HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 411 Pub. Rec./Photographs and Video and Audio Recordings Depicting or Recording the Killing of a Person
SPONSOR(S): Burgin
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 416

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N	Williamson	Williamson
2) Criminal Justice Subcommittee		Krol	Cunningham
3) State Affairs Committee			

SUMMARY ANALYSIS

The bill creates a public record exemption for photographs and video and audio recordings that depict or record the killing of a person. It is identical to the public record exemption provided for photographs and video and audio recordings of an autopsy.

Such photograph or video or audio recording is confidential and exempt from public records requirements; however, a surviving spouse or other enumerated relatives may view and copy a photograph or video recording or listen to or copy the audio recording of the decedent. The surviving relative with whom authority rests to obtain such confidential and exempt records may designate in writing an agent to obtain those records.

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of the killing of a person.

Without a court order, the custodian of such records may not permit any other person to view or copy a photograph or video recording or to listen to or copy the audio recording of the killing of a person. A person must file a petition and obtain a court order in order to view, listen to, or copy such records. A surviving spouse or other enumerated relative must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter. Upon a showing of good cause, the court may issue an order authorizing a person to view or copy a photograph or video recording or to listen to or copy the audio recording of the killing of a person.

The bill provides that the public record exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, a court in such proceeding is not prohibited from restricting or controlling the disclosure of such records upon a showing of good cause.

The bill provides penalty provisions for violating the public record exemption.

The bill provides for repeal of the exemption on October 2, 2016, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution, and provides for retroactive application of the exemption.

The bill appears to have an insignificant fiscal impact to the state and is effective July 1, 2011.

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the State Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.[1]

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act[2] provides that a public record or public meeting exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no broader than is necessary to meet one of the following purposes:

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

Public Record Exemption, Criminal Intelligence and Criminal Investigative Information

Current law provides a public record exemption for criminal intelligence information[3] and criminal investigative information.[4] Active criminal intelligence information[5] and active criminal investigative information[6] are exempt[7] from public records requirements.

Public Record Exemption, Autopsy Photos and Video Audio Recordings

Current law provides a public record exemption for photographs and video and audio recordings of an autopsy held by a medical examiner.[8] Such photographs and video and audio recordings are

[1] Section 24(c), Art. I of the State Constitution.
[2] Section 119.15, F.S.
[3] Section 119.011(3)(a), F.S., defines "criminal intelligence information" to mean "information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity."
[4] Section 119.011(3)(b), F.S., defines "criminal investigative information" to mean "information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance."
[5] Criminal intelligence information is considered "active" as long as it is related to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities. Section 119.011(3)(d)1., F.S.
[6] Criminal investigative information is considered "active" as long as it is related to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future. Section 119.011(3)(d)2., F.S.
[7] There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. (*See WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released, by the custodian of public records, to anyone other than the persons or entities specifically designated in the statutory exemption. (*See* Attorney General Opinion 85-62, August 1, 1985).
[8] Section 406.135(2), F.S.

confidential and exempt from public records requirements, except that a surviving spouse and other enumerated family members may obtain the records.

Pursuant to a written request and in the furtherance of its duties and responsibilities, a local governmental entity or a state or federal agency may view or copy a photograph or video recording or may listen to or copy an audio recording of an autopsy. The identity of the deceased must remain confidential and exempt.[9]

Other than these exceptions, a custodian of the photographs and video and audio recordings is prohibited from releasing such photographs and recordings to any other person not authorized under the exemption, without a court order.[10]

Effect of Bill

The bill creates a public record exemption for photographs and video and audio recordings that depict or record the killing of a person. The public record exemption is identical to the public record exemption provided for photographs and video and audio recordings of an autopsy.

The bill defines "killing of a person" to mean:

> [A]ll acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death.

Such photograph or video or audio recording is confidential and exempt from public records requirements; however, a surviving spouse may view and copy a photograph or video recording or listen to or copy the audio recording of the decedent. If there is no surviving spouse, then the surviving parents have access to such records. If there is no surviving spouse or parent, then an adult child has access to such records. The surviving relative with whom authority rests to obtain such confidential and exempt records may designate in writing an agent to obtain those records.

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

Without a court order, the custodian of such records may not permit any other person to view or copy a photograph or video recording or to listen to or copy the audio recording of the killing of a person. A person must file a petition and obtain a court order in order to view, listen to, or copy such records. A surviving spouse must receive reasonable notice of the petition and of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be provided to the deceased's parents, and if the deceased has no living parent, then to the adult child of the deceased.

Upon a showing of good cause, the court may issue an order authorizing a person to view or copy a photograph or video recording or to listen to or copy the audio recording of the killing of a person. The bill provides 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.

The bill provides that the public record exemption does not apply to such photographs or video or audio recordings submitted as part of a criminal or administrative proceeding; however, it appears to apply to

[9] Section 406.135(3)(b), F.S.
[10] Section 406.135(4), F.S.

such information submitted as part of a civil proceeding. In addition, a court in such proceeding is not prohibited from restricting or controlling the disclosure of such records upon a showing of good cause.

It is a third degree felony[11] for any:

- Custodian of such photograph or video or audio recording to willfully and knowingly violate the provisions of the exemption.
- Person to willfully and knowingly violate a court order issued pursuant to the exemption.

The bill provides for repeal of the exemption on October 2, 2016, unless reviewed and saved from repeal by the Legislature. It also provides a statement of public necessity as required by the State Constitution,[12] and provides for retroactive application[13] of the public record exemption.

B. SECTION DIRECTORY:

Section 1. Creates an unnumbered section of law to create a public record exemption for photographs and video and audio recordings that depict or record the killing of a person.

Section 2. Provides a public necessity statement.

Section 3. Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

On March 2, 2011, the Criminal Justice Impact Conference determined the fiscal impact of SB 416[14] to be insignificant due to anticipated low volume and because the felonies created by the bill are unranked.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires a person to petition the court for access to photographs and video and audio recordings of a killing of a person. As such, a person petitioning the court would be subject to court costs and fees.

D. FISCAL COMMENTS:

None.

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[11] A third degree felony is punishable by up to five years imprisonment and up to $5,000 fine. Sections 775.082 and 775.083, F.S.
[12] Section 24(c), Art. I of the State Constitution.
[13] The Supreme Court of Florida ruled that a public record exemption is not to be applied retroactively unless the legislation clearly expresses intent that such exemption is to be applied retroactively. *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So.2d. 373 (Fla. 2001).
[14] SB 416 is the companion to HB 411.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

Vote Requirement

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution, requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a new public record exemption; thus, it includes a public necessity statement.

Overly Broad

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

In *Campus Communications, Inc., v. Earnhardt*,[15] the Fifth District Court of Appeal upheld a similar law exempting autopsy photographs and video and audio recordings against an unconstitutional over breath challenge brought by a newspaper. The court went on to certify the question of constitutionality to the Florida Supreme Court. On July 1, 2003, the Florida Supreme Court, per curiam, denied review of this case, leaving in place the appellate court's holding.[16]

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Opponents of the bill have expressed concerns because, according to opponents, the bill restricts oversight of governmental actions and creates less accountability. Opponents have listed as examples the Martin Lee Anderson incident at the Bay County Boot Camp,[17] and the execution of Jesse Joseph Tafero.[18]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

[15] 821 So.2d 388 (Fla. 5th DCA 2002), review denied, 848 So.2d 1153 (Fla. 2003).
[16] 848 So.2d 1153 (Fla. 2003).
[17] In January 2006, Martin Lee Anderson, a resident of the Bay County Boot Camp, which was operated by the Bay County Sheriff's Office, died from suffocation a day after entering boot camp. A videotape of the events surrounding his death, specifically the activities of boot camp employees, resulted in the Legislature closing boot camps, but only after the news media and others made the video public. Letter from the First Amendment Foundation to Representative Burgin (February 25, 2011), on file with the Government Operations Subcommittee.
[18] In 1990, the execution of Jesse Joseph Tafero was botched causing his head to catch fire. Videos or photos of this event would be protected under this bill, also limiting oversight. *Id.*