

7398 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

July 24, 2002

The Honorable Gary Watts
Richland County Coroner
P. O. Box 192
Columbia, South Carolina 29202

Dear Coroner Watts:

You seek an opinion regarding a new statute recently enacted, S.C. Code Ann. Sec. 17-5-535. This new law makes autopsy photographs or videos confidential and provides criminal penalties for violation thereof. Both you, as well as the Coroners' Association, "agree with keeping videos and photographs out of the hands of the general public." However, you also are of the opinion that "photographs and/or videos are an intricate part of our continuing education and are often used in training sessions and seminars." You request "a written ... opinion that clears us to use photographs and/or videos in appropriate training circumstances."

Law / Analysis

Section 1 of Section 17-5-535 makes photographs and videos of or incidental to an autopsy exempt from the Freedom of Information Act. The only exceptions are:

- (i) a law enforcement agency, for official use only;
- (ii) parents of the deceased, surviving spouse, guardian, personal representative, or next of kin;
- (iii) a prosecutor or a defendant when the defendant in the case is accused of the murder or homicide of the subject of the photograph or video;
- (iv) a person bringing or defending a civil action or administrative matter where the photo or video is considered by the judge or hearing officer, by written order, to be relevant to the action or matter; or
- (v) a person who receives such photograph or video pursuant to a validly issued subpoena, after notice and opportunity to object are provided to the personal representative of the decedent's estate.

Request Letter

Section 2 of the Act makes photographs or videos of the autopsies confidential as a matter of law. The provision creates Section 17-5-535 which states that

- (A) Photographs or videos of and incidental to the performance of an autopsy shall only be viewed by:
- (1) the coroner and/or the medical examiner, and their deputies;
 - (2) a law enforcement agency, for official use only;
 - (3) parents of the deceased, surviving spouse, guardian, personal representative, or next of kin;
 - (4) a prosecutor or a defendant when the defendant in the case is accused of the murder or homicide of the subject of the photograph or video;
 - (5) a person bringing or defending a civil action or administrative matter where the photo or video is considered by the judge or hearing officer, by written order, to be relevant to the action or matter; and
 - (6) a person who receives such photograph or video pursuant to a validly issued subpoena, after notice and opportunity to object are provided to the personal representative of the decedent's estate.

These photographs and videos must be released and disseminated only as authorized by this section.

Contained in § 17-5-535 is no specific exception for use of autopsy videos or photographs for educational purposes such as training seminars, etc. Generally speaking, "[t]he canon of construction 'expressio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). Under this rule of statutory interpretation, there is clearly no authority for an exception for "educational training purposes."

However, other rules of interpretation are also relevant. It is recognized by our Supreme Court that the foregoing rule of "expressio unius est exclusio alterius" is one which "is not inflexible, and should be applied to accomplish the legislative intention, and not to defeat it." Home Bldg. & Loan Assn. v. City of Spartanburg, et al., 185 S.C. 313, 194 S.E. 139 (1937). Moreover, the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges, supra. An enactment should be given a reasonable and practical construction, consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 832

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(1979). A court will reject a meaning of a statute which leads to absurd consequences. Robson v. Cantwell, 143 S.C. 104, 141 S.E. 180 (1920). The real purpose and intent of the lawmakers will prevail over the literal import of the words actually used. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). The context of the statute must be examined as part of the process of determining the intent of the General Assembly. Hancock v. Southern Cotton Oil Co., 211 S.C. 432, 45 S.E.2d 850 (1948).

Section 17-5-535 was enacted in response to the tragic death of NASCAR legend Dale Earnhardt. Following Earnhardt's demise, there was considerable demand for public access to photographs taken as part of the autopsy conducted on the famed race driver. Earnhardt's widow, however, was outspoken in decrying the unseemly, ghoulish nature of exposing autopsy photographs to public view. In short, as recognized by this Office in Op. Atty. Gen., Op. No. 81-87 (October 27, 1981), autopsy details, including photographs, are of such an "intimate personal nature" that they should not be open to public inspection. Such public revelation would violate the family's personal privacy.

However, the use of generic autopsy photographs for educational training, where such photographs are displayed so that there is no identification of the decedent, stands on a somewhat different footing. The purpose of § 17-5-535 clearly is to protect the privacy of the decedent's next of kin and other family members as well as his or her memory. Logically, when there is no identification of the decedent in any use of autopsy photographs and videos for educational training, no privacy interest would be infringed or violated. Courts often deem redaction of names or removal of identity as adequate to protect individual privacy. See, e.g. Ex Parte The Greenville News, et al. v. Evatt, 326 S.C. 1, 482 S.E.2d 556 (1997) [juror privacy protected by disclosure of sealed information with redaction of jurors' names and identifying information]; Diaz v. Lukash, 644 N.Y.S.2d 300 (1996) [court ordered disclosure of autopsy information "while still protecting the identity of the decedents from disclosure."]

It would appear unnecessarily restrictive, bordering on the absurd, to read this recently enacted confidentiality statute so narrowly that even when the information disclosed is non-identifying, it cannot be presented as part of an educational training seminar. See, Op. Atty. Gen., Op. No. 80-77 (July 2, 1980) [even though juvenile records are confidential as a matter of law, law enforcement agencies may provide non-identifying, statistical information therefrom to SLED]. It stands to reason that so long as the autopsy photograph or video in no way identifies the decedent, such information may be used as part of a valid training session. Common sense must prevail.

A similar situation was addressed recently by the Florida Attorney General. In Fla. AGO 2001-47, the Attorney General of Florida addressed the scope of the newly enacted autopsy exemption law passed in the wake of Dale Earnhardt's death. The Florida statute now makes a "photograph or video or audio recording in the custody of a medical examiner ... confidential and exempt" from public disclosure. In enacting the confidentiality provision, the Florida Legislature made the following findings:

The Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight.

In the opinion, the Attorney General noted that the Florida Legislature gave strong consideration to the fact that autopsy photographs or videos might be used for training or in educational settings. Thus, the following exception in pertinent part was inserted into the Bill:

[a] local governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy and unless otherwise required in the performance of their duties, the identify of the deceased shall remain confidential and exempt.

Relying upon this exception, the Florida Attorney General concluded that “the legislative history surrounding the enactment [of the Florida autopsy law] ... reflects an intent to allow the medical examiner to use autopsy photographs and recordings for education and training for public agencies In addition, the Attorney General noted that “[t]he same discussion also reveals an intent that law enforcement agencies be able to access the photographs and recordings as needed in the performance of their duties without having to obtain a Court order.” Referencing a Florida circuit court decision, In the Matter of Bruce A. Hyma, M.D., Medical Examiner, Miami-Dade County, Florida, No. 01-787 3CA 01 (Fla. 11th Cir. Ct. April 2, 2001), the Attorney General concluded that “the medical examiner ... may show autopsy photographs or videotapes in the context of professional training or education efforts for public agencies, provided the identity of the deceased is shielded”

Section 17-5-535 likewise authorizes the viewing of photographs or videos of autopsies by “a law enforcement agency, for official use only” We have heretofore recognized that in certain

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limited respects, a coroner possesses law enforcement authority. Op. Atty. Gen., June 27, 1991. Clearly, the type of training and education to which you refer which involves the use of generic autopsy photographs or videos would be for "law enforcement" purposes and, thus, for "official use." Typically, attending such training sessions are coroners, prosecutors, law enforcement officers, investigators, pathologists, etc. Accordingly, to my mind, it would constitute an absurdity to read the statute so narrowly as to conclude that where no identity of the deceased is revealed, autopsy photographs and videos may not be used for training seminars and education so as to promote law enforcement. Thus, we agree with the reasoning of the Florida Attorney General with respect to a similar statute and conclude that § 17-5-535 does not preclude use of autopsy photographs and/or videos for education and training so long as the identity of the deceased is in no way revealed or suggested thereby.

We caution that this opinion addresses only the very narrow issue of using autopsy photographs and/or videos for the purpose of educational training for law enforcement purposes and other related activities when no identity of the decedent is revealed. Our conclusion herein is limited to this very narrow factual circumstance.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

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