneola*, 575 So.2d 683, 690 (Fla. 5th DCA 1991) ("We hold that a cause of action in tort for reckless infliction of emotional distress can lie for outrageous conduct involving pictures of the dead body of a plaintiff's spouse, child, sibling or parent, even though the plaintiff was not present at the display of the pictures and the allegedly tortious conduct did not physically impact the plaintiff, whether or not the emotional distress in turn caused physical harm to the plaintiff").

Similarly, in *Armstrong v. H & C Communications, Inc.*, 575 So. 2d 280, 281-2 (Fla. 5th DCA 1991), the court speaking through Judge Cobb found that a television station could be liable for the tort of outrage when it displayed a skull in the following manner

The close-up of the skull was intentionally included to create sensationalism for the report. The close-up was gruesome and macabre, and was broadcast to thousands of viewers, including the Armstrongs. The broadcast opened with an emotional story on the memorial services with the photographs of Regina Mae and film footage of the family. Immediately following was a close-up of animal remains, originally thought to have been those of Regina Mae. Then, the cameraman cut directly to the Oviedo Police Chief removing her skull from the box, zoomed in for a frontal close-up of the tilted skull facing directly at the camera, and the audio identified the skull as that of Regina Mae Armstrong

...
We have no difficulty in concluding that reasonable persons in the community could find that the alleged conduct of Channel 2 was outrageous in character and exceeded the bounds of decency so as to be intolerable in a civilized community. An average member of the community might well exclaim, "Outrageous!" Cf. *Kirker v. Orange County*, 519 So. 2d 682 (Fla. 5th DCA 1988).¹ Indeed, if the facts as alleged herein do not constitute the tort of outrage, then there is no such tort.

The tort of outrage is a limited exception to the general rule that Florida law does not recognize simple emotional distress as a legally remediable harm. Judge Cobb cited the standard for outrage as follows

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Armstrong, 575 So. 2d at 282 (quoting *Metropolitan Life Ins. Co. v. McCarron*, 467 So. 2d 277 (Fla. 1985))

Comparably, Florida courts have refused to allow recovery for mental anguish suffered as a result of negligent interference with a dead body *Dunahoo v Bess*, 200 So. 2d 541 (1941). Recovery may be allowed only where the plaintiff shows that the wrongful act was malicious or outrageous. *Kirksey, Accord, Gonzalez v. Metropolitan Dade County Public Health Trust*, 626 So. 2d 1030 (Fla. 3d DCA 1993).

The law protects only against outrageous displays. It does not recognize that a person has a legally protectable interest in being shielded from any possible display of such images, and it does not recognize that anything less than severe emotional harm may be remedied. This has been the experience of the common law in our open society over the centuries.

Against this settled tradition, the bill radically expands the legal interest. It recognizes a public necessity to protect the family from any exposure to the images of the deceased without regard to whether the exposure is outrageous or reasonable. There is no concern with outrageousness and no attention to the severity of the resulting distress. Even the slightest emotional distress resulting from the most reasonable and sensitive portrayal of the deceased is sufficient to override the public right of access to records of government.

I submit the broad interest invoked by this bill is less than a justifying public necessity sufficient to justify suppressing public records. We live in an open society, and while we necessarily must be sensitive to the emotions of the vulnerable and grieving, such extreme solicitude for that interest is unjustifiable and unbalanced. There is no comparable protection in other contexts.

Under license from NASCAR, for example, Fox television has been constantly rebroadcasting images of the fatal crash of Dale Earnhardt in order to promote a television audience for its race broadcasts. It is well accepted in our open society that while Fox could be held liable under the standard of *Armstrong* if its conduct met the standard of outrage, family members have no right to bar such ordinary and accepted displays of the actual moment of death of their loved one. This is because our society and our legal system recognize that the survivors of the dead actually do not have a proprietary right in the images of the deceased. They have a right to be protected from outrageous displays but no more.

If the bill were pure and perfect in its effect and truly barred all public access to all photographs of the autopsy in the interest of protecting the family against any exposure to such images whatsoever, then I would challenge the sufficiency of the cited public necessity. As opposed to the interest in protection against outrage, the newly recognized interest of a family against any exposure and any level of distress is not as weighty as the public right of access.

The bill is not pure, however. In light of the bill's provision for judicially created exceptions, it is apparent that the authors of the bill agree that the broadly stated interest in being free of exposure to any image in any circumstance is not sufficient to justify full-fledged suppression of the right of access. Indeed, it is obvious from the structure of the bill and from the stated reasons for the exemption that the bill is actually concerned only with the same sort of outrageous display of these images that the courts already have condemned in *Minneola* and *Armstrong*. The stated concern with graphic and brutal images of the deceased parallels the tort law's distinction between negligent and outrageous displays. However, by failing to tailor the exemption to deal narrowly with the

outrageous as opposed to the reasonable, the bill is broader than necessary to achieve the purpose of protecting the family's interest in being protected from outrageous depictions of the deceased

The FAF proposal would narrow the exemption without reducing the bill's protection of survivors from outrageous or other depictions of the deceased

The retroactive provision is unwise and of highly doubtful validity.

The attempt to make this exemption retroactive is quite troubling. How can the legislature withdraw a record from the public domain? What happens to those copies of the records that have previously been obtained through the lawful exercise of the right of access? Is it now a felony for a citizen who holds such a copy to provide copies to others? Suppose that an insurance adjuster has obtained copies of autopsy photographs before this law is enacted. Is it a felony for him to copy and forward the photographs to his insurance company?

Beyond this somewhat metaphysical confusion, there is a substantial constitutional issue. The constitution forbids the retroactive abrogation of vested rights. Therefore, the Supreme Court has said, "[e]ven when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 56 (Fla. 1995) (citing *Alamo Rent-a-Car Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994); *State v. Lavazzoli*, 434 So. 2d 321 (Fla. 1983) and *Seaboard Sys. R.R. v. Clemente*, 467 So. 2d 348 (Fla. 3d DCA 1985)).

The Court has explained that such abrogation violates the due process clause "[D]ue process considerations . . . prohibit retroactive abolition of vested rights." *Rupp v. Bryant*, 417 So. 2d 658, 661 (Fla. 1982) (holding statute expanding public officer immunity could not retroactively abolish "right to seek recovery" asserted in pre-enactment suit). See also *State Dept. of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981) (holding same statute could not constitutionally diminish a pre-enactment non-final jury award against newly immunized officer). See generally *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494, 503 (Fla. 1999) (citing *Knowles* and *Rupp* (explaining in dictum that "retroactive abolition of substantive vested rights is prohibited by constitutional due process considerations"))).

In applying this constitutional doctrine, the first step, and the heart of [the] issue, is to determine what legal rights [existed] prior to the [new law]."*Rupp* at 661. Here, the right of public access is a self-executing substantive right vested in every person in Florida under the declaration of rights

The declaration provides that "[e]very person has the right to inspect or copy any public record [and to attend] all meetings of any collegial public body of [state and local government]. art. I, § 24(a) & (b), Fla. Const. Through the Sunshine Amendment, the people of Florida "elevated the public's right to government in the sunshine to constitutional proportions "

It is therefore true that the public records law "grants a substantive right to Florida citizens." *Allen v Butlerworth*, 756 So. 2d 52, 66 (Fla. 2000) (holding legislature "has the authority to define the substantive right to public records" but not the power to regulate "the procedure for public records production in capital cases"). See also *Henderson v State*, 745 So. 2d 319, 326 (Fla. 1999) (construing public records law as substantive).

That the public right of access now has constitutional stature distinguishes the present circumstances from *City of Orlando v Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986). Although the Court in 1986 may not have considered the public right of access "substantive," the right is now a substantive constitutional right. In *Desjardins*, Justice Adkins wrote that if a statute is found to be "remedial" in nature, it can be applied retroactively. Later, in *Arrow Air, Inc. v Walsh*, 645 So. 2d 422, 424 (Fla. 1994), Justice Kogan distinguished *Desjardins* and explained that the Court has never applied remedial legislation retroactively where it stripped vested substantive rights. *Arrow Air*, 645 So. 2d at 424. The Court quite recently has recognized that the right of access is "a substantive right [of] Florida citizens." *Allen*

In *Memorial Hospital-West Volusia, Inc. v News-Journal Corp.*, 729 So. 2d 373, 384 (Fla. 1999), the Supreme Court refused to hold the exemption created by § 395.3036 applied retroactively, stating "we reject the contention that the amended statute shall apply retroactively." Because the defendant hospital contends that the Court did not make such a holding, it has refused to comply with the mandate. That question is now back before the Court on a question certified in *Memorial Hospital-West Volusia, Inc. v News-Journal Corp.* 747 So. 2d 473 (Fla. 5th DCA 1999). While it is always possible that the Court will reach a different conclusion, I do not believe that the possibility is sufficiently great to justify the rush to pass this bill in time to affect the outcome of pending litigation involving vested rights of access to public records.

Prior restraint issues.

The present draft purports to grant authority to the circuit court to permit records to be copied but not published. Such an order would be a prior restraint and almost conclusively presumed to be unconstitutional under the First Amendment.

A prior restraint of speech prohibits the utterance of speech in advance. *Near v. Minnesota ex-rel. Olsen*, 283 U. S. 697, 701-702 (1931) ("[It is] generally, if not universally, considered that it is the chief purpose of the [freedom of the press] guaranty to prevent previous restraints upon publication"). The United States Supreme Court has said that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin v Keefe*, 402 U. S. 415, 419 (1971), quoting *Curroll v Princess Anne*, 393 U. S. 175, 181 (1968). The presumption of unconstitutionality can be overcome only in exceptional circumstances where it is necessary to serve a state interest of the highest order. *Nebraska Press Association v Stuart*, 427 U. S. 539, 559 (1976). The interest in protecting the family of a decedent from any and all exposure to images of the decedent would never support a prior restraint. Compare *New York Times Co. v. United States*, 403 U. S. 713 (1971) (denying restraint in Pentagon Papers Case).

The only legitimate way to prevent publication is by appropriately restricting the right to make copies within the boundaries set by the Florida Constitution. A proper exemption of the photographs from the public right to copy will not be a prior restraint, but the way the bill is now crafted there could be prior restraint issued thereunder. In lieu of that questionable tactic, it would seem better to adopt the FAF distinction between inspection and copying

Thank you for considering these comments and for your public service

Kind regards.

Sincerely,

Jon Kaney

Jonathan D. Kaney Jr

2001-1

HO 1083

H	State Admin	19/3312	
	3/15/01	19/3313	(tapes NA)

58 1356

S.	(CRIM Justice	18/2462	(625/915 - 2 tapes)
	3/13 Fil	18/2463	←

S	Govt. Oversight	18/2482	
	3/21	18/2478	(625/926 - 2 tapes) on both tapes

Notes in SD of

455 SD 2d 373

Forsberg v. Husin, Auth of Man. Bd 4

575 SD 2d 583

Williams v. City of Minneapolis

Several w. law pages - various cases

HISTORY OF HOUSE BILLS

- H 1079 (CONTINUED)**
 01/13/01 HOUSE On Committee agenda—Fiscal Policy & Resources (FRC), 04/17/01, 1 00 pm, 21 L—C—Not considered
 05/04/01 HOUSE Died in Committee on Fiscal Policy & Resources (FRC)
- H 1081 GENERAL BILL** by Sobel, (CO-SPONSORS) Weissman, Ritter; Gannon; Holloway; Rich; Greenstein; Henriquez; Prieguez; Wilson; Peterman; Romeo; Gottlieb (Identical S 0328, Compare H 0043, H 0075, CS/1ST ENG/S 0182, S 0312)
Hurricane Loss Projection Method, limits authority of insurers to use findings of Fla Commission on Hurricane Loss Projection Methodology in rate filing under specified provision, provides that such findings are not admissible & relevant in consideration by DOI of rate filing unless department has access to all factors & assumptions used in developing standards or models, etc Amends 627 0628, repeals 627 062(6) Effective Date 10/01/2001
 03/08/01 HOUSE Filed, Introduced -HJ 00157
 03/16/01 HOUSE Referred to Insurance (CCC); Local Government & Veterans Affairs (SGC), Council for Competitive Commerce -HJ 00194
 05/04/01 HOUSE Died in Committee on Insurance (CCC)
- H 1083 GENERAL BILL/1ST ENG** by Johnson; Miller; (CO-SPONSORS) Lynn; Bean; Mayfield; Baker; Murman; Berfield; Allen; Cantens; Stansel; Farkas; Bense; Hart; Haridopolos; Bennett; Mack; Greenstein; Kendrick; Henriquez; Kosmas; Garcia; Davis; Gibson; Waters; Spratt; Mahon (Identical CS/CS/1ST ENG/S 1356)
Public Records/Autopsy Photographs, provides exemption from public records law for photographs & video & audio recordings of autopsy, provides exemption for certain members of immediate family, or representative thereof, or state or federal agency; prohibits custodian of said photographs or recordings from permitting any person to view or duplicate same, except pursuant to court order & under direct supervision of custodian or his or her designee, etc Effective Date 03/29/2001
 03/08/01 HOUSE Filed, Introduced, referred to State Administration (SGC) -HJ 00157
 03/13/01 HOUSE On Committee agenda—State Administration (SGC), 03/15/01, 8 00 am, 212 K
 03/15/01 HOUSE Favorable with 1 amendment(s) by- State Administration (SGC), YEAS 3 NAYS 2 -HJ 00198
 03/16/01 HOUSE Placed on Calendar, on second reading -HJ 00198
 03/22/01 HOUSE Placed on Special Order Calendar, Read second time -HJ 00336, Amendment(s) adopted -HJ 00337, Read third time -HJ 00339, Passed as amended, YEAS 91 NAYS 12 -HJ 00339, Immediately certified -HJ 00340
 03/22/01 SENATE In Messages
 03/29/01 SENATE Received, referred to Criminal Justice, Governmental Oversight and Productivity -SJ 00280, Withdrawn from Criminal Justice, Governmental Oversight and Productivity -SJ 00248, Substituted for CS/CS/SB 1356 -SJ 00248, Read second and third times -SJ 00248, Passed, YEAS 40 NAYS 0 -SJ 00248, Immediately certified -SJ 00248
 03/29/01 HOUSE Ordered enrolled -HJ 00393
 03/29/01 Signed by Officers and presented to Governor -HJ 00415, Approved by Governor, Chapter No 2001-1 -HJ 00415
- H 1085 GENERAL BILL** by Pickens, (CO-SPONSORS) Hogan; Baker; Arza; Garcia; Stansel; Kendrick; Bean; Melvin (Similar CS/1ST ENG/S 1246)
Rodman Reservoir State Reserve, establishes said reserve, directs Recreation & Parks Division of DEP to develop multipurpose recreational opportunities & provide supervision of area, allows public hunting, authorizes State Lands Division to acquire adjacent or contiguous property, requires State Lands Division to notify persons with easements in area, requires report Creates 258 166 Effective Date Upon becoming law
 03/08/01 HOUSE Filed, Introduced -HJ 00157
 03/20/01 HOUSE Referred to Natural Resources & Environmental Protection (RIC), General Government Appropriations (FRC), Council for Ready Infrastructure -HJ 00324
 03/23/01 HOUSE On Committee agenda—Natural Resources & Environmental Protection (RIC), 03/26/01, 5 00 pm, Morris Hall
 03/26/01 HOUSE Favorable by Natural Resources & Environmental Protection (RIC), YEAS 9 NAYS 1 -HJ 00410
 03/27/01 HOUSE Now in General Government Appropriations (FRC) -HJ 00410
 04/02/01 HOUSE On Committee agenda—General Government Appropriations (FRC), 04/04/01, 8 00 am, Morris Hall
 04/04/01 HOUSE Favorable with 1 amendment(s) by General Government Appropriations (FRC), YEAS 9 NAYS 3 -HJ 00505
 04/05/01 HOUSE Now in Council for Ready Infrastructure -HJ 00505
 04/09/01 HOUSE On Council agenda—Council for Ready Infrastructure, 04/11/01, 8 00 am, 404-H
- H 1085 (CONTINUED)**
 04/11/01 HOUSE Favorable with 1 amendment(s) by- Council for Ready Infrastructure, YEAS 13 NAYS 6 -HJ 00532
 04/13/01 HOUSE Placed on Calendar, on second reading -HJ 00532
 04/27/01 HOUSE Placed on Special Order Calendar, Retained on Calendar
 05/04/01 HOUSE Died on Calendar
- H 1087 GENERAL BILL** by Pickens, (CO-SPONSORS) Davis (Similar CS/1ST ENG/S 1234, Compare CS/3RD ENG/H 0501, CS/2ND ENG/S 0345, CS/S 1410)
Florida State Boxing Commission requires one member of said commission to be licensed physician, increases penalty for participating in or promoting toughman or badman competition, provides procedure for processing fingerprint cards, provides for revocation of license for failure or refusal to provide required urine sample, exempts sale of tickets for viewing of matches via closed circuit telecast, etc Amends Ch 548 Effective Date Upon becoming law
 03/08/01 HOUSE Filed, Introduced -HJ 00157
 03/20/01 HOUSE Referred to Tourism (CCC), Business Regulation (SGC), Council for Competitive Commerce -HJ 00324
 03/22/01 HOUSE On Committee agenda—Tourism (CCC), 03/26/01, 5 00 pm, 24-H
 03/26/01 HOUSE Favorable with 4 amendment(s) by Tourism (CCC), YEAS 6 NAYS 0 -HJ 00410
 03/27/01 HOUSE Now in Business Regulation (SGC) -HJ 00410
 04/10/01 HOUSE On Committee agenda—Business Regulation (SGC), 04/12/01, 9 15 am, 12-H
 04/12/01 HOUSE Favorable with 4 amendment(s) by Business Regulation (SGC), YEAS 9 NAYS 0 -HJ 00532
 04/13/01 HOUSE Now in Council for Competitive Commerce -HJ 00532
 04/16/01 HOUSE On Council agenda—Council for Competitive Commerce, 04/18/01, 10 30 am, Reed Hall
 04/18/01 HOUSE Favorable with 1 amendment(s) by- Council for Competitive Commerce, YEAS 13 NAYS 0 -HJ 00548
 04/20/01 HOUSE Placed on Calendar, on second reading -HJ 00548
 04/27/01 HOUSE Placed on Special Order Calendar; Retained on Calendar
 05/04/01 HOUSE Died on Calendar, Link/Iden/Sim/Compare passed, refer to CS/HB 501 (Ch 2001-89)
- H 1089 GENERAL BILL** by Bilirakis; Argenziano; Rubio; (CO-SPONSORS) Sobel; Paul; Carassas; Needelman; Goodlette; Green; Littlefield (Similar 1ST ENG/S 1424)
Real Estate Professionals authorizes licensees to return escrowed property to buyer of real property without notifying Real Estate Commission or initiating required escape procedure if buyer, in good faith, fails to satisfy terms contained in financing clause of contract for sale & purchase of real property, provides requirements for employment of registered assistant appraisers, requires designation of primary supervisor, etc Amends 475 25, 622, creates 475 6221 Effective Date 10/01/2001
 03/08/01 HOUSE Filed, Introduced -HJ 00158
 03/20/01 HOUSE Referred to Business Regulation (SGC), Judicial Oversight (SGC), Council for Smarter Government -HJ 00324
 03/27/01 HOUSE On Committee agenda—Business Regulation (SGC), 03/29/01, 9 30 am, 12-H
 03/29/01 HOUSE Favorable by Business Regulation (SGC), YEAS 8 NAYS 0 -HJ 00434
 04/02/01 HOUSE Now in Judicial Oversight (SGC) -HJ 00434, On Committee agenda—Judicial Oversight (SGC), 04/03/01, 8 00 am, 212-K—Not considered
 04/09/01 HOUSE On Committee agenda—Judicial Oversight (SGC), 04/11/01, 3 45 pm, 212-K
 04/11/01 HOUSE Favorable by Judicial Oversight (SGC), YEAS 11 NAYS 0 -HJ 00533
 04/13/01 HOUSE Now in Council for Smarter Government -HJ 00533, On Council agenda—Council for Smarter Government, 04/17/01, 8 30 am, Morris Hall
 04/17/01 HOUSE Favorable by- Council for Smarter Government, YEAS 11 NAYS 0 -HJ 00659
 04/24/01 HOUSE Placed on Calendar, on second reading -HJ 00659
 04/26/01 HOUSE Placed on Special Order Calendar, Retained on Calendar
 04/27/01 HOUSE Placed on Special Order Calendar; Senate Bill substituted, Laid on Table, Link/Iden/Sim/Compare passed, refer to SB 1424 (Ch 2001-274) -HJ 01083
- H 1091 GENERAL BILL/1ST ENG** by Wishner; Mahon; (CO-SPONSORS) Davis; Mayfield; Holloway (Compare CS/CS/2ND ENG/H 0807, CS/CS/3RD ENG/H 1063, CS/CS/CS/S 1068, S 1630)
Fla Golf License Plate provides for Florida Golf license plate, provides for use fee, directs HSMV to develop said license plate, provides for distribution and use of fees, requires Florida Sports Foundation to establish youth golf (CONTINUED ON NEXT PAGE)

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House 1083: Relating to Public Records/Autopsy Photographs

H1083 GENERAL BILL/1ST ENG by Johnson; Miller; (CO-SPONSORS) Lynn; Bean; Mayfield; Baker; Murman; Berfield; Allen; Cantens; Stansel; Farkas; Bense; Hart; Haridopolos; Bennett; Mack; Greenstein; Kendrick; Henriquez; Kosmas; Garcia; Davis; Gibson; Waters; Spratt; Mahon (Identical CS/CS/1ST ENG/S 1356)

Public Records/Autopsy Photographs; provides exemption from public records law for photographs & video & audio recordings of autopsy; provides exemption for certain members of immediate family, or representative thereof, or state or federal agency; prohibits custodian of said photographs or recordings from permitting any person to view or duplicate same, except pursuant to court order & under direct supervision of custodian or his or her designee, etc EFFECTIVE DATE: 03/29/2001.

03/08/01 HOUSE Filed; Introduced, referred to State Administration (SGC) -HJ 00157

03/13/01 HOUSE On Committee agenda-- State Administration (SGC), 03/15/01, 8:00 am, 212-K

03/15/01 HOUSE Favorable with 1 amendment(s) by- State Administration (SGC); YEAS 3 NAYS 2 -HJ 00198

03/16/01 HOUSE Placed on Calendar, on second reading -HJ 00198

03/22/01 HOUSE Placed on Special Order Calendar; Read second time -HJ 00336; Amendment(s) adopted -HJ 00337; Read third time -HJ 00339; Passed as amended; YEAS 91 NAYS 12 -HJ 00339; Immediately certified -HJ 00340

03/22/01 SENATE In Messages

03/29/01 SENATE Received, referred to Criminal Justice; Governmental Oversight and Productivity -SJ 00280; Withdrawn from Criminal Justice; Governmental Oversight and Productivity -SJ 00248; Substituted for CS/CS/SB 1356 -SJ 00248; Read second and third times -SJ 00248; Passed, YEAS 40 NAYS 0 -SJ 00248; Immediately certified -SJ 00248

03/29/01 HOUSE Ordered enrolled -HJ 00393

03/29/01 Signed by Officers and presented to Governor -HJ 00415; Approved by Governor; Chapter No. 2001-1 -HJ 00415

Bill Text

Version:	Posted:	Format:
H 1083	03/09/2001	Web Page PDF
H 1083E1	03/23/2001	Web Page PDF
H 1083ER	03/30/2001	Web Page PDF

Amendments:

HB1083AM

Amendment:	Posted:	Format:
425227	03/22/2001 ✓	Web Page PDF
433703	03/21/2001 ✓	Web Page PDF →
822031	03/21/2001 ✓	Web Page PDF "
874155	03/15/2001 ✓	Web Page PDF *
953769	03/21/2001 ✓	Web Page PDF

HB1083E1

Amendment:	Posted:	Format:
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HB1083ER

Amendment:	Posted:	Format:
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Bill Analysis:

Analysis:	Sponsor	Format:
h 1083	State Administration	PDF
h 1083a	State Administration	PDF
h 1083b	State Administration	PDF

Vote History:

Chamber:	Roll Call:	Date:	Format:
HOUSE	0066	03/22/01	Web Page
HOUSE	0068	03/22/01	Web Page
HOUSE	0069	03/22/01	Web Page
SENATE	0002	03/29/01	Web Page

Citations - Statute

NO STATUTE CITATIONS FOUND FOR HOUSE BILL 1083

Citations - Constitution

NO CONSTITUTION CITATIONS FOUND FOR HOUSE BILL 1083.

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Senate 1356: Relating to Public Records/Autopsy Photographs

S1356 GENERAL BILL/CS/CS/1ST ENG by Governmental Oversight and Productivity; Criminal Justice; King; (CO-SPONSORS) Posey; Sebesta; Clary; Peaden; Bronson; Horne; Brown-Waite; Pruitt; Dawson; Burt; Constantine; Sanderson; Saunders; Garcia (Identical 1ST ENG/H 1083)

Public Records/Autopsy Photographs; provides exemption from public records law for photographs & video & audio recordings of autopsy; provides exemption for certain members of immediate family, or representative thereof, or state or federal agency; prohibits custodian of said photographs or recordings from permitting any person to view or duplicate same, except pursuant to court order & under direct supervision of custodian or his or her designee, etc. **EFFECTIVE DATE:** Upon becoming law.

03/06/01 SENATE Filed

03/08/01 SENATE Introduced, referred to Criminal Justice; Governmental Oversight and Productivity -SJ 00133; On Committee agenda-- Criminal Justice, 03/13/01, 9:15 am, 37-5

03/13/01 SENATE CS by Criminal Justice; YEAS 6 NAYS 0 -SJ 00149; CS read first time on 03/16/01 -SJ 00182

03/15/01 SENATE Now in Governmental Oversight and Productivity -SJ 00149

03/16/01 SENATE On Committee agenda-- Governmental Oversight and Productivity, 03/21/01, 2 00 pm, 37-5

03/21/01 SENATE CS/CS by- Governmental Oversight and Productivity; YEAS 7 NAYS 0 -SJ 00222; CS read first time on 03/22/01 -SJ 00226

03/22/01 SENATE Placed on Calendar, on second reading -SJ 00222

03/27/01 SENATE Placed on Special Order Calendar -SJ 00228; Read second time -SJ 00236; Amendment(s) adopted -SJ 00236; Ordered engrossed -SJ 00237

03/29/01 SENATE House Bill substituted -SJ 00248, Laid on Table, Link/Iden/Sim/Compare passed, refer to HB 1083 (Ch. 2001-1)

Bill Text

Version:	Posted:	Format:
S 1356	03/08/2001	Web Page PDF
S 1356C1	03/16/2001	Web Page PDF
S 1356C2	03/23/2001	Web Page PDF
S 1356E1	03/28/2001	Web Page PDF

Committee Amendments and Filed Floor Amendments:

Version:	Amendment:	Published/Filed:	Action:	Format:
S 1356C2	381678	Published 03/26/2001 ✓	Unavailable	Web Page PDF

Staff Analysis:

Analysis:
s 1356
s 1356

Committee:
Criminal Justice
Governmental Oversight and Productivity

Format:
[PDF](#)
[PDF](#)

Vote History - Floor

NO VOTE HISTORY AVAILABLE FOR SENATE BILL 1356

Citations - Statute

NO STATUTE CITATIONS FOUND FOR SENATE BILL 1356.

Citations - Constitution

NO CONSTITUTION CITATIONS FOUND FOR SENATE BILL 1356.

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CHAPTER 2001-1

House Bill No 1083

An act relating to public records, providing an exemption from the public records law for photographs and video and audio recordings of an autopsy, providing an exemption for certain members of the immediate family, or a representative thereof, or a state or federal agency, prohibiting the custodian of a photograph or video or audio recording of an autopsy from permitting any person to view or duplicate a photograph or video or audio, except pursuant to court order and under the direct supervision of the custodian or his or her designee; exempting criminal and administrative proceedings from the act, requiring certain persons to be parties in a request for access to a photograph or video or audio recording of an autopsy, providing penalties, providing for future legislative review and repeal; providing a finding of public necessity, providing a retroactive effective date

Be It Enacted by the Legislature of the State of Florida.

Section 1 (1) A photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of section 119 07(1) and s 24(a), Art I of the State Constitution, except that a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records. A local governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt. The custodian of the record, or his or her designee, may not permit any other person to view or copy such photograph or video recording or listen to or copy an audio recording without a court order. For the purposes of this section, the term "medical examiner" means any district 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.

(2)(a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate.

In determining good cause, the court shall consider 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. In all cases, the viewing, copying, listening to or other handling of a photograph or video or audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.

(2)(b) A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording, a copy of such petition, and reasonable notice 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 given to the deceased's parents, and if the deceased has no living parent, then to the adult children of the deceased.

(3)(a) Any custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates this section commits a felony of the third degree, punishable as provided in section 775 082, section 775 083 or section 775 084, Florida Statutes.

(b) Any person who willfully and knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in section 775 082, section 775 083, or section 775 084, Florida Statutes.

(c) A criminal or administrative proceeding is exempt from this section, but unless otherwise exempted, is subject to all other provisions of Chapter 119, Florida Statutes, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime-scene, or similar photograph or video or audio recordings in the manner prescribed herein.

(4) This exemption shall be given retroactive application.

(5) The exemption in this section is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119 15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119 07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions 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 notes that the existence of the World Wide Web and the proliferation

of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Section 3 This act shall take effect upon becoming a law, and shall apply to all photographs or video or audio recordings of an autopsy, regardless of whether the autopsy was performed before or after the effective date of the act

Approved by the Governor March 29, 2001

Filed in Office Secretary of State March 29, 2001

H. State Administration Committee

HB 1083 BILL FILE S.19/3312

Meeting FILE 3/15/01 S.19/3313



THE FLORIDA SENATE
SENATE MAJORITY OFFICE
SENATOR JAMES E. "JIM" KING, JR.
Majority Leader
Agustin G. Corbella, Staff Director
Legislature's Website www.leg.state.fl.us

FAX TRANSMISSION

DATE: 3-5-01

TO: JIM RHEA

FAX: 7-5380

FROM: PAUL HULL

FAX: (850) 487-5842

SUBJECT: EARNHARDT ISSUE

Pages Including Cover: 3

COMMENTS:

Jim,
Thanks for your help!
-Paul

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18

2482

Paul - FYI ... see me, please. Gus

Court fight for autopsy photos sparks outrage

Amid Dale Earnhardt fans' outcry, the *Sentinel* explains its reasons for requesting access to the photographs

By MAYA BELL
STAFF WRITER

From near and far, fans of Dale Earnhardt say they are disgusted and angry with the *Orlando Sentinel* for seeking autopsy photos of the legendary NASCAR driver who died at the Daytona 500 last month.

They're also widely misinformed, which, newspaper experts said, might result from the paper's own decision to hold back why it wants the pictures.

Under Florida law, public records experts agree, newspapers clearly have the right to such photos. Autopsies are subject to Florida's public records laws, as long as they're not part of a criminal investigation. At the request of Earnhardt's widow, Teresa, a judge in Volusia County agreed to halt the

release of the autopsy photos on Feb. 21.

The *Sentinel* is challenging the judge because it contends the photos could help resolve a conflict over how Earnhardt died. And that makes a lot of people mighty angry. Hundreds have bombarded the *Sentinel* with e-mails and phone calls condemning the paper for being insensitive and sensational. The vast majority of the complaints weren't from Central Florida but instead came from across the nation.

Others are hurling vituperations on radio talk shows and sports Web sites. Many wrongly think the *Sentinel* wants to publish the photos, although the newspaper has repeatedly said in print that it had no interest in doing that.

"What kind of sick animals are you?" reader Patti Beers wrote in a typical e-mail. "I think you are all pigs and you should be astrained of your actions."

Another reader, John Lane, ...

PHOTOS, B5

To our readers

This newspaper now knows what it like to be at the center of a media controversy. We also have come to realize how frustrating it is when the controversy is based largely on misinformation.

We have received hundreds of e-mails and phone calls in recent days about our request to view the autopsy photos of NASCAR legend Dale Earnhardt. The vast majority of those complaints were from people who mistakenly thought we wanted to print the photos in the newspaper. I wanted to write this letter to reiterate the newspaper's position, and to reassure readers that we are in no way attempting to cause further pain to Teresa Earnhardt, her family or the driver's many fans.

We are NOT going to publish the autopsy photos. We are NOT going to copy the photos.

What we do want is to allow a medical expert to review the pictures — not copy them — as well as the autopsy report and pictures of Mr. Earnhardt's car. He then will report his findings about how Mr. Earnhardt died at the Daytona 500 last month. Toward this end, the *Sentinel* has retained one of the nation's foremost experts on head injuries.

What's the point? There are conflicting reports about how Mr. Earnhardt died.

Daytona International Speedway's physician has indicated that Mr. Earnhardt's injuries were the result of a rare seat belt failure that caused his face to hit the steering wheel, causing massive head injuries. Other medical experts, however, assert that the injuries were the result of head whip, stretching the head and neck to the point of causing basal skull fracture.

The latter injury has caused the deaths of three other NASCAR drivers in the past nine months that perhaps could have been prevented by head restraint equipment. The questions are whether Mr. Earnhardt was the fourth driver to die in this way and whether such equipment could have prevented his death.

These questions are critical to the future of NASCAR safety and the drivers who regularly risk their lives. Our goal is to shine a light on the safety issues of NASCAR in hopes that other fatal accidents can be prevented. The journalistic goal is this: What can be learned from this tragedy that could help avert future racing tragedies?

We are not a newcomer to this topic. One week before the Daytona 500, the *Sentinel* published an investigative series on NASCAR safety that took six months to report and raised many questions about the racing league's response to the recent fatalities in its sport.

Our goal is not sensational journalism; it is obtaining credible information in a way that respects the privacy of the Earnhardt family.

Sincerely,
Timothy A. Franklin
Editor/Managing Director

Maybe get Payne Stewart's family involved too?

ORLANDO SENTINEL

Sent By: SEN - JIM KING

TOP

8504875368

Mar-5-07 11:37AM

Page 2/3

Expert hired by Sentinel aims to resolve conflict

PHOTOS FROM BE

mailed this observation "The statement made by your attorney, David Bralow — 'if these photos will help elucidate the nature of what exactly went wrong or what happened to Dale Earnhardt, then the public is served' — is laughable. Is Mr Bralow going to analyze these pictures and let us know what his 'respected' medical opinion is?"

The answer is no.

Sentinel Editor Tim Franklin simply wants one of the nation's leading authorities on head trauma to review the pictures and make an independent determination about how Earnhardt died.

But the Sentinel never fully explained its reasons or internal thought processes in print because it was concerned about competitors who might seek the same information.

"That's often the failure of news organizations — the will and inability to explain and justify what and how and why we do what we do," said Bob Steele, director of the ethics program at the Poynter Institute, which promotes excellence and integrity in journalism.

"It's not a matter of defending what we do," Steele said, "but holding ourselves accountable by telling readers the purposes of our actions and justifying our processes based on our journalistic obligations and ethical standards. When we don't, that gets papers in trouble."

Bralow, the Sentinel's lawyer, said there was good reason not to be too explicit.

"We wanted a competitive edge. We thought other people would want to do the same thing, given the obvious disparity between what NASCAR says and what the

medical examiner says. There was an obvious question: What's going on here?"

The medical examiner in Daytona Beach determined that Earnhardt died from a basal skull fracture, which is caused by a violent whiplash that hurls the head forward with such force that blood vessels at the base of the skull rip apart. How he sustained that injury is a source of speculation.

A Daytona International Speedway doctor said Earnhardt probably died when his seat belt snapped, causing his chin to slam into the steering wheel. But after hearing the results of Earnhardt's autopsy, three experts told the Sentinel that there was a high probability that Earnhardt suffered the basal skull fracture before the seat belt snapped. They all agreed that hitting a steering wheel generally prevents, not causes, a basal skull fracture because the wheel would stop the head's violent forward motion.

The exact timing is important, because three other NASCAR drivers have died from violent head movement in the past nine months. If Earnhardt died the same way, his death would mark the fourth time a driver had died from what might have been a preventable injury. Unlike other motor sports, NASCAR does not require its drivers to use a HANS — head and neck support — device designed to prevent violent head movements.

If the Sentinel is granted access to Earnhardt's autopsy photos at a court hearing on Thursday, its expert, Phillip A. Villanueva, might be able to resolve the conflict. The director of the division of neurotrauma at the University of Miami/Jackson Memorial Medical Center, Villa-

nueva is one of the nation's leading experts on basal skull fractures.

"We're just trying to resolve these conflicts, period," Franklin said.

There is another conflict: media experts agree that is difficult for the public to understand — the conflict between the public's right to know and individual privacy, especially the privacy of Earnhardt's grieving widow. But Poynter's Steele said such intrusions often serve the public, if done compassionately and fairly.

"There are a number of things that news organizations do that are intrusive and potentially harmful to vulnerable people, but that intrusion and harm is sometimes necessary in the pursuit of legitimate information," he said. "I would suggest the same logic could apply to the Sentinel's request for the autopsy photos. There may be important information about safety issues that can be revealed through these photos."

And that, according to Bralow, is the whole point.

"The public purpose is for us to help our community understand this tragedy, whether it could have been avoided by a HANS, and if it could, why aren't they mandated?" he said. "This is a classic marketplace-of-ideas issue. If we can't tell people what the information is, then they don't have the information to make an informed decision or influence those who make the decisions. Information results in decision-making."

It also results in understanding. Many of the callers who listen to the Sentinel's explanation for seeking the autopsy photos have hung up expressing support, their anger dispelled.

CRIMINAL SENTINEL

Autopsy photos could be sealed

A bill removing the photos from the public record is gaining support.

By **DAVID COX**
TALLAHASSEE BUREAU

TALLAHASSEE — State lawmakers are trying to rush through a bill that would deny public access to autopsy photographs

Their push comes as thousands of Dale Earnhardt fans across the nation wage a campaign against the *Orlando Sentinel*. The newspaper is seeking a judge's permission Thursday to release autopsy photographs of the legendary NASCAR

driver to an independent expert for analysis.

Sentinel Editor Tim Franklin has repeatedly reassured the public that the newspaper has no plans to print, copy or handle the pictures of Earnhardt. The *Sentinel* hired a medical expert to review the photos to resolve questions about whether Earnhardt's injuries may have been prevented if he had worn a head-restraint device.

The Volusia County medical examiner concluded that Earnhardt died from a basal skull fracture. Such a fracture is caused by a violent whip-lash that hurtles the head forward with such force that blood vessels at the base of the skull tear apart.

However, a Daytona International Speedway doctor said Earnhardt probably died when his seat belt snapped, causing his chin to slam into

the steering wheel.

The *Sentinel's* pursuit of the autopsy photographs is intended to discover precisely how Earnhardt died so that other such fatal injuries might be prevented.

Gov. Jeb Bush, House Speaker Tom Feeney, R-Orlando, and other lawmakers have received more than 12,000 e-mails from Earnhardt fans across the nation demanding that they stop the *Sentinel*.

"The fact that the *Sentinel* has a well-intentioned motive for seeking access — that doesn't mean someone else will," said Feeney on Monday, the eve of this year's legislative session.

Reps. Randy Johnson, R-Celebration, Jeff Miller, R-Pace, and Sen. Jim King, R-Jacksonville, are drafting legislation that would prohibit the release of anyone's autopsy photographs. Such photos would be treated as private medical records.

A spokeswoman for Bush said he supports the idea. Autopsy photographs now are public records under the state's open government laws.

But lawmakers acknowledge it is unlikely they can pass a law before the *Sentinel's* court hearing Thursday, where the release of the Earnhardt photos is to be debated.



EARNHARDT

David Cox can be reached at dcox@orlandosentinel.com or 850-222-5564.



MORE ONLINE

For complete text of Teresa Earnhardt's and Tim Franklin's statements as well as video clips and the latest developments, go to orlando.sentinel.com

Our Views

Let reason prevail

Autopsy photographs are part of the public record for good reason. Emotion should not drive public policy.

Grief, no matter how profound, should not drive the creation of public policy.

When Dale Earnhardt's stock car crashed into a retaining wall during the final seconds of last month's Daytona 500 race, killing the legendary driver, the outpouring of emotion was palpable. Thousands flocked to memorial services honoring his many achievements in the sport. Thousands more set up makeshift shrines.

The cause of Mr. Earnhardt's death, however, remains unclear.

Seeking to unravel that mystery, the *Orlando Sentinel* asked a Volusia County judge to allow a medical expert hired by the newspaper to review the autopsy photographs. The *Sentinel* wants to determine if the use of a head-restraint safety device now used by other racing organizations could have prevented Mr. Earnhardt's death.

But Mr. Earnhardt's widow, Teresa, objects, contending that public review of the autopsy photographs would be ghoulish and cruel. She also urged Dale Earnhardt fans to lobby state lawmakers and Gov. Jeb Bush to prevent future public access to autopsy photographs.

Mrs. Earnhardt's request certainly has emotional appeal. And her anguish is heart-wrenching.

But autopsy photographs are part of the public record for good reason. To begin with, of course, the public pays taxes to collect and store that information.

More important, though, is the protection that keeping that record public affords people in many walks of life.

What would happen, for example, if a nursing-home patient died suddenly from what officials said was natural causes? What if autopsy photographs could prove otherwise?

What if a family who lost a loved one wanted to publicize autopsy photographs as a public service, so that other tragic deaths could be avoided?

What if a wealthy corporation failed to provide for the safety of its workers, an employee died and the company discouraged inquiries to avoid bad publicity and potential legal liability? What if autopsy photographs could prove that the company was negligent?

What if a medical examiner was inept, or routinely botched medical examinations of homicide victims? How would the public ever know?

Many public records contain

unseemly, embarrassing or disturbing information — domestic violence cases, homicides, car accidents to cite just a few. But those records are available for public inspection because there is a correct presumption that taxpayers have a right to examine how their tax dollars are spent.

Where would lawmakers draw the line?

Some have suggested that the courts determine, on a case-by-case basis, what information to make public. But if government starts restricting what people can see, the people will be at the mercy of government.

Another proposal holds more promise: Give the public access to view and analyze autopsy photographs but restrict the dissemination or reproduction of such material.

That would assuage Mrs. Earnhardt's concerns that the pictures would be published — which never was the *Sentinel's* intent. And it would preserve the public's right to get access to public information.

Mr. Earnhardt's death was tragic in so many ways. But lawmakers should tread carefully before allowing raw emotion to influence the formulation of public policy.

Keep stock-car racing safe

One motive drives the *Sentinel's* pursuit of information about what caused the death of Dale Earnhardt. safety.

Before Mr. Earnhardt's death last month, during the final lap of the Daytona 500 automobile race, three other National Association for Stock Car Auto Racing drivers — Adam Petty, Kenny Irwin and Tony Roper — had died in racetrack crashes during the past year.

Those three men shared a common fate: All died of a basal skull fracture, which occurs when a violent whiplash propels the head forward.

Experts say that injury could have been prevented by a head-and-neck safety restraint system known as a HANS.

Drivers on the Championship Auto Racing Teams and Formula One Grand Prix circuits are required to use the safety system. Yet NASCAR, the top sanctioning body for professional stock-car racing, has resisted making that safety move and instead has left it up to the choice of individual drivers.

Mr. Earnhardt chose not to use the device.

If an independent examina-

tion shows that Mr. Earnhardt's death could have been prevented, then perhaps NASCAR will do the right thing and follow the commendable example of the other motorsports groups that require the restraint system.

Mr. Earnhardt's death should not be in vain. His loss should not be in vain.

In countless interviews, Mr. Earnhardt expressed his love for motorsports.

Surely neither he, nor the other drivers who died of basal skull fractures, would want any more lives to be lost unnecessarily.

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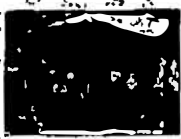
ORLANDO SENTINEL

Orlando Sentinel Sports

SECTION C / WEDNESDAY
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TV listing

Dale Earnhardt



The Aftermath

At Rockingham show will



An investigative look. Volusia County Medical Examiner photos of Dale Earnhardt's car show the force of Sunday's fatal crash at Daytona.

More on the Earnhardt tragedy

- Dale Earnhardt's Thursday funeral may not be on TV in Central Florida, C9
- Ken Schrader looked at his friend in disbelief immediately after the crash, C9
- Dale Earnhardt Jr. commented on death in racing last year, C9
- Sterling Marlin, blamed by some for the crash, has received death threats, A1
- Fans are pouring into Kannapolis, N.C., and Daytona to mourn their hero, A1

The Dura-Lube 400 will take place as scheduled Sunday and include a ceremony honoring Dale Earnhardt.

By BRIAN SCHMITZ
OF THE SENTINEL STAFF
ROCKINGHAM, N.C. — Stock-car society moves on from its glamour event, the Daytona 500, to the little one-mile working man's oval at North Carolina Motor Speedway. But this was no ordinary track in Dale Earnhardt's life, and it will not be on the Sunday after his death.

Only in memories will Earnhardt return to a place he held deep in his heart. It was here, in the track's 1994 fall race, that Earnhardt won the AC Delco 500 and wrapped up his seventh points championship, tying him with Richard Petty for the most career Winston Cup titles.

There will be an eerie mix of condo-

Phoenix Suns 110, Orlando Magic 104

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workingman's hero will be a private, invitation only affair. It has to be, largely because of logistics.

Earnhardt, NASCAR's most popular racer, commands a following of millions of loyal fans. No church could hold those who would come.

In a statement released by Earnhardt's company — Dale Earnhardt Industries Inc. — only immediate family, company employees and NASCAR Winston Cup Series teams and associated sponsors are invited.

"It's impossible to accommodate the tremendous outpouring of support from those who followed Dale," according to the family statement "With that in mind, the family has chosen to broadcast the service live on television, enabling fans across the country to share in this service for Dale."



STEPHEN ALDOWILL/ORLANDO SENTINEL

Dad's grave. Ralph Earnhardt is buried at Center Grove Lutheran Cemetery in Kannapolis, N.C. His sons' names are on his tombstone.

Fans who aren't invited but want to mourn together have an alternative.

The town of Kannapolis will mourn Earnhardt on Sunday at 7:30 p.m. at Fieldcrest Cannon Stadium. Because of the large crowd expected, the city moved it from the A.L. Brown High School, the same school in this rural textile mill town where Earnhardt quit ninth grade at 16, friends of his family recalled.

The burial spot for Earn-

hardt has not been announced. But Bob Chambers, a longtime friend of the family and caretaker of the cemetery at Center Grove Lutheran Church, hopes it's at the little church cemetery where Earnhardt's father, Ralph, is laid.

The elder Earnhardt died of a heart attack at age 45 in 1973. His headstone is embossed with a 1950s model Chevrolet stock car and his trademark No. 8. On the doors are the names of his three sons: Dan, Randy and

was a plot available next to Ralph Earnhardt's grave.

The pastor sent Chambers out to look.

There is. And a few more on the other side too.

"I ain't saying he's coming here, and I ain't saying he ain't," Chambers said. "But we'd love to see him come home here."

"This is the church where his Momma used to go. His Daddy's here. And it's on a nice hill overlooking the new Dale Earnhardt Boulevard."

Some fans on Tuesday sought out the gravesite, too, guessing it as a likely spot.

Nancy Shaw of Kannapolis, a family friend, laid a single rose on the grave Tuesday.

"It's gonna take us a long time to get over this one," she said. "When I heard he died, they had to pick me up off the

The family wasn't taking visitors but there was a book on an old rocking chair on the front porch that was set out for folks to sign.

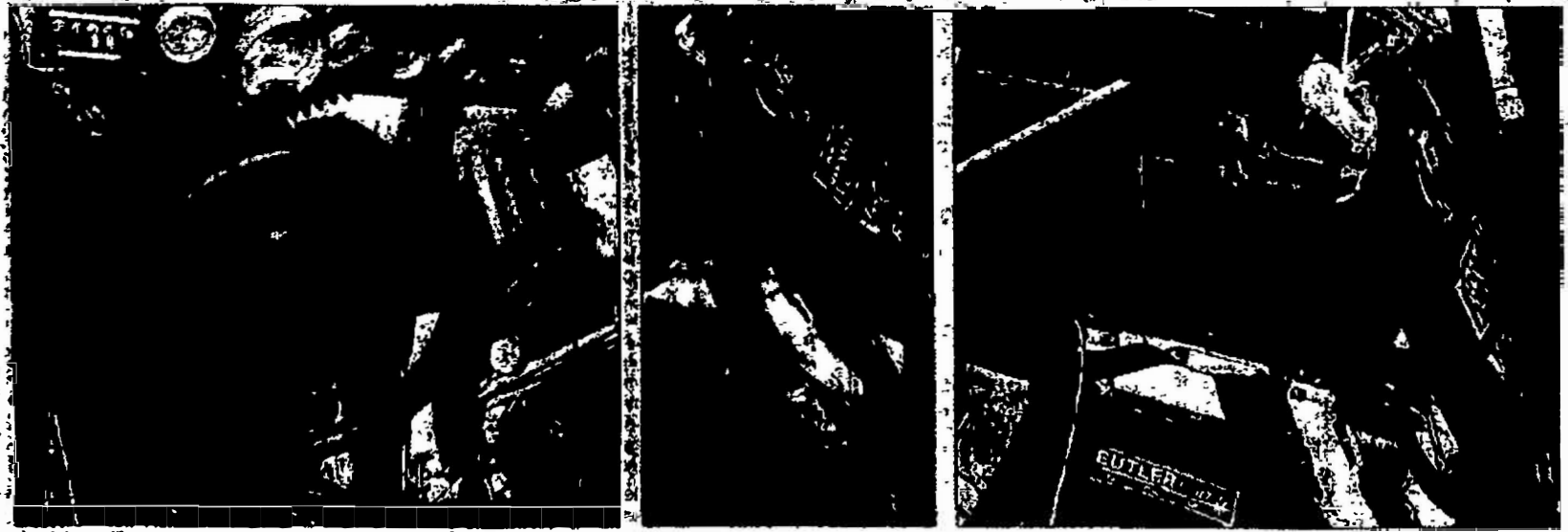
Many fans continued making a pilgrimage to Earnhardt's company headquarters in Mooresville.

Truck driver David Bollick of Lenoir, N.C., couldn't get the time off work to make the trip. So he stopped by the side of the road and made his own memorial, with black electrical tape on the back of his 18-wheeler.

"Thank you # 3 Dale," it reads.

"I just want everyone to know that he was a good man and it don't seem right him being gone," Bollick said.

Rick Hiday can be reached at 306-523-2314 or rchiday@rhnewsintl.com.



Inside Earnhardt's car. The impact of Dale Earnhardt's fatal accident in the No. 3 Chevrolet Monte Carlo is clearly visible in these photos taken by the medical examiner's office.

Schrader has feeling of disbelief after fatal wreck

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Orlando Sentinel

Bush joins move to change access law

By DAVID COX
TALLAHASSEE BUREAU

TALLAHASSEE -- With the support of Gov. Jeb Bush and the endorsement of Dale Earnhardt's widow, legislative leaders will unveil a bill today that would prohibit the release of autopsy photographs.

The legislation, by Rep. Randy Johnson, R-Celebration, and Sen. Majority Leader Jim King of Jacksonville, was prompted by the *Orlando Sentinel's* request for a judge to release autopsy photographs of NASCAR legend Dale Earnhardt to an independent medical expert for analysis.

The *Sentinel* wants the expert to review the photographs to determine precisely how Earnhardt died and whether better safety equipment could have saved him when he crashed at the Daytona 500 last month.

Bush will join Johnson and King at a news conference today to announce the bill. It would prohibit the release of anyone's autopsy photographs unless they were needed by a police agency for an investigation or unless a judge ruled there was good reason for the photographs to be released.

Autopsy photographs are now open to public inspection

by anyone under the state's open-records law. Earnhardt's family persuaded a judge to temporarily block release of his photographs, but that is the subject of a court hearing Thursday.

Bush spoke with Earnhardt's widow, Teresa, by telephone Tuesday and pledged his support for the new legislation.

The controversy inundated lawmakers as they opened their session Tuesday. Earnhardt fans across the nation bombarded state political leaders with more than 15,000 e-mails asking them to keep Earnhardt's photographs private.

And even though lawmakers

are moving at unusual speed, it is unlikely the bill could pass before Thursday's court hearing.

The legislation first must be assigned to committees in the House and Senate, which Senate President John McKay, R-Bradenton, and House Speaker Tom Feeney, R-Oviedo, could do today. But from there the two leaders would have to use their considerable power to hurry legislation to final passage before Thursday.

Feeney said the House probably would not consider the bill before the week of March 19.

David Cox can be reached at or 850-222-5564

O.S.

Widow rejects proposal for expert to see photos

By SEAN MUSSENDEN
OF THE SENTINEL STAFF

Teresa Earnhardt will not accept a deal offered by the *Orlando Sentinel* that would have allowed an independent expert to review autopsy photographs of her husband, Dale Earnhardt, without going to court, her new attorney said Tuesday.

The deal, which was offered by the newspaper Sunday, would have allowed a representative of the NASCAR legend's estate to be present when a medical expert hired by the newspaper reviewed the photographs. The photos would not be published, copied or handled by the newspaper.

"We found it not to be much of an offer at all," said attorney E. Thom Rumberger of Tallahassee.

Laurence H. Bartlett, a Daytona Beach attorney who represented Teresa Earnhardt until earlier this week, agreed with the *Sentinel* that the photographs were public records. He had been negotiating with the newspaper to reach an agreement whereby the newspaper's expert could look but not remove or copy any of the photos.

"She's having a hard time understanding the scope of the public-records law," Bartlett said of Teresa Earnhardt last week.

Earnhardt replaced Bartlett with Rumberger's firm this week.

According to a motion filed by Rumberger with the Volusia County Circuit Court late Tuesday, Bartlett's negotiations were done "without consent" of Teresa Earnhardt.

The *Sentinel's* request is scheduled for a hearing Thursday before Volusia County Circuit Judge Joseph Will, who ordered the autopsy photographs sealed Feb. 22. At a hearing at 2 p.m. today, Earnhardt's attorneys are expected to ask the judge for more time to prepare.

Sentinel attorney David Bralow said a provision in the public-records act requires a speedy hearing. "We're entitled to an immediate hearing because the courts recognize that 'news delayed is news denied,'" he said.

Rumberger pointed out that a bill that would exempt autopsy photographs from Florida's public-records law was to be introduced in Tallahassee. He also said the photographs are exempt because the newspaper plans to use them to review safety issues in NASCAR and not for government oversight.

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Newspapers back Sentinel in photo case

By CHRISTOPHER BOYD

ORLANDO SENTINEL STAFF

Four metropolitan newspapers including the *Miami Herald* and *Tampa Tribune*, have joined the *Orlando Sentinel's* attempt to gain access to autopsy photos of NASCAR legend Dale Earnhardt

The newspapers took the action amid a growing debate over the photos, which the *Sentinel* wants to examine as part of its inquiry into the crash that killed Earnhardt during the final lap of the Daytona 500 on Feb. 18.

Earnhardt's widow, Teresa, sued Volusia County four days after the crash to prevent release of the autopsy photos, calling it an invasion of the family's privacy. Volusia County Circuit Judge Joseph Will granted a temporary injunction

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tion barring their release on the grounds that they are not newsworthy

The next day, the *Sentinel* made a public-records request for the pictures

In addition to the *Herald and Tribune*, the *Los Angeles Times*, *Chicago Tribune* and WFLA-Channel 8, a Tampa NBC affiliate, joined the *Sentinel's* lawsuit to obtain access. The *Sentinel*, *Times* and *Chicago Tribune* are all owned by Tribune Co. of Chicago.

The *Sentinel* also has received support from the Society of Professional Journalists, which is the nation's largest journalism association, the Reporters Committee for Freedom of the Press, the First Amendment Foundation, The Associated Press Sports Editors, the *St. Petersburg Times* and two other Tribune newspapers, *Newsday* on Long Island, N.Y., and *The Sun* of Baltimore. None is part of the lawsuit

"It's gratifying that some of the biggest journalism organizations in the country see the importance of keeping these records open to the public," *Sentinel* Editor Timothy Franklin said Tuesday

The newspaper, which published the results of a six-month investigation into NASCAR safety just days before Earnhardt's death, wants an independent medical expert to study the photos. The newspaper said the inspection is needed to help resolve how Earnhardt died

"We are very sympathetic to the Earnhardt family but we believe there's interest about the question of NASCAR safety," Franklin said. "In less than nine months, four NASCAR drivers have died. I believe our role is to provide as much credible and independent information as possible about the deaths of Mr. Earnhardt and the other drivers

Despite the newspaper's assurance that it wouldn't publish, copy or handle the pictures, its

public-records request drawn thousands of critical phone calls and e-mails. Several Florida legislators say they plan to introduce bills to prohibit release of autopsy photos

The *Sentinel* and its supporters argue that, under Florida public-records laws, the courts can't block access to the photos

"These are public records and we think it is very important that these records be available," *Miami Herald* Executive Editor Martin Baron said. "This is all about checks and balances in our system. The press should be able to examine these photos."

Tampa Tribune Executive Editor Gill Thelen said access is important both to the *Sentinel's* newsgathering effort and protection of the public's right to information under Florida's Sunshine Law

"It's information that is material to the public's understanding of what happened in this case," Thelen said. "And we certainly want to ensure that no holes are punched in the Sunshine Law."

Ray Marcano, president of the Society of Professional Journalists, said public concern over how the photos might be used clouds the real issue — open public access

"What's getting lost in the debate is whether government has a right to withhold records that are clearly public," Marcano said. "And the answer is simple: Government does not and should not even try."

Barbara Petersen, executive director of the First Amendment Foundation in Tallahassee, said the Circuit Court judge overstepped his authority

"I don't think the judge can do what he's doing under Florida public records laws," she said. "The judge doesn't have the authority to balance public and private interests, that can only take place in the Legislature."

Christopher Boyd can be reached at cboyd@orlandosentinel.com or 407-420-5723

A bill to be entitled

An act relating to public records; providing that autopsy photographs or videos are confidential and exempt from the requirements of s 119 07(1) and s 24(a), Art. I of the State Constitution; providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida

Section 1. Photographs or videos of an autopsy are confidential and exempt from the requirements of s 119.07(1) and s. 24(a), Art. I of the State Constitution, except upon a court order on a showing of good cause. Any state or federal agency that is authorized to have access to such documents by any provision of law shall be granted such access in the furtherance of such agency's statutory duties, notwithstanding the provisions of this section. This exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119 15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that photographs or videos of an autopsy show the deceased in graphic and often disturbing fashion. Such photographs or videos may depict the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or videos of an autopsy are highly sensitive depictions of the deceased that could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injure the memory of the deceased, if copied and publicized. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and videos twenty-four hours a day and that such widespread dissemination of autopsy photographs and videos would subject the immediate family of the deceased to continuous injury. Further, the Legislature notes that the continued availability of other types of information, such as the autopsy report, are less intrusive and injurious to the immediate family members of the deceased while still providing public oversight. Given the likelihood of injury to immediate family members by the dissemination of autopsy photographs and videos, and the availability of less intrusive means of providing public oversight, the Legislature finds that it is a public necessity that autopsy photographs be made confidential and exempt from the requirements of s 119 07(1) and s 24(a), Art. I of the State Constitution.

personal

and videos

involve the privacy of the immediate family and of the deceased

made available for inspection, copying, and publication.

A bill to be entitled

An act relating to public records: providing that autopsy photographs are exempt from the copying requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, providing for inspection under supervision, providing a statement of public necessity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida

Section 1. A photograph or video of an autopsy that is a public records is subject to public inspection but is exempt from the copying requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Photographs or videos of an autopsy may be inspected only under the direct supervision of the custodian of the photographs in order to ensure that they are not removed or copied by an unauthorized viewer. Autopsy photographs may be copied only by an immediate family member of the deceased, an attorney representing an immediate family member of the deceased, a state or federal law enforcement agency, or upon a court order upon a showing of good cause. This exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119.15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature recognizes that autopsy photographs or videos in the custody of a governmental entity are public records. The Legislature finds that photographs or videos of an autopsy show the deceased in graphic and often disturbing fashion. Such photographs or videos may depict the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or videos of an autopsy are highly sensitive depictions of the deceased that could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injure the memory of the deceased, if copied and publicized. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and videos twenty-four hours a day and that such widespread dissemination of autopsy photographs and videos would subject the immediate family of the deceased to continuous injury. As a result, it is a public necessity that the copying of photographs or videos of an autopsy be made exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, while still permitting public inspection. Further, the Legislature notes that, in addition to inspection of photographs or videos of an autopsy, there continue to be other types of available information, such as the autopsy report, that are less intrusive and injurious to the immediate family members of the deceased while still providing public oversight.

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(Cite as: 1994 WL 722891 (Fla.Cir.Ct.))

H

Florida Circuit Court, Eighth Judicial Circuit,
Alachua County

STATE of Florida, Plaintiff,
v.

Danny Harold ROLLING a/k/a, Michael J
Kennedy a/k/a, Mike Kennedy, Defendant.

No. 91-3832 CF A

July 27, 1994

Rod Smith, State Atty., Don Royston, Eighth
Judicial Circuit, Gainesville, FL.

C Richard Parker, Public Defender, Eighth
Judicial Circuit, Gainesville, FL.

Gabel, Taylor & Dees, George D. Gabel, Jr.,
Charles D. Tobin, Jacksonville, FL

Holland & Knight, Gregg D. Thomas, David S
Bralow, Tampa, FL.

Deborah R. Linfield, New York Times Co., New
York City.

Jerold I. Budney, Associate Gen. Counsel, Miami
Herald Pub., Miami, FL

Mateer, Harbert & Bates, P.A., James R. Lussier,
Orlando, FL

Thomas R Julian, Miami, FL

**ORDER ON DISCLOSURE OF VICTIM
PHOTOGRAPHS AND VIDEOTAPES**

STAN R. MORRIS, Circuit Judge.

*1 The State Attorney, on behalf of the families of the murdered victims, filed a motion requesting non disclosure of those photographs and videotapes which depict the victims both at the murder scene and the autopsy room of the District III Medical Examiner. ~~The motion was supported by 12 affidavits from the parents and siblings of each murder victim expressing their belief they would suffer future harm by further disclosure of these photographs and their opinion that their rights of~~

privacy would be thereby violated. Attached as exhibits were various demands by the media to see and copy these and other discovery materials. The issue was raised prior to trial and at the penalty phase proceedings subsequent to the entry of the plea of guilty by the defendant

The record contains hundreds of photographs taken at the scene or at the autopsies, only seventeen of which were admitted into evidence. Prior to trial and again prior to the penalty phase proceedings, the court had held a series of hearings upon motion of the defendant to limit or prohibit the use of the victims photographs at trial or at the penalty phase. The Court, after hearing, excluded some photographs on the basis that they were irrelevant or, on the basis that their relevance was outweighed by the potential for prejudice to the Defendant. The Court required other photographs to be altered or cropped in such a fashion as to reduce undue prejudicial impact. The Court then ordered the State to file all photographs in the record for any future review by an appellate court.

During the penalty phase the Court did not close proceedings or in any way unpede the right of the media or public present in the courtroom. Any difficulty in observing the proceedings was the product of the physical design of the courtroom and the positioning of video cameras (located on a stand built by the media at their request) inside the rail and to the back and side of the jury box at an angle, so that the camera might record the proceedings from the jurors' perspective. The Court did prohibit the future disclosure, observation or copying of the photographs of the victims until a full hearing was held. All other physical evidence, including photographs of the crime scenes not depicting the victims, was displayed each evening for the media and public on a table or easel located immediately behind the bar

A hearing was held on the State's motion on April 12, 1994, at which the Defendant, his counsel, the State Attorney and two counsel representing media organizations were present and presented argument. Media attorneys present represented the Gainesville Sun, the Orlando Sentinel, the Florida Alligator and WESH-TV Orlando. The State presented the motion on behalf of the victims in anticipation of

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1994 WL 722891

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(Cite as: 1994 WL 722891, *1 (Fla.Cir.Ct.))

demand on the Clerk of Court and upon other records custodians for review and copying of the photographs and of crime scene videotapes. The videotapes had not been admitted into evidence. The Defendant took no position on these issues. At the hearing, counsel represented that some media representatives could not see the exhibits offered into evidence, although access to such exhibits was needed in order to adequately evaluate government operations. Reporters wished to be able to place themselves in the position of the jurors in order to evaluate independently the impact of the photographs on the proceeding. Media counsel offered a compromise on behalf of their clients to limit themselves to review only those photographs presented to the jury, to do so in the presence of the Clerk and not to reproduce, copy or remove the photographs. In addition, they stated it was not their intention to print or publish the photographs.

The Public Records Issue:

*2 The first question to be answered is whether the photographs of the bodies of the victims are public records under the law of the State of Florida. The court finds that they are public records. The photographs were taken by officers of the State in the course of the investigation and are in the possession of officers of the State in their official capacities. All were created as part of the criminal investigation of this case and all were subject to pretrial discovery pursuant to Florida Rule of Criminal Procedure 3.220. The photographs have been the subject of numerous orders prohibiting pretrial disclosure in order to preserve the fair trial rights of the defendant. The rationale of all previous orders of nondisclosure, that the defendant's right to a fair trial might be compromised by the disclosure, no longer applies. The materials must be disclosed and are subject to inspection and copying unless the law recognizes some exception sufficient to prohibit or in some fashion restrict public access.

The Standing Issue:

The media questioned the standing of the State Attorney to raise the claim that disclosure of the materials would in some way compromise the right to privacy of the victims' families. The court finds that the State Attorney does have standing. First, the material sought by the media is in the possession

of the State Attorney in his capacity as records custodian. It is the State Attorney, as well as the Clerk of Court, who is requested to release the material to the media. The State has had standing to contest pretrial motions for nondisclosure in order to protect the defendant's right to a fair trial. Rule 3.220, Fla.R.Crim.P., allows "any person" to raise the issue of nondisclosure. The State Attorney is given statutory duties to notify and inform victims of the progress of the prosecution, as well as to present matters on their behalf such as requests for restitution. The victims themselves, through correspondence to this Court, have raised the issue and have requested that the photographs not be disclosed in order to protect their rights to privacy. The Court finds that the State Attorney has standing to raise this issue and that the issue is one properly addressed to the trial judge as collateral to the issues of guilt, innocence and sentence. The right of the public access to public records, the right to a fair trial and the right to privacy has dominated much of this Court's time and attention for the past two years.

The Existence of a Right to Privacy in the Material's themselves.

It is important to note that this case does not deal with the First Amendment right of the Press to publish material already legitimately in their possession, nor does it involve any action against the Press for improper disclosure of such material. Those issues, should they arise, would be governed by the principles enunciated in *Florida Star v. B.J.F.*, 488 U.S. 887, 109 S.Ct. 216, 102 L.Ed.2d 208 (1988) and similar cases. [FN1] Rather, this case deals with the obligation of a government official having custody of public records to disclose those records, when the disclosure would impinge on recognized privacy interests of an individual who is the subject of those records. It is the Public's Right to Know rather than the Media's Right to Publish which is at issue here.

FN1 See also Comment: *Florida Star v. J.J.F.: The Wrongful Obliteration of the Tort of Invasion of Privacy through the Publication of Private Facts*, 18 HASTINGS CONST L Q 391 (1991). Comment: *Florida Star v. B.J.F.: The Right of Privacy Collides with the First Amendment*, 75 IOWA L REV. 139 (.990).

*3 The Supreme Court of Florida has clearly held

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(Cite as: 1994 WL 722891, *3 (Fla.Cir.Ct.))

that the Public's interest in the disclosure of public records pursuant to statute is to be balanced against the privacy rights of the subjects of those records. In *Post-Newsweek Stations, et al. v John Doe, et al.*, 612 So.2d 549 (1992), the Court stated "Here, we also qualify the public's statutory right of access to pretrial discovery information by balancing it against the Does' constitutional right to privacy." In coming to its decision, the Court relied on *Barron v Florida Freedom Newspapers*, 551 So.2d 113 (Fla., 1988) to establish the various grounds on the basis of which material statutorily subject to disclosure may be withheld from the public. "Closure of court proceedings or records should occur only when necessary . . . (i) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed." The Supreme Court in *Barron* had specifically found that "under appropriate circumstances, the constitutional right of privacy established in Florida by the adoption of article I, section 23, could form a constitutional basis for closure under (e) or (f)". *Barron* at 16.

The Court in *Doe* went on to explain that the information which would be withheld from disclosure was information which would be of an intimate, potentially embarrassing, information. They held that the names and addresses of the individuals involved did not constitute the kind of information which would fall under the individuals' right to privacy. Material including "intimate information relating to genital size and sexual performance," however, would be evaluated in light of the right to privacy, and, in *Doe*, the Supreme Court held that such information should not be released to the public.

The Court finds that the materials at issue in this case, photographs of the nude and mutilated bodies of the victims as they were found by investigating officers, although they are public records as defined by statute, are materials which would be subject to a right to privacy were the victims still alive.

The existence of a Right to Privacy in the Relatives of the Victims

Although the victims in this case would have had a right to privacy in the materials if they had survived, the Court must now determine whether the

close relatives of the victims have a privacy interest which survives the deaths of the victims. The close relatives of the victims might acquire such a right, either derivative from the victims themselves or in their own right.

Most courts considering the issue have held that the close relatives of a victim do not acquire a derivative right to privacy. The victim's right to privacy does not survive the death of the victim. In so doing, the courts have adhered to the common law rule that actions involving libel, defamation and the like do not survive the death of a party. [FN2] The recent Florida case of *Williams v City of Mineola*, 575 So.2d 683 (Fla. 5th D.C.A., 1991), apparently follows this policy when a post-death action for damages for wrongful disclosure is brought by the survivors of the victim.

FN2 See, e.g. Note: *Defamation Survivability and the Demise of the Antiquated "Actio Personarum" Doctrine*, 85 COLUM.L.REV. 1833 (1985).

*4 A decision in at least one federal court concluded that a relatives right of privacy does exist, a right which may, upon balance, be sufficient to prohibit disclosure of materials which would be subject to a right of privacy were the victim alive. *N.Y. Times v. NASA*, 782 F Supp. 628, 19 Media L.Rep. 1688 (1991). [FN3] In that case, the families of deceased astronauts did not wish to suffer by hearing the voices of the deceased repeated in the media. The Court found this to be a sufficient basis to deny a federal disclosure demand because the statute specifically excepted this type of material from disclosure under the privacy rights acknowledged as part of federal law. Although the specific legal bases differ, the content analysis directed by the Florida Supreme Court leads to the conclusion that a photograph of a stabbed and mutilated child or sibling should be afforded the same status under our law as would a voice under federal notions of privacy.

FN3. See also *Michigan's Freedom of Information Act and Personal Privacy: A Divergence from the Federal Freedom of Information Act as to Privacy Interest of Deceased Persons and their Families* 55 UNIV. OF DETROIT MERCY L.R. 599 (1992), *Constitutional Law: Individual's Right to Disclosures Privacy as Limited by Public Records Act*, 10 STETSON L.R. 376 (1981); Greenberg, "Disclosures Privacy in Florida—Drawing the line

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after Doe v State, 22 STETSON L R -- (1992)

In addition, the relatives of the victims may claim a right of privacy in their own right, to prevent the direct trauma, sorrow and humiliation which they might suffer from public display of intimate and potentially embarrassing photographs of the mutilated bodies of their children. The families have sought prohibition of any future disclosure. They claim a right to privacy and they wish to be harmed no further by being confronted in the media with the images of their slain and mutilated loved ones. This Court has reviewed the photographs many times in camera, in hearings and during the penalty phase proceedings. Common sense and experience dictate that no reasonable person could expect these claimants to face these images in a public forum without great emotional distress and trauma.

The *Barron* court noted "it is generally the content of the subject matter rather than the status of the party that determines whether a privacy interest exists and closure should be permitted." The court then went on to hold that one of the bases on which the privacy interest might, on balance, outweigh the public's right to know was "(e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]." Although the issue arose, in *Barron*, in the context of the closing of a court proceeding to media representatives, the rationale extends to other situations where the right to privacy might require the non-disclosure of otherwise public material. The potential for substantial injury to innocent third parties presumptively applies to the intimate relatives of murdered victims. The content of the subject matter--the photographs of the nude bodies, the stab wounds and mutilations of the victims--can reasonably be expected to cause extreme emotional distress and trauma if encountered in supermarket tabloids, newspapers, magazines, television programs or the like, especially since these involve utilization of the photographs for commercial gain.

*5 Based on all the factors in this case, the Court concludes that there exists a right to privacy for intimate relatives of the victims, whether it is a derivative right which survives the death of the victims, or it is the right of the family members in their own right. The privacy interest of the

intimate relative, however, is less than that which would inure to the offended individual, if the offended individual had lived. The relative strength of the privacy interest depends on the intimacy of the relationship between the relative and the victim. In this case, the photographs are intimate, embarrassing and trauma producing photographs of the victims, who are the children of those asserting the right--the closest possible familial relationship. The right is less weighty, however, than would be the right to privacy held by the victims themselves, and is further attenuated by the distance of the relatives from the victims and from the event itself. It is this lesser right which is to be weighed, on balance, against the right of the public to disclosure of public documents.

The Test to be Applied.

The test to be applied, then, is one of a careful balancing of the public's right to know against the residual privacy interest of the victims' relatives. In balancing these interests, the Court looks first to the policy of disclosure of public records--that it permits the public to evaluate the actions of public officials in order to hold them accountable for those actions. The Court is aware that the Court cannot substitute its judgment on the publication value of the materials for that of the members of the media, but can decide whether the information has significant relevance to that function and whether the same information is available from other, less intrusive, sources. The more likely that disclosure of the material will permit the public to oversee and to judge governmental operations, the greater the need for full disclosure.

The public's right to information which permits the public to evaluate the operations of government must be balanced against the intrusion on the right to privacy, a balancing which should include at least four factors:

- a. The relevance of disclosure of the material to furthering public evaluation of governmental accountability;
- b. The seriousness of the intrusion into the close relatives' right to privacy by disclosure of the material;
- c. The availability, from other sources--including other public records--of material which is equally relevant to the evaluation of the same government action but is less intrusive on the right to privacy;

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d. The availability of alternatives other than full disclosure which might serve to protect both the interests of the public and the interests of the victims

In that balance, the less the information tends to open governmental operation to public view and the greater the intrusiveness of disclosure of personal information on this lessened right to privacy, the more the pendulum swings to prohibition of disclosure. Conversely, the more the information opens the government operations to scrutiny and the less personal and intrusive it is, the more the pendulum swings to disclosure of the information. If equivalent material is available from other sources, for example, the written description of the crime scene as opposed to more sensationalistic photographs of the bodies, the need for disclosure of the material is lessened.

The Balance

*6 In balancing these factors, the Court finds:

- a. The materials sought to be disclosed facilitate evaluation of public law enforcement officials in carrying out their duties of investigating criminal offenses. The photographs show what public officers found, and permit evaluation of the subsequent investigation. The photographs admitted at trial permit public evaluation of the jury's performance and the actions of the trial judge in admitting or excluding photographs. The public interests involved are weighty interests, and the photographs are relevant to the ability of the public to hold public officials accountable for their actions.
- b. Because the photographs depict the nude mutilated bodies of their children or siblings, public disclosure would be a serious infringement of the right to privacy of the children's parents and siblings. This is a factor which weighs heavily with the Court.
- c. Information equivalent to that provided by disclosure of the photographs is available to the public through other sources. The actual photographs add but little to what the public can learn through a review of other documents already disclosed, particularly the detailed descriptions of the crime scenes filed by the investigators of those crime scenes and the reports of the autopsies performed on the bodies of the victims. Although disclosure of the photographs are of little

additional value to the information available from other sources, the photographs are not without some value. Photographs are less subjective than are written descriptions of crime scenes and disclosure of the photographs might permit the public to evaluate the impact of the photographs on the jurors and to evaluate the adequacy of the crime scene reports themselves.

d. Having carefully weighed the various factors affecting disclosure in this case, the Court believes that a remedy can be devised which can preserve the rights of both the public and the victims' relatives, a remedy suggested by counsel for the Media. A viable alternative exists, less restrictive than that of nondisclosure of the material.

The Remedy

Having weighed carefully the relative weight of the interests of the parties, the Court believes that the suggestion of the attorney for the media, made at the hearing on this matter, will adequately protect the right to privacy on the part of the victims' families and, at the same time, will insure the media and interested public access to the photographs adequate for the purpose of insuring accountability of public officials. The remedy suggested by the attorney for the media is adopted by the Court.

At the hearing, it was suggested that the Court allow access by members of the public and the media only to those photographs seen by the jury, but not permit the photographs to be removed from the possession of the records custodian or to be reproduced. The Court concurs with the suggestion of the attorneys for the media, but feels that it should not be limited only to those photographs seen by the jurors. Under the suggested procedure, the victims' families have no justifiable fear of being confronted with these photographs in a public forum. This remedy permits the public and media to independently evaluate what the jurors saw, close-up as they saw it, and to reach whatever independent conclusion they deem proper. It permits interested members of the public and the media access to the material sufficient to enable them to carry out the oversight function envisioned by Florida's Public Records law. In addition, in the event that after privately reviewing the material, members of the public or the media conclude that the limited availability of the material is not sufficient to achieve the purpose of disclosure of public records--

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that of evaluating governmental accountability--they can move for full disclosure, including the copying and photographing of those specific items which they deem necessary, presenting to the Court the reasons why copying and photographing the items promotes the public interest. At a subsequent hearing, the Court would be able to again evaluate the need for more complete disclosure against the interests of the victims' close relatives in non-disclosure

*7 The State suggests that those statutes prohibiting pornography would justify closure on this instance. The Court doubts that the statute would apply in this case, but finds no need to make such analysis when condition 1 e) of the third factor of *Barron* suffices to justify a limited disclosure.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT

1 The photographs of the victims and videotapes of the crime scenes produced or acquired by law enforcement officers or by any other government officer in the investigation or prosecution of this case shall be made available, upon reasonable request to the records custodian having possession of such photographs or videotapes, for viewing and

inspection by members of the public.

2 The records custodian shall inform any member of the public wishing to view such material of the restrictions on copying or removing such material that have been set out in this order before the record custodian permits access to the material.

3. The records custodian shall take every precaution to ensure that such photographs and videotapes shall not be removed or copied, which may include restrictions on items which may be carried into the room in which the material is to be viewed, restrictions on the number of persons who may be permitted to view the material at the same time, and the requirement that the records custodian maintain possession of the material while it is being viewed


4 No further access to the materials shall be permitted except upon order of this Court, predicated on a written motion with notice to the State, and after a hearing at which the movant shall bear the burden of showing the necessity for further access.

DONE AND ORDERED.

END OF DOCUMENT

MEMORANDUM

To: Senator Jim King (Paul Hull)
 Senator Bill Poscy (Russ Cyphers)

From: Sue Santa 

Re "Eamhardt Family Privacy Amendment"

Attached, please find the summary that you requested outlining the basic principles of the "Eamhardt Family Privacy Amendment" (tentative, working title.) It provides: (1) a summary of the activities of the past week, (2) an explanation of the problem inherent in Chapter 119 of the Florida Statutes, and (3) a "lay person" explanation of the change to Chapter 119 sought by the Eamhardt family.

Please contact me if you have any questions. 904-947-6624.

Thank you.

Attachment

18 2482

DRAFT

**TO: Senator Jim King
Senator Bill Posey**

RE: Summary - "Earnhardt Family Privacy Amendment"

Background:

On February 18, 2001, legendary race car driver Dale Earnhardt was killed in an accident at Daytona International Speedway. In the days following the accident, the public and the press sought any and all available information regarding Mr. Earnhardt, his career and the event of his death. The Earnhardt family became aware that, under the broad scope of Florida's so-called "Sunshine Law" or Florida Public Records Act (Chapter 119, Florida Statutes), all information held by the Medical Examiner related to Mr. Earnhardt's death would be available to the public, including a transcript of the autopsy, photographs of the inside of Mr. Earnhardt's race car taken after he was removed from it, and photographs of the autopsy.

Absent a request by the public or the press, the Volusia County Medical Examiners Office posted on the Volusia County website (www.volusia.org) photographs of Mr. Earnhardt's wrecked race car taken after he was removed from the car. Subsequently, the print and electronic media published some of these photos, presumably after obtaining them from the website. Thereafter, Mr. Earnhardt's wife, Teresa, his family and the estate obtained from the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida, a temporary injunction barring the Volusia County Medical Examiner from "releasing, disclosing, posting or causing to be printed, published, displayed, or otherwise used publicly or privately any photographs taken or created by [the County ME] in connection with [the ME's] investigation and the performance of its duties in connection with the death of Dale Earnhardt." (Case No. 2001-30373-CICI, February 22, 2001).

The Court found that publication of the automobile photos on the website may have been improper and was not in response to a proper request under Chapter 119, Florida Statutes. Furthermore, the Court found that (1) the photos were accessible to children and exposed them to highly graphic and disturbing images, (2) the release of the photos may well negatively distort the public's perception and memory of Mr. Earnhardt, (3) the Earnhardt Estate did not authorize the use of the photos; (4) the photographs not yet released have "no bonafide newsworthiness, and are not the subject of legitimate journalistic interest," (5) the further release of photos would cause Mr. Earnhardt's family additional anguish and grief, and would inflict further emotional distress, (6) the Earnhardt family would suffer immediate and irreparable harm if the temporary injunction was not entered, (7) the Earnhardt Estate would have no adequate remedy at law; and (8) the temporary injunction would protect the public interest from exposure to these photographs

The Medical Examiners Office has now received at least one general request for all information in the ME's file regarding Mr. Earnhardt's death. This would, of course, include Mr. Earnhardt's autopsy photos. The Earnhardt family also anticipates challenges to the temporary injunction.

On behalf of her family, Mrs. Earnhardt is pursuing several efforts to protect her family from public release her husband's autopsy photos, asserting that the Florida Public Records Act blatantly disregards her family's right to privacy and protection from the irreparable harm that would be caused by publication of the photos. Furthermore, the photographs serve no reasonable "news interest"; the photos would likely be used for sensational, exploitative and/or commercial purposes. Finally, the extensive use of the internet would likely result in the photographs being splashed on many websites available for widespread, uncontrolled review.

Proposal:

The Earnhardt family appeals to the Florida Legislature to adopt a narrow exemption to the "Florida Public Records Act" which would protect autopsy photographs, videos or other visual depiction from release to the public for duplication or publication.

Basic Principles:

- Protect autopsy photographs, video or other visual depiction from release to the public or press for duplication or publication.
- Allow the public or the press, pursuant to proper request to the Medical Examiner or other appropriate State or local official, to view autopsy photographs, video or other visual depiction. Photographs, video or visual depiction could not be copied, photographed, downloaded or otherwise duplicated and could not be published.
- An individual or organization could overcome this exemption by demonstrating to the appropriate Florida Court that "public necessity" dictates that the photographs, videos or visual depiction be released for duplication or publication. (*The precise standard TBD.*) In this process, the deceased's family, heirs or estate would be given the opportunity to assert their interest. Likewise, the exemption could be waived for use of autopsy photos in criminal and/or civil proceedings.
- The overriding intention of this exemption is to adequately protect the privacy rights of the deceased's family, heirs and estate from the irreparable harm that could be caused by dissemination of autopsy photos by the press or other electronic medium.
- Access to all other written and oral records maintained by the Medical Examiner's Office (i.e., autopsy transcripts, reports indicating cause of death, etc.) would not be affected by this amendment.
- NOTE. The legislature has provided similar exemptions for victims of sexual crimes and crimes against children. Furthermore, the State protects the medical records of the living.



Akerman, Senterfitt & Eidson, P.A.
255 South Orange Avenue, P. O. Box 231
Orlando, Florida 32802-0231
Tel: (407) 843-7860
Fax: (407) 843-6610

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AKERMAN, SENTERFITT

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 2001-30373-CI-CI

TERESA EARNHARDT, and The Estate of DALE EARNHARDT, by and through its personal representative, TERESA EARNHARDT, for and on Behalf of The Estate and For The Survivors,

Plaintiff,

v.

VOLUSIA COUNTY, OFFICE OF THE MEDICAL EXAMINER,

Defendant.

CLERK OF THE CIRCUIT & CIV. COURT VOLUSIA COUNTY FLORIDA

2001 FEB 22 AM 11:15

FILED

TEMPORARY INJUNCTION

THIS CAUSE came on for hearing on Plaintiffs' Motion for Injunctive Relief, and the Court having reviewed said Motion, having heard argument of counsel, and having been duly advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiffs' Motion for Injunctive Relief is GRANTED.
2. The Court hereby enjoins Defendant, or anyone acting under Defendant's direction or control, from voluntarily releasing, disclosing, posting or causing to be printed, published, displayed, or otherwise used publicly or privately any photographs taken or created by Defendant, or at Defendant's request, in connection with Defendant's investigation and the performance of its duties in connection with the death of Dale Earnhardt, ("Mr. Earnhardt").
3. The Court finds that Defendant's publication on its website of photographs created in connection with the performance of Defendant's duties in connection with the death of Mr. Earnhardt may have been improper, and not in response to a proper request for production of said photographs under Chapter 119, Florida Statutes. As a result of Defendant's potentially

improper actions in making said photographs available on its website, children will have access and exposure to these highly graphic and disturbing photographs.

4. The Court further finds that any further improper release of these photographs may well negatively distort the public's perception and memory of Mr. Earnhardt.

5. The Court further finds that Mr. Earnhardt's Estate has not authorized the use of these photographs. The Court also finds that many of the photographs not yet released by Defendant on its website may have no bona fide newsworthiness, and are not the subject of legitimate journalistic interest.

6. The Court further finds that the further release of said photographs would cause Mr. Earnhardt's family additional anguish and grief, and would inflict further emotional distress upon them.

7. The Court further finds that the family and Estate of Mr. Earnhardt will suffer immediate and irreparable harm if the requested temporary injunction is not entered.

8. The Court further finds that the family and Estate of Mr. Earnhardt have no adequate remedy at law. Injunctive relief alone will prevent their pain and suffering, additional anguish and grief, invasion of their privacy, unauthorized use of these photographs and the distortion of Mr. Earnhardt's memory.

9. The entry of the requested injunctive relief will protect the public interest from exposure to these photographs.

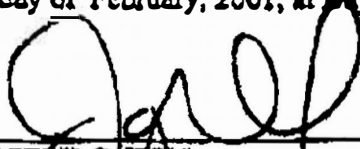
10. The Court is aware that some of the photographs taken by Defendant may constitute public records under Chapter 119, and that a proper request for production of said photographs under Chapter 119 may require that this Court, in accordance with Forsberg v. Housing Authority of Miami Beach, 455 So. 2d 373 (Fla. 1984) at p. 375-376, and Williams v. City of Minneola, 575 So. 2d 683 (Fla. 5th DCA 1991) at p. 687-688, to balance the competing privacy rights of Plaintiffs under Article I, Section 23 of the Florida Constitution and the right of any future requester to access public records under Chapter 119. Thus, the Court hereby directs Defendant to advise it and Plaintiffs, through their counsel, in a timely fashion, of any pending or future proper requests for any of the photographs under Chapter 119, and to tender all such

requests to this Court for consideration and review prior to producing any photographs in response to any such requests.

11. This injunctive relief is effective immediately upon entry of this Order. However, the continuation of the injunctive relief is dependent upon Plaintiffs posting a \$500 cash or surety bond with the Clerk within three (3) days from the date of this Order. Said bond shall be conditioned upon Plaintiffs' payment of all costs and damages sustained by Defendants if Defendants are wrongfully enjoined.

12. The Court hereby reserves jurisdiction to enter any further orders necessary or appropriate in this action. The injunctive relief granted herein shall continue until further Order of this Court.


DONE AND ORDERED this 22nd day of February, 2001, at Daytona Beach, Volusia County, Florida.



JOSEPH G. WILL
CIRCUIT COURT JUDGE

cc: JOSEPH E. FOSTER, ESQUIRE, P.O. Box 231, Orlando, FL 32802-0231;
LAURENCE H. BARTLETT, ESQUIRE, 1800 W. International Speedway Blvd.,
Building 2, Suite 201, Daytona Beach, FL 32114;
OFFICE OF THE VOLUSIA COUNTY MEDICAL EXAMINER, 1360 Indian Lake
Road, Daytona Beach, FL 32124



STATE OF FLORIDA, VOLUSIA COUNTY
HEREBY CERTIFY that foregoing is a true copy
of the original filed in this office. This
22 day of Feb A.D. 2001
Clerk of Circuit and County Court

Deputy Clerk



1801 W. INT'L SPEEDWAY BLVD.
DAYTONA BEACH, FL 32114
(MAILING ADDRESS)
P. O. BOX 2875
DAYTONA BEACH, FL 32120-2801
MR. CROTTY'S DIRECT LINE: (904) 947-6715
FAX TELEPHONE: (904) 947-6884

FAX COVER SHEET

TO: JIM RHEA
FAX: 850-487-5380
FROM: SUSAN WILSON FOR GARY CROTTY
DATE: MARCH 1, 2001

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MESSAGE:

18 2482

The Orlando Sentinel

Volusia Bureau
2730 Enterprise Road, Suite A
Orange City, Florida 32703

February 23, 2001

Dave Byron
Volusia County Community Information Director
DeLand, FL

Dear Sir

This is a request under the Florida Public Records Law, Fla. Stat. Ann. Secs. 119.01 to 119.15

I am a newspaper reporter for The Orlando Sentinel. In that capacity I write to request copies of any and all photographs of racecar driver Dale Earnhardt taken by the Volusia County Medical Examiner's Office.

If your agency does not maintain these public records, please let me know who does and include the proper custodian's name and address.

If all or any part of my request is denied, please respond to me in writing, pursuant to Fla. Stat. Sec. 119.07(02)(a), listing the specific statutory citation for exemption(s) from disclosure which you assert to justify your failure to make the requested information available. Also, please state with particularity the reasons for your conclusion that the records are exempt.

If you determine that all or any part of the records which I am requesting are not public records subject to public inspection, please note that Fla. Stat. Sec. 119.07(2)(c) provides that you shall not dispose of those records for a period of thirty days after the date on which you receive this request. If you determine that some of the portions of the requested materials are exempt, please provide me with the remaining, non-exempt portion, pursuant to Fla. Stat. Sec. 119.07(2)(a).

If you have any questions regarding this request, please telephone me at the numbers listed at the top of the page. Pursuant to judicial interpretation of the Public Records Law, your response should be delayed only by the limited amount of time it takes to retrieve the records, and, if appropriate, to delete those portions of the records which you assert are exempt from disclosure.

Please be advised that I am prepared to pursue whatever legal remedy necessary to obtain access to the requested records. I would note that knowing violation of the open records law can result in your suspension and removal or impeachment and, in addition, your being fined up to \$1,000, imprisoned for up to one year, or both. Litigation costs and attorney fees may also be awarded.

I look forward to hearing from you as soon as possible. I thank you in advance for your help and quick response.

Sincerely,

Amy C. Rippe
The Orlando Sentinel
Phone: 386-822-6802

Cc: David Bralow

IN THE CIRCUIT COURT OF THE
THE SEVENTH JUDICIAL CIRCUIT IN
AND FOR VOLUSIA COUNTY, FLORIDA

TERESA EARNHARDT and The Estate of
DALE EARNHARDT, by and through
its personal representative, TERESA
EARNHARDT, for and on Behalf
of The Estate and For The Survivors

CASE NO. 2001-30373-CICI
DIVISION 32

Plaintiffs,

v

VOLUSIA COUNTY, OFFICE OF THE
MEDICAL EXAMINER,

Defendant

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Teresa Earnhardt and the Estate of Dale Earnhardt, by and through its personal representative, Teresa Earnhardt, for and on behalf of the Estate and for the Survivors, hereby sues the Office of the Medical Examiner for Volusia County, Florida, and state

1 This is an action for declaratory and temporary and permanent injunctive relief pertaining to Chapter 119, Florida Statutes, otherwise known as the Florida Public Records Act, and Section 540.08, Florida Statutes.

2. This Court has jurisdiction pursuant to Chapter 86, Florida Statutes.

3 Venue is proper in this Court pursuant to Section 47.011, Florida Statutes, because the subject matter of this action involves the release of certain photographs in the possession of and maintained by the Office of the Medical Examiner within and for Volusia County, Florida.

4 Teresa Earnhardt, the Wife of Dale Earnhardt, ("Mr. Earnhardt" or "Deceased"), and

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

TERESA EARNHARDT and the Estate of
DALE EARNHARDT, by and through
its personal representative, TERESA
EARNHARDT, for and on Behalf of
The Estate and for the Survivors,

Plaintiffs,

CASE NO. 2001-3073-CICI
DIVISION 01

-vs-

VOLUSIA COUNTY, OFFICE OF
THE MEDICAL EXAMINER,

Defendant.

**COUNTY OF VOLUSIA MEDICAL EXAMINER
RESPONSE TO MOTION FOR INJUNCTIVE RELIEF**

COMES NOW the Defendant, County of Volusia Medical Examiner, by and through the undersigned attorney, and responds to the Motion for Injunctive Relief and states as follows:

1. The only body authorized by law, the Florida Legislature, has not created an exemption to the public's right, pursuant to Article I, Section 24, Florida Constitution and Section 119.07, Florida Statutes (2000), to inspect and obtain copies of public records.
2. Article I, Section 23, Florida Constitution (1968), specifically provides that the Florida right of privacy shall not be construed to limit the public's right of access to public records.
3. The County is required by constitutional, statutory, and precedential decisional law, in the absence of a specific exemption being created by the Florida

Legislature, to provide public records in a reasonable time and manner for inspection and copying.

4. The custodian of public records may display public records entirely of his own volition. Williams v. City of Minneola, 575 So.2d 883, 687 (Fla 5th DCA 1991), review denied 589 So 2d 289 (Fla 1991).

5. Photographs taken for the Medical Examiner in his investigation of the death of Dale Earnhardt are public records. AGO 078-23, Williams, *supra*. at 686. (Byron affidavit, paragraphs 3-4).

6. The County received requests to inspect and obtain copies of photographs of the race car taken by the Medical Examiner after the accident. (Byron affidavit, paragraphs 11 and 14)

7. The County provided inspection of the public records (the photographs of the race car) after receipt of a request (Byron affidavit, paragraph 11).

8. The County provided the public records (photographs of the race car) in a format for copying after requests and after they had been published on a Channel 9, the Orlando ABC affiliate, newscast. (Byron affidavit, paragraph 14).

9. The race car was shown live, before, during and after the accident on the FOX television network and rebroadcast innumerable times on network, local and cable broadcasts.

10. Photographs of the race car were published in the Orlando Sentinel, Wednesday, February 21, 2001. (Exhibit 1)

11. Defendant is unaware of any constitutional, statutory or precedential decisional law which relieves it of its duty imposed by the Florida Constitution and Statutes to permit inspection of public records (photographs taken for the Medical Examiner in performance of his duties) in a reasonable time and manner.

12. Defendant will abide by the law as understood and pronounced by the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by facsimile and U. S. Mail to Laurence H. Bartlett, Esq., 1800 W. International Speedway Blvd., Building 2, Suite 201, Daytona Beach, FL 32114 (facsimile: 904-254-3459); and to Joseph E. Foster, Esq., Citrus Center, 17th Floor, 255 South Orange Avenue, P. O. Box 231, Orlando, FL 32802, (facsimile: 407-843-6610) this 23rd day of February, 2001.



Daniel D. Eckert
Florida Bar No. 180083
County Attorney
123 West Indiana Avenue
DeLand, Florida 32720-4613
Telephone: 904-736-5950
Facsimile: 904-736-5990
Attorney for Defendant

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

TERESA EARNHARDT and the Estate of
DALE EARNHARDT, by and through
its personal representative, TERESA
EARNHARDT, for and on Behalf of
The Estate and for the Survivors,

Plaintiffs,

CASE NO. 2001-3073-CIC1
DIVISION 01

-vs-

VOLUSIA COUNTY, OFFICE OF
THE MEDICAL EXAMINER,

Defendant.

COUNTY OF VOLUSIA'S NOTICE OF FILING

Notice is hereby given to all parties that Defendant, County of Volusia, hereby files with this Court the Affidavit of David F. Byron in the above styled cause with the Clerk of this Honorable Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by U S Mail to Laurence H. Bartlett, Esq., 1800 W. International Speedway Blvd., Building 2 Suite 201, Daytona Beach, FL 32114 (facsimile: 904-254-3459), and to Joseph E. Foster, Esq., Citrus Center, 17th Floor, 255 South Orange Avenue, P. O. Box 231, Orlando, FL 32802, (facsimile 407-843-6610) this 23rd day of February, 2001.



Daniel D. Eckert
Florida Bar No. 180083
County Attorney
123 West Indiana Avenue
DeLand, Florida 32720-4613
Telephone: 904-736-5950
Facsimile: 904-736-5990
Attorney for Defendant

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

TERESA EARNHARDT and the Estate of
DALE EARNHARDT, by and through
its personal representative, TERESA
EARNHARDT, for and on Behalf of
The Estate and for the Survivors,

Plaintiffs,

CASE NO 2001-3073-CICI
DIVISION 01

-vs-

VOLUSIA COUNTY, OFFICE OF
THE MEDICAL EXAMINER,

Defendant.

AFFIDAVIT

STATE OF FLORIDA

COUNTY OF VOLUSIA

David F. Byron, after being duly sworn, states as follows:

1. I am Community Information Director of the County of Volusia.
2. My duties include responding to requests for copies of public records requested by news organizations.
3. I was made aware Monday, February 19, 2001, by the Medical Examiner's Office that photographs of the Earnhardt car and the autopsy were taken.
4. The photographs were taken at the direction of the Volusia County Medical Examiner's Office. They were taken in digital format by an investigator for the Medical Examiner's Office on Monday.
5. In response to several verbal public records requests by the news media on

Monday morning, the County released a one page "Death Certificate Worksheet" from the Medical Examiner's Office. Consistent with the County news dissemination policy, we called the local television stations, Channels 2, 6, 9, 13 and 35 and two local newspapers, the Orlando Sentinel and the Daytona Beach News-Journal. We agreed to meet these reporters at 11 45 a.m. in the Volusia Room of Daytona Beach International Airport. At this time, the reporters were given the Death Certificate Worksheet and I spoke briefly on camera as to the cause and manner of death, as described on the worksheet.

6. I spoke with other reporters on the telephone throughout the day Monday and on Tuesday as to the cause and manner of death.

7. By mid-afternoon Monday, I received a verbal public records request from Amy Rippeel of the Orlando Sentinel for any and all information related to the autopsy. Specifically, I was asked to provide any and all notes or other records as part of the autopsy process.

8. I conveyed this request to the County Attorney and met with him in his office. I was present when the County Attorney spoke by telephone to an attorney representing the Orlando Sentinel concerning the newspaper's request for the additional information. The County decided to release a transcription of the Medical Examiner's audio notes.

9. The Community Information Office received via fax 14 pages of information from the Medical Examiner's Office at 5:53 p.m. Monday. This included the Death Certificate Worksheet, release of body form to Baggett and Summers, Medical Examiner's narrative, clothing/personal effects/evidence record, personal effects inventory, deceased valuables and personal property record sheet, protocol routing sheet and body sketch

drawing.

10. This information was faxed out of the Community Information Office in DeLand to 25 numbers of local news organizations (some of the numbers are the same organization but different locations) plus CNN and the Associated Press, which also had requested this information.

11. At approximately 5:00 p.m. Monday evening, Channel 9 arrived at the Medical Examiner's Office, I was advised by Bill Foster, Operations Manager of the Medical Examiner's Office. Foster advised the reporter spoke with Dr. Thomas Parsons, who had done the autopsy. At its request, Channel 9 was given the body sketch drawing and videotaped the photos of the car

12 I was called by Amy Rippel of the Orlando Sentinel at approximately 6:00 p.m. I was advised they were extremely upset that Channel 9 had been given the sketch drawing and had shown it on the air. The Sentinel said they were told that Community Information was handling all media inquiries. They asked how Channel 9 got access to information they didn't have. The Sentinel demanded any and all information. I assured the Sentinel the sketch drawing was part of the information we would be releasing shortly.

13. By approximately 9:00 p.m., the fax transmission was complete.

14. At approximately 12:30 p.m. Tuesday, February 20, 2001, I spoke with Ron Kendrick of Channel 2 who was extremely upset that Channel 9 had videotaped the Earnhardt car photos, taken by the Medical Examiner's Office, which Channel 9 had broadcast during the noon news. I advised Channel 2 the photos would be made available. Within minutes, Amy Rippel of the Orlando Sentinel called and also was

extremely upset about the Channel 9 broadcast of the Earnhardt car photos. I advised the Sentinel these photos would be made available. A short time later, I also spoke with Mike Lafferty of the Orlando Sentinel.

15 I made arrangements with Bill Foster to have these digital photos downloaded on a CD, which Foster delivered to me in DeLand by about 1:30 p.m. Tuesday. The Sentinel called again and was extremely anxious to get these images. There were 13 in all

16. In an effort to facilitate getting these photos to the news media and being concerned about the ability to transmit these files by e-mail, I chose to make them available to the news media via the County's Internet web server. The larger images were uploaded to a sub folder of a local, County-owned internet server. A web page was created and uploaded with "thumbnails" (smaller version of each image) that linked to the larger images.

17. The page and images were not linked to/from any other web pages and were available to those who were given the URL web address <http://208.34.312.5/photo>. This hidden address was not listed on any outside search engine or website. The pictures did not appear on the County's website and the address was not listed in the County's website.

18. The use of the County's server was only for purpose of transmitting these images to the news media for their use, not for the public to view/access these images through the County website. By 3.00 p.m. Tuesday, the images had been transmitted to the following news agencies: Channel 2, Channel 6, Channel 13, Channel 35, New

Smyrna Beach Observer, DeLand Beacon, AP, News-Journal and Orlando Sentinel. These agencies were notified by telephone and received the images either by e-mail or by accessing the special URL. Reuters requested the photos on Wednesday.

19. Shortly before the images were made available to the news media, the International Speedway Corporation was notified by the Community Information Director that these photographs were going to be released at the request of the news media. The Speedway was given the hidden URL address.

20. A server traffic search done by the County on the "hidden" URL address shows that during the 24 hours these images were on the County server, the page was viewed by computer users from only eight locations. We have tentatively identified the County; the International Speedway Corporation. Akerman Senterfitt, Attorneys at Law; Blank, Meenan and Smith, Attorneys at Law; Channel 9; and the USAirways Intranet as having accessed the photographs.

FURTHER AFFIANT SAYETH NOT.

David F. Byron

DAVID F. BYRON

Sworn to and subscribed before me on this 23rd day of February, 2001, by David F. Byron.

Alicia J. Gilpin

Notary Public - State of Florida
ALICIA J. GILPIN
(print, type or stamp name)
Personally known OR Produced
ID If produced ID,
type: _____
Commission No. CC 724299

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO 2001-30373-CI-CI

TERESA EARNHARDT, and The Estate
of DALE EARNHARDT, by and through
its personal representative, TERESA
EARNHARDT, for and on Behalf of The Estate
and For The Survivors,

Plaintiff,

v

VOLUSIA COUNTY, OFFICE OF THE
MEDICAL EXAMINER,

Defendant.

CLERK OF THE CIRCUIT
& CITY COURT VOLUSIA CO. FL
CC19

2001 FEB 22 AM 11:15

FILED

TEMPORARY INJUNCTION

THIS CAUSE came on for hearing on Plaintiffs' Motion for Injunctive Relief, and the Court having reviewed said Motion, having heard argument of counsel, and having been duly advised in the premises, it is hereby

ORDERED AND ADJUDGED:

1. Plaintiffs' Motion for Injunctive Relief is GRANTED.
2. The Court hereby enjoins Defendant, or anyone acting under Defendant's direction or control, from voluntarily releasing, disclosing, posting or causing to be printed, published, displayed, or otherwise used publicly or privately any photographs taken or created by Defendant, or at Defendant's request, in connection with Defendant's investigation and the performance of its duties in connection with the death of Dale Earnhardt, ("Mr. Earnhardt").
3. The Court finds that Defendant's publication on its website of photographs created in connection with the performance of Defendant's duties in connection with the death of Mr. Earnhardt may have been improper, and not in response to a proper request for production of said photographs under Chapter 119, Florida Statutes. As a result of Defendant's potentially

improper actions in making said photographs available on its website, children will have access and exposure to these highly graphic and disturbing photographs

4 The Court further finds that any further improper release of these photographs may well negatively distort the public's perception and memory of Mr. Earnhardt

5 The Court further finds that Mr Earnhardt's Estate has not authorized the use of these photographs. The Court also finds that many of the photographs not yet released by Defendant on its website may have no bona fide newsworthiness, and are not the subject of legitimate journalistic interest.

6. The Court further finds that the further release of said photographs would cause Mr. Earnhardt's family additional anguish and grief, and would inflict further emotional distress upon them

7 The Court further finds that the family and Estate of Mr. Earnhardt will suffer immediate and irreparable harm if the requested temporary injunction is not entered.

8. The Court further finds that the family and Estate of Mr Earnhardt have no adequate remedy at law. Injunctive relief alone will prevent their pain and suffering, additional anguish and grief, invasion of their privacy, unauthorized use of these photographs and the distortion of Mr. Earnhardt's memory.

9 The entry of the requested injunctive relief will protect the public interest from exposure to these photographs.

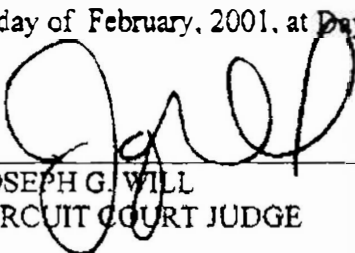
10. The Court is aware that some of the photographs taken by Defendant may constitute public records under Chapter 119, and that a proper request for production of said photographs under Chapter 119 may require that this Court, in accordance with Forsberg v. Housing Authority of Miami Beach, 455 So. 2d 373 (Fla. 1984) at p 375-376, and Williams v City of Minneola, 575 So. 2d 683 (Fla. 5th DCA 1991) at p. 687-688, to balance the competing privacy rights of Plaintiffs under Article I, Section 23 of the Florida Constitution and the right of any future requester to access public records under Chapter 119. Thus, the Court hereby directs Defendant to advise it and Plaintiffs, through their counsel, in a timely fashion, of any pending or future proper requests for any of the photographs under Chapter 119, and to tender all such

requests to this Court for consideration and review prior to producing any photographs in response to any such requests.

11. This injunctive relief is effective immediately upon entry of this Order. However, the continuation of the injunctive relief is dependent upon Plaintiffs posting a \$500 cash or surety bond with the Clerk within three (3) days from the date of this Order. Said bond shall be conditioned upon Plaintiffs' payment of all costs and damages sustained by Defendants if Defendants are wrongfully enjoined


12. The Court hereby reserves jurisdiction to enter any further orders necessary or appropriate in this action. The injunctive relief granted herein shall continue until further Order of this Court

DONE AND ORDERED this 22nd day of February, 2001, at Daytona Beach,
Volusia County, Florida.



JOSEPH G. WILL
CIRCUIT COURT JUDGE

cc JOSEPH E FOSTER, ESQUIRE, P.O. Box 231, Orlando, FL 32802-0231;
LAURENCE H. BARTLETT, ESQUIRE, 1800 W. International Speedway Blvd.,
Building 2, Suite 201, Daytona Beach, FL 32114;
OFFICE OF THE VOLUSIA COUNTY MEDICAL EXAMINER, 1360 Indian Lake
Road, Daytona Beach, FL 32124


STATE OF FLORIDA VOLUSIA COUNTY
I HEREBY CERTIFY the foregoing is a true copy
of the original filed in this office. This
22nd day of Feb A.D. 2001

Clerk of Circuit and County Court

Tammie Clark

HOUSE AMENDMENT FOR COMMITTEE PURPOSES

Bill No. 1083

Amendment No. _____ (for drafter's use only)

COMMITTEE ACTION

ADOPTED _____	<u>Y</u> / <u>N</u>		FAILED TO ADOPT _____	<u>Y</u> / <u>N</u>
ADOPTED AS AMENDED _____	<u>Y</u> / <u>N</u>		WITHDRAWN _____	
ADOPTED W.O OBJECTION _____			OTHER _____	

Committee hearing bill: State Administration

Representative(s) McGriff offered the following

Amendment (with title amendment)

On page 1, line 14-31; page 2, lines 1-20 of Amendment No. 1

remove from Amendment No. 1

said language

and insert in lieu thereof:

(2)(a) An audiovisual autopsy record is not exempt from those provisions of section 119 07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution, which permit a person to inspect and examine a public record. The medical examiner having custody of an audiovisual autopsy record shall permit any person to inspect and examine the record under reasonable conditions and supervision to safeguard the record from copying, but such medical examiner may not permit any person to copy, photograph, or otherwise reproduce an audiovisual autopsy record, except as provided in this section.

(2)(b) An audiovisual autopsy record may be copied, photographed, or otherwise reproduced, in whole or in part, by any person, upon a finding of good cause by a court for the copying of all or any part of the record. At least one member of the deceased's family, consisting of the spouse, parents, or children, must be a party to any proceeding for access to an audiovisual autopsy record. If the court finds that the family is indigent and unable to employ counsel to respond to the petition, or if the court finds that the interests of justice would best be served, the court shall appoint the Attorney General to represent the interests of the family or to act as a friend of the court.

to Amendment

Failed

HOUSE AMENDMENT FOR COMMITTEE PURPOSES

Bill No. _____

Amendment No _____ (for drafter's use only)

1 =====TITLE AMENDMENT=====

2 And the title is amended as follows

3 On page line , of the bill

4 remove from the title of the bill: all of said lines,

5

6 and insert in lieu thereof.

7

**House of Representatives
COUNCIL/COMMITTEE BILL ACTION WORK SHEET**

Council/Committee on State Administration Bill No 1083
 Meeting Date 3/15/2001 Time 8:00 am Subject Pub. Rec / Autopsy Photo.
 Place 212 - Knott Date Received _____ Date Reported _____

FULL COMMITTEE ACTION:

- Favorable
- Favorable with 1 Amendments
- Favorable with Council/Committee Substitute
- Unfavorable
- Temporarily Passed
- Reconsidered

19 3313
 3/15/01

Other Action *Strike everything adopt first*

Final Vote on Bill		MEMBERS	<i>A. Johnson Miller</i>		<i>L. McGuff</i>					
Yeas	Nays		Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays
✓		<i>Murphy</i>								
		Donald Brown								
		Paula Dockery								
		Will Kendrick	A		F					
		Perry McGriff								
		Frederick C. Brummer, Chair								
Yeas	Nays		Yeas	Nays	Yeas	Nays	Yeas	Nays	Yeas	Nays
		TOTALS								

APPEARANCE RECORD

Name	Representing	Address

NOTICE OF COMMITTEE MEETING
House of Representatives

State Administration (SGC)

19 3313

March 15, 2001 8:00 A.M.-12:00 P.M. Room 212 Knott Building

Consideration of the following bill(s):

- HB 0347 by Fasano--Public Employee Optional Retirement
- HB 0615 by Kallinger & others--Payment or Performance Bonds
- HB 1083 by Johnson & others--Public Records/Autopsy Photographs

Consideration of the following bill(s), along with pending proposed committee substitute(s):

- PCS/HB 503 by State Administration and Fasano--Public Employees Optional Retirement
- HB 0503 by Fasano--Public Employees Optional Retirement

Consideration of the following bill(s), along with pending proposed committee substitute(s):

- PCS/HB 681 by State Administration, Waters and others--Insurance & Financial Services Dept.
- HB 0681 by Waters & others--Governmental Reorganization

Pursuant to Rule 7.28(d), amendments by non-committee members must be filed by 12:00 p.m. on Wednesday, March 14, 2001.

RECEIVED
OFFICE OF THE CLERK
01 MAR 13 PM 4:13

Jack B. ...
Chair

Received in the Office of the Sergeant at Arms on <u>March 13</u> 2001 at <u>4:15 PM</u> (time).	Received in the Office of the Clerk on _____ 2001 at _____ (time).	Filed with the Sergeant at Arms and the Clerk on <u>March 13</u> 2001 in compliance with Rules.
<i>Barbara Payne</i> Sergeant at Arms	<i>JMK</i> Clerk of the House	<i>Martha J. ...</i> Committee Admin. Assistant

Distribution: Sergeant; Clerk (Calendar); Reg. Info.; others as required by Rules.

SENATE CRIMINAL JUSTICE COMMITTEE

SB 1356 BILL FILE 5.18/2962

✓

spoke
COMMITTEE APPEARANCE RECORD
(Submit to Committee Chairman or Secretary)

3/13/01
(date)

1356
(Bill No.)

Name [Handwritten Name]

Address [Handwritten Address]

Representing [Handwritten Organization]

Lobbyist (Registered with Senate) Yes [checked] No

Speaking: For Against Information [checked]

Subject

If state employee-- Time: from .m. to .m.

(State employees are required to file the first copy of this form with Committee Chairman unless appearance is requested by chairman as a witness or for informational purposes.)

18 2462

spoke

2 ✓

COMMITTEE APPEARANCE RECORD
(Submit to Committee Chairman or Secretary)

3/13/01
(date)

361350
(Bill No.)

Name Susan Tillotson Mills or Amendment

Address 410 N. Howard St #2300 Tampa FL 33613

Representing The Orlando Sentinel

Lobbyist (Registered with Senate) Yes No

Speaking: For Support Against Information

Subject Access to State Public Records

If state employee-- Time: from _____ .m. to _____ .m.

(State employees are required to file the first copy of this form with Committee Chairman unless appearance is requested by chairman as a witness or for informational purposes.)

18 2462

Spoke

*Wrote to Sp...
...
S. 1256*

COMMITTEE APPEARANCE RECORD
(Submit to Committee Chairman or Secretary)

_____ (date)

_____ (Bill No.)

on Amendment

Name _____

Address _____

Representing _____

Lobbyist (Registered with Senate) Yes _____ No _____

Speaking: For _____ Against _____ Information _____

Subject _____

If state employee-- Time: from _____ .m. to _____ .m.

(State employees are required to file the first copy of this form with Committee Chairman unless appearance is requested by chairman as a witness or for informational purposes.)

SENATE COMMITTEE VOTE RECORD

BILL NUMBER. SB 1356

(Continued)

COMMITTEE ON: Criminal Justice

(to be used for additional amendments and motions)

SENATORS	03/13/01		03/13/01		03/13/01		03/13/01		03/13/01		03/13/01	
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Bronson												
Burt												
Meek												
Silver												
Smith												
VICE CHAIRMAN												
Crist												
CHAIRMAN												
Villalobos												
TOTAL	FWO	-	-	UVV	FWO	-	FWO	-	FWO	-	FWO	-
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay

SENATE COMMITTEE VOTE RECORD

BILL NUMBER: SB 1356

(Continued)

COMMITTEE ON: Criminal Justice

(to be used for additional amendments and motions)

SENATORS	03/13/01		03/13/01		03/13/01		03/13/01					
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay
Bronson												
Burt												
Meek												
Silver												
Smith												
VICE CHAIRMAN Crist												
CHAIRMAN Villalobos												
TOTAL	FWO	-	FWO	-	FWO	-	FWO	-				
	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay	Yea	Nay

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.)

FILE COPY

BILL PCS/SB 1356
 SPONSOR Criminal Justice Committee and Senators King and Posey
 SUBJECT Public Records Exemption; Autopsy Photographs and Videos
 DATE March 9, 2001 REVISED _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger <i>Q.D.</i>	Cannon <i>AL</i>	CJ	
2.			GO	
3.				
4.				
5.				
6.				

18 2462

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 PCS makes confidential and exempt photographs and video 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 recordings. Other persons may have access (viewing, duplicating, or publishing) to the autopsy photos and videos only upon court order showing clear and convincing need. Such access, if granted by the court, must be performed under the direct supervision of the custodian of the record.

The PCS also notes that photographs and video 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 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 bill makes it a felony of the third degree to knowingly violate the provisions of the section. The bill is effective upon becoming law and is to be applied retroactively.

This PCS 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 *Watt 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 purpose⁴

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 statute⁵. 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 circumstances⁶.

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.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure⁷. 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 records⁹.

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 date. An exemption is substantially amended if the amendment expands the scope of the

³ *Christ 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. 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. 1st DCA 1999)

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

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. Donn 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 PCS 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 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 recordings. The custodian of the record or his or her designee may not permit any person to view or duplicate the photo or video without a court order.

Under the PCS, the court, upon a showing of clear and convincing need, may issue an order authorizing any other person to

- View the photo or video 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 PCS 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. A surviving spouse, parent, or child of the deceased or their legal representative may intervene in a request by a third party to access these records under the PCS.

The PCS makes it a felony of the third degree for any custodian of a photo or video 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 PCS makes the exemption subject to the Open Government Sunset Review Act.

In addition, the PCS provides a statement of public necessity supporting the exemption. Photographs and videos 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 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 PCS 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 PCS permits a court to grant access to the photographs and videos of an autopsy upon a showing of clear and convincing need.

The act shall take effect upon becoming a law and shall apply to all autopsy photographs and video recordings whether made before or after the effective date of the act. The PCS 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 bill creates a public records exemption for a photograph or video 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

Because the PCS creates unranked third degree felonies, the Criminal Justice Estimating Conference (CJEC) customarily finds that there is no prison bed impact. There is no bed impact because the recommended sentence for an unranked third degree felony is a non-state prison sanction under the Criminal Punishment Code. The CJEC is planning to officially review the PCS after the writing of this analysis.

VI. Technical Deficiencies:

None

VII. Related Issues:

Under this PCS, medical autopsy photographs and video 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 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

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 Suss 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).

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

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

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

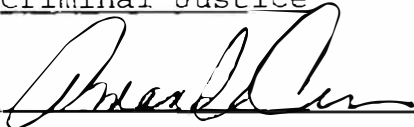
²⁴ *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986), *accord*, *Roberts v. Butterworth*, 668 So. 2d 580 (Fla. 1996)

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

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
PROPOSED COMMITTEE SUBSTITUTE FOR
Senate Bill 1356

- Provides that the exemption is to apply retroactively.
- Provides 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 autopsy photographs or video recordings.
- Provides that others may have access (viewing, duplicating, or publishing) to the autopsy photos and videos only upon court order showing clear and convincing need.
- Provides that such access, if granted by the court, must be performed under the direct supervision of the custodian of the record.
- Makes it a felony of the third degree to knowingly violate the provisions of the act.
- Provides that a surviving spouse, parent, or child of the deceased or their legal representative may intervene in a request by a third party to access these records.

Committee on Criminal Justice

Staff Director  _____

(FILE TWO COPIES WITH THE SECRETARY OF THE SENATE)

Major Differences between PCS/SB 1356 and Strike Everything Amendment

PCS/SB 1356	Strike Everything Amendment
Creates an exemption for a photo or video recording of an autopsy.	Applies to an audiovisual autopsy record (includes photo, video recording, or audio recording).
Provides that the exemption is to apply retroactively .	Does not apply retroactively.
Provides that only 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 autopsy photographs or video recordings without a court order .	Allows anyone to view them without a court order, and a state or federal agency in furtherance of its official duties may view or copy without a court order .
Provides that persons other than the family may have access (viewing, duplicating, or publishing) to the autopsy photos and videos only upon court order showing clear and convincing need .	Allows anyone to copy or reproduce them only upon court order showing good cause .
Makes it a third degree felony to knowingly violate the section.	Makes it a first degree misdemeanor to violate the section.
Provides that a surviving spouse, parent, or child of the deceased or their legal representative may intervene in a request by a third party to access these records .	Requires at least one member of the family to be a party to any proceeding for access to the record , and if the family is indigent, the court must appoint the AG to represent the family or to be a friend of the court.

FILE COPY

SENATE CJ Comm. Mtg. 3/13/01 9:15-12
Room 37

		Tape/Side
9:15	Meeting to Order	1 A
9:15	SB 1356	"
9:30	Dick Shelton	"
9:34	Susan Mills	"
9:43	SB 1356 - Sen. King	"
10:00	"	2/A
10:10	Thom Rumberger	"
10:15	SB 360	"
10:26	SB 322	"
10:42	Jeanne Howard	"
10:45	" "	1/B
10:50	SB 366	"
10:54	Nancy Daniels	"
10:58	Buddy Jacobs	"
1:00	SB 514	"
1:01	SB 676	"
1:04	SB 444	"
1:06	Adjourned	"

A G E N D A

COMMITTEE ON CRIMINAL JUSTICE

Alex Villalobos, CHAIRMAN
Victor Crist, VICE CHAIRMAN

FILE COPY

DATE: Tuesday, March 13, 2001
TIME: 9:15 A.M. - 12:00 NOON
PLACE: Room 37, Senate Office Building

MEMBERS: Charles Bronson
Locke Burt
Kendrick Meek
Ron Silver
Rod Smith

18 2-163

TAB	BILL NO AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	SB 0320 Geller	Outfit Offenders CJ 03/13/01 CJ APJ AP	Favorable read 4 Nays 1
2	SB 0360 Saunders	Victim Injury, Annals CJ 03/13/01 A-J AP	Favorable read 3 Nays 1
3	SB 0444 Latvala (Identical H 0250)	Offense Against Children CJ 03/13/01 APJ AP	Favorable read 5 Nays 0
4	SB 0518 Miller (Identical H 0263)	Obtaining Property, False Personation CJ 03/13/01 APJ AP	Temporarily Postponed
5	SB 0705 Campbell (Similar H 1107)	Pawnbrokers & Secondhand Dealers CJ 03/13/01 JU APJ AP	Temporarily Postponed

COMMITTEE ON CRIMINAL JUSTICE

DATE: Tuesday, March 13, 2001

TIME: 9:15 A.M. - 12:00 NOON

TAB	BILL NO AND INTRODUCER	BILL DESCRIPTION AND SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
6	SB 1356 King et al (Similar H 1093)	Public Records/Autopsy Photographs CC 03/13/01 SO	Fav/CS Yeas 6 Nays 0
7	SB 0366 Vizlalobes et al (Identical H 0147)	DNA Evidence CJ 03/13/01 CL SEJ AP	Fav/CS Yeas 5 Nays 0
8	SB 0514 Burt	Use of Public Record Information CJ 03/13/01 FPJ AP	Favorable Yeas 5 Nays 0
9	SB 0676 Smith	Prison Release Reoffender CC 03/13/01 APC AP	Favorable Yeas 5 Nays 0

SENATE GOVT. OVERSIGHT

SB 1356 BILL FILE

5.18/2462

RHEA.JIM

From: WILLIAMSON HEATHER
Sent: Tuesday, March 20, 2001 12:38 PM
To: RHEA JIM
Cc: AHEARN MARLEEN
Subject: Autopsy Bill

Jim,

I spoke with Dr. Stephen Nelson regarding the Rita Melton case. Dr. Nelson said that in this particular case, the skull was given to the University of Florida's forensic anthropology department for purposes of identifying the victim.

The victim was buried without her skull. The mother later found out and was very upset over this information. She filed suit against the Gainesville Medical Examiner and the University of Florida. The case was dismissed with prejudice.

The victim's mother worked with the Medical Examiner's Commission to create a rule requiring that medical examiners seek permission from the next of kin (unless the next of kin is the perpetrator) prior to removing a portion of the victim's body. This rule is now s. 406.11(2), F.S.

FIDE also said that they do not need the exemption for research, but rather for case-related research. Case-related research pertains to each autopsy separately. For example, if a medical examiner finds a spot on the heart of a dead body, then if the medical examiner is unsure of what this spot is and whether or not it caused the death, then they would remove the heart and have a cardiologist examine it. Research just for the sake of research is not permitted. For instance, in Gainesville, a class contacted the medical examiner to seek permission to examine the brain tissue of executed inmates in order to determine if there was a shared pattern in the brain tissue. This type of research is not permitted.

If there are any further questions, please give me a call.

Heather A. Williamson, M.S.W.

Legislative Research Assistant
 Committee on State Administration
 Florida House of Representatives
 303 House Office Building
 Tallahassee, FL 32399
 850 488 4803

18 2102

COMPARISON OF CS/HB 1356, CS/HB 1083 & 1ST AM. FOUNDATION

18 2482

SENATE BILL	HOUSE BILL	1 ST AM. FOUND.	DECISION
Autopsy photos, videos, audios confidential & exempt	Photographs or video recordings of autopsy are confidential & exempt	Audio-visual autopsy record is exempt from copying requirements but not viewing.	
No definition	No definition	Defines "audio-visual autopsy record" to mean photograph, video recording, audio recording made by medical examiner during autopsy, excluding written transcript, other writing, or <u>detailed finding</u> .	
Confidential & exempt in custody of medical examiner	Confidential & exempt in custody of district medical examiner.	Audio-visual autopsy record in the custody of medical examiner is exempt only.	
No definition of medical examiner	No definition of medical examiner	Defines medical examiner to include associate medical examiner, substitute medical examiner, as well as employee, deputy, or agency of a medical examiner or any other person who obtains possession of record in course of assisting a medical examiner in performing official duties	
	Authorizes medical examiner or associate in official capacity to use photos & videos to seek another expert medical opinion, for providing professional training, for case-related medical or scientific research purposes, or other purposes solely related to duties & responsibilities, must maintain confidential & exempt identity of deceased unless family waiver obtained		

Surviving spouse, parent or child of deceased, or legal representative may view, copy, disseminate	Any person may view or copy pursuant to a written waiver by surviving spouse, if none, surviving parent, if none, surviving adult child	Any person may view but not copy.	
State or federal agency may view or copy in furtherance of official duties	Local government, state or federal agency may view or copy in furtherance of its official duties upon written request, must maintain confidential & exempt identity of deceased unless otherwise required in performance of official duties	State or federal agency may view or copy in furtherance of official duties	
All others must have court order.	Any person may petition court for order to inspect upon good cause, but not copy.	All others except state or federal agency need court approval to copy all or part of record.	
Surviving spouse, parent, child or legal representative must be made a party to 3 rd party proceeding to view, duplicate, or publish	Surviving spouse must be given reasonable notice of petition, copy of petition, opportunity to be present and heard any hearing on matter. If no surviving spouse, then deceased's parents, if no living parent's, then deceased's adult child	Requires at least one person of deceased's family, consisting of spouse, parents, and children, to be a party to any proceeding for access to audio-visual autopsy records	
Court may appoint AG, local state attorney, or private counsel to represent family if family is indigent or if best interests of justice is served	No AG, local state attorney, or private counsel appointment authority specified	If court finds family is indigent and unable to employ counsel or if best interest of justice would be served, court shall appoint AG to represent family or act as friend of court	
Court order issued upon showing of good cause	Court determination of good cause required to inspect. Copying not authorized under subsection.	Court finding of good cause necessary to copy	
Issues for consideration of good cause (a) relevance of disclosure to evaluation of governmental accountability, (b) seriousness of intrusion into family's privacy, (c) availability from other sources,	Issues for consideration of good cause. (a) necessity of viewing in determining governmental accountability, (b) ramifications of viewing with respect to family's right of privacy, (c) availability of similar information in other forms	Issues for consideration of good cause. whether the harm to the family's interest in protecting the record from widespread or unauthorized dissemination outweighs public interest or a particular private interest	
Court order options.	Court order options for viewing only	Must tailor any order denying access so	

(a) View but not duplicate; (b) View, duplicate, but retain confidentiality, (c) View, duplicate, or publish, or (d) prescribe any other restrictions or stipulations	but pursuant to terms and conditions which it deems appropriate, notice to family on hearing	that is no broader than necessary to accommodate competing interests	
Viewing, copying, other handling under direct supervision of custodian/designee	Viewing or copying under direct supervision of custodian of records or designee	Inspect/examine under reasonable conditions and direct supervision of custodian/designee	
(a) Any custodian who knowingly violates commits 3 rd degree felony (b) Any person who knowingly violates court order commits 3 rd degree felony.	Any person who willfully or knowingly violates commits 3 rd degree felony	Any custodian who knowingly violates commits 3 rd degree felony	
Exempts criminal & administrative proceedings.			
Exemption described as remedial and given retroactive application in statement of public necessity	Exemption given retroactive application in main part of bill and in statement of public necessity	Exemption not described as remedial and not made remedial	
Subject to OGSRA and repeals 10/02/06 unless reviewed & reenacted.	Subject to OGSRA and repeals 10/02/06 unless reviewed & reenacted	Subject to OGSRA and repeals 10/02/06 unless reviewed & reenacted	
Effective upon becoming law, specifically applies to all autopsy photos and videos in custody of medical examiner whether made before or after effective date of act	Effective upon becoming law, specifically applies to all autopsy photos and videos in custody of medical examiner whether made before or after effective date of act	None stated	

By the Committee on Criminal Justice and Senators King, Posey, Sebesta, Clary, Peaden, Bronson, Horne, Brown-Waite, Pruitt, Dawson, Burt and Constantine

307-1501A-01

There is no surviving spouse. Parents shall have access to such records. There is no surviving spouse or parent. Then a adult child shall have access to such records.

A bill to be entitled
An act relating to public records; providing an exemption from the public records law for photographs and video and audio recordings of an autopsy; providing an exemption for certain members of the immediate family, or a representative thereof, or a state or federal agency; prohibiting the custodian of a photograph or video or audio recording of an autopsy from permitting any person to view or duplicate a photograph or video or audio, except pursuant to court order and under the direct supervision of the custodian or his or her designee; exempting criminal and administrative proceedings from the act; requiring certain persons to be parties in a request for access to a photograph or video or audio recording of an autopsy; providing penalties; providing for future legislative review and repeal; providing a finding of public necessity; providing a retroactive effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1)(a) A photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution, except that a surviving spouse ~~may~~ ^{shall} have access to ~~parent, or child of the deceased, or legal representative.~~

access to photograph or video or audio recording of the deceased spouse's autopsy.

*Prohibit
to a witness
in a case*

*Any person may
discuss
the case*

*and whenever such disclosure
is the least intrusive means*

*and unless otherwise required in the performance of their duties, the
identity of the deceased shall remain confidential and exempt.*

1 ~~thereof, may view, copy, or disseminate a photograph or video~~
2 ~~or audio recording of the autopsy.~~ In furtherance of its
3 official duties, ^{in a local governmental entity,} a state or federal agency may view or copy a
4 photograph or video or audio recording of an autopsy. The
5 custodian of the record or his or her designee may not permit
6 any other person to view or duplicate such photograph or video
7 or audio recording without a court order.

8 (b) ~~The court, upon a showing of good cause, shall~~ ^{may}
9 issue an order authorizing ~~any other person to:~~ ^{The viewing or copying of the photo-}

10 ~~graph or video recording or listening to the audio recording and~~
11 1. View the photograph or video or audio recording of
12 the autopsy, but not to duplicate the record;

13 2. View and duplicate the photograph or video or audio
14 recording, but to maintain the confidentiality of the copied
15 record;

16 3. View, duplicate, or publish a photograph or video
17 or audio recording of an autopsy; or

18 4. ^{may} Prescribe any other restrictions or stipulations
19 that the court deems appropriate, including, but not limited
20 to, viewing, copying, or publishing only portions of a
21 photograph or video or audio recording deemed relevant to the
22 petition.

whether such

23 In determining good cause, the court shall consider ~~the~~ ^{such}
24 relevance of disclosure of the material ^{is necessary for the} to furthering public
25 evaluation of governmental ^{performance} accountability; the seriousness of
26 the intrusion into the family's right to privacy by disclosure

27 of the photographs or video or audio recordings, and the
28 availability ^{of similar information in other forms} from other sources, ~~including other public~~
29 records, ^{regardless of form,} of material that is equally relevant to the

30 evaluation of the same government action but is less intrusive
31 of the right of privacy. In all cases, the viewing, copying,

OK ~~Florida Senate~~ ~~2001~~ ~~307-1501A-01~~

1 or other handling of a photograph or video or audio recording
2 of an autopsy must be under the direct supervision of the
3 custodian of the record or his or her designee.

4 (c) A criminal or administrative proceeding is exempt
5 from this section, but is subject to all other provisions of
6 chapter 119, Florida Statutes; however, this section does not
7 prohibit a court in a criminal proceeding or investigation or
8 administrative proceeding, upon good cause shown, from
9 restricting or otherwise controlling the disclosure of an
10 autopsy or crime-scene photograph or video or audio recordings
11 in the manner prescribed in this section.

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12 (d) A surviving spouse, parent, or child of the
13 deceased, or legal representative thereof, must be made a
14 party to any proceeding by a third party requesting to view
15 duplicate, or publish the photograph or video or audio
16 recording of an autopsy. If the court finds that a family
17 member is indigent and unable to employ counsel to respond to
18 the third-party request, or if the court finds that the
19 interests of justice would best be served, the court may
20 appoint the Attorney General, the local state attorney, or
21 private counsel to represent the interests of the family or to
22 otherwise advise and assist the court.

*See
page
2, lines
7-13*

23 (2)(a) Any custodian of a photograph or video or audio
24 recording of an autopsy who ^{willfully and} knowingly violates this section
25 commits a felony of the third degree, punishable as provided
26 in section 775.082, section 775.083, or section 775.084,
27 Florida Statutes.

28 (b) Any person who ^{willfully and} knowingly violates a court order
29 issued pursuant to this section commits a felony of the third
30 degree, punishable as provided in section 775.082, section
31 775.083, or section 775.084, Florida Statutes.

(+)
~~(3)~~

1 The exemption in this section is subject to the
2 Open Government Sunset Review Act of 1995 in accordance with
3 section 119.15, Florida Statutes, and shall stand repealed on
4 October 2, 2006, unless reviewed and saved from repeal through
5 reenactment by the Legislature.

6 Section 2. Given the likelihood of injury to the
7 privacy rights and emotional well-being of immediate family
8 members by the widespread, unauthorized dissemination of
9 photographs or video or audio recordings of an autopsy and the
10 availability of less intrusive means of providing public
11 oversight, the Legislature finds that it is a public necessity
12 that autopsy photographs and video and audio recordings be
13 made confidential and exempt from the requirements of section
14 119.07(1), Florida Statutes, and Section 24(a) of Article I of
15 the State Constitution. The Legislature finds that photographs
16 or video or audio recordings of an autopsy show the deceased
17 in graphic and often disturbing fashion. Such photographs or
18 video or audio recordings may depict the deceased nude,
19 bruised, bloodied, broken, with bullet or other wounds, cut
20 open, dismembered, or decapitated. As such, photographs or
21 video or audio recordings of an autopsy are highly sensitive
22 depictions of the deceased which, if copied and publicized,
23 could result in trauma, sorrow, humiliation, or emotional
24 injury to the immediate family of the deceased, as well as
25 injury to the memory of the deceased. The Legislature further
26 finds that the exemption provided in this act should be given
27 retroactive application because it is remedial in nature and
28 furtheres the public policy embodied in section 382.008,
29 Florida Statutes, which provides that information on the death
30 certificate relating to the cause of death is confidential,
31 and the act mitigates the application of the public records

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1 law in circumstances in which the privacy interests of the
2 deceased's surviving spouse, parent, or child are most
3 implicated. The Legislature notes that the existence of the
4 World Wide Web and the proliferation of personal computers
5 throughout the world encourages and promotes the wide
6 dissemination of photographs and video and audio recordings 24
7 hours a day and that widespread unauthorized dissemination of
8 autopsy photographs and video and audio recordings would
9 subject the immediate family of the deceased to continuous
10 injury. The Legislature further notes that there continue to
11 be other types of available information, such as the autopsy
12 report, which are less intrusive and injurious to the
13 immediate family members of the deceased and which continue to
14 provide for public oversight.

15 Section 3. This act shall take effect upon becoming a
16 law, and shall apply to all photographs or video or audio
17 recordings of an autopsy, regardless of whether the autopsy
18 was performed before or after the effective date of the act.

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1 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
2 COMMITTEE SUBSTITUTE FOR
3 Senate Bill 1356

- 4 - Includes audio recordings of autopsies under the newly
5 created exemption.
6 - Provides that the exemption is to apply retroactively.
7 - Provides that a surviving spouse, parent, or child of the
8 deceased or their legal representative, or a state or
9 federal agency in furtherance of its official duties, may
10 view or copy autopsy photographs or video or audio
11 recordings.
12 - Provides that all others may have access (viewing,
13 duplicating, or publishing) to the autopsy photos,
14 videos, and audio recordings only upon a court order
15 showing good cause.
16 - Provides that such access, if granted by the court, must
17 be performed under the direct supervision of the
18 custodian of the record.
19 - Makes it a felony of the third degree to knowingly
20 violate the provisions of the act.
21 - Provides that a surviving spouse, parent, or child of the
22 deceased or their legal representative must be a party to
23 any proceeding by a third party requesting access to
24 these records and requires the court to appoint counsel
25 to represent an indigent family.
26 - Provides a criteria for the court to consider in
27 determining what constitutes good cause.
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Amendment No. 01 (for drafter's use only)

COUNCIL/COMMITTEE ACTION

1	ADOPTED	Y	N	:	FAILED TO ADOPT	Y	N
2	ADOPTED AS AMENDED			:	WITHDRAWN		
3	ADOPTED w/o OBJECTION			:	OTHER		
4				:			
5				:			
6				:			

7 Council/Committee hearing bill: State Administration
 8 Representative(s) Johnson and Miller offered the following:

Amendment (with title amendment)

11 Remove from the bill: Everything after the enacting clause
 12
 13 and insert in lieu thereof:

14 Section 1. (1) All photographs or video recordings of
 15 an autopsy in the possession of a district medical examiner
 16 pursuant to chapter 406 are confidential and exempt from the
 17 provisions of s. 119.07(1), and s. 24(a), Article I of the
 18 State Constitution, except as otherwise provided herein.

19 Photographs and video recordings of an autopsy made
 20 confidential and exempt by this section shall be disclosed for
 21 viewing or copying:

22 (a) Pursuant to a written waiver by the surviving
 23 spouse. If there is no surviving spouse, then pursuant to a
 24 written waiver by a surviving parent; and, if there is no
 25 surviving spouse or parent, then pursuant to written waiver by
 26 an adult child of the deceased; or

27 (b) Pursuant to a written request by a local
 28 government, state agency, or federal agency, in the
 29 furtherance of its official duties; and, unless otherwise
 30 required in the performance of their duties, the identity of
 31 the deceased shall remain confidential and exempt.

Amendment No. 01 (for drafter's use only)

1 (2) Any person may petition the court for an order to
2 make the photographs and video recordings available for
3 inspection. Pursuant to such a public records petition, and
4 the petitioner's showing of good cause, the court may
5 authorize inspection pursuant to the terms and conditions
6 which it deems appropriate, but shall not authorize copying;
7 provided that the surviving spouse is given reasonable notice
8 of the petition, and a copy of the petition, and reasonable
9 notice of the opportunity to be present and heard at any
10 hearing on the matter. If there is no surviving spouse, then
11 such notice must be given to the deceased's parents, and if
12 the deceased has no living parents, then to the adult children
13 of the deceased.

14 In determining good cause the court shall consider:

15 a) The necessity of the viewing in determining
16 governmental accountability;

17 b) The ramifications of the viewing with respect to
18 the family's right to privacy; and

19 c) The availability of similar information in other
20 forms.

21 (3) The viewing or copying of an autopsy photograph or
22 video recording pursuant to this section shall be under the
23 direct supervision of the custodian of the record or his or
24 her designee.

25 (4) The district medical examiner or associate medical
26 examiner, in his or her official capacity, may use the
27 photographs or video recordings for the purposes of seeking
28 another expert medical opinion, for providing professional
29 training, for case-related medical or scientific research
30 purposes, or for other purposes solely related to the
31 accomplishment of the district or associate medical examiner's

Amendment No. 01 (for drafter's use only)

1 duties and responsibilities. However, the identity of the
2 deceased shall remain confidential and exempt, unless a waiver
3 has been obtained as provided for in subsection (1)(a).

4 (5) Any person who willfully or knowingly violates
5 this section commits a felony of the third degree, punishable
6 as provided in ss. 775.082, 775.083, or 775.084.

7 (6) This exemption shall be given retroactive
8 application. This section is subject to the Open Government
9 Sunset Review Act of 1995 in accordance with section 119.15,
10 and shall stand repealed on October 2, 2006, unless reviewed
11 and saved from repeal through reenactment by the Legislature.

12 Section 2. The Legislature finds that it is a public
13 necessity that photographs or video recordings of an autopsy
14 be made confidential and exempt. Photographs or video
15 recordings of an autopsy are highly sensitive, graphic
16 depictions of the deceased, which, if viewed, copied, or
17 publicized, could result in trauma, sorrow, humiliation, or
18 emotional injury to the immediate family of the deceased, and
19 is an invasion of that family's privacy, as well as injurious
20 to the memories of the deceased. Furthermore, the Legislature
21 finds that the existence of the World Wide Web and the
22 proliferation of personal computers throughout the world
23 encourages and promotes the worldwide dissemination of
24 photographs and video recordings 24 hours a day, and that
25 widespread dissemination of autopsy photographs and video
26 recordings would subject the immediate family of the deceased
27 to continuous injury. The Legislature further finds that
28 there are other types of available information, such as the
29 autopsy report, which is less intrusive and injurious to the
30 immediate family member of the deceased but which continues to
31 provide for public oversight. Furthermore, the Legislature

Amendment No. 01 (for drafter's use only)

1 finds that it is a public necessity that the exemption
 2 provided in this act be given retroactive application because
 3 it is remedial in nature and it furthers the public policy
 4 embodied in s. 382.008, that all information on the death
 5 certificate relating to the cause of death is confidential.

6 Section 3. This act shall take effect upon becoming a
 7 law and shall apply to all autopsy photographs and video
 8 recordings in the custody of a district medical examiner,
 9 whether made before or after the effective date of this act.

10

11

12 ===== T I T L E A M E N D M E N T =====

13 And the title is amended as follows:

14 On page 1, lines 3 through 7,
 15 remove from the title of the bill: all of said lines

16

17 and insert in lieu thereof:

18 exemption from public records requirements for
 19 photographs and video recordings of an autopsy;
 20 providing exceptions; providing a

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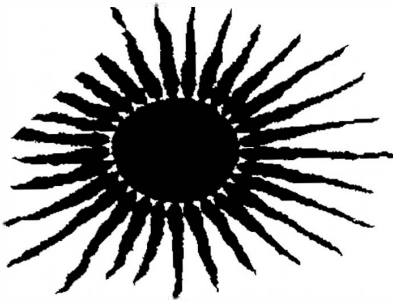
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First Amendment Foundation
336 East College Ave. Ste 300
Tallahassee, FL 32301-1554
850/224-4555
www.floridafaf.org

Recipient: Senator Rudy Garcia (S) **Sent By:**

Company:

Fax Number: 4875380

Voice Number: 4875177

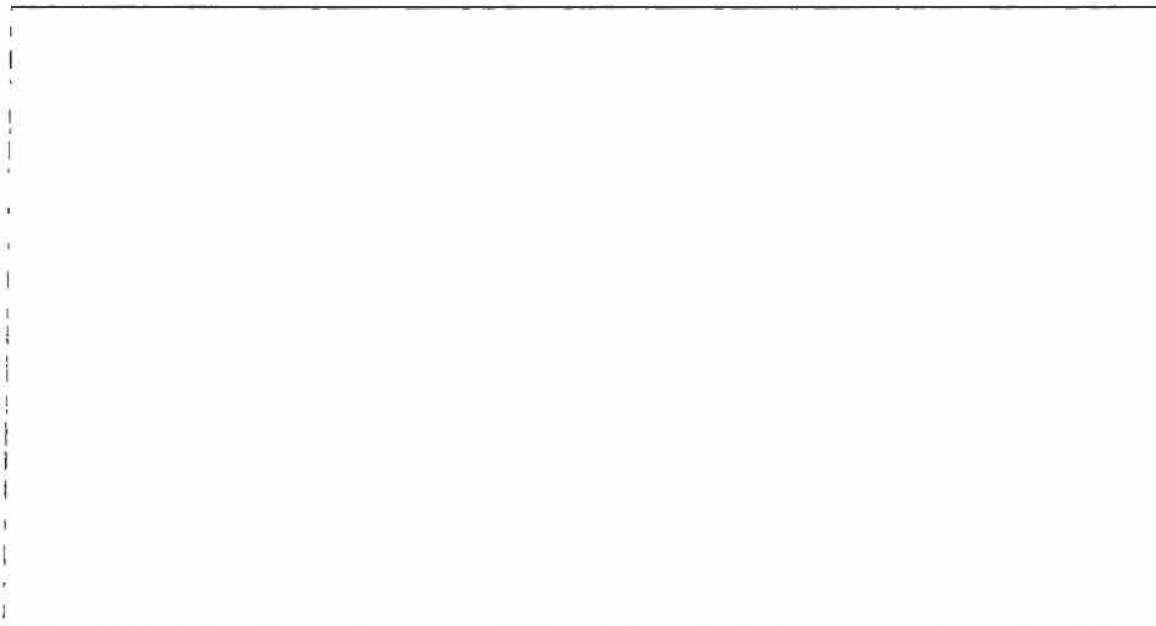
Date: 3/16/2001

Time: 2:44:57 PM

Total No. Pages: 5

Subject:

Message:





FIRST AMENDMENT FOUNDATION

336 East College Avenue, Suite 300 Tallahassee, FL 32301-1554

16 March 2001

The Honorable Jim King
The Florida Senate
Room 300, Senate Office Building
404 S Monroe Street
Tallahassee, FL 32399-1100

VIA FACSIMILE - 4 Pages

Re: CS/SB 1356, Public Records Exemption/Autopsy Photographs

Dear Senator King,

As you know, we have some serious constitutional concerns regarding the CS/SB 1356, and we're trying to fashion a possible compromise that would address our concerns as well as the interests of the family in protecting these highly sensitive records from broad and unauthorized dissemination.

Attached is the most current version of our proposed language, Senator King. In sum, it for inspection of autopsy photos, videos, or tape recordings under the direct supervision of the custodian of the record, but prohibits copying of the record except under court order upon a showing of good cause. In finding good cause, a court would be required to balance the interests of the family with the public's right of governmental oversight. It also stipulates that a violation of the provision is a third degree felony. It's important to note, I think, that under this proposed language, a judge would be allowed to authorize a *redacted* copy of the audio-visual autopsy record—that is, a judge could require that certain features in the photo, for example, could be blocked-out.

We hope you will consider our proposed compromise, Senator King, and we look forward to discussing the issues with you.

Sincerely,

Barbara A. Petersen
Executive Director

cc The Honorable Locke Burt
The Honorable Rudy Garcia
Neil Brown, FSNE
Jon Kaney, Cobb Cole & Bell

The Honorable Rod Smith
Dick Shelton, FPA
David Bralow, The Tribune Company
Sam Morley, Holland & Knight

CS/SB 1356 - Proposed Amendment

An act relating to public records, providing an exemption from the public records law for copying photographs and audio or video recordings of an autopsy in the possession of a district medical examiner; providing for access by a state or federal agency as provided by law and in furtherance of the agency's statutory duties, providing a penalty; providing for future legislative review and repeal; providing a finding of necessity, providing an effective date

Be It Enacted by the Legislature of the State of Florida:

Section 1 (1) An audio-visual autopsy record in the custody of the medical examiner is exempt from those provisions of section 119.07(1), Florida Statutes, and Section 24(a) of Article I, of the State Constitution which permit a person to copy or obtain a copy of a public record, except as provided in this section.

(2) An audio-visual autopsy record is not exempt from those provisions of section 119.07(1), Florida Statutes, and Section 24(a) of Article I, of the State Constitution which permit a person to inspect and examine a public record. The medical examiner having custody of an audio-visual autopsy record shall permit any person to inspect and examine the record under reasonable conditions and direct supervision of the custodian of the record or his or her designee to safeguard the records from copying, but such custodian shall not permit any person to copy, photograph, or otherwise reproduce an audio-visual autopsy record, except as provided in this section.

(3) The whole or any part of an audio-visual autopsy record may be copied, photographed or otherwise reproduced by the following:

(a) A state or federal agency, as provided by law and in furtherance of the agency's statutory duties.

(b) Any person, upon a finding by a court of good cause for copying all or any part of the record. At least one member of the deceased's family consisting of the spouse, parents, and children shall be a party to any proceeding for access to an audio-visual autopsy record. If the court finds that the family is indigent and unable to employ counsel to respond to the petition, or if the court finds that the interests of justice would be served, the court shall appoint the Attorney General to

finds that the interests of justice would be served, the court shall appoint the Attorney General to represent the interests of the family or to act as friend of the court.

In determining good cause, the court shall consider whether the harm to the family's interest in protecting the audio-visual autopsy record from widespread or unauthorized dissemination outweighs the public interest in access to such records or a particular private interest in access to such records and shall tailor any order denying access, in whole or in part, no more broadly than necessary to accommodate these competing interests.

(4) Any custodian of an audio-visual autopsy record who knowingly violates this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(5) For purposes of this section, the term "audio-visual autopsy record" means any photograph of an autopsy, any video recording of an autopsy, and any audio recording made by a medical examiner during the course of an autopsy, but it does not include the written transcript of these records nor other writing or record of the autopsy or the detailed findings of autopsy and laboratory investigations. The term "medical examiner" means any medical examiner, associate medical examiner or substitute medical examiner acting pursuant to Chapter 406, Florida Statutes, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of an audio-visual autopsy record in the course of assisting a medical examiner in performing official duties.

(6) This section is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119.15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Given the possibility of injury to immediate family members by the dissemination of audio-visual autopsy records and the availability of less intrusive means of providing public oversight, the Legislature finds that it is a public necessity that audio-visual autopsy records be made exempt from the right to copy provided by section 119.07(1) and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video recordings of an autopsy show the deceased in graphic and often disturbing fashion, and the audio recording of the autopsy examination may include spontaneous and similarly graphic descriptions of such sights.

An audio-visual autopsy record may depict or describe the deceased bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, audio-visual autopsy records are highly sensitive depictions of the deceased which 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, if copied and publicized. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video recordings 24 hours a day and that widespread dissemination of audio-visual autopsy records could subject the immediate family of the deceased to continuous injury. The Legislature concludes that the right of access to public records as guaranteed by Section 24(a) of the State Constitution consists of the distinct rights to inspect and to copy and further concludes that under Section 24(c) of the State Constitution, the Legislature may enact an exemption from the right to copy as distinct from the right to inspect when it determines that such an exemption is justified by a public necessity and no broader than necessary.

RHEA.JIM

From: RHEA JIM
Sent: Wednesday, March 07, 2001 5 17 PM
To: HULL PAUL S08
Subject: Retroactivity

Paul:

As usual, the answer to your question is not clear. In a 1987 case, the Florida Supreme Court held that a new exemption to ch. 119, F.S. (statutory right NOT constitutional right), 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. However, in a 1998 case (which is AFTER the adoption of the constitutional amendment on public access) the Florida Supreme Court declined to rule on the constitutionality of an exemption enacted after a public records action had commenced and said it rejected the contention that the amended statute should apply retroactively. However, in a related case, the 5th DCA, while acknowledging what the FSC said, noted that it was "arguable" that the Legislature intended an exemption to be remedial and thus retroactive and certified the question back to the Florida Supreme Court, where it still sits today.

Bottom line. Given that exemptions are to be construed narrowly, if the Legislature considers an exemption to be remedial and wants the exemption to be applied retroactively, we MIGHT want to consider stating it (DO NOT, I REPEAT, DO NOT REPEAT THIS PART TO ANYONE YET BECAUSE WE MIGHT FIND THAT IT WILL CAUSE MORE PROBLEMS IN THE LONG RUN because of rules of statutory construction).

Tracking:

Recipient
HULL PAUL S08

Delivery

Delivered 03/07/2001 5 17 PM

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RETROACTIVITY UNDER PUBLIC RECORDS LAW

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.¹ Such legislation is therefore valid unless it is invalid for reason other than its retrospective nature.² A retrospective law may work to a person's disadvantage, provided it does not deprive the person of any substantial right or protection.³

Retroactive or retrospective legislation is invalid if it impairs a substantive, vested right.⁴ 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 right⁵ or a retroactive abrogation of value.⁶ 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.⁷

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 laws⁸ and may apply immediately to pending cases.⁹ As a general rule, the Legislature may ratify, validate, or confirm through a curative act anything that it could have authorized initially.¹⁰ 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.¹¹ 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 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.¹²

¹ *Yellow Cab Co. v. Dade County* (1982, Fla. App. D3), 412 So. 2d 395, petition denied 424 So. 2d 764 (Fla.)

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

³ *Blakenship v. Dugger*, 521 So. 2d 1097 (Fla. 1988).

⁴ *Commercial Bldg. Co. v. Kelliher*, 134 So. 209 (1931), *Serna v. Milunese, Inc.*, 643 So. 2d 36 (1994, Fla. App. D3 643),

⁵ *Florida Patient's Compensation Fund v. Scherer*, 558 So. 2d 411 (Fla. 1991).

⁶ *Dep't of Transp. v. Knowles*, 402 So. 2d 1155 (Fla. 1981)

⁷ *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)

⁸ *North Bay Village v. Miami Beach*, 365 So. 2d 389 (1978, Fla. App. D3)

⁹ *El Portal v. Miami Shores*, 362 So. 2d 275 (Fla. 1978), *Florida Birth-Related Neurological Injury Compensation Ass'n v. DeMarco*, 640 So. 2d 181 (1994, Fla. App. D1)

¹⁰ *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. Pancost*, 102 Fla. 267, 135 So. 518 (1931)

¹¹ *Certain Lots, etc. v. Monticello*, 159 Fla. 134, 31 So. 2d 905 (1947)

¹² *State v. Oehling*, 750 So. 2d 109 (Fla. 5th DCA 1998), reh'g denied, (July 17, 1998)

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.¹⁷

¹⁷ *News-Press Pub. Co. v. Kaune* (1987, Fla. App. D2) 511 So. 2d 1023, 12 FLW 1865, 2 BNA IER Cas. 889.

order the public record or part thereof in question to be immediately produced for inspection, examination, or copying.⁴⁹

Although an in camera inspection is discretionary with respect to the exemption for active criminal intelligence or investigative information,⁵⁰ it is a good practice to conduct such an inspection in any case in which an exemption to the Public Records Act is asserted, in order to lend credence to the trial court's decision and to help dispel any suspicion regarding the government's efforts to sustain secrecy.⁵¹

Illustration: In an action to compel disclosure of the records of a police department, some of which the police department claimed were exempt as active criminal intelligence and active criminal investigative information, the trial court was not required to allow discovery consisting of the department's indexing or itemizing records the court had found to be exempt from disclosure, where the court conducted a careful in camera examination of the records prior to that determination and where there was no indication the police department lacked good faith in its dealings with the requesting party or the court.⁵²

If no in camera hearing is requested by either party, and the defendant's counsel makes no objection during the trial to the evidentiary matters flowing from the record at issue, the trial court is not required to initiate an in camera hearing sua sponte.⁵³

§ 134. When exemptions become effective; retroactivity

Normally, in determining whether a newly enacted exemption to

FS § 119.07(3)(l), exempting records of an agency attorney's mental impression, conclusion, legal strategy, or legal theory, is discussed at §§ 86 et seq.

FS § 119.07(3)(o), exempting records of certain data processing software received or produced by an agency, is discussed at § 120.

Annotations In camera trial or hearing and other procedures to safeguard trade secret or the like against undue disclosure in course of civil action involving such secret, 62 ALR2d 509

49. FS § 119.07(2)(b)

50. FS § 119.07(2)(b)

As to the statutory exemption for active criminal intelligence or investigative information, see §§ 88 et seq.

51. *Tribune Co. v Public Records, etc* (1986, Fla App D2) 493 So 2d 480, 11 FLW 1533, 13 Media L R 1201.

52. *Lorei v Smith* (1985, Fla App D2) 464 So 2d 1330, 10 FLW 712, review den (Fla) 475 So 2d 695.

53. *Jordan v School Bd* (1988, Fla App D4) 531 So 2d 976, 13 FLW 1764, clarified (Fla App D4) 13 FLW 2339.

the Public Records Act⁵⁴ 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.⁵⁵

The limited attorney-client exemption according temporary protection from the disclosure of sensitive documents is addressed to precisely the type of remedial rights—those arising for the purpose of protecting or enforcing substantive rights—which is allowed retroactive application.⁵⁶

|||| Illustration: During the course of an action brought against a city for allegedly negligent inspection and maintenance of a traffic signal, where the cause of action had accrued prior to the effective date of the limited attorney-client exemption, the exemption operated retroactively to protect from disclosure those portions of the city's litigation file which reflected a mental impression, conclusion, litigation strategy, or legal theory.⁵⁷

B. ACTIONS [§§ 135-145]

Research References

FS §§ 119.02, 119.10-119.12

ALR Digest: Records and Recording Laws § 3

ALR Index. Records and Recording

66 Am Jur 2d, Records and Recording Laws § 31

21 Am Jur Pl & Pr Forms (Rev), Records and Recording Laws,
Forms 1-4, 18

West's Fla Digest 2d, Records # # 61-67

54. FS Ch 119

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

56. Orlando v Desjardins (1986, Fla)
493 So 2d 1027, 11 FLW 474

57. Orlando v Desjardins (1986, Fla)
493 So 2d 1027, 11 FLW 474.

For a discussion of the limited
attorney-client exemption, see §§ 80 et
seq.

- A private party's right to recover money that is due when a statute is passed⁵²

No vested rights accrue to:

- The heirs of a party entitled to the homestead exemption, who have no present vested interest in the exempted property entitling them to claim a deprivation of rights by a statute governing descent of the homestead⁵³
- A person who has operated a motor vehicle for carriage of property for compensation by virtue of an exemption relieving that individual from obtaining a certificate of public convenience and necessity⁵⁴

XIII. RETROACTIVE OR RETROSPECTIVE LEGISLATION [§§ 339-347]

A. IN GENERAL [§§ 339, 340]

Research References

ALR Digest: Constitutional Law §§ 132-134 9

ALR Index: Constitutional Law: Retrospective Operation and Laws

16A Am Jur 2d, Constitutional Law §§ 661-666

West's Fla Digest 2d, Constitutional Law ¶¶ 186-191

§ 339. Definition; validity

Retroactive or retrospective legislation refers to a law that changes the legal consequences of acts completed before its effective date.⁵⁵ Neither the state constitution nor the federal constitution prohibits the enactment of legislation with retroactive effect.⁵⁶ Such legislation is therefore valid unless it is invalid for some reason other than its retrospective nature.⁵⁷ A retrospective law may

52. *Bedell v Lassiter* (1940) 143 Fla 43, 196 So 699.

53. *Nesmith v Nesmith* (1945) 155 Fla 823, 21 So 2d 789

54. *State v White* (1967, Fla) 194 So 2d 601

55. *Miller v Florida* (1987) 482 US 423, 96 L Ed 2d 351, 107 S Ct 2446

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

57. *McCord v Smith* (1949, Fla) 43

work to a person's disadvantage, provided it does not deprive the person of any substantial right or protection.⁵⁸

§ 340. Constitutional limitations

Retroactive or retrospective legislation is invalid if it impairs a substantive, vested right.⁵⁹ After substantive rights vest, they cannot be adversely affected by subsequently enacted legislation.⁶⁰ Furthermore, due process considerations usually preclude the retroactive application of a law creating a substantive right⁶¹ or a retroactive abrogation of value.⁶² In determining the validity of a statute that retroactively abrogates a thing of value, courts weigh 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.⁶³

B. EX POST FACTO LAWS [§§ 341-345]

Research References

US Const Art I §§ 9, 10

So 2d 704, *Crooks v State* (1940) 141 Fla 597, 194 So 237.

58. *Blankenship v Dugger* (1988, Fla) 521 So 2d 1097, 13 FLW 179.

59. *Commercial Bldg Co v Kelliher* (1931) 101 Fla 382, 134 So 209; *Serna v Milanese, Inc.* (1994, Fla App D3) 643 So 2d 36, 19 FLW D2052, 24 UCCRS2d 980, related proceeding (Fla App D3) 657 So 2d 966, 20 FLW D1655, 27 UCCRS2d 546; *Sarasota County v Andrews* (1991, Fla App D2) 573 So 2d 113, 16 FLW D146. In re *Will of Martell* (1984, Fla App D2) 457 So 2d 1064, *Talmadge v District School Bd* (1981, Fla App D5) 406 So 2d 1127

As to retroactive legislation as impairment of contractual obligation, see §§ 362, 372

As to vested rights, generally, see §§ 331 et seq.

60. *L. Ross, Inc v R. W. Roberts Constr. Co* (1985, Fla App D5) 466 So 2d 1096, 10 FLW 285, approved (Fla) 481 So 2d 484, 11 FLW 31

61. *Florida Patient's Compensation Fund v Scherer* (1990, Fla) 558 So 2d 411, 15 FLW S123

Annotations: Retroactive application of federal legislation as violating due process clause of Federal Constitution's Fifth Amendment—Supreme Court cases, 107 L Ed 2d 1105.

62. *State, Dep't of Transp v Knowles* (1981, Fla) 402 So 2d 1155.

63. *State, Dep't of Transp v Knowles* (1981, Fla) 402 So 2d 1155; *Hernandez v Department of State, Division of Licensing* (1993, Fla App D3) 629 So 2d 205, 18 FLW D2427, review den (Fla) 640 So 2d 1107

Fla Const Art I § 10

ALR Digest: Constitutional Law §§ 123-131

ALR Index: Constitutional Law, Ex Post Facto Laws, Retrospective Operation and Laws

16A Am Jur 2d, Constitutional Law §§ 634-660

West's Fla Digest 2d, Constitutional Law # # 197-203

§ 341. Definition

An ex post facto law is one that renders an act punishable in a manner in which it was not punishable when it was committed.⁶⁴ It may take the form of:

- A law that allows for prosecution and conviction for actions that were lawful at the time of their commission
- A law that imposes a punishment more severe than that assigned when the crime occurred
- A law that changes the proof necessary to convict a defendant⁶⁵

§ 342. Constitutional prohibitions

The United States Constitution forbids both Congress⁶⁶ and the states⁶⁷ to pass any ex post facto law. Similarly, the Florida Constitution provides that no ex post facto law shall be passed.⁶⁸

§ 343. Purpose of constitutional prohibition

The prohibition of ex post facto laws assures that legislative acts give fair warning of their effect and permit an individual to rely on their meaning until explicitly changed.⁶⁹ It is considered fundamentally unjust for the legislature to impose a new or increased obliga-

64. *United States v Johnson* (1994, MD Fla) 845 F Supp 864, 8 FLW Fed D 33. (1988, Fla) 521 So 2d 1097, 13 FLW 179.

65. *Weaver v Graham* (1981) 450 US 24, 67 L Ed 2d 17, 101 S Ct 960. *Hock v Singletary* (1995, CA11 Fla) 41 F3d 1470, 8 FLW Fed C 943, reh, en banc, den (CA11 Fla) 58 F3d 642 and cert den (US) 133 L Ed 2d 668, 116 S Ct 715 and (disapproved on other grounds by *Lynce v Mathis* (US) 1997 US LEXIS 1269), *Blankenship v Dugger*

66. US Const Art I § 9

Annotations: Supreme Court's views as to what constitutes an ex post facto law prohibited by Federal Constitution, 53 L Ed 2d 1146

67. US Const Art I § 10.

68. Fla Const Art I § 10.

69. *Weaver v Graham* (1981) 450 US 24, 67 L Ed 2d 17, 101 S Ct 960

tion, burden, or penalty as to a set of facts after they have occurred,⁷⁰ thereby punishing someone who could not have known that the conduct was subject to penalty when he or she committed the act.⁷¹

§ 344. Applicability of ex post facto prohibitions

The constitutional ex post facto prohibitions apply only to criminal laws.⁷² For a criminal law to be ex post facto, (1) it must be retrospective (that is, it must apply to events that occurred before its enactment); and (2) it must disadvantage the offender by imposing greater punishment.⁷³ A law need not impair a vested right to violate the ex post facto provision.⁷⁴ Even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the constitutional prohibition if it is both retrospective and more onerous than the law in effect on the date of the offense.⁷⁵

§ 345. Limitations; procedural matters

A retrospective law that merely alters procedural rather than substantive matters, without increasing the punishment or changing the elements of the crime, is not an ex post facto law, even

70. *L. Ross, Inc v R W Roberts Constr Co* (1985, Fla App D5) 466 So 2d 1096, 10 FLW 285, approved (Fla) 481 So 2d 484, 11 FLW 31

71. *United States v Johnson* (1994, MD Fla) 845 F Supp 864, 8 FLW Fed D 33

72. *United States v Johnson* (1994, MD Fla) 845 F Supp 864, 8 FLW Fed D 33, *Seaboard S R., Inc. v Clemente* (1985, Fla App D3) 467 So 2d 348, 10 FLW 668, 10 FLW 1139.

73. *Weaver v Graham* (1981) 450 US 24, 67 L Ed 2d 17, 101 S Ct 960, *Hock v Singletary* (1995, CA11 Fla) 41 F3d 1470, 8 FLW Fed C 943, reh. en banc, den (CA11 Fla) 58 F3d 642 and cert den (US) 133 L Ed 2d 668, 116 S Ct 715 and (disapproved on other grounds by *Lynce v Mathis* (US) 1997 US

LEXIS 1269), *Blankenship v Dugger* (1988, Fla) 521 So 2d 1097, 13 FLW 179

74. *Weaver v Graham* (1981) 450 US 24, 67 L Ed 2d 17, 101 S Ct 960; *Hock v Singletary* (1995, CA11 Fla) 41 F3d 1470, 8 FLW Fed C 943, reh. en banc, den (CA11 Fla) 58 F3d 642 and cert den (US) 133 L Ed 2d 668, 116 S Ct 715 and (disapproved on other grounds by *Lynce v Mathis* (US) 1997 US LEXIS 1269)

75. *Weaver v Graham* (1981) 450 US 24, 67 L Ed 2d 17, 101 S Ct 960, *Hock v Singletary* (1995, CA11 Fla) 41 F3d 1470, 8 FLW Fed C 943, reh. en banc, den (CA11 Fla) 58 F3d 642 and cert den (US) 133 L Ed 2d 668, 116 S Ct 715 and (disapproved on other grounds by *Lynce v Mathis* (US) 1997 US LEXIS 1269)

though it may work to the disadvantage of a criminal defendant.⁷⁶ The legislature can extend a criminal statute of limitations period without violating the constitutional ex post facto prohibition if it does so before prosecution is barred by the old statute, and it clearly indicates that the new statute is to apply to cases pending when it becomes effective.⁷⁷

On the other hand, a change in the law that takes a seemingly procedural form may be an ex post facto law if it alters a substantial right.⁷⁸ Furthermore, the prohibition on ex post facto laws cannot be circumvented by enacting a civil law that is primarily criminal in nature.⁷⁹

C. CURATIVE AND REMEDIAL LEGISLATION [§§ 346, 347]

Research References

ALR Digest: Constitutional Law §§ 135-143
 ALR Index: Constitutional Law: Retrospective Operation and Laws
 16A Am Jur 2d, Constitutional Law §§ 678-680
 West's Fla Digest 2d, Constitutional Law # # 192-196

§ 346. Validity

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 laws⁸⁰ and

76. *Miller v Florida* (1987) 482 US 423, 96 L Ed 2d 351, 107 S Ct 2446, *Hock v Singletary* (1995, CA11 Fla) 41 F3d 1470, 8 FLW Fed C 943, reh. en banc, den (CA11 Fla) 58 F3d 642 and cert den (US) 133 L Ed 2d 668, 116 S Ct 715 and (disapproved on other grounds by *Lynce v Mathis* (US) 1997 US LEXIS 1269); *Dugger v Rodrick* (1991, Fla) 584 So 2d 2, 16 FLW S482, cert den 502 US 1037, 116 L Ed 2d 790, 112 S Ct 886 and (disapproved on other grounds by *Lynce v Mathis* (US) 1997 US LEXIS 1269)

77. *Andrews v State* (1980, Fla App D2) 392 So 2d 270, petition den (Fla) 399 So 2d 1145

Annotations: Retroactive effect on appeal from judgment previously entered of statute shortening time allowed for appellate review, 81 ALR2d 417

78. *Miller v Florida* (1987) 482 US 423, 96 L Ed 2d 351, 107 S Ct 2446.

79. *United States v Johnson* (1994, MD Fla) 845 F Supp 864, 8 FLW Fed D 33

80. *North Bay Village v Miami*

may apply immediately to pending cases.⁸¹ As a general rule, the legislature may ratify, validate, or confirm through a curative act anything that it could have authorized initially⁸² and may still authorize⁸³

§ 347. **Limitations**

A curative statute may ratify or confirm only the acts that the legislature may authorize⁸⁴ 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.⁸⁵ Thus, for example, a curative statute that attempts to validate any and all acts and doings of a municipal corporation is too general to be effective as a valid exercise of legislative power.⁸⁶

XIV. OBLIGATION OF CONTRACTS [§§ 348-373]

A IN GENERAL [§§ 348-352]

Research References

US Const Art I § 10

Fla Const Art I § 10

ALR Digest: Constitutional Law §§ 166-166 7

ALR Index Constitutional Law, Impairment of Contract

16A Am Jur 2d, Constitutional Law §§ 682-686

West's Fla Digest 2d, Constitutional Law # # 113, 117-119

Beach (1978, Fla App D3) 365 So 2d 389

81. *El Portal v Miami Shores* (1978, Fla) 362 So 2d 275, *Florida Birth-Related Neurological Injury Compensation Ass'n v DeMarko* (1994, Fla App D1) 640 So 2d 181, 19 FLW D1662

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

10 Fla Jur 2d

83. *Winter Haven v A M Klemm & Son* (1938) 132 Fla 334, 181 So 153, reh den 133 Fla 525, 182 So 841

84. *Smith Bros, Inc. v Williams* (1930) 100 Fla 642, 126 So 367; *Wemberger v Board of Public Instruction* (1927) 93 Fla 470, 112 So 253.

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

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

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Although Privileges and Immunities Clause does not prevent states from requiring nonresidents to allocate income and deductions for tax purposes based on their in-state activities in manner described in Supreme Court precedents, those precedents do not automatically guarantee that state may disallow nonresident taxpayers every manner of nonbusiness deduction on assumption that such amounts are inevitably allocable to state in which taxpayer resides USCA Const Art. 4, § 2 Lunding v New York Tax Appeals Tribunal, 118 S. Ct 766 (U S 1998)

§ 330 — When permitted

Cases

Under Privileges and Immunities Clause, nonresidents may be required to make ratable contribution in taxes for support of government, that duty is one to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of state USCA Const. Art 4, § 2 Lunding v. New York Tax Appeals Tribunal, 118 S Ct 766 (U.S. 1998)

Inequalities that result not from hostile discrimination, but occasionally and incidentally in application of tax system that is not arbitrary in its classification, are not sufficient to defeat law under Privileges and Immunities Clause USCA Const Art. 4, § 2 Lunding v New York Tax Appeals Tribunal, 118 S. Ct 766 (U.S. 1998)

Privileges and Immunities Clause bars discrimination against citizens of other states where there is no substantial reason for discrimination beyond mere fact that they are citizens of other states but does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. thus, inquiry in each case must be concerned with whether such reasons exist and whether degree of discrimination bears close relationship to them, with due regard for principle that states should have considerable leeway in analyzing local evils and in prescribing appropriate cures USCA Const Art. 4, § 2 Lunding v New York Tax Appeals Tribunal, 118 S Ct 766 (U.S. 1998)

When confronted with challenge under Privileges and Immunities Clause to law distinguishing between residents

and nonresidents, state may defend its position by demonstrating that there is substantial reason for difference in treatment, and that discrimination practiced against nonresidents bears substantial relationship to state's objective USCA Const Art 4, § 2 Lunding v New York Tax Appeals Tribunal, 118 S. Ct 766 (U S 1998)

XIII. RETROACTIVE OR RETROSPECTIVE LEGISLATION [§§ 339-347]

A. IN GENERAL [§§ 339, 340]

§ 339 Definition; validity

Cases

Prescription is not made retroactive merely because it draws upon antecedent facts for its operation Regions Hosp v Shalala, 118 S Ct. 909, 123 Ed Law Rep 1038 (U.S. 1998)

In order to determine whether a constitutional change in the law rises to the level of 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 State v Oehling, 750 So 2d 109, 24 Fla L Weekly D54 (Fla Dist Ct App 5th Dist 1999)

§ 340 Constitutional limitations

Cases

Substantive rights cannot be adversely affected by enactment of legislation once those rights have vested, nor may legislature increase existing obligation, burden or penalty as to set of facts after those facts have occurred Bitterman v Bitterman, 714 So 2d 356, 23 Fla. L Weekly S168 (Fla. 1998), reh'g denied, (July 17, 1998)

B. EX POST FACTO LAWS [§§ 341-345]

§ 344 Applicability of ex post facto prohibitions

Cases

Under ex post facto clause, for purpose of determining inmates' entitlement to early release, inmates were subject to version of prison overcrowding statute in effect at time of each inmate's offense.

Alternative 2 – Confidential and Exempt With No Petition

Section 1. (1) A photograph or video recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution, except that a surviving spouse, parent, child of the deceased, legal representative thereof, or a state or federal agency in the furtherance of its official duties, may view or copy a photograph or video recording of the autopsy. The custodian of the record or his or her designee shall not permit any other person to view or duplicate such photograph or video recording without a court order. The court, upon a showing of a clear and convincing need, may issue an order authorizing any other person to: (a) view the photograph or video recording of the autopsy but not to copy the record; (b) view and copy the photograph or video recording but to maintain the confidentiality of the copied record, (c) view, copy or publish a photograph or video recording of an autopsy; or (d) prescribe any other restrictions or stipulations that it deems appropriate, including but not limited to, viewing, copying or publishing only portions of a photograph or video recording deemed relevant to the petition. In all cases, the viewing, copying or other handling of an autopsy photograph or video recording shall be under the direct supervision of the custodian of the record or his or her designee.

(2) (a) A custodian of a photograph or video recording of an autopsy who knowingly violates this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.085, Florida Statutes;

(b) Any person who knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.085, Florida Statutes.

(3) This exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119.15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Given the likelihood of injury to immediate family members by the widespread, unauthorized dissemination of autopsy photographs and videos, and the availability of less intrusive means of providing public oversight, the Legislature finds that it is a public necessity that autopsy photographs be made confidential and exempt from the

requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The Legislature finds that photographs or videos of an autopsy show the deceased in graphic and often disturbing fashion. Such photographs or videos may depict the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or videos of an autopsy are highly sensitive depictions of the deceased that could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injure the memory of the deceased, if copied and publicized. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and videos twenty-four hours a day and that such widespread unauthorized dissemination of autopsy photographs and videos would subject the immediate family of the deceased to continuous injury. Further, the Legislature notes that the continued availability of other types of information, such as the autopsy report, are less intrusive and injurious to the immediate family members of the deceased while still providing public oversight.

Section 3. This act shall take effect upon becoming a law

Alternative 1 - Petition

Section 1. (1) A photograph or video recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution, upon petition by a surviving spouse, parent, child of the deceased, or legal representative thereof, to a court of competent jurisdiction to seal the photograph or video recording of an autopsy. Upon the issuance of the order sealing the photograph or video recording of an autopsy, the custodian of the record or his or her designee shall not permit any person to view or duplicate such photograph or video recording without a court order, except that a surviving spouse, parent, or child of the deceased, or legal representative thereof, or a state or federal agency in the furtherance of its official duties, may view or copy the record under the direct supervision of its custodian or his or her designee. The court, upon a showing of a clear and convincing need, may issue an order authorizing any other person to: (a) view the photograph or video recording of the autopsy but not to copy the record; (b) view and copy the photograph or video recording but to maintain the confidentiality of the copied record; (c) view, copy or publish a photograph or video recording of an autopsy; or (d) prescribe any other restrictions or stipulations that it deems appropriate, including but not limited to, viewing, copying or publishing only portions of a photograph or video recording deemed relevant to the petition. In all cases, the viewing, copying or other handling of an autopsy photograph or video recording shall be under the direct supervision of the custodian of the record or designee.

(2) (a) A custodian of a photograph or video recording of an autopsy who knowingly violates this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.085, Florida Statutes;

(b) Any person who knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.085, Florida Statutes.

(3) This exemption is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119.15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. Given the likelihood of injury to immediate family members by the widespread, unauthorized dissemination of autopsy photographs and videos, and the availability of less intrusive means of providing public oversight, the Legislature finds that it is a public necessity that autopsy photographs be made confidential and exempt from the requirements of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. The Legislature finds that photographs or videos of an autopsy show the deceased in graphic and often disturbing fashion. Such photographs or videos may depict the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or videos of an autopsy are highly sensitive depictions of the deceased that could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injure the memory of the deceased, if copied and publicized. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and videos twenty-four hours a day and that such widespread unauthorized dissemination of autopsy photographs and videos would subject the immediate family of the deceased to continuous injury. Further, the Legislature notes that the continued availability of other types of information, such as the autopsy report, are less intrusive and injurious to the immediate family members of the deceased while still providing public oversight.

Section 3. This act shall take effect upon becoming a law.