

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

CRC14-00216CFAES

STATE OF FLORIDA

v.

CURTIS J. REEVES

SPN 00683538

**STATE'S REQUEST FOR DECLARATORY JUDGMENT ON DISCOVERY AND PUBLIC RECORDS**

Comes now, BERNIE McCABE, State Attorney for the Sixth Judicial Circuit of Florida, through his undersigned Assistant State Attorney, and requests a declaratory judgment as follows:

The homicide in this case, which took place within a movie theater, was recorded by surveillance cameras in that theater. The State is in possession of those video recordings and at a hearing on January 30, 2014, the State agreed to release the videos to the defense today, February 3, 2014. It has since come to the State's attention that release of those videos may violate §406.136(2), Fla. Stat. It is on this matter that the State seeks guidance from this Court.

Section 406.136(2), Fla. Stat. states in pertinent part:

A photograph or video or audio recording that depicts or records the killing of a person is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, except that a surviving spouse of the decedent may view and copy any such photograph or video recording or listen to or copy any such audio recording. 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.

The "killing of a person" is defined in §406.136(1), Fla. Stat. as:

all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death.

As stated previously, the videos at issue specifically depict the shooting which caused the death of the victim, and more generally depict "related acts" occurring immediately before and after the shooting. It thus appears that these videos are squarely what was considered by the Legislature in enacting § 406.136, Fla. Stat.

The statute declares that the videos are not only "exempt," which is a protection waivable by

PAUL S. O'NEILL  
CLERK OF THE CIRCUIT COURT  
PASCO COUNTY, FLORIDA  
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the records custodian, but also “confidential,” which acts as a prohibition on release. See WFTV, Inc. v. Sch. Bd. of Seminole, 874 So.2d 48, 53 (Fla. 5th DCA 2004) (“There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential. If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute.”). Section 406.136(6), Fla. Stat. declares that violations of the statute are third degree felonies.

Release of such records is limited to family members via § 406.136(2), or by court order via §406.136(4). Records that may be released by court order must first be preceded by a showing of good cause. In making that determination, a court must consider:

1. Whether such disclosure is necessary for the public evaluation of governmental performance;
2. The seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and
3. The availability of similar information in other public records, regardless of form.

§ 406.136(4)(b), Fla. Stat.

In the instant case, the first factor could be addressed by those seeking the videos and the second factor could be addressed by the victim’s family.<sup>1</sup> As for the third factor, the State believes there is no “similar” information available save for written descriptions of the video that may have been produced by investigators.

Further complicating this matter is § 406.136(6)(c), Fla. Stat. which states:

A criminal or administrative proceeding is exempt from this section but, unless otherwise exempted, is subject to all other provisions of chapter 119, 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 a killing, crime scene, or similar photograph or video or audio recordings in the manner prescribed herein

The relevant issue seems to turn on what the Legislature meant by “proceeding.” One reading of this provision would suggest that the instant case, these “proceedings,” is wholly exempt from the restrictions of § 406.136, Fla. Stat. This interpretation seems somewhat erroneous in that many if not most killings will result in a criminal proceeding and wholly exempting such proceedings would vitiate most of the intent behind the statute. Another more restrictive reading would suggest that a

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<sup>1</sup> All such people known to the State will be noticed for the hearing on this motion.

hearing or trial in the instant case, a “proceeding,” is exempt such that the video could be played in court during the course of that specific “proceeding.” The Final Bill Analysis states:

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.

State’s Exhibit 1.

The State suggests that, at the least, the statute allows the State and Defense to play the videos during relevant hearings or at trial. The State submits that a public records request by a non-party is likely not meant to be included within the “criminal proceeding” exception referenced in this subsection.

The State intends to play excerpts of the videos to this Court at the hearing on February 5, 2014 and may wish to play them at other relevant hearings and trial. Assuming this Court permits that display, the State would like clarification on the means and restrictions of that display. If the videos are displayed on the standard courtroom monitors, they could be viewed by the public in the courtroom. If this Court determines that more restrictions are necessary, the videos could be displayed on a monitor positioned so that the public could not see, or this Court could view them in camera.

As for the disclosure of these videos to the defense, one would assume that the defense should be permitted some access to them in discovery. It may be that the discovery process was part of what was considered in the exception in § 406.136(6)(c), Fla. Stat. The disclosure itself might be in the form of physically releasing a copy of the videos to the defense with the directive that they not be further disclosed, or it could be in the form described in § 406.136(4)(c) wherein the defense could view the videos under the supervision of the State. The State would ask first though that this Court specifically direct such disclosure after having had the opportunity to consider the restrictions of § 406.136, Fla. Stat.

Another matter is the consideration of these videos in the public records context. The State has already received several requests from the media seeking the videos at issue. In a typical criminal case, the instant videos would be exempt from public review as active criminal intelligence/investigative information under § 119.071(2)(c), Fla. Stat. until such time that the records were discovered to the defense. Times Pub. Co. v. State, 827 So. 2d 1040, 1042 (Fla. 2d DCA 2002) (“When the State discloses documents to a criminal defendant in discovery, the documents are subject to public inspection and copying.”) (citing § 119.011(3)(c)(5), Fla. Stat.).

However, that procedure is limited to the criminal intelligence/investigative exemption. §119.011(3)(c)(5), Fla. Stat. As described above, the instant videos are also subject to the restrictions of § 406.136, Fla. Stat. Unlike § 119.071(2)(c), § 406.136 specifically addresses when the records it considers may be disclosed to the public, and that is only upon court order after a showing of good cause. Even that disclosure is specifically limited to review under the supervision of the records custodian.<sup>2</sup> § 406.136(4)(c), Fla. Stat. Therefore, the State does not believe that these videos become public merely upon review by the defense. See Rameses, Inc. v. Demings, 29 So.3d 418, 423 (Fla. 5th DCA 2010) (“We hold that the disclosure to a criminal defendant during discovery of unredacted versions of undercover police surveillance recordings does not destroy, in a public records context, the exemptions contained in section 119.071 for information relating to the identity of undercover law enforcement personnel.”). It may be however, that the videos become public upon their disclosure in open court.<sup>3</sup> Again, the State seeks guidance in how it should respond to public records requests for the videos at issue.

Unfortunately, as the statute is relatively new, there are at present no appellate cases interpreting it. It is for this reason and those identified above that the State seeks guidance from this Court. Specifically, the State respectfully asks that this Court consider these questions:

- 1) May the State release the videos to the Defense? If so, should that release be a physical copy of the videos or should the Defense view it under the supervision of the State?
- 2) As the State intends to show this video to this Court at the hearing on February 5, 2014, should that display be public or limited to the view of this Court?
- 3) When the videos are reviewed by the defense do they become public record such that they could be disclosed to the public? If not, are they public once they are played in court?

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<sup>2</sup> An analogous circumstance might be child pornography, which is viewable by the defense in discovery under the supervision of the State, but is nevertheless confidential and exempt under § 119.071(2)(h), Fla. Stat.

<sup>3</sup> The court in Sarasota Herald-Tribune, 924 So. 2d 8 (Fla. 2d DCA 2005) found that autopsy photos exempt under the similarly worded § 406.135 became public when presented as exhibits in court. However, that determination turned on that statute’s limited applicability to records held by the medical examiner such that when they were transferred to the Clerk as court exhibits it no longer applied. That case also addressed a provision in § 406.135(3)(c) excepting criminal proceedings, but seems to have limited the application to records presented as exhibits in “criminal court proceedings.”

WHEREFORE, the State respectfully requests declaratory judgment from this Court as described above.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished to Richard Escobar, Esq., via FAX, this 3rd day of February, 2014.

BERNIE McCABE, State Attorney  
Sixth Judicial Circuit of Florida



for

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Assistant State Attorney  
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**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT  
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**STATE'S INDEX TO EXHIBITS**

1. Final Bill Analysis on CS/HB 411.

**FINAL BILL ANALYSIS**

**BILL #:** CS/HB 411

**FINAL HOUSE FLOOR ACTION:**

111 Y's    6 N's

**SPONSOR:** Rep. Burgin

**GOVERNOR'S ACTION:** Approved

**COMPANION BILLS:** HB 163, CS/CS/SB 416

**SUMMARY ANALYSIS**

CS/HB 411 passed the House on April 27, 2011, and subsequently passed the Senate on April 29, 2011. The bill was approved by the Governor on June 2, 2011, chapter 2011-115, Laws of Florida, and takes effect July 1, 2011.

The bill creates a public record exemption for photographs and video and audio recordings that depict or record the killing of a person. 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 on the state and does not appear to have a fiscal impact on local governments.

FILED FOR RECORD  
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Paula S. O'Neil  
Clerk & Comptroller  
Tallahassee, Florida

## I. SUBSTANTIVE INFORMATION

### A. EFFECT OF 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.<sup>1</sup>

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<sup>2</sup> 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<sup>3</sup> and criminal investigative information.<sup>4</sup> Active criminal intelligence information<sup>5</sup> and active criminal investigative information<sup>6</sup> are exempt<sup>7</sup> from public records requirements.

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<sup>1</sup> Section 24(c), Art. I of the State Constitution.

<sup>2</sup> Section 119.15, F.S.

<sup>3</sup> 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."

<sup>4</sup> 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."

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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



### Public Record Exemption, Autopsy Photos and Video and Audio Recordings

Current law provides a public record exemption for photographs and video and audio recordings of an autopsy held by a medical examiner.<sup>8</sup> Such photographs and video and audio recordings are 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.<sup>9</sup>

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.<sup>10</sup>

### **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 “all acts or events that cause or otherwise relate to the death of any human being, including any related acts or events immediately preceding or subsequent to the acts or events that were the proximate cause of death.”

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

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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).

<sup>8</sup> Section 406.135(2), F.S.

<sup>9</sup> Section 406.135(3)(b), F.S.

<sup>10</sup> Section 406.135(4), F.S.

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 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<sup>11</sup> 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,<sup>12</sup> and provides for retroactive application<sup>13</sup> of the public record exemption. However, the retroactive application is not intended to, nor may it be construed to, overturn, abrogate, or alter any existing court orders that restrict or limit access to any photographs or video or audio recordings that depict or record the killing of a person.

The public record exemption only applies to such photographs and video and audio recordings held by an agency as defined in s. 119.011, F.S. "Agency" is defined to mean:

[A]ny state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

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<sup>11</sup> A third degree felony is punishable by up to five years imprisonment and a fine up to \$5,000. Sections 775.082 and 775.083, F.S.

<sup>12</sup> Section 24(c), Art. I of the State Constitution.

<sup>13</sup> 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).

## 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 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.