In the Wake of a Tragedy: The Earnhardt Family Protection Act Brings Florida’s Public Records Law Under the Hot Lights

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I. INTRODUCTION

On February 18, 2001, “[i]n a sudden, shocking instant, on the last turn of the last lap in stock car racing’s greatest spectacle, the Daytona 500, Dale Earnhardt was called into the pits by a power even greater than he.” 1 Dale Earnhardt was considered by most racing fans to be the greatest stock car driver in history and NASCAR’s 2 greatest superstar. 3 The speculation over Dale Earnhardt’s exact cause of death left several news organizations scrambling to obtain Dale Earnhardt’s autopsy photos for an independent medical evaluation. 4 Dale Earnhardt’s widow managed to have a Volusia

2. National Association for Stock Car Auto Racing [hereinafter NASCAR].
4. See Jim Leusner et al., Earnhardt Head Injury Detailed in Report: Medical Expert Rules Out Seat-Belt Failure as Direct Cause of Racer’s Death, SUN-SENTINEL (Ft. Lauderdale), Apr. 10, 2001, at 1A (discussing the Orlando Sentinel’s settlement agreement with Dale Earnhardt’s wife, which allowed the news organization to have a court appointed medical expert study the autopsy photos). The expert “reject[ed] NASCAR’s theory” of Dale Earnhardt’s death, in that Earnhardt died when his “head whipped violently forward” which would have happened regardless of whether Earnhardt’s seatbelt had torn or not, giving credence to the alleged cover up by NASCAR. Id.
County judge seal the autopsy photos before they were requested by the Orlando Sentinel and other news organizations. These news organizations had the constitutional right in Florida to view and copy Dale Earnhardt’s autopsy photos. However, Florida’s Legislature came to the rescue of the Earnhardt family, allowing them the right to mourn in privacy without Dale Earnhardt’s autopsy photos on the cover of every newspaper in the nation.

The Florida Legislature responded in quick fashion with the Earnhardt Family Protection Act. Governor Jeb Bush, accompanied by Dale Earnhardt’s widow, signed the Act into law March 29, 2001, with “wide public support.” However, a round of legal challenges awaiting the Act were unleashed, and they are a long way from being exhausted.

The Earnhardt Family Protection Act exempts “a photograph or video or audio recording of an autopsy” from Florida’s public records law found in section 119.07(1) of the Florida Statutes, and Article I, Section 24(a) of the Florida Constitution. In making autopsy photographs, video, and audio, confidential and exempt, the Florida Legislature has raised some constitutional issues. A Volusia circuit judge in the Earnhardt case has upheld the new exemption under claims of its unconstitutionality, however, the exemption has yet to work its way through the appellate process. The Independent Florida Alligator and Websitecity are the news organizations leading the charge, and they are ignoring the pleas from Earnhardt’s family and supporters to end the pursuit for Earnhardt’s autopsy photos and to “[l]et

5. Id. at 6A; see also Pat Dunnigan, Off Track?, FLA. TREND, June 2001, at 76.
7. Dunnigan, supra note 5, at 79.
8. Patrik Jonsson, Can ‘Sunshine Laws’ Sometimes Shed Too Much Light?, CHRISTIAN SCIENCE MONITOR (Boston) May 22, 2001, at 2 (discussing the “trend is toward limiting [media] access,” in favor of protecting privacy, which in turn has worried public access advocates who say the “public benefits mightily when reporters use sunshine laws to uncover stories”).
9. FLA. STAT. § 406.135 (2001) (discussing various people in the deceased’s family, and various agencies who still have access to a photograph, video, or audio recording of an autopsy).
10. Mike Branom, Autopsy Photo Review Denied, SUN-SENTINEL (Ft. Lauderdale), June 14, 2001, at 10B (discussing how the release of the autopsy pictures would cause the Earnhardt family pain and would constitute an “invasion of privacy to the highest degree”); see also Dunnigan, supra note 5, at 79.
11. This is a University of Florida student run news organization, available at http://www.alligator.org.
Dale Earnhardt rest in peace!" An appellate challenge to the Earnhardt exemption will determine if the constitutional right of privacy has watered down "the most liberal public records access laws in the nation." With the proliferation of websites on the World Wide Web, and "go-for-the-throat reporting," the public has demanded more and more protection for their privacy. The Florida Legislature has responded to this request by consistently adding to the list of exemptions found in the public records law, however, these exemptions conflict with the age-old policy behind the public records law. The Earnhardt Family Protection Act is a perfect exemption to scrutinize in light of the two competing constitutional rights, those of privacy and the right to inspect public records. No other exemption to the public records law has brought about as much debate, especially from media organizations. Rightfully so, since the media organizations are the ones who suffer the most from these exemptions, since they are the predominant users and requestors of public records. The small news organizations and websites that exploit all types of graphic autopsy photos are the real groups to blame for the exemption. However, media organizations are the public's main source for finding out what the government is doing, since very few people are investigating public records themselves to uncover dishonest government actions.

This article will examine the Earnhardt Family Protection Act and the effect that it has had on the public's right of access to records in Florida. Part II will provide an overview of the Florida public records law before the recent exemption was enacted in the aftermath of the Earnhardt tragedy. Part III will look at the Earnhardt Family Protection Act and examine the Florida Legislature's intent in creating the exemption. Part IV will then examine the constitutionality of the exemption, specifically, the right of privacy, the retroactive application to Dale Earnhardt's autopsy photos, and how narrowly tailored it is to the public necessity of the exemption. Part V

13. Paper Reports Threats Over Earnhardt Autopsy Photos: Publication Pursuing its Right of Access, SUN-SENTINEL (Ft. Lauderdale), June 18, 2001, at 6B (discussing hostile flyers and messages that the University of Florida student newspaper has received since they have been trying to gain access to Dale Earnhardt's autopsy photographs).
15. Jonsson, supra note 8, at 2. The article explains that the current mood of the nation's legislatures is for more privacy and that over 200 bills dealing with public access are in consideration. Id. at 1.
16. See generally Jenkins, supra note 14, at 2 ("The Orlando Sentinel's request to view photos from Dale Earnhardt's autopsy reignited a common journalism controversy, pitting the public's right to know against a family's right to privacy.").
of the article will look at the media’s role in spurring the Florida Legislature to pass the Earnhardt Family Protection Act. Finally, part VI of this article will look at the future of the Earnhardt Family Protection Act and the likely effects that the new exemption may have on Florida’s public records law and an individual’s right of privacy. Lastly, Part VII will include final thoughts about the Earnhardt tragedy.

II. OVERVIEW OF FLORIDA’S PUBLIC RECORDS LAW

Florida’s public records law provides that “all state, county, and municipal records shall be open” for inspection to anyone, and are considered the nation’s “toughest of the tough’ sunshine laws.” This policy is to ensure that governmental actions are brought out into the public arena where they can be under the watchful eye of Florida’s citizens. Florida has validated this policy for open access to public records by enacting an amendment to the Florida Constitution in 1992. Article 1, Section 24, of the Florida Constitution also grants everyone the right to “inspect or copy any public record” of any legislative, executive, and judicial branch of Florida’s government. If an agency unlawfully refuses to permit

17. FLA. STAT. § 119.01(1) (2001).
18. Jonsson, supra note 8, at 3.
19. See, e.g., Michel v. Douglas, 464 So. 2d 545, 546 (Fla. 1985) (“[T]he right of access to personnel records as public records is not the right to rummage freely through public employees’ personal lives.”); Forsberg v. Hous. Auth. of Miami Beach, 455 So. 2d 373, 378 (Fla. 1984) (“The purpose of the Public Records Act is to promote public awareness and knowledge of governmental actions in order to ensure that governmental officials and agencies remain accountable to the people.”); Christy v. Palm Beach Sheriff’s Office, 698 So. 2d 1365, 1366 (Fla. 4th Dist. Ct. App. 1997) (citing City of Riviera Beach v. Barfield, 642 So. 2d 1135, 1136 (Fla. 4th Dist. Ct. App. 1994)); Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d Dist. Ct. App. 1985); Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775, 779 (Fla. 4th Dist. Ct. App. 1985) (“[T]he underlying policy of the Public Records Act—open government to the extent possible in order to preserve our basic freedom, without undermining significant government functions.”); cf. Jonsson, supra note 8, at 3 (discussing some disadvantages that reporters have encountered with having everything open in the public forum, such as fewer “opinions and debate” since people are more careful in their comments for fear that they may become public).
20. Patricia A. Gleason & Joslyn Wilson, The Florida Constitution’s Open Government Amendments: Article I, Section 24 and Article III, Section 4(e)—Let the Sunshine in, 18 NOVA L. REV. 973, 974 (1994) (discussing the history of open public records and the constitutional amendments that have been enacted to support the policy for open access to public records).
21. FLA. CONST. art. I, § 24(a). The full text of Article I, Section 24(a) of the Florida Constitution provides:
inspection or copying of a public record, a court shall assess reasonable attorney’s fees against the agency.\textsuperscript{22}

The legislature has been delegated the power to exempt records from being open for inspection by the public.\textsuperscript{23} All exemptions from disclosure, however, must be narrowly construed and limited to the specific purpose for the exemption.\textsuperscript{24} If the custodian of a record claims it to be exempt from inspection, that custodian must state the statutory citation of the particular

(a) Every person has 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, 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.

\textit{Id.}

22. \textit{FLA. STAT.} § 119.12(l) (2001); see also \textit{FLA. STAT.} § 119.11(1) (2001) (granting an “immediate hearing [with] priority over [all] other pending cases” when a public records action is filed).

23. \textit{FLA. CONST.} art. I, § 24(c). Section 24(c) provides:

(b) This section shall be self-executing. The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) and the exemption of meetings from the requirements of subsection (b), provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal, and disposition of records made public by this section, except that each house of the legislature may adopt rules governing the enforcement of this section in relation to records of the legislative branch. Laws enacted pursuant to this subsection shall contain only exemptions from the requirements of subsections (a) or (b) and provisions governing the enforcement of this section, and shall relate to one subject.


24. \textit{Id.} § 24(c); see also \textit{Mem'l Hosp.-W. Volusia, Inc. v. News-Journal Corp.}, 729 So. 2d 373, 380 (Fla. 1999) (“[A]n exemption from public records access is available only after the legislature has followed the express procedure provided in article I, section 24(c) of the Florida Constitution.”); \textit{Tribune Co. v. Pub. Records}, 493 So. 2d 480, 483 (Fla. 2d Dist. Ct. App. 1986) (discussing the limitation on exemptions to their “stated purposes”).
exemption. When a court is doubtful about an exemption, "the courts should find in favor of disclosure rather than secrecy." Over the years the number of exemptions to the public records law have varied in range, from estimates as high as 800 to as low as 200. However, many of these exemptions are created at the urging of certain groups and fail to fulfill any public necessity.

All new and substantially amended exemptions to the public records law are subject to the "Open Government Sunset Review Act of 1995." This Act automatically repeals exemptions on October 2, the fifth year after enactment of the exemption, unless the legislature reenacts the exemption. The legislature will maintain an exemption, if the exempted record is sensitive and personal in nature and concerns an individual. The legislature also has to determine if the exemption is important enough to override "the strong public policy of open government."

The Florida Statutes have defined what records shall be public as all material "regardless of the physical form...made or received...in connection with the transaction of official business by any agency." An
"agency" is "any state, county, district... public or private agency... or business entity acting on behalf of any public agency." The language of the statute makes a private company or even an individual subject to provide access to certain records if they are working with or for a public agency. Article I, Section 24(a) of the Florida Constitution is similar, stating that an agency includes all "legislative, executive, and judicial branches of government, and each agency or department created thereunder..." Further interpretation of what exactly is and is not a public record is found in Shevin v. Byron, Harless, Schaffer, Reid & Associates. The Supreme Court of Florida defined a "public record" as "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." Further, "public records" do not include rough drafts or notes that are to be used in preparing "some other documentary material" or "precursors of governmental 'records.'" Material that is "midway on the spectrum" of being public records have to be "determined on a case-by-case basis." Public records very often contain information about private citizens, and those

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"Public record" means 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.

Id.

§ 119.011(2). The full text of section 119.011(2) provides:

"Agency" means any 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.

Id.

An analysis of the relevant case law on private entities subject to the public records law is beyond the scope of this article. See Rivas, supra note 27, at 1234–47, for a thorough examination of when private entities may be subject to the public records law.

FLA. CONST. art. I, § 24(a).

This case is considered the "Seminal Case" on defining public records and determining when a private entity is subject to the public records law. Rivas, supra note 27, at 1234.

Shevin v. Byron, Harless, Schaffer Reid & Assocs., 379 So. 2d 633, 640 (Fla. 1980).

Id.

Id.
records are still open to inspection or copying by every person who desires to do so as provided in Article I, Section 24(a) of the Florida Constitution.\(^{41}\)

An example of a public agency would be the district medical examiner’s office, since it has been established by law.\(^{42}\) A medical examiner in the district where a death occurs shall perform investigations and autopsies when any person therein dies by accident.\(^{43}\) The records that a medical examiner creates in their examinations and autopsies of a person killed by accident, would be open to the public to inspect and copy under section 119.01(1) of the Florida Statutes and Article I, Section 24(a) of the Florida Constitution.\(^{44}\) Autopsy photographs created by a district medical examiner’s office would also fit the definition of “public record” found in the Shevin case.\(^ {45}\) However, autopsy photographs of the medical examiner are no longer a “public record” open to the public, compliments of the Earnhardt Family Protection Act.\(^ {46}\)

III. THE EARNHARDT FAMILY PROTECTION ACT

With the presence of the World Wide Web and other vast media outlets, autopsy photos can be viewed by millions of people, even by the deceased’s immediate family members.\(^ {47}\) The Earnhardt Family Protection Act was

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41. **FLA. CONST. art. I, § 24(a).**
42. **FLA. STAT. § 119.011(2) (2001).**
43. **FLA. STAT. § 406.11(1)(a)(2) (2000)** the full text of § 406.11(1) provides:

\[(1) \text{ In any of the following circumstances involving the death of a human being, the medical examiner of the district in which the death occurred or the body was found shall determine the cause of death and shall, for that purpose, make or have performed such examinations, investigations, and autopsies as he or she shall deem necessary or as shall be requested by the state attorney.} \]

Id.

44. **FLA. CONST. art. I, § 24(a); § 119.01(1).**
45. **See Shevin, 379 So. 2d at 640.**
46. **FLA. CONST. art. I, § 24(a); § 119.01(1).**
47. **Earnhardt Family Protection Act, ch. 2001-1 § 2, 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)).** Section 2 provides:

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
created by the legislature to stop this proliferation of autopsy documents, ceasing any further "injury to the memory of the deceased." The legislature also responded to the immediate family's need to grieve over their loved one in peace without additional "trauma, sorrow, humiliation, or emotional injury." This additional trauma to the immediate family could occur because the photographs, video and audio of the deceased's autopsy "may depict or describe the deceased nude, bruised, bloodied... dismembered, or decapitated." With this statutory language, the legislature has clearly stated the public necessity justifying the exemption required by Article I, Section 24(c) of the Florida Constitution. Whether any family members have ever been confronted with their deceased relative's autopsy photos on newspapers or on the Internet remains to be seen. It is obvious that family members would suffer more sorrow if they were to see their deceased family member's autopsy photos on those forms of media.

The Earnhardt Family Protection Act exempts "[a] photograph or video or audio recording of an autopsy in the custody of a medical examiner" from being inspected or copied under the Florida Constitution and section 119.07(1) of the Florida Statutes. The legislature found this autopsy material to be "highly sensitive depictions or descriptions of the deceased." The deceased's spouse still has access to view and copy the entire autopsy photographs, video, and audio that the medical examiner prepared during the 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.

Id.

48. Id.
49. Id.
50. Id.
51. FLA. CONST. art. I, § 24(c).
52. Earnhardt Family Protection Act, ch. 2001-1, § 1(1), 2001 Fla. Sess. Law Serv. 1, 2 (West) (to be codified tentatively at FLA. STAT. § 406.135 (2001)).
53. Earnhardt Family Protection Act, § 2.

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investigation. Otherwise, anyone else requesting access to view or copy the autopsy materials must provide a court order allowing such access. A court order will only be issued if it is shown that there is "good cause" to view or copy records of an individual's autopsy. If a court grants a court order, handling of the autopsy photos, video, or audio must be done under the custodian's direct supervision. The surviving spouse shall be given notice and an opportunity to be heard, if there is a petition to view the deceased's records.

The Earnhardt Family Protection Act also provides a stiff penalty for a custodian or anyone who violates a court order regarding the exempted autopsy photos, video, and audio. It is a third degree felony for "willfully and knowingly" allowing an unauthorized person to view or copy autopsy photos, video or audio. This leaves the possibility that private citizens could risk a felony charge for viewing unauthorized autopsy material that has been illegally copied and placed on the World Wide Web. The legislature seems to be expressing their dissatisfaction with those record custodians who take advantage of their positions and help in the trafficking of graphic and disturbing autopsy material.

IV. CONSTITUTIONAL ISSUES BEHIND THE ACT

A. Right of Privacy

To show "good cause" and obtain disclosure of the sensitive autopsy material, the court shall balance the public's need to evaluate governmental performance against the intrusion into the family's right of privacy. This balancing of the right of privacy against the public's right of access to public records is a major collision between Article I, Section 23 of the Florida

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54. Earnhardt Family Protection Act, § 1(1) (stating that "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.").
55. Id.
56. Earnhardt Family Protection Act, § 1(2)(a).
58. Earnhardt Family Protection Act, § 1(2)(b). Notice shall be given to the deceased parents if no surviving spouse and then to the children if there are no living parents. Id.
59. Earnhardt Family Protection Act, § 1(3)(a).
60. Earnhardt Family Protection Act, § 1(3)(a), (b).
61. Earnhardt Family Protection Act, § 1(2)(a) (discussing how the court must also determine if disclosure of the requested records is the least intrusive means available and the whether other similar information is available in other public records, regardless of form).
Constitution and Florida’s Public Records Act. Article I, section 23 provides: “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.” This right of privacy in Florida “is expressly subservient to the Public Records Act.” This leaves the never-ending question of which is more important and which takes precedent, the public’s strong right of access to public records or the right of privacy in the deceased family member’s memory. The Florida Legislature would say the latter is more important when it comes to autopsy photos, since the Earnhardt Family Protection Act gives a deceased’s family the right of privacy in such photos. However, the Supreme Court of Florida does not always see eye to eye with the Florida Legislature, especially in the area of an individual’s right of privacy.

The family’s right of privacy was examined in *Williams v. City of Minneola,* when videotape and photos of the deceased were displayed to police officers and others who were not custodians of those records. The family sued the officers for invasion of privacy, among other causes of action, and the officers claimed that the autopsy photos and video were public record; therefore, they could not be liable for displaying the photos and video. The court stated the Public Records Act “does not impose a secrecy requirement which bars a custodian from displaying a public record entirely of his own volition.” The court also concurs that a person who is

62. See John Sanchez, *Constitutional Privacy in Florida: Between the Idea and the Reality Falls the Shadow,* 18 NOVA L. REV. 775, 780 (1994) (“As case law on section 23 has developed, it has become evident that it is on a collision course with Florida’s Public Records Act.”).
63. FLA. CONST. art. I, § 23.
64. Bd. of County Com’rs. v. D.B., 784 So. 2d 585, 591 (Fla. 4th Dist. Ct. App. 2001) (finding that an adult entertainer does not have a reasonable expectation of privacy in the personal information required to obtain a worker identification card, which was needed to work as an adult entertainer in the county).
65. Earnhardt Family Protection Act, § 1(2)(a).
67. Id. at 686. The video was shown at a police officer’s house since police headquarters did not have the needed equipment, and it was shown to an officer who was not in the same police force investigating the death of the individual. Id. at 686 n.1.
68. Id.
69. Id. at 687. The court stated, Article I, section 23 of the Florida Constitution appears to guarantee the absolute right to inspection and examination of public records...there is no indication that the section was intended to give...agency personnel or members of the public
the subject of a record cannot "claim a constitutional right of privacy as a bar to requested inspection of a public record which is in the hands of a government agency." However, the law will not protect a custodian of public records from any civil liability when they unnecessarily reveal such records to persons outside of that agency. The court did not reverse the officers' summary judgment on the invasion of privacy cause of action. The family's privacy was not invaded, only the deceased's was, and only where there are unusual circumstances, which are sufficiently egregious, shall the members of decedent's immediate family have a invasion of privacy action.

The Williams court finds itself in the majority of courts that have held the close relatives of a victim do not acquire a derivative right to privacy. The Florida Legislature in the Earnhardt Family Protection Act does not follow the reasoning for denying a right of privacy like in the Williams case. The legislature reaches the opposite conclusion, finding that a deceased's family has the right of privacy regarding the deceased's autopsy photos, video and audio. A logical byproduct of the family's right of privacy in the Earnhardt exemption, would be an action for invasion of privacy if a records custodian's behavior was similar to that of the defendants in the Williams case.

... immunity from all the safeguards for individual rights which the common law has painstakingly developed over the centuries.

Id.

70. Williams, 575 So. 2d at 687. See, e.g., Michel v. Douglas, 464 So. 2d 545, 546 (Fla. 1985) (discussing Article I, Section 23 of the Florida Constitution, in that the right of privacy does not apply to public records and that there is not a state or federal right of disclosural privacy that exists); Forsberg v. Hous. Auth. of Miami Beach, 455 So. 2d 373, 374 (Fla. 1984); Shevin v. Byron, Harless, Schaffer, Reid and Assocs., 379 So. 2d 633, 638 (Fla. 1980).

71. Williams, 575 So. 2d at 687. The court found that the Public Records Act and the Florida Constitution do not grant a custodian of public records immunity from tort liability when communicating a public record to someone outside the agency unless the person inspecting the public records has made a bona fide request to examine them, or the agency's official business requires it to reveal the public records to someone who has not requested to see them. Id.

72. Id. at 690.

73. Id. at 689-90. See also Loft v. Fuller, 408 So. 2d 619, 621 (Fla. 4th Dist. Ct. App. 1981) ("[A] cause of action for invasion of the common law right of privacy is strictly personal... Relatives of a deceased person have no right of action for invasion of privacy... regardless of how close such personal relationship was with the deceased.").


75. Earnhardt Family Protection Act, ch. 2001-1 § 1(1).
case. The Williams court did not allow such an invasion of privacy action on behalf of the deceased’s family against a custodian of autopsy records since only the deceased’s privacy was violated and only the deceased had a right of privacy in the autopsy video and photos. The Supreme Court of Florida may wonder how the Florida Legislature justified the family’s right of privacy, is it derivative from the deceased or in the family’s own right based on Article I, Section 23 of the Florida Constitution.

The “good cause” balancing test in the Earnhardt Family Protection Act is identical to the balancing test in State v. Rolling. In that case, members of the murder victim’s family had requested nondisclosure of photographs and video of the murder scene and autopsies. The media had initially demanded to copy the photos and video, but they eventually compromised to just view the photos and video in the presence of the clerk. The court found that the photographs and video were public record based on their creation by public agencies. However, the court also concluded the deceased’s relatives might acquire a privacy interest that was “either derivative from the victims themselves or in their own right.” The court goes on to find that substantial injury would occur to the deceased’s relatives if “confronted in the media with images of their slain and mutilated loved ones.” In addition, the court applied a test, which balanced the public’s right to know and hold public officials accountable versus the privacy interest of the victim’s relatives. The photographs and video at issue were

77. Rolling, 1994 WL 722891 at *1.
78. Id.
79. Id. (stating that the media did not intend to print or publish the photographs, they just wanted to “place themselves in the position of the jurors” to evaluate the impact of the photographs).
80. Id. at *2 (discussing how the photographs and video were taken in the course of the police officer’s official business to become public records).
82. Id. at *4 (“[A]t least one federal court concluded that a relatives’ right of privacy does exist . . . sufficient to prohibit disclosure of materials which would be subject to a right of privacy were the victim alive.”) (citing N.Y. Times v. NASA, 782 F. Supp. 628 (D.D.C. 1991)).
83. Id. at *5 (“[T]he 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 . . . and whether the same information is available from other, less intrusive, sources.”).
declared not open for any type of copying, but the court did allow reasonable inspection of them in the presence of the records custodian. 84

The Rolling court’s balancing test for public records disclosure is identical to the “good cause” test for disclosure found in the Earnhardt exemption. 85 The Rolling court and the Florida Legislature both agree that substantial injury would occur to the deceased’s family if autopsy photographs or video is freely copied and disseminated in global forms of media. 86 However, it took the death of a legend for the Florida Legislature to take heed and enact a public records exemption that included a right of privacy for a deceased’s family. 87 The Earnhardt exemption is long overdue according to the Rolling court’s holding and rationale. 88 The Florida Legislature went further than the Rolling court, which allowed reasonable viewing of photos and video, by not allowing any viewing of autopsy photos and video. 89 Neither the Florida Legislature nor the Rolling court explains the history indicating that the family has a right of privacy in the deceased. 90 They both just grant a family the right of privacy, justifying it on the possibility of substantial injury to the deceased’s family, which they feel is more important than open government. Had the Rolling case been appealed, an exemption for graphic autopsy material may have been brought to the attention of the Florida Legislature many years earlier, and an appellate court may have cleared up the basis for a family’s right of privacy in a deceased relative.

In Forsberg v. Housing Authority of Miami Beach, 91 tenants in public housing sought to enjoin the public’s access to information provided by public housing tenants. 92 The tenants had to submit personal and confidential information, such as family status and relationship, income, assets, medical history, and employment. 93 The tenants claimed that the release of that personal information would cause them to suffer humiliation and embarrassment. 94 The Supreme Court of Florida affirmed the motion to

84. Id. at *7.
85. Earnhardt Family Protection Act § 1(2)(a); Rolling, 1994 WL 722891, at *5.
86. Rolling, 1994 WL 722891 at *4; see also Fla. Stat. § 119.15 (2)(c).
87. Earnhardt Family Protection Act, § 2.
88. See Rolling, 1994 WL 722891, at *5.
89. Earnhardt Family Protection Act § 2.
90. Id. See also Rolling, 1994 WL 722891, at *5.
91. 455 So. 2d 373 (Fla. 1984).
92. Id.
93. Id. at 374.
94. Id. at 375.
dismiss since there is no constitutional right of privacy that would prevent
the inspection of the housing authority’s public records. The court did not
find relief in the privacy amendment of Article I, Section 23 of the Florida
Constitution, since it “specifically does not apply to public records.”

The Forsberg court reiterates the proposition that individuals have no
right of privacy in the records that are created by public agencies, contrary to
the Earnhardt exemption. The Forsberg court interprets the right of
privacy in the Florida Constitution to mean, clearly and unequivocally, that
the right does not extend to situations involving public records. However,
the Forsberg case did not include public records that were of a highly
graphic and sensitive nature as did the Rolling court and the Florida
Legislature in the Earnhardt case. Forsberg only dealt with an individual’s
personal information, which is less likely to cause substantial injury if it
were to be disclosed through access to public records. The Earnhardt
exemption strays from the Forsberg court’s finding that the right of privacy
in article I, section 23 does not apply to public records.

In a very similar tragedy to that of Dale Earnhardt’s, the NASA
Challenger explosion brought out the same issues underlying the Earnhardt
exemption. In New York Times Co. v. NASA, a news organization
requested copies of the audiotapes that were recorded in the cabin of the
Challenger up to the time of the explosion in which the astronauts were
killed. The news organization was denied the request and brought suit
under the Freedom of Information Act to obtain such audiotapes. The
court found that an exemption to the Act provides the family of the
astronauts with a privacy interest in those records relating to the deceased
astronauts. The Challenger families have a substantial privacy interest
since the disclosure of the audiotapes would be a “disruption of their peace

95. Id. at 374.
96. Forsberg, 455 So. 2d at 374.
97. Id. The court also finds no general right of disclosural privacy provided in the
state constitution (citing Shevin v. Byron, Harless, Schaffer, Reid & Assocs., 379 So. 2d 633
(Fla. 1980)).
98. Id.
99. Id.
100. Id.
104. Id. at 630.
105. Id. at 630–31.
of mind” every time the tapes are played in their proximity. The court also determined that the strong public interest in disclosure of the audiotapes would not be served in any way. The fact that NASA provided a transcript of the audiotape was sufficient to allow the strong public interest to be served. In determining whether to disclose the audiotapes, the court balanced the privacy interest versus the public interest. The privacy interest was substantial in this case and outweighed the public interest, which was uncertain and served through the transcripts of the audiotapes.

While the NASA case was examined under the federal right of privacy and the Freedom of Information Act, it gives credibility to the Florida Legislature’s intent in creation of the Earnhardt exemption. The Freedom of Information Act is similar to Florida’s Public Records Act, in that they both provide access to government records in the name of public interest. However, the right of privacy in the Florida Constitution is much broader than that of the Federal Constitution. Florida has shown this broad right of privacy in the addition of Article I, Section 23 to the Florida Constitution. The Florida Legislature has been asleep at the wheel for not interpreting the right of privacy in a manner similar to that of the NASA court sooner. The Florida Legislature could find numerous areas where the right

106. Id. at 632; see also Katz v. Nat’l Archives & Records Admin., 862 F. Supp. 476, 484 (D.D.C. 1994) (discussing how the Kennedy family had been traumatized by publication of unauthorized records concerning John F. Kennedy’s assassination.) The same district court found that the family would suffer continuous anguish if those unauthorized records were to be further published. Id.

107. NASA, 782 F. Supp. at 632. The court agreed with the news organization that the public has a legitimate interest in completely understanding the actions surrounding the Challenger explosion and the conduct of all the agencies involved with the tragedy. Id.

108. Id. at 633. The actual texture of the Challenger astronauts’ voices and background noises of the cabin that are on the audiotapes does not shed any additional light on the public’s interest in determining the conduct of all agencies involved in the explosion. Id.

109. Id.

110. Id.


113. See, e.g., City of N. Miami v. Kurtz, 653 So. 2d 1025, 1027 (Fla. 1995); Winfield v. Div. of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985) (stating the Florida Constitution expressly provides for a strong right of privacy not found in the United States Constitution); Fla. Bd. of Bar Exam’rs Re Applicant, 443 So. 2d 71 (Fla. 1983).

of privacy in graphic sensitive public records out weighs the public interest in open government.115

The NASA court found that the public interest was satisfactorily served through the transcripts of the audiotapes.116 The Florida Legislature also comes to the same conclusion in the Earnhardt exemption by finding that the autopsy report is sufficient to serve the public’s interest in open government.117 What is also interesting about the Challenger, Earnhardt, and Rolling tragedies, was the enormous publicity surrounding them, which may have motivated the protection of the family’s right of privacy.118 Had there not been as much publicity and debate in these tragedies, the public interest in access to the records may have been found to be more important than a family’s right of privacy.

The NASA case also raises the question of what is a legitimate public interest in obtaining disclosure of sensitive and graphic records. The NASA court found that the public interest in understanding the Challenger explosion was not served in any additional way by the release of the audiotapes.119 Florida’s public interest in determining what happened to Dale Earnhardt in the Daytona 500 can easily be served by the release and examination of Earnhardt’s autopsy report. The release of Dale Earnhardt’s autopsy photographs do not seem to serve any other legitimate public interest, which has not already been satisfied by the autopsy report. The NASCAR cover-up theory, which challenges the medical examiner’s findings, seems little more than a wild goose chase on the part of the media and not a legitimate public interest.

The balance between the intent of the Public Records Law and the privacy interest of a deceased’s family, regarding graphic material, seems to sway toward the family’s privacy, except in the Williams case.120 The

116. Id. at 632.
117. Earnhardt Family Protection Act, ch. 2001-1, § 2, 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)) ("The Legislature further notes that there continue to be other types of available information, such as the autopsy report,... which continues to provide for public oversight.").
118. John F. Kennedy’s family also received a right of privacy from the same district court when John F. Kennedy’s autopsy photographs were requested under The Freedom of Information Act. The assassination of John F. Kennedy has probably received the most debate and publicity in the twentieth century, which may have been a leading cause in the court choosing to protect such high profile families with the substantial right of privacy. Katz v. Nat’l Archives & Records Admin., 862 F. Supp. 476, 485 (D.D.C. 1994).
The Williams case may have been different if the deceased's family had requested that the video be undisclosed and if there was more publicity surrounding the death of the family member like in the Earnhardt case. However, the Rolling case and the Earnhardt exemption clearly show that when graphic public records are at issue in the right of privacy, the policy of open access to public records is less important. A deceased's autopsy photographs do not provide Florida's citizens with necessary or valuable insight into their government's actions. Most individuals would be disgusted even at the thought of an autopsy, let alone viewing such photographs. The examination or copying of autopsy photographs and the like only facilitate purveyors of the dark and abnormal that enjoy viewing such gruesome material. Therefore, when it comes to sensitive and graphic material that is not necessary information to the public, the right of privacy should prevail against public interest.

A majority of the cases discussed in this article incorporate a balancing test, which is essentially the "good cause" test, found in the Earnhardt exemption. The judiciary will have the task of determining on a case-by-case basis, which is more important, the release of autopsy photos in the public interest or the substantial injury that may befall the deceased's family. The Rolling court bases its use of a balancing test from an examination of the NASA case that, although a federal case, provides a right of privacy to the deceased's family members.

The language of Article I, Section 23 of the Florida Constitution is still problematic for the Florida Legislature which has established a right of privacy in public records. The language of that section states that a person will be free from "governmental intrusion" into their private lives, not public intrusion. The government does not intrude into the private lives of individuals when another private individual is allowed to inspect public records. The "privacy provision applies only to government action," which does not come into play when autopsy photographs, video, and audio are used by private individuals or the media.

123. NASA, 782 F. Supp at 628.
124. FLA. CONST. art. I, § 23.
125. City of N. Miami v. Kurtz, 653 So. 2d 1025, 1028 (Fla. 1995).
B. **Narrowly Tailored**

The Earnhardt exemption must be construed narrowly and limited to the exemption's stated purposes.\(^{126}\) This could be the reason the Florida Legislature puts on the brakes before exempting all autopsy records from disclosure as required under Florida's Public Records Law. The legislature makes it very clear 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" while still providing "public oversight."\(^{127}\) This, most likely, is to be sure that the Earnhardt exemption is "no broader than necessary to accomplish the stated purpose of the law,"\(^{128}\) to pass any constitutional challenge. The Florida Legislature was probably well aware that creating such an exemption, with as much publicity as it has received, would eventually be reviewed by the Supreme Court of Florida.

The *Rolling* court found that allowing only inspection of the graphic photographs and video was sufficient enough to keep those from being exploited and causing any further injury to the deceased's family.\(^{129}\) The Florida Legislature may have gone one step too far by not allowing the same reasonable inspection of autopsy photographs, video and audio. The purpose of the Earnhardt exemption, similar to the *Rolling* court's reasoning, was to stop the dissemination of graphic material, which in turn causes the deceased's family injury. Ending the dissemination of autopsy photos, video, and audio can be accomplished by doing just what the *Rolling* court did, allowing only inspection of the graphic material. If people cannot copy autopsy photos, video, and audio, then they cannot publish such material in a form that would cause injury to the deceased's relatives. The only downfall with inspection of autopsy photographs, video and audio, is that people may attempt to steal the material and publish it. However, the custodians who are in charge of the records are also known for stealing such material, hence the reason for the third degree felony that the legislature placed in the Earnhardt exemption.\(^{130}\)

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\(^{126}\) *See*, e.g., FLA. CONST. art. I, § 24(c); Christy v. Palm Beach Sheriff's Office, 698 So. 2d 1365, 1366 (Fla. 4th Dist. Ct. App. 1997); Tribune Co. v. Pub. Records, 493 So. 2d 480, 483 (Fla. 2d Dist. Ct. App. 1986); City of Riviera Beach v. Barfield, 642 So. 2d 1135, 1136 (Fla. 4th Dist. Ct. App. 1994).

\(^{127}\) *Earnhardt Family Protection Act*, ch. 2001-1 § 2, 2001 Fla. Sess. Law Serv. 1, 2 (West) (codified at FLA. STAT. § 406.135 (2001)).

\(^{128}\) FLA. CONST. art. I, § 24(c).


\(^{130}\) *Earnhardt Family Protection Act*, § 1(3).
While the autopsy report would cause less injury to the immediate family, since it is less graphic if published, it would not facilitate a true independent medical examination. Allowing reasonable inspection and no copying of autopsy photographs, video, and audio, would satisfy the public necessity that the legislature has intended and allow public evaluation of government. In the Earnhardt accident, the Orlando Sentinel requested an independent medical examination of the autopsy photos to determine the true cause of Earnhardt's death. The newspaper, among others, believed the autopsy photos would show that Earnhardt's death was caused by different injuries than the Volusia County medical examiner had concluded in the autopsy report. A medical examiner could make mistakes in his autopsy report, and only the autopsy photographs and video would be useful to discover such mistakes. However, there is no great public importance to uncover mistakes and alleged conspiracies in the county medical examiner's office.

C. Retroactivity of the Exemption

The Earnhardt Family Protection Act "should be given retroactive application because it is remedial in nature." The Florida Constitution and the United States Constitution do not forbid the state legislature from enacting laws with retroactive results. A retroactive law looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. A retrospective statute may be disadvantageous to someone, as long as the person is not deprived of any substantial right or protection. The critical date in determining whether a public record is subject to examination is the date the request for examination is made. However, if the legislature adopts an exemption to the Public Records Law that is remedial in nature, after the request and before it is complied with, thereby being retroactive, the date the request is made is meaningless.

132. Earnhardt Family Protection Act, § 2.
133. Yellow Cab Co. v. Dade County, 412 So. 2d 395, 397 (Fla. 3d Dist. Ct. App. 1982).
134. BLACK'S LAW DICTIONARY 1318 (7th ed. 1999).
136. News-Press Publ'g Co. v. Kaune, 511 So. 2d 1023, 1026 (Fla. 2d Dist. Ct. App. 1987) (finding that the documents in question came into existence in June 1986, and request for examination was made on July 2, 1986. The law became effective July 1, 1986, therefore, the court does not have to determine if the law is remedial and thereby retroactive).
137. Id.
There is the presumption that a law is not retroactive unless there is "an express manifestation of legislative intent to the contrary." 138

In *City of Orlando v. Desjardins*, 139 a statutory exemption to Florida's Public Records Act was not enforced by the lower court since the cause of action accrued prior to the effective date of the exemption. 140 The Supreme Court of Florida reversed, 141 finding that the statute is remedial in nature and should be applied retroactively to serve its "intended purposes." 142 Protecting substantive rights, even by remedial acts, is allowed retroactive application especially in this case where there is the potential disclosure of sensitive documents. 143 Therefore, a new exemption to section 119 of the *Florida Statutes* is applicable to public records that were already in existence before the exemption was enacted. 144

In a more recent case, *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 145 the Supreme Court of Florida held that an amended statute should not apply retroactively because it was not expressly stated by the legislature that they intended such a result. 146 The amended statute exempted private hospitals, which were providing public hospital services, from the requirements of Article I, Section 24(a) of the Florida Constitution. 147 This exemption was created by the legislature in response to the Fifth District Court of Appeal ruling, which held the private hospital was subject to the obligations of the Public Records Act. 148 The legislature did state in the statute that the exemption would apply to "all existing leases" that corporations have with public health care facilities. 149 That language was not express enough to find that the legislature intended the statute to apply retroactively to the public records action, which was commenced

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139. 493 So. 2d 1027 (Fla. 1986).
140. *Id.* at 1028.
141. *Id.* at 1029.
142. *Id.* at 1028 (discussing the "intended purpose" of the statute, which was to exempt a governmental agency attorney from providing documents that otherwise would be public records and open to inspection or copying by the other party to a particular lawsuit the agency attorney was involved).
143. *Id.*
144. *Desjardins*, 493 So. 2d at 1029.
145. 729 So. 2d 373 (Fla. 1999).
146. *Id.* at 383–84.
147. *Id.* at 375–76.
148. *Id.* at 388.
149. *Id.*
before the creation of the exemption. The Supreme Court of Florida passed on deciding whether the statute is constitutional since the challenge should start with an initial proceeding in the circuit court.

Since the Earnhardt exemption is expressly remedial in nature and thereby retroactive, it can be applied to exempt Dale Earnhardt’s autopsy photos from being released to those news organizations that requested the photos before the exemption was enacted. The Orlando Sentinel was first to request Dale Earnhardt’s autopsy photos; however, the request was never complied with due to a Volusia County judge that ordered them sealed. Had the Orlando Sentinel’s request been complied with, and the paper given copies of Dale Earnhardt’s autopsy photos, the Earnhardt exemption would have failed to protect one of its intended benefactors, the Earnhardt family. That would have been a similar outcome to the News-Journal Corp. holding, the difference being that the legislative language in the Earnhardt exemption was clearer on the issue of retroactive status.

V. THE MEDIA AND THE EARNHARDT EXEMPTION

Media organizations cannot blame anyone else but themselves for the legislature exempting autopsy records from public disclosure. The Florida Legislature specifically names the World Wide Web as the main culprit in the publishing and dissemination of autopsy photos. However, even well known organizations, such as the Orlando Sentinel, have acted with some degree of disregard for the well being of Dale Earnhardt’s family “for ‘selfish, business-driven purposes.’” While established news organizations shy away from publishing graphic material, such as autopsy photographs, they often glorify the cause of death in a method that causes some injury to a deceased’s family. Usually those media organizations that directly exploit graphic material, like autopsy records and photos, are small and based on the World Wide Web.

Websitescity is one small web based news organization that has taken an active role in obtaining Dale Earnhardt’s autopsy photographs, almost certainly to exploit them. The website has already published Dale Earnhardt’s

151. Id.
152. Leusner, supra, note 4, at 6A.
154. Dunnigan, supra note 5, at 78.
autopsy report from the Volusia County medical examiner’s office.\textsuperscript{155} Websitecity has also published graphic autopsy photographs of two other NASCAR drivers who died at Daytona back in 1994.\textsuperscript{156} The memory of Dale Earnhardt, in the eyes of his family and fans, would surely have been injured had his autopsy photos been available to the media organizations like those other NASCAR drivers that have been exploited on Websitecity. It would be no surprise to see Dale Earnhardt’s autopsy photos posted on Websitecity had the Florida Legislature failed to enact the Earnhardt Family Protection Act and Dale Earnhardt’s widow failed to get an injunction. Even with the protection afforded to Dale Earnhardt’s autopsy photographs, they will eventually end up on the Internet, as does everything else that is supposedly confidential.

Various media organizations claim that the Earnhardt Family Protection Act is an example of a public records exemption initiated for “business interests.”\textsuperscript{157} Legal counsel for the Independent Florida Alligator has claimed that NASCAR is scared of a lawsuit for not requiring drivers to use head and neck support.\textsuperscript{158} In addition, the Earnhardt family has partly pursued the injunction of the autopsy photographs to protect the commercial interests that Dale Earnhardt had created during his NASCAR career.\textsuperscript{159} The injury to Dale Earnhardt’s memory by release of the autopsy photographs may come in the form of a ripple effect on Earnhardt’s business ventures. Therefore, the competing interests may go deeper than privacy rights versus public records access, it may come down to the almighty dollar.

There are countless websites that exhibit graphic autopsy material to all those individuals who have the stomach and curiosity to view them. This dissemination of information through the Internet has been going on ever since the dawn of the Internet age, there is nothing new about this fact. Legislators may be taking this opportunity to simply “exploit fear”\textsuperscript{160} in favor of a strong right of privacy at the expense of the public’s interest in open and honest government. If this is the case, then the legislature and the courts need to revisit the strong public policy for open government, and the

\begin{itemize}
\item \textsuperscript{155} See http://www.websitecity.com/earnhardt/Documents/me_docs/20010219_0001/ (last visited July 25, 2001).
\item \textsuperscript{156} See http://www.websitecity.com/earnhardt/Gallery/ (last visited July 25, 2001).
\item \textsuperscript{157} Dunnigan, supra note 5, at 80.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id. at 78.
\item \textsuperscript{160} Jonsson, supra note 8, at 2.
\end{itemize}
language in Article 1, Section 23 of the Florida Constitution, which grants public records a superior position over the right of privacy. 161

VI. THE FUTURE OF THE EARNHARDT EXEMPTION AND PUBLIC RECORDS

According to the cases discussed thus far, the Supreme Court of Florida has consistently found in favor of open access to public records even when confronted with the compelling argument for the right of privacy. The Florida Legislature has implemented judicial intervention to insure the accomplishment of the Public Records Act, so that the right of disclosure is not defeated by an unjust statutory exemption to the Act. 162 When the Earnhardt exemption is eventually challenged to the Supreme Court of Florida, the judiciary will insure that the statutory exemption does not unjustly defeat the strong public policy for open access to governmental records. The Supreme Court of Florida will likely find the Earnhardt exemption meets the requirements for public records exemptions under Article I, Section 24 of the Florida Constitution. The exemption expressly states the public necessity and is limited to one subject. Media organizations that have challenged the exemption will have a difficult time showing that there is a compelling reason to see the Dale Earnhardt autopsy photographs, but could argue that the exemption is broader than necessary to achieve the stated purpose. The purpose in protecting a deceased person’s family from additional grief can be accomplished by allowing reasonable inspection of the autopsy photographs, video, and audio, without copying. The Earnhardt exemption may be broader than necessary in not allowing reasonable inspection by the public.

The Earnhardt exemption will automatically be repealed on October 2, 2006, unless reenacted by the legislature, which is almost certain. 163 The legislature will likely maintain the exemption against the strong public policy for open government, since autopsy photos, video, and audio are sensitive and personal in nature as required by the “Open Government Sunset Review Act of 1995.” 164 The exemption will also be found to override the strong policy of open government, since the public interest can still be preserved by examination and copying of the autopsy report. However, the real test for the Earnhardt exemption will not come in the form

161. See FLA. CONST. art. I, § 23.
of sunset review, but in the Supreme Court of Florida and maybe the United States Supreme Court.

The policy of open government as dictated in the *Florida Statutes* and the Florida Constitution will continue to be one of the nation's strongest, even with the hard hit of the Earnhardt exemption. The Earnhardt exemption only impacts one type of record out of thousands that are open to the public, and still allows the autopsy report to be inspected and copied by anyone. The public still has access to an enormous amount of records relating to the legislative, executive, and judicial branches of Florida's Government. Inspecting those branches of government is why the Public Records Act was created. It was not created to allow the media and individuals to snoop around into the personal lives of private citizens who have lost a loved one. However, there may be situations where the inspection of autopsy photographs, video or audio is necessary to uncover government actions, which are compelling in the name of public interest.

VII. CONCLUSION

All families suffer tremendous grief and sorrow when they lose someone they love and treasure. The Earnhardt family was not any different when they "lost a son, a father, a grandfather, a husband and a brother." The Florida Legislature recognized the Earnhardt family's need to mourn in peace at a time when the media was in a whirlwind over the cause of Dale Earnhardt's death. In doing so, the legislature created an exemption to the Public Records Law that will protect countless other families from the possibility of undergoing additional grief at the hands of the media and the World Wide Web. The media organizations are the main group affected by the Earnhardt Family Protection Act, and will continue to pursue their rights for disclosure. For the time being, the Florida Legislature has sent a message that the public interest is not served by having access to graphic autopsy photographs, video and audio. However, Florida's appellate courts have not assured that the Earnhardt Family Protection Act is a just statutory exemption to the Public Records Act.

Regardless of the legislature's true motivation in creating an exemption that has caused so much debate with public records advocates, the exemption does not signal the end of Florida's policy of open government. The "good cause" balancing test in the Earnhardt Family Protection Act assures that the strong policy for public evaluation of government will continue to breathe

165. Prince, *supra* note 1, at 60.
life. When a situation arises where the public interest is substantial in viewing autopsy records, a court should order such viewing over the right of privacy. The Earnhardt exemption is a victory for the majority of Florida who hunger for a right of privacy that is not second to the Public’s Records Act as expressed in Article I, Section 23 of the Florida Constitution. The Earnhardt exemption is also a victory for the Earnhardt family and the memory of the “Intimidator.”

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