
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 268 **Hearing Date:** June 29, 2021
Author: Irwin
Version: February 25, 2021
Urgency: No **Fiscal:** Yes
Consultant: MK

Subject: *Courts: sealing records: autopsy reports*

HISTORY

Source: Ventura County Board of Supervisors

Prior Legislation: SB 1421 (Skinner), Chapter 998, Stats. 2018
SB 5 (Hollingsworth) Chapter 302, Stats. 2010

Support: Brady Campaign; Brady Campaign California; California State Coroners' Association; California State Sheriffs' Association

Opposition: ACLU California Action; American Civil Liberties Union/northern California/Southern California/San Diego and Imperial Counties; California News Publishers Association Services, INC.; California Black Media; California Broadcasters Association; California Newspaper Publishers Association (CNPA); California Public Defenders Association (CPDA); Californians Aware: the Center for Public Forum Rights; First Amendment Coalition; Northern California Society of Professional Journalists

Assembly Floor Vote: 75 - 1

PURPOSE

The purpose of this bill is to require the Court, upon the request of a qualifying family member, to seal and not disclose the autopsy report and evidence associated with the examination of a victim who has been killed as a result of any criminal act, as specified.

Existing law provides that, when a child under 18 years of age is killed as a result of a criminal act and a person has been convicted and sentenced for committing that criminal act, or a person has been found to have committed the offense by the juvenile court and adjudged a ward of the juvenile court, upon the request of a qualifying family member of the deceased child, the autopsy report and the evidence associated with the examination of the victim in the possession of a public agency, as defined, shall not be disclosed, except as specified. (Code of Civil Procedure § 130 (a).)

Existing law defines "qualifying family member", for the purpose of the above provision means the biological or adoptive parent, spouse, or legal guardian. (Code of Civil Procedure § 130

(j)(3.)

Existing law prohibits any copy or reproduction to be made of any photograph, negative, or print, including video recordings, of the body, or any portion of the body, of a deceased person, taken by or for the coroner at the scene of death or in the course of a post mortem examination or autopsy. This prohibition does not apply to use in a criminal action or proceeding that relates to the death of that person, or except as a court permits, by order after good cause has been shown and after written notification of the request for the court order has been served to the district attorney, as specified. (Code of Civil Procedure § 129.)

Existing law provides, under the Public Records Act (PRA), that public records of state and local agencies are open to inspection, unless exempt. (Government Code §§ 6250 *et seq.*) The PRA provides that it shall not be construed to require disclosure of personnel, medical, or similar files, “the disclosure of which would constitute an unwarranted invasion or personal privacy.” (Government Code § 6254(c).) Records of investigations conducted by any state or local police agency or investigatory files of those agencies are also exempt from disclosure. (Government Code §§ 6254 (f).)

Existing law provides that public records may be exempt from disclosure by express provisions of state or federal law. (Government Code § 6254(k).) Existing law provides that an agency shall justify withholding any record by demonstrating that it is exempt from disclosure under express provisions of law, as specified, or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure. (Government Code, § 6255.)

Existing law provides that the people have the right of access to information concerning the conduct of the people’s business and, therefore, the writings of public officials and agencies shall be open to public scrutiny. The California Constitution also provides that a statute shall be broadly construed if it furthers the people’s right of access and narrowly construed if it limits that right of access. (California Constitution, Article 1, Section 3.)

Existing law provides that, among other rights, all people have an inalienable right to pursue and obtain privacy. (California Constitution, Article 1, Section 1.)

Existing law provides that in order to preserve and protect a victim’s rights to justice and due process, a victim shall be entitled to be treated with fairness and respect for his/her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process. (California Constitution, Article 1, Section 28(b)(1).)

Existing case law, provides that coroner and autopsy reports are public records and may be exempt from disclosure under Government Code Section 6254(f) when they “constitute investigations of a suspected homicide death.” (*Dixon v. Superior Court*, 170 Cal.App.4th 1271; Rev. denied, 2009 Cal. LEXIS 4729 (May 13, 2009).)

Existing case law, provides that the intent of the PRA is to hold government accountable while still protecting individual privacy. (*Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169; *California State University, Fresno Association v. Superior Court* (2001) 90 Cal.App.4th 810.)

This bill requires the Court, upon the request of a qualifying family member, to seal and not disclose the autopsy report, and evidence associated with the examination of a victim in

possession of a public agency, as defined, and removes the limitation that the victim be under the age of 18 and provided that the victim is killed as a result of a criminal act and any of the following apply:

- a) A person has been convicted and sentenced for the commission of that act;
- b) A person has been found to have committed the offense by the juvenile court and has been adjudged a ward of the juvenile court; or,
- c) The prosecution has concluded all persons who could have been prosecuted for the criminal act have died.

This bill provides that an autopsy report and evidence associated with the examination of the victim that has been sealed by the court may be disclosed as follows:

- a) To law enforcement, prosecutorial agencies and experts hired by those agencies, public social service agencies, child death review teams, or the hospital that treated the person immediately prior to death, to be used solely for investigative, prosecutorial, or review purposes, and may not be disseminated further;
- b) To the defendant and the defense team in the course of criminal proceedings or related habeas proceedings, to be used solely for investigative, criminal defense, and review purposes, including review for the purpose of initiating a criminal proceeding or related habeas proceeding, and may not be disseminated further. The “defense team” includes, but is not limited to, all of the following: attorneys, investigators, experts, paralegals, support staff, interns, students, and state and privately funded legal assistance projects hired or consulted for the purposes of investigation, defense, appeal, or writ of habeas corpus on behalf of the person accused of killing the victim; and,
- c) To civil litigants in a cause of action related to the victim’s death with a court order and proper legal notice, to be used solely to be used solely to pursue the cause of action.

This bill provides that if an autopsy report and the evidence associated with the examination of the victim has been sealed, a qualifying family member may request that the seal be removed, and the request shall be adjudicated, as specified or she is seeking, as specified

This bill defines a “qualifying family member” as the next of kin, personal representative, biological or adoptive parent, grandparent, sibling, spouse, domestic partner, or legal guardian.

COMMENTS

1. Need for This Bill

According to the author:

Currently, a person’s privacy rights under state and federal laws apply inconsistently before and after death. The law strongly protects the privacy of living individuals but lacks privacy protections for certain individuals who have died. A person’s medical records, whether produced by a public or private institution, are protected federally under the Health Insurance Portability and Accountability Act (HIPAA) and in California under the Confidentiality of Medical

Information Act (CMIA) throughout a person's life. The privacy of medical information created or held by a health care provider is maintained under HIPAA for 50 years after death and under CMIA forever.

Medical Examiner and Coroner death investigation and autopsy records, which are not considered medical records themselves, are exempt in full or in part from public disclosure in nearly half of U.S states. Medical Examiner and coroner death investigation records include extensive private information, including an individual's medical and social history and often contain details about a person's financial and legal history to support a determination of manner of death.

Not unlike medical records, death investigation reports contain detailed descriptions of the decedent's body, including scars, tattoos, and genitalia, in addition to the results of various medical tests (e.g., toxicology, cultures, and electrolytes). Like medical records, a death investigation will include a person's social history, drug use history, psychiatric history, and other relevant aspects of a decedent's private life. While this information is considered confidential and is protected if requested directly from medical records prepared during a person's lifetime, this information does not have the same protections when included in a death investigation or autopsy report, prepared after a person dies.

Under current California law, these reports are generally considered public and can be requested by anyone in most instances. Many Californians are unaware of the volume of detailed private information contained within these reports.

In 1968 the Legislature enacted Code of Civil Procedure (CCP) 129 to prevent the copying and dissemination of autopsy photographs. It has been updated over the years, most recently by AB 2427 (Chapter 467 of 2016)....

In 2010, in response to the kidnapping, rape, and murder of Chelsea King of Poway, CA SB 5 (Chapter 302 of 2010) was enacted creating Code of Civil Procedure 130. This law allows qualified family members to petition a court to seal the autopsy report of a child who died as a result of a criminal act, if a person has been convicted for the offense.

Websites like AutopsyFiles.org and other online message boards traffic in medical examiner and coroner autopsy reports that have been uploaded by members who received them from Public Records Act Requests in California and other states with similar permissive laws. These often become fodder for conspiracy theorists surrounding celebrity and other well-publicized deaths.

The need for the additional protections sought by AB 268 has been underscored by events like the Borderline shooting in Thousand Oaks, CA in the fall of 2018 that claimed 12 lives. After the Shooting the County Medical Examiner was flooded with requests to access the autopsy reports of the victims. Many of these requests were filed by individuals without any connection whatsoever to the victims, following a common tactic of conspiracy theorists or potential "copycats" who may use the information as a blueprint for their own acts of violence.. This has inflicted additional trauma to the surviving family members, who have had to endure repeated court hearings in an ongoing effort to prevent the release of the autopsy

records, and will continue with arguments over the balancing test within the CPRA if this bill is not passed.

2. The Public Records Act's (PRA)

The PRA declares that, “mindful of the right of privacy,” “access to information concerning the conduct of the people’s business is a fundamental and necessary right” of the public. (Government Code § 6250.) In addition, the California Constitution underscores the people’s right of access to information. Under Proposition 59, which voters approved in 2004, the constitution states that a statute shall be broadly construed if it furthers the people’s right of access and narrowly construed if it limits access.

The PRA sets forth the procedure for disclosure of public records. The law vests in public agencies the duty to make determinations regarding whether records should be disclosed, and states that an agency shall not outsource that determination. (Government Code § 6253.3.)

Autopsy and coroner reports are public records that have long been disclosed in California. They are the official government death record and are typically disclosed to the public upon request. In 2018, the Legislature passed SB 1421 (Skinner), Chapter 998, Statutes of 2018, to specifically mandate the disclosure of autopsy reports, and the time of disclosure, when there is an incident involving a peace officer’s use of force. (Penal Code § 832.7(b)(2).) SB 1421 specifically stated that its provisions applied “notwithstanding any other law,” including the investigatory records exemption in Government Code Section 6254 (f). Previous court cases have recognized that a police agency may withhold an autopsy report as an investigatory record, if the exemption applies. However, the investigatory records exemption does not permit withholding an autopsy report when Penal Code Section 832.7 mandates disclosure.

When the law does not specifically mandate disclosure of records, a public agency has the discretionary power to deny access to, or require redaction of, those records. This includes an autopsy report; an agency can withhold some or all of an autopsy report if nondisclosure is clearly in the public interest. (Government Code §§ 6253, 6255.) The PRA also provides that it shall not be construed to require the disclosure of personnel, medical, or similar files, “the disclosure of which would constitute an unwarranted invasion or personal privacy.” (Government Code, § 6254(c).) While such information may be withheld from disclosure by an agency, the PRA “requires public agencies to use the equivalent of a surgical scalpel to separate those portions of a record subject to disclosure from privileged portions.” (L.A. Cty. Bd. of Supervisors v. Superior Court, 2 Cal. 5th 282, 292 (2016).) Thus, if an autopsy report includes information that the agency believes should not be made public, it has the ability to redact those portions of the record, and produce the rest. Wholesale nondisclosure of factual death information, however, likely does not comport with the law.

3. Recent Cases where Autopsy Reports were Disclosed

Autopsy reports are regularly critical records in the public’s understanding of various events resulting in death. In the majority of cases, the public interest mandates the disclosure of death reports because the reports reveal the cause of death of a person. This is particularly vital when the incident involves a police use of force.

Autopsy reports were disclosed in the following incidents: in police shootings such the killing of Ezell Ford in 2014, Stephon Clark in 2018 in Sacramento, and Andres Guardado, who had five

gunshot wounds in 2020. In other high-profile incidents including when John Zawahri killed five people in Santa Monica in 2013; when Elliot Roger killed six individuals in 2014 in Isla Vista; after the San Bernardino terrorism attacks in 2016; after the killings of 49 people in 2016 at the Pulse Nightclub in Florida; and after the 2019 Conception boat fire. Additionally, autopsy reports have been relevant to the public's understanding of the timeline of the spread of COVID-19 and information about resulting deaths.

4. Right of Privacy

Since 1968, California has limited the reproduction and distribution of death photos taken by a coroner or medical investigator. (Code of Civil Procedure § 129.) The law was passed to protect “individuals and families against unconscionable invasions of their privacy” and that “reproduction, for unrelated and improper purposes, of any photograph of the body of a deceased person taken in the course of a post mortem examination or autopsy is contrary to such a policy.” Legislation in 2013 and 2016 modernized these provisions and specifically prohibited not just the reproduction, but also the distribution, of death images.

The right of privacy is a personal right that extinguishes at death. In narrow circumstances, California law has acknowledged a family member's right of privacy is implicated by the distribution of death photos. In *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, an 18-year old woman was killed in an automobile accident. Images of the scene were taken by two California Highway Patrol officers and posted to the internet. The survivors of the woman filed claims against the officers. A California Court of Appeal determined that the family's privacy interests were violated by the distribution of the gruesome photos because “there [was] no indication that any issue of public interest...was involved” and that the public dissemination of the photograph was a case of “pure morbidity and sensationalism without legitimate public interest or law enforcement purpose.” (Id. at 874.)

This holding is consistent with longstanding California law limiting distribution of death photos. Additionally, last year California passed AB 2655 (Gipson), Chapter 219, Statutes of 2020, prohibiting first responders, including peace officers, from capturing images of a deceased person without a legitimate law enforcement purpose. This bill was introduced after news reports that members of the Los Angeles County Sheriff's Department took and distributed photographs of bodies at the scene of the helicopter crash that killed Kobe Bryant. There were intense public outcry at the capture and distribution of these photos. However, disclosure of the autopsy report was not viewed as a privacy violation, and the reports disclosed important facts about the crash. (See Nicholas Bogel-Burroughs, Kobe Bryant Helicopter Crash Autopsies Say Pilot Tested Negative for Drugs, New York Times, May 15, 2020, available at <https://www.nytimes.com/2020/05/15/us/kobe-bryant-autopsy-report-crash.html>.)

The Deceased Child Victims' Protection and Privacy Act (DCVPPA), enacted in 2011, does provide a narrow exception to the rule that autopsy reports be disclosed. It permits the family of a minor victim who is killed to ask a court to seal the minor's death report. However, after the passage of SB 1421 in 2018, the DCVPPA would not apply in a police use of force incident which resulted in the death of a minor, based on the principle that a later enacted law controls when conflicting with an earlier enacted law.

5. Current Litigation

In 2018, there was a mass shooting at a bar in Thousand Oaks resulting in 13 deaths, including the gunman and one officer. The autopsy reports of the gunman and officer were disclosed to the public. The County of Ventura prepared to disclose the autopsy reports of the 11 other people to the public, based on requests from local media and other for access. The County said that the records were required to be produced under existing law. Prior to the County's release of the records, the families of the 11 people filed a lawsuit to enjoin disclosure of the autopsy reports, citing a privacy interest as the basis for the lawsuit.

A trial court issued a preliminary injunction, ordering the County to refrain from producing the autopsy reports. The court said it was making its temporary ruling based on the introduction of this bill, AB 268:

Counsel for plaintiffs has represented that Assemblywoman Irwin has introduced legislation that would amend Government Code 6250, et. seq., so as to provide plaintiffs with the relief they are seeking here. If that were to occur, it would provide plaintiffs with a more secure form of the relief they are seeking than would a judicial interpretation of the Government Code in its present form. Furthermore, if the court were to find against plaintiffs and allow the release of the autopsy reports, and then the legislature were to act in their favor, the damage would be done. Privacy once invaded cannot retroactively be again made private.

If the legislature does not act to enact the Irwin legislation, the court will issue a ruling on the merits of the dispute. Legislation enacted by the legislature expresses a legislative intent. Failure to enact legislation does not necessarily express a legislative intent. That, however, is a discussion for another day.

This case has been appealed by the Los Angeles Times and the Ventura County Star, and is currently before the Second District Court of Appeal. (*Los Angeles Times Communications LLC et l. v. Housley et al.*, B310585.)

Is this a case the Legislature wants to impact the result through this legislation?

6. Family member can request sealing of autopsy

As noted above, under existing law a qualified family member may request a court have the autopsy of a child under the age of 18 be sealed, unless the family member is suspected of being responsible for the death or the child was a victim a police shooting. This bill would extend the ability to request a court seal the autopsy report and evidence associated with the examination when the victim was killed as a result of a criminal act and any of the following apply:

- A person has been convicted and sentenced for the commission of that act.
- A person has been found to have committed the offense by the juvenile court and adjudged a ward of the juvenile court.
- The prosecutorial agency has concluded all person who could have been prosecuted for the criminal act have died.

This bill does not limit disclosure to law enforcement, prosecutors, or defense attorneys.

This bill would apply where the death was the result of any criminal act, so includes everything from a DUI to a mass shooting event.

This bill does not include a person under 18 who was a victim of abuse or neglect, or was residing in a juvenile detention facility at the time of their death.

This bill is extending the concept of a right of privacy to beyond death and vesting in it individuals related to the person who is no longer alive. Autopsy photographs are already found to not have a public interest, but is does the public have an interest in the report of deaths that were the result of a criminal act? In some cases some of the information may be part of the trial but in cases where a person pleads, a person is a juvenile, or the perpetrator is dead, this information may not ever be accessible to the public. Even in the case of a trial, the entire report may not be introduced. Is there any public interest in having someone outside the criminal justice system review an autopsy report? Does the current ability to redact the reports suffice for not letting out too much private information? If there is an issue with personal information not directly related to the crime not being redacted would it be more appropriate to clarify what information should be redacted than to seal the whole report?

7. Qualifying Family Member

This bill defines “qualifying family” member as the next of kin, personal, representative, biological or adoptive parent, child, grandparent, grandchild, sibling, spouse, domestic partner, or legal guardian.

Is this definition too broad? Would it be more appropriate to limit it to the person who has the ability to make a decision for the person’s estate, whether a named executor or the next of kin?

8. Argument in Support

The sponsor of the bill, Ventura County states:

The County of Ventura affirmatively supports efforts to maintain the privacy of individuals after death by enhancing protections for medical examiner and coroner records. Currently, a person’s privacy rights under state and federal law are inconsistent. The law strongly protects the privacy of living individuals, while privacy protections for those who have died are lacking. When an autopsy is called for, the death investigation records include extensive private information, including an individual’s medical and social history and often contain details about a person’s financial and legal history. Not unlike medical records, a medical examiner or coroner’s death investigation report contain detailed descriptions of the decedent’s body, including scars, tattoos, and genitalia, in addition to the results of various medical tests. Additionally, a death investigation report will detail a person’s social activities, drug use, and psychiatric history, as well as other relevant aspects of a decedent’s private life. While this information is considered confidential and is protected if requested directly from medical records while the person is living, it does not have the same protections when included in a death investigation or autopsy report prepared after a person dies.

The County believes this disparate treatment of records is deserving of closer examination. AB 268 offers a thoughtful yet reasonably narrow expansion to

Section 130 by including a defined group of crime victims for whom a qualifying family member may request that a court seal the associated autopsy report and records. Under current law, the ability of families to request records sealing applies in cases in which the victim is under the age of 18 and where the perpetrator either has been convicted and sentenced in adult court or found to have committed the offense and subsequently adjudged a ward of the juvenile court. Under the provisions of AB 268, the avenue to enhanced privacy protections would be expanded to include cases in which persons who – irrespective of their age – are killed as the result of a criminal act, and the individual or individuals responsible for the criminal act have died. The measure continues to assure that those with a legitimate need, as defined, will have access to these records. Further, AB 268 leaves untouched the public’s access to the medical examiner or coroner’s findings with respect to the cause and manner of death, among other vital information, as specified.

The County shares in particular Assembly Member Irwin’s desire to ensure that the families of the victims killed in the 2018 Borderline incident – and others like them – do not experience additional trauma that would be caused by public disclosure of highly personal information contained in autopsy reports. Ensuring that surviving family members of crime victims can seek to protect private, sensitive information is an important and meaningful way to honor those who tragically were lost on November 7, 2018.

9. Argument in Opposition

The California Newspaper Publishers Association, California Black Media, California Broadcasters Association, ACLU, and the First Amendment Coalition oppose this bill stating, in part:

Autopsy records are well established public records that reporters rely on when it comes to reporting on a number of critical issues including police involved shootings, mass shootings, deaths of individuals in custody, overdoses, murders, horrific car accidents, COVID-19 deaths, and any other death where the manner and circumstances involve a matter of public concern. For example, the Ventura County Star, and other publications, regularly report on every homicide because of the impact on the community. This has led to more in-depth investigation on issues ranging from the treatment of those with mental illness in police custody to dangers of underage drinking and driving to laying rumors around the deaths of celebrities to rest.

These reports have helped shine the light on misconduct in the medical examiner’s office, specifically in Ventura County where the coroner signed off on autopsies done by an assistant, not certified to perform them, while he on vacation. The same coroner was also found to be conducting autopsies in two separate jurisdictions, which led to the passing of policy changes in SB 1189 (2016). Another investigative report based on autopsy reports found a coroner selling the corneas of the deceased. It is essential for transparency that the public can access these reports when Sheriff’s are responsible for performing autopsies in 49 of the 58 counties across the state, particularly in the case of a police involved shooting.

Journalists must be able to access this information to fulfill their constitutional mandate to inform the public and serve as a necessary check on government actions.

We understand that the intent of this legislation is to protect the privacy of decedent and their loved ones. However, under the existing structure already provides safeguards to protect those interests. Under the current structure a report that contains information that should be withheld, the holder of those records, such as the coroner, can withhold portions of the report. These types of redactions are common and provide an appropriate balance between the public's right to know and other competing interests.

The request for records of the victims in the Borderline shooting, which are the catalyst for this bill, is making its way through the courts. The Legislature should allow this case to be resolved in the proper forum, a court of law.

Additionally, the Legislature specifically rejected confidentiality of autopsy reports with the enactment of SB 1421, which included the requirement for the release of autopsy reports in officer involved shootings or caused great bodily injury. This demonstrates that the Legislature recognizes the importance of these records the need for transparency on these issues.

-- END --