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Documenting Death: Public Access to Government Death Records and Attendant Privacy Concerns

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ARTICLES

DOCUMENTING DEATH: PUBLIC ACCESS TO GOVERNMENT DEATH RECORDS AND ATTENDANT PRIVACY CONCERNS

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This Article examines the contentious relationship between public rights to access government-held death records and privacy rights concerning the deceased, whose personal information is contained in those same records. This right of access dispute implicates core democratic principles and public policy interests. Open access to death records, such as death certificates and autopsy reports, serves the public interest by shedding light on government agency performance, uncovering potential government wrongdoing, providing data on public health trends, and aiding those investigating family history, for instance. Families of the deceased have challenged the release of these records on privacy grounds, as the records may contain sensitive and embarrassing information about the deceased. Legislatures and the courts addressing this dispute have collectively struggled to reconcile the competing open access and privacy principles. The Article demonstrates how a substantial portion of the resulting law in this area is haphazardly formed, significantly overbroad, and loaded with unintended consequences. The Article offers legal reforms to bring consistency and coherence to this currently disordered area of jurisprudence.

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INTRODUCTION

Imagine a nurse who works in the delivery room of a local hospital learns that a baby has died at the hospital due to the hospital staff's failure to watch the baby's monitors. The nurse also learns that the hospital informed the baby's parents that the baby died of toxemia. Believing that hospital administration is attempting to cover up the matter, the nurse contacts a newspaper reporter to relay this information. Because the nurse is fearful of losing her job, she does not provide the baby's name to the reporter, but she promises the reporter that she will confirm which baby caused concern if the reporter obtains the baby's name.

With this information, the reporter decides to inspect the death certificates on file in the local registrar's office to determine if an infant has died of toxemia at the involved hospital during the relevant time period. In order to access the death certificates, the reporter sends a freedom of information request to the local registrar, but the local registrar denies access to the reporter, citing privacy grounds. The reporter then contacts the State Registrar of Vital Statistics and makes the same request, which again is denied.

The newspaper then files a lawsuit, arguing that death certificates are public records subject to public disclosure under the state's freedom of information law. The newspaper petitions the court for an order to grant its reporter access to the requested government records.[1] In deciding whether to rule in favor of the newspaper or the government, the court must face a highly contentious and highly fractured area of jurisprudence.

Public access to death certificates, autopsy reports, and other types of government-held death records, a seemingly benign legal topic, has generated robust disagreement, pitting open government principles against privacy concerns surrounding the deceased, and essentially creating a "conflict between the interests of the living and the interests of the dead."[2] Divergent approaches to resolve the conflict have spread across the country, with statutory and common law differing extensively among jurisdictions.[3]

Deep-seated public policy standards have long supported open access to government practices,[4] and the public's right to inspect govern-

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[1] This scenario is based upon facts as alleged in *Home News v. Dep't of Health*, 570 A.2d 1267, 1268–69 (N.J. Sup. Ct. App. Div. 1990).

[2] Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 791 (2009).

[3] *See, e.g.*, *infra* notes 255, 281 and surrounding text (discussing differing statutory and common law approaches to autopsy report access).

[4] See Glenn Dickinson, *The Supreme Court's Narrow Reading of the Public Interest Served by the Freedom of Information Act*, 59 U. CIN. L. REV. 191, 194 n.23 (1990) (quoting James Madison's defense of open access to government practices).

ment records is a core democratic principle that allows citizens to monitor government action.[5] To this end, Congress and every state legislature have enacted freedom of information laws that provide the public with varied judicially enforceable access rights to records held by government agencies.[6] As President Obama has emphasized, "In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government."[7] In turn, Attorney General Holder declared, "[o]pen government requires agencies to work proactively and respond to requests promptly" to inform the public about "what is known and done by Government."[8] Under freedom of information laws, government agency records are generally open for public inspection and copying.

Death records held by the government appear to fall easily within the scope of the freedom of information laws' reach because government agencies create and maintain these documents, which serve as "permanent record[s] of the fact of death."[9] The records historically have been open to public inspection, and the general public has benefited from open access in multiple ways. For instance, citizens have frequently requested access to death certificates, for the certificates may provide clues to journalists and other investigators in uncovering specific instances of medical malpractice and other types of harmful health practices, raw data to researchers analyzing public safety trends, and ancestry guidance to individuals and groups conducting genealogical research.[10] Moreover, from a public health perspective, death certificate data are a principal means of detecting community health problems and assessing the effectiveness of intervention programs targeted to address those problems.[11]

Death records by their nature reveal delicate information about private, albeit deceased, individuals. As a matter of course, the records in-

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5 *See id.* at 191–92.

6 Michael Hoefges et al., *Privacy Rights Versus FOIA Disclosure Policy: The "Uses and Effects" Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 2 (2003).

7 Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009).

8 Office Att'y Gen., Memorandum for Heads of Executive Departments and Agencies (Mar. 19, 2009), http://www.usdoj.gov/ag/foia-memo-march2009.pdf [hereinafter Attorney General Holder's FOIA Memorandum].

9 DEPT. HEALTH & HUMAN SERV., PUB. NO. (PHS) 2003-1110, MEDICAL EXAMINERS' AND CORONERS' HANDBOOK ON DEATH REGISTRATION AND FETAL DEATH REPORTING 2 (2003), *available at* http://www.cdc.gov/nchs/data/misc/hb_me.pdf [hereinafter CDC CORONERS' HANDBOOK].

10 *See infra* note 241 and accompanying text (describing the frequency by which citizens request access to death certificates).

11 4B LAWYERS' MEDICAL CYCLOPEDIA § 32A.56 (5th ed. 2002).

clude standard personal identification, demographic, and medical[12] data on their subjects. Beyond this routine content, the records may contain sensitive revelations, such as indicators that the deceased committed suicide or died from a drug overdose or a sexually transmitted disease. Open access to records with such sensitive content clashes with notions of privacy, specifically the "informational privacy"[13] interest "in avoiding disclosure of personal matters."[14] Although case law dictates that "a person's privacy right terminates at death,"[15] courts recognize that families of the deceased maintain a privacy interest in preventing the public release of sensitive content concerning their loved ones.[16]

Accordingly, while a number of jurisdictions grant open access to death records under their freedom of information laws, many legislatures and courts have been uncomfortable with the freedom of information laws' application to release what may be highly sensitive death records to members of the public. A number of state legislatures have largely decided that death records as a whole should not be publicly accessible; thus, these states have prohibited the public inspection or copying of death certificates and/or autopsy records, exempting the documents specifically from their right-to-know laws.[17] Many courts justify these access restrictions based upon the right to privacy held by the decedent's family that "protects people from suffering the unhappiness of unwanted publicity about their deceased relatives."[18] Yet, other courts argue that restricting public access to death records is repugnant to government transparency principles, and that such restrictions essentially amount to "censor[ing] the public's access to public records, all in the fair name of

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12 Death records are generally exempt from the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the federal statute that addresses the confidentiality of certain patient information. *See* Op. Ga. Att'y Gen. 2007-4 (2007), *available at* http://law.ga.gov/opinion/2007-4 ("responding to a request for access to . . . death certificates . . . is required by law and not subject to the prohibitions of HIPAA."); Op. Neb. Att'y Gen. 04018 (2004), *available at* http://www.ago.ne.gov/ag_opinion_view?oid=4063 (finding that HIPAA does not restrict the release of autopsy reports or death certificates).

13 Martin E. Halstuk, *Shielding Private Lives From Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 11 COMMLAW CONSPECTUS 71, 79 (2003).

14 Whalen v. Roe, 429 U.S. 589, 599 (1977).

15 New Era Publs. Int'l v. Henry Holt & Co., 873 F.2d 576, 588 n.4 (2d Cir. 1989).

16 *See, e.g.*, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004) (recognizing "family members' right to personal privacy with respect to their close relative's death-scene images.").

17 *See, e.g.*, N.D. CENT. CODE § 23-02.1-27 (2011) (statute prohibiting the public disclosure of death certificates); WASH. REV. CODE § 68.50.105 (2012) (statute prohibiting the public disclosure of autopsy reports).

18 Metter v. Los Angeles Exam'r, 95 P.2d 491, 495 (Cal. Ct. App. 1939) (defining a relational privacy right as "a right to be spared unhappiness through publicity concerning another person because of one's relationship to such person."). *See generally* Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087 (2002) (providing overview of informational privacy law).

'personal privacy,' [which] eviscerates the state's freedom of information act and moves the freedom of information cause one giant step backward."[19] Still other courts and legislatures are struggling to find a proper balance between the public interest to access the government's death records and the privacy interests of the deceased's immediate family.

This Article analyzes the clashing open government and privacy interests and the thorny legal issues inherent in providing public access to death records. It demonstrates how well-intentioned laws that close public access to death records are bad public policy, chill expression needlessly, and offend freedom of information laws and their underlying principles. Part I provides a brief overview of freedom of information laws, with a particular focus on their privacy-based exemption provisions. Part II assesses the government's involvement with the deceased upon death and discusses the legal structure that mandates the issuance of death certificates and autopsy reports. Part III examines death certificate and autopsy record open access disputes, analyzes legislative and judicial responses to open access permissions and privacy concerns involving these death records, and concludes with recommendations for legal reform in this currently muddled area of jurisprudence.

I. FREEDOM OF INFORMATION LAWS

A. *The Federal Freedom of Information Act: Overview, History and Purpose*

In 1966, Congress enacted the Freedom of Information Act (FOIA)[20] to provide public access to federal agency records.[21] The statute essentially mandates that the public has the right to obtain any federal

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[19] *In re* Rosier, 717 P.2d 1353, 1360 (Wash. 1986) (Andersen, J., dissenting).

[20] 5 U.S.C. § 552.

[21] FOIA defines a "record" as including "any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format." 5 U.S.C. 552(f)(2) (2006). The statute requires federal agencies, *inter alia*: (1) to disclose automatically, through publication in the Federal Register, their substantive and procedural rules, statements of general policy, forms, and instructions "for the guidance of the public", (2) to make available routinely for public inspection and copying agency opinions, specific policy statements, interpretations, staff manuals, and other documents that are not published in the Federal Register; and (3) "upon any request for records which . . . reasonably describes such records," to make such records "promptly available to any person." 5 U.S.C. §§ 552(a), 552(c) (2006).

agency record[22] unless FOIA by its terms categorically prohibits the record's disclosure.[23]

Congress enacted FOIA as an amendment to the widely-criticized Section 3 (the public disclosure section) of the Administrative Procedures Act (APA).[24] The section severely restricted the public's access to government documents by granting broad discretion to agencies regarding whether or not to disclose records in their control and by providing no remedy to the public when agencies unjustly withheld requested records.[25] As the Supreme Court acknowledged, this section was "plagued with vague phrases"[26] and "was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute."[27] Congress recognized that the shortcomings of APA Section 3 allowed agencies to withhold legitimate information from the public, so it overhauled the section to endorse a presumption of government openness.[28] By enacting FOIA, Congress shifted the information access paradigm to provide for expansive transparency to the public.

Embodying a general philosophy of federal agency disclosure,[29] FOIA "defines a structural necessity in a real democracy."[30] By requiring agencies to disclose information to the public, it establishes and enforces the right of any person to obtain access to any agency record, subject to statutory exemptions, "for any public or private purpose."[31]

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22 FOIA applies to records of the Executive Branch of the federal government, which includes fifteen executive branch departments and approximately seventy-five federal agencies. *Official US Executive Branch Web Sites*, THE LIBRARY OF CONGRESS, http://www.loc.gov/rr/news/fedgov.html (last visited Apr. 9, 2012). FOIA does not apply to records held by Congress, the federal courts, advisory offices of the Executive Branch, or state or local governments. 5 U.S.C. §§ 551(1), 552(f)(1) (2006).

23 *See infra* Part I.A.2 (discussing FOIA's exemptions).

24 5 U.S.C. § 1002 (1964). *See* EPA v. Mink, 410 U.S. 73, 79 (1973) (discussing history of the APA's public disclosure section).

25 U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 754 (1989); *Mink*, 410 U.S. at 79.

26 *Mink*, 410 U.S. at 79. For instance, the Section exempted from disclosure "any function of the United States requiring secrecy in the public interest." 5 U.S.C. § 1002 (1964).

27 *Mink*, 410 U.S. at 79.

28 S. REP. NO. 89-813 (1965), *as reprinted in* Subcomm. on Admin. Practice & Procedure, S. Comm. on the Judiciary, 93rd Cong., FREEDOM OF INFORMATION ACT SOURCE BOOK 36, 38 (Comm. Print 1974). *See also* S. REP. NO. 88-1219, at 8 (1964) (noting that Section 3 was "full of loopholes which allow agencies to deny legitimate information to the public" and that "[i]t has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities and justified by [Section 3's vague exceptions].").

29 *Reporters Comm.*, 489 U.S. at 754 (quoting Dep't of Air Force v. Rose, 425 U.S. 352, 360 (1976) (quoting S. REP. NO. 89813, at 3 (1965))).

30 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004).

31 Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048, 3048 (1996).

With an aim of promoting government accountability, the statute "open[s] agency action to the light of public scrutiny."[32] The Supreme Court also recognizes that "disclosure, not secrecy, is the dominant objective of the Act."[33] Subsequent amendments to FOIA have reinforced Congress' intent to: (1) foster democracy by enabling public access to agency documentation; (2) boost public access to government information; (3) ensure agency compliance through prompt time limits; and (4) "maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government."[34]

1. FOIA Requests Are Available for All to Submit

FOIA explicitly permits "any person" to make a FOIA request.[35] This includes individuals, corporations, partnerships, associations, and public and private organizations.[36] Moreover, a FOIA requester's identity generally has no bearing on the merits of her request.[37] The Supreme Court has further clarified that FOIA requesters need not explain or justify their purpose when requesting any record:

> [A]s a general rule, when documents are within FOIA's disclosure provisions, citizens should not be required to explain why they seek the information. A person re-

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32 *Rose*, 425 U.S. at 361 (quotation omitted).

33 *Id.* The United States Supreme Court has recognized that "[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

34 Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, § 2(b), 110 Stat. 3048, 3048–49 (1996). *See also* Chrysler Corp. v. Brown, 441 U.S. 281, 290 n.10 (1979) ("The [FOIA] legislative history is replete with references to Congress' desire to loosen the agency's grip on the data underlying governmental decisionmaking."). For a discussion of the subsequent amendments to FOIA after its enactment, see the DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT (2009 ed.) at 5–7, *available at* http://www.justice.gov/oip/foia_guide09/introduction.pdf [hereinafter DOJ GUIDE].

35 Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2006); *see also* DOJ GUIDE, *supra* note 34, at 40–43 (explaining the procedural requirements for a FOIA requester).

36 Administrative Procedure Act, 5 U.S.C. § 551(2) (2006) (defining "person"); *see also* SAE Prods., Inc. v. FBI, 589 F. Supp. 2d 76, 80 (D.D.C. 2008) (citing 5 U.S.C. § 551(2) to interpret the definition of "person" under the FOIA). *See generally* DOJ GUIDE, *supra* note 34, at 41 (explaining the connection between § 551(2) and FOIA).

37 U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989) ("[T]he identity of the requesting party [generally] has no bearing on the merits of his or her FOIA request."); Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004) ("As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester."); *see also* Swan v. SEC, 96 F.3d 498, 499 (D.C. Cir. 1996) ("Whether [a particular exemption] protects against disclosure to 'any person' is a judgment to be made without regard to the particular requester's identity."); Durns v. BOP, 804 F.2d 701, 706 (D.C. Cir. 1986) ("Congress granted the scholar and the scoundrel equal rights of access to agency records."). *See generally* DOJ GUIDE, *supra* note 34, at 44 n.104 (collecting cases).

> questing the information needs no preconceived idea of the uses the data might serve. The information belongs to citizens to do with as they choose. Furthermore, . . . the disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all.[38]

However, a requester's right to access an agency record is neither increased nor decreased based upon her particular interest or need in the record sought.[39] Thus, according to judicial interpretation, neither the requester's identity nor her purpose for submitting a request is relevant when determining whether an agency must disclose a requested record.

2. FOIA's Privacy-Related Exemptions Shield Sensitive Information Where Necessary

While FOIA enabled comprehensive public access to agency records, Congress recognized that agencies may justifiably shield some information from the public.[40] Accordingly, Congress exempted nine categories of records from the FOIA's disclosure requirements.[41] The exemptions represent "the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses."[42] Through these exemptions, Congress sought to reach a "'workable balance'" between the public's right to know and the Government's need to safeguard certain information.[43] The combination of FOIA's broad statutory mandate for disclosure with these narrow exemptions reflects the balance Congress reached.[44] Gen-

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38 *Favish*, 541 U.S. at 172.

39 *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975) (recognizing that a requester's "rights under the Act are neither increased nor decreased by reason of the fact that [she] claims an interest in the [requested records] greater than that shared by the average member of the public."); *see also Reporters Comm.*, 489 U.S. at 771 ("As we have repeatedly stated, Congress clearly intended the FOIA to give any member of the public as much right to disclosure as one with a special interest [in a particular record].") (alteration in original) (citations and internal quotation marks omitted)). *See generally* DOJ GUIDE, *supra* note 34, at 44 n.105 (collecting cases).

40 *See* Lahr v. NTSB, 569 F.3d 964, 973 (9th Cir. 2009).

41 Freedom of Information Act, 5 U.S.C. § 552(b) (2006); *Reporters Comm.*, 489 U.S. at 771. In addition to the ten exemptions, Congress provided special protection to three additional categories of records which pertain to especially sensitive federal law enforcement matters; these records are explicitly excluded from FOIA's scope. *See* 5 U.S.C. § 552(c)(1), (c)(2), (c)(3); *see also* DOJ GUIDE, *supra* note 34, at 671–80 (explaining the 5 U.S.C. § 552(c) exceptions).

42 Dep't. of Air Force v. Rose, 425 U.S. 352, 361 (1976).

43 John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. REP. No. 89–1497, at 6 (1966)).

44 *See id.* at 153.

erally, the exemptions direct an agency to withhold particular types of records if certain conditions are met.[45]

The exemptions, which Congress "explicitly made exclusive,"[46] must be narrowly construed[47] "with all doubts resolved in favor of disclosure."[48] When an agency denies a records request, FOIA permits the aggrieved requester to file a challenge to the agency's response in a United States District Court.[49] The agency invoking an exemption must establish that the exemption prevents it from releasing the requested record,[50] and the district court may enjoin the agency from improperly withholding the records and compel the records' production.[51] Moreover, if a government employee acts "arbitrarily or capriciously" when withholding a record, that employee may face disciplinary action.[52]

If an exemption applies to a requested record, FOIA nevertheless mandates that "any reasonably segregable portion of [the] record" be disclosed.[53] Under this partial disclosure requirement, an agency may not withhold an entire record simply because it contains some exempt information,[54] rather the agency must redact the exempt material and release

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45 *See* Chrysler Corp. v. Brown, 441 U.S. 281, 293–94 (1979). The Privacy Act, 5 U.S.C. § 552(a), operates in tandem with FOIA to prevent certain privacy-related disclosures. Specifically, if FOIA permits an agency to withhold information under Exemptions 6 and/or 7(C), the Privacy Act mandates nondisclosure. *See* News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1189 (11th Cir. 2007) ("[W]here the FOIA requires disclosure, the Privacy Act will not stand in its way, but where the FOIA would permit withholding under an exemption, the Privacy Act makes such withholding mandatory upon the agency.").

46 *Chrysler Corp.*, 441 U.S. at 290 n.9 (citing 5 U.S.C. § 552(c)).

47 Milner v. Dep't. of Navy, 131 S. Ct. 1259, 1262 (2011); *see also Rose*, 425 U.S. at 361 (emphasizing that the "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."); *News-Press*, 489 F.3d at 1191 ("Because the net effect of the FOIA, with its exemptions, is to place emphasis on the fullest responsible disclosure, the Supreme Court has repeatedly stated that the policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.") (citations omitted) (internal quotation marks omitted); U.S. Dep't of Justice v. Tax Analysts, 492 U.S. 136, 151 (1989) ("Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.").

48 Local 3, IBEW v. NLRB, 845 F.2d 1177, 1180 (2d Cir. 1988).

49 Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (2006); *see also* EPA v. Mink, 410 U.S. 73, 78 (giving a case example of how the review process might proceed in District Court).

50 5 U.S.C. § 552(a)(4)(B).

51 *Id.*

52 5 U.S.C. § 552(a)(4)(F).

53 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under [one of the nine FOIA exemptions]."); *see also* DOJ GUIDE, *supra* note 34, at 82 (discussing partial disclosure requirement); Attorney General Holder's FOIA Memorandum, *supra* note 8, at 1 ("Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information.").

54 Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977) ("The focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material."); *see also*

the non-exempt portions, if reasonably segregable.[55] However, if the segregation of portions results in "an essentially meaningless set of words and phrases," such as "disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content," the agency may determine that segregation of those portions is not possible.[56]

Two FOIA exemptions, Exemptions 6 and 7(C), specifically protect personal privacy interests.[57] Privacy interests in this context, according to the Supreme Court, generally "encompass the individual's control of information concerning his or her person."[58] These privacy-based FOIA exemptions block the release of government records to prevent unwarranted invasions of privacy.

a) The Exemption 6 Analysis

Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[59] Indeed, the primary concern of Congress in drafting the exemption was to safeguard the confidentiality of personal information,[60] as Congress intended the exemption to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information."[61] Hence, an agency may withhold requested information under Exemption 6 only if two requirements are met: (1) the information is contained in personnel, medical, or "similar" files;[62] and (2) the information's release would constitute "a

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Vaughn v. Rosen, 484 F.2d 820, 825 (D.C. Cir. 1973) ("[A]n entire document is not exempt merely because an isolated portion need not be disclosed . . . . [T]he agency may not sweep a document under a general allegation of exemption . . . .").

55 *See, e.g.*, Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1116 (D.C. Cir. 2007) ("Before approving the application of a FOIA exemption, the district court must make specific findings of segregability regarding the documents to be withheld.").

56 *Mead Data Cent., Inc.*, 566 F.2d at 261 & n.55.

57 *See* 5 U.S.C. § 552(b)(6), (7)(C).

58 U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989); *see also* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 545 (1970) ("Privacy attempts to draw a line between the individual and the collective, between self and society. It seeks to assure the individual a zone in which to be an individual, not a member of the community.").

59 5 U.S.C. § 552(b)(6).

60 Dep't of Air Force v. Rose, 425 U.S. 352, 375 n. 14 (1976).

61 U.S. Dep't of State v. Wash. Post Co., 456 U.S. 595, 599 (1982).

62 *See* Associated Press v. U.S. Dep't of Defense, 554 F.3d 274, 291 (2d Cir. 2009). The Supreme Court has interpreted the meaning of "similar files" broadly, maintaining that "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." *Wash. Post Co.*, 456 U.S. at 602 (alteration in original) (quoting H.R. REP. NO. 89-1497, at 11 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2428); *see also* Forest Guardians v. United States FEMA, 410 F.3d 1214, 1217 (10th Cir. 2005) ("Similar files under Exemption 6 has a broad, rather than a narrow, meaning and encompasses all information that applies to a particular individual.") (citation and internal quotation marks

clearly unwarranted invasion of personal privacy."[63] Once the threshold requirement is met (the requested information is in fact kept in a personnel, medical, or similar file), courts generally conclude that an agency faces an "onerous" burden of demonstrating "a clearly unwarranted invasion of personal privacy."[64] To assess whether the agency has met this burden, courts employ a balancing test that weighs the individual's right to privacy against the public's right to disclosure.[65]

Courts initiate this balancing test by examining the privacy right at issue, ascertaining whether disclosing the requested information would "compromise a substantial, as opposed to a de minimis, privacy interest."[66] A "substantial" privacy interest is "anything greater than a de minimis privacy interest."[67] According to the Supreme Court, the existence of a privacy interest broadly covers all interests involving "the individual's control of information concerning his or her person,"[68] such as a citizen's name, address, criminal history, birthdate, employment history and work history.[69] If the court finds only a de minimis interest, or no

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omitted). An example of a "similar file" is an administrative investigative file that contains information about an individual, such as one's "place of birth, date of birth, date of marriage, employment history, and comparable data." *Wash. Post Co.*, 456 U.S. at 600; *see also* Wood v. FBI, 432 F.3d 78, 86 (2d Cir. 2005) ("In considering whether the information is contained in a 'similar' file, we ask whether the records at issue are likely to contain the type of personal information that would be in a medical or personnel file.").

63 5 U.S.C. § 552(b)(6); *see also Wash. Post Co.*, 456 U.S. at 598; Hopkins v. U.S. Dep't of Hous. & Urban Dev., 929 F.2d 81, 86-87 (2d Cir. 1991) (discussing the balancing test under Exemption 6).

64 News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173, 1198 (11th Cir. 2007) (citations and internal quotations omitted); *see also* Cochran v. United States, 770 F.2d 949, 955 (11th Cir. 1985) ("If the balance [between an individual's right to privacy and the public's right to know] is equal the court should tilt the balance in favor of disclosure."); Stern v. FBI, 737 F.2d 84, 91 (D.C. Cir. 1984) (discussing how Exemption 6's language "require[s] a balance tilted emphatically in favor of disclosure") (citation and internal quotations omitted); Kurzon v. Dep't of Health & Human Servs., 649 F.2d 65, 67 (1st Cir. 1981) ("By restricting the reach of exemption 6 to cases where the invasion of privacy . . . is not only unwarranted but *clearly* so, Congress has erected an imposing barrier to nondisclosure under this exemption.") (emphasis in original).

65 *See, e.g.*, *Rose*, 425 U.S. at 372–73; 5 U.S.C. § 552 (a)(4)(B) (requiring the agency to bear the burden of demonstrating that the application of the exemption is appropriate).

66 Multi Ag Media LLC v. USDA, 515 F.3d 1224, 1229 (D.C. Cir. 2008) (quoting Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 874 (D.C. Cir. 1989)) (internal quotations omitted).

67 *Id.* at 1229–30.

68 U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989).

69 Associated Press v. U.S. Dep't of Justice, 549 F.3d 62, 65 (2d Cir. 2008) ("Personal information, including a citizen's name, address, and criminal history, has been found to implicate a privacy interest cognizable under the FOIA exemptions."); People for the Am. Way Found. v. Nat'l Park Serv., 503 F. Supp. 2d 284, 304 (D.D.C. 2007) ("Federal courts have previously recognized a privacy interest in a person's name and address.").

privacy interest at all, its analysis ends, and the FOIA mandates disclosure.[70]

If a court finds a substantial privacy interest, it then must weigh the public interest that disclosure would serve against the substantial privacy interest to determine if the invasion of privacy is "clearly unwarranted."[71] The public interest under FOIA has been defined singularly as "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'"[72] The requester bears the burden of demonstrating that disclosing the requested information would serve this public interest.[73] When courts find that the privacy interest outweighs any public interest present, they withhold the requested information.[74] However, courts have stressed that "under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act."[75]

b) The Exemption 7(C) Analysis

The law enforcement counterpart to Exemption 6, Exemption 7(C), protects personal information contained in law enforcement records from FOIA disclosure.[76] While the exemption excludes all records or information compiled for law enforcement purposes, it does so "only to the extent that the production of such [information] . . . could reasonably be

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70 *See Multi Ag Media LLC*, 515 F.3d at 1229–30.

71 *Associated Press*, 554 F.3d at 291 (citing Wood v. FBI, 432 F.3d 78, 86 (2d Cir. 2005)).

72 Bibles v. Oregon Natural Desert Ass'n, 519 U.S. 355, 355–56 (1997) (alteration in original) (citation omitted); *see also Associated Press*, 554 F.3d at 285 ("[T]he Supreme Court has made clear that there is only one relevant interest, namely, 'to open agency action to the light of public scrutiny.'") (quoting *Reporters Comm.*, 489 U.S. at 772).

73 *See* 37A AM. JUR. 2d, *Freedom of Information Acts* § 246 (2005) (discussing burden).

74 *See, e.g.*, Seized Prop. Recovery Corp. v. U.S. Customs & Border Prot., 502 F. Supp. 2d 50, 56 (D.D.C. 2007) ("If no public interest is found, then withholding the information is proper, even if the privacy interest is only modest."); News-Press v. U.S. Dep't of Homeland Sec., 489 F.3d 1173,1205 (11th Cir. 2007) ("In order to affirm withholding the addresses, we would have to find that the privacy interests against disclosure are *greater* than the public interest in disclosure.") (emphasis in original).

75 *Multi Ag Media LLC*, 515 F.3d at 1227 (quoting Nat'l Ass'n of Home Builders v. Norton, 309 F.3d 26, 32 (D.C. Cir. 2002)); *see also* Consumers' Checkbook Ctr. for the Study of Servs. v. U.S. Dep't of Health & Human Servs., 554 F.3d 1046, 1057 (D.C. Cir. 2009) ("[FOIA's] presumption favoring disclosure . . . is at its zenith under Exemption 6") (citation and internal quotation marks omitted); Lawyers' Comm. for Civil Rights of S.F. Bay Area v. U.S. Dep't of the Treasury, No. 07-2590, 2008 U.S. Dist. LEXIS 87624, at *60 (N.D. Cal. Sept. 30, 2008) ("The burden remains on the agency to justify any withholdings under Exemption 6 since the presumption in favor of disclosure under this exemption is as strong as that with other exemptions."); DOJ GUIDE, *supra* note 34, at 418 n.6 (collecting cases).

76 *See* DOJ GUIDE, *supra* note 34, at 561 (discussing the background and mechanics of Exemption 7(C)).

expected to constitute an unwarranted invasion of personal privacy."[77] The exemption protects any person mentioned in a law enforcement record, not just the person who is the subject or focus of the law enforcement document.[78]

When faced with an Exemption 7(C) withholding dispute, courts first decide whether the information or records withheld were in fact "compiled for law enforcement purposes."[79] Records "compiled for law enforcement purposes" include all materials compiled to enforce federal,[80] state,[81] local,[82] and foreign[83] laws that are in the possession of the federal government, such as records compiled to document criminal investigations, audits, or confidential informants.[84] Moreover, "law enforcement purposes" pertain to the enforcement of criminal and civil laws[85] and administrative regulations.[86] If the withheld information had been so compiled at the time the FOIA request was made,[87] courts will proceed with the Exemption 7(C) analysis.

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77 5 U.S.C. § 552(b)(7)(C) (2006).

78 120 CONG. REC. 17,034 (1974) ("[Exemption 7(C) protects the] privacy of any person mentioned in the requested files, and not only the person who is the object of the investigation.").

79 *See* John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989) ("Before it may invoke this [Exemption 7] provision, the Government has the burden of proving the existence of such a compilation for such a [law enforcement] purpose."). "Compiled" documents involve "materials collected and assembled from various sources or other documents." *Id.*

80 *See, e.g.*, Wojtczak v. U.S. Dep't of Justice, 548 F. Supp. 143, 148 (E.D. Pa. 1982) ("This Court must therefore interpret the statute as written and conclude that Exemption 7 applies to all law enforcement records, federal, state, or local, that lie within the possession of the federal government.").

81 *See* DOJ GUIDE, *supra* note 34, at 497 n.18 (collecting cases).

82 *See, e.g.*, Antonelli v. Bureau of Alcohol, Tobacco, Firearms & Explosives, No. 04-1180, 2005 U.S. Dist. LEXIS 17089, at *12 (D.D.C. Aug. 16, 2005) ("The withheld records were compiled during the course of an investigation by a local police department . . . [and so] [t]hey therefore satisfy the threshold requirement of having been compiled for law enforcement purposes.").

83 *See* DOJ GUIDE, *supra* note 34, at 497 n.19 (collecting cases).

84 *See id.* at 498–500 (discussing illustrations of records compiled for law enforcement purposes).

85 *See, e.g.*, Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 550 (6th Cir. 2001) ("[Exemption 7] applies not only to criminal enforcement actions, but to records compiled for civil enforcement purposes as well."); Rural Hous. Alliance v. U.S. Dep't of Agric., 498 F.2d 73, 81 n.46 (D.C. Cir. 1974) ("[L]aw enforcement purposes . . . include both civil and criminal purposes."); *see also* DOJ GUIDE, *supra* note 34, at 502–03 nn.29–30 (collecting cases).

86 *See, e.g.*, Schoenman v. FBI, 573 F. Supp. 2d 119, 146 (D.D.C. 2008) ("Exemption 7(C) covers investigatory files related to enforcement of all kinds of laws, including those involving adjudicative proceedings[ ] and administrative matters.") (citation and internal quotation marks omitted).

87 *See* John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 ("The objects sought merely must have been 'compiled' when the Government invokes the Exemption [7(C)]."); *see also* Lion Raisins v. USDA, 354 F.3d 1072, 1082 (9th Cir. 2004) ("Information need not have been originally compiled for law enforcement purposes in order to qualify for the 'law enforcement' exemption, so long as it was compiled for law enforcement at the time the FOIA request was made.").

Once courts find that the requested material meets the threshold requirement, they then employ a balancing test, akin to the Exemption 6 test, which weighs the privacy right against the public's right to be informed.[88] The privacy interests in this context are typically strong; as courts recognize that individuals referenced in law enforcement files face potential stigma, reputational damage and harassment upon the files' release.[89] In contrast, to satisfy the public interest requirement, the requested material must uncover information about the government's actions and procedures.[90] With such dynamics at play, some courts have weighed in favor of privacy rights and refused to grant the release of the requested information in Exemption 7(C) balancing test disputes.[91]

B. State Freedom of Information Acts

In unison with the federal government, all fifty states have enacted their own version of a freedom of information act,[92] bestowing public access to much of their internal documents.[93] These state statutes largely share the same function and purpose as the FOIA, with a number of the

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[88] *See supra* Part I.A.2.a (discussing the FOIA Exemption 6 balancing test).

[89] *See generally* Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990) ("It is surely beyond dispute that the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.") (citation and internal quotation marks omitted).

[90] *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989) (recognizing that only "[o]fficial information that sheds light on an agency's performance of its statutory duties" qualifies as public interest for an Exemption 7(C) exemption analysis); *see also* Dickinson, *supra* note 4, at 206–11 (criticizing as flawed the Supreme Court's reading of the public interest served by FOIA).

[91] *See* DOJ GUIDE, *supra* note 34, at 592–93 (discussing requesters' failure to satisfy public interest requirement and collecting cases). A requester faces greater difficulty in obtaining a record protected by Exemption 7(C) compared to one protected by Exemption 6, largely because Exemption 7(C)'s privacy language as drafted is more expansive. Exemption 6's requirement that a privacy invasion being "clearly unwarranted" is absent from Exemption 7(C), thus easing the burden to justify withholding. *Reporters Comm.*, 489 U.S. at 756. Moreover, Exemption 6 addresses disclosures that "would constitute" an invasion of privacy, creating a higher burden for an agency to meet when compared to Exemption 7(C)'s language encompassing any disclosure that "could reasonably be expected to constitute" such an invasion. *Id.* at 756 & n.9. These drafting differences are the product of Congress' deliberate decision to provide agencies with greater freedom to protect privacy interests implicated in records compiled for law enforcement purposes. *Id.* (analyzing Congressional effort to provide greater privacy protection under Exemption 7(C)).

[92] *See, e.g.*, MICH. COMP. LAWS § 15.231 *et seq.* (2012) (Michigan's "Freedom of Information Act"); N.Y. PUB. OFF. LAW § 85 *et seq.* (McKinney 2011) (New York's "Freedom of Information Law"). These statutes are also known as open records acts or right to know laws. *See, e.g.*, KY. REV. STAT. ANN§ 61.870 et seq. (West 2012) (Kentucky "Open Records Act"); 65 PA. CONS. STAT. § 67.101 (West 2012) ("This act shall be known and may be cited as the [Pennsylvania] Right-to-Know Law").

[93] *See generally* Bruce D. Goldstein, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 EMORY L.J. 1185 (1992) (examining the individual freedom of information acts for the fifty states). The District of Columbia and Puerto Rico also have their own freedom of information acts. *See id.* at 1218,

state statutes modeling the FOIA's structure and content.[94] For instance, the statutes generally seek to promote government transparency through information disclosure,[95] and courts in general interpret the statutes' expansive language broadly in favor of government openness.[96] While some state freedom of information statutes grant more extensive access than others,[97] all of the statutes function similarly.

Every state exempts certain categories of information from its freedom of information act disclosures,[98] and a number of state freedom of information act exemptions mirror those within the FOIA.[99] Moreover, state governments have echoed the Congressional mandate that exemptions to disclosure should be narrowly construed.[100] The state freedom of information act exemptions generally contain privacy protections,[101]

1220; 37A AM. JUR. 2D *Freedom of Information Acts* § 2 (2011) (providing overview of state freedom of information laws).

94 *See, e.g.*, San Gabriel Tribune v. Superior Court, 143 Cal. App. 3d 762, 772 (Cal. 1982) ("The [California Public Records] Act, modeled after the 1967 federal Freedom of Information Act (FOIA), can draw on its federal counterpart for judicial construction and legislative history."); Barry v. Wash. Post Co., 529 A.2d 319, 321 (D.C. 1987) ("The District of Columbia FOIA was modeled on the corresponding federal statute, and many of its provisions closely parallel those of the federal act.") (internal citations omitted); Suffolk Constr. Co. v. Div. of Capital Asset Mgmt., 870 N.E.2d 33, 41 (Mass. 2007) (noting that the Massachusetts Public Records Law was "[m]odeled after the Federal Freedom of Information Act").

95 *See, e.g.*, Better Gov't Ass'n v. Blagojevich, 899 N.E.2d 382, 391 (Ill. App. Ct. 2008) ("Our legislature enacted the FOIA in recognition that: (1) blanket government secrecy does not serve the public interest; and (2) transparency should be the norm, except in rare, specified circumstances.").

96 *See, e.g.*, Dade Aviation Consultants v. Knight Ridder, Inc., 800 So. 2d 302, 304 (Fla. Dist. Ct. App. 2001) (holding that Florida's Public Records Act should be construed liberally in favor of openness and that when in doubt a court should find in favor of disclosure).

97 *See, e.g.*, Tex. Comptroller of Pub. Accounts v. Att'y Gen. of Tex., 354 S.W.3d 336, 359 (Tex. 2010) ("Relative to other freedom of information laws, such as FOIA, the Texas [Public Information Act] more strongly favors transparency and open government.").

98 Many states provide exemptions either statutorily—within their particular freedom of information laws or elsewhere in their statutory codes—or through their common law. *See, e.g.*, Hathaway v. Joint Sch. Dist. No. 1, 342 N.W.2d 682, 687 (Wis. 1984) ("[P]ublic records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential.").

99 *See, e.g.*, Mans v. Lebanon Sch. Bd., 290 A.2d 866, 867 (N.H. 1972) ("The exemption provisions of our right-to-know law are similar to the Federal Freedom of Information Act.") (citations omitted); Sattler v. Holliday, 318 S.E.2d 50, 51 (W. Va. 1984) ("The exemptions in our statute are similar to those in the federal Freedom of Information Act and other state acts.") (citation omitted).

100 *See, e.g.*, CAL. CONST., art. I, § 3, div. (b) subdiv. (2) ("A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."); *see also* Young v. Rice, 826 S.W.2d 252, 254 (Ark. 1992) (holding that any exemption from the state's FOIA must be narrowly construed).

101 *See, e.g.*, Goldstein, *supra* note 93, at 1185–95 & n.2 (discussing the state FOIA privacy-related exemptions).

including exemptions pertaining to medical and personnel records[102] as well as law enforcement records.[103] Several of these exemptions emulate both FOIA's Exemptions 6[104] and 7(C),[105] respectively. In addition, some states have adopted a balancing test analysis, similar to that used in FOIA cases, in order to examine public and privacy interests in conflict and resolve withholding disputes involving these types of exemptions.[106]

II. GOVERNMENT AGENCY RECORDS DOCUMENTING INDIVIDUAL DEATHS: AN OVERVIEW OF DEATH RECORD LAW

Every death in the United States carries legal implications that necessitate government involvement. After someone dies, government agencies at every level may be actively involved in responding to the death. For example, the local emergency dispatcher may send the county coroner to the decedent's home, the county social services agency may cease providing monthly assistance, the state revenue department and the Internal Revenue Service may assess estate taxes upon the decedent's estate, and the Veteran's Administration may terminate the provision of benefits.

Government agencies may also pursue investigations surrounding the causes and circumstances of one's death, and create investigatory files, take photographs, draft reports and compile medical documents as part of the investigation. The agencies' activities will inevitably leave a document trail, and the amount and types of records created will depend upon the scope of the government's investigation. This Part provides a brief overview of medical-legal death reporting systems in the United

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102 *See, e.g.*, WYO. STAT. ANN. § 16–4–203(d) (2012) (exempting medical and personnel records from public disclosure); N.J. STAT. ANN. § 47:1A-10 (West 2012) (same).

103 *See, e.g.*, CAL. GOV'T CODE § 6254(f) (West 2012) (exempting law enforcement records from state freedom of information act); *see also* Sarah Henderson Hutt, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41 DUKE L.J. 368, 383–84 (1991) ("[T]he majority of state freedom of information acts contain specific exemptions for [law enforcement] records . . . . Many of the states without specific exemptions either classify law enforcement records as confidential in other sections of their code, or have case law . . . construe[ing] such records as exempt from disclosure.").

104 *See* Andrea G. Nadel, *What Constitutes Personal Matters Exempt from Disclosure by Invasion of Privacy Exemption under State Freedom of Information Act*, 26 A.L.R.4th 666, at § 2(a) ("A majority of state freedom of information laws include some form of privacy exemption, and, with few exceptions, the exemptions closely track the Federal Freedom of Information Act's sixth exemption.").

105 *See* 37A AM. JUR. 2d *Freedom of Information Acts* § 278 (2011) ("State freedom of information laws may contain exemptions for information compiled for law enforcement purposes that are modeled on, or similar to, Exemption 7 of the FOIA.").

106 *See*, e.g., Mulgrew v. Bd. of Educ. of the City School Dist. of New York, 919 N.Y.S.2d 786, 790 (Sup. Ct. 2011) (using "a balancing test in which the privacy interests at stake are balanced against the public interest in disclosure of the information." (internal quotations omitted)).

States, their relevant procedures, and the government documentation they generate.

A. Death Certificates: The Quintessential Death Record

Roughly 1 percent of the United States population (about 2.6 million people) dies annually in the United States,[107] with most dying either in a hospital, a nursing home facility, or at home.[108] At or shortly after the moment of death, an attending physician, coroner or medical examiner may pronounce the death officially, pursuant to the local jurisdiction's requirements.[109] State law also mandates the filing of a death certificate shortly after death.

Every state requires the registration of any death within its borders through the creation of a death certificate.[110] A death certificate is both a permanent legal record[111] and a core component of the vital registration

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107 Sherry L. Murphy et al., *Death: Preliminary Data for 2010*, vol. 60 no. 4 NATIONAL VITAL STATISTICS REPORTS, at 6 (Jan. 11, 2012), http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_04.pdf; NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 244 (2009) ("About 1 percent of the U.S. population (about 2.6 million people) dies each year.") [hereinafter STRENGTHENING FORENSIC SCIENCE].

108 Press Release, CDC, New Study of Patterns of Death in the United States (Feb. 23, 1998), http://www.cdc.gov/nchs/pressroom/98facts/93nmfs.htm. Depending upon the circumstances, a caregiver or witness may call 911, a funeral director, or the local coroner's office to remove the decedent from the place of death for transportation to a funeral home, coroner's office or local mortuary. *See, e.g.*, Quick Answers—Death in Your Family, http://www.funeralwise.com/answers/someone_died (last visited Apr. 9, 2012) (discussing "who to call when someone dies" and "transporting the body").

109 Procedures for the official pronouncement of death are determined by statute. *See, e.g.*, GA. CODE ANN. § 31-10-16(a) (2011) (criteria for determining death); MICH. COMP. LAWS § 333.1033 (West Supp. 2012) (same). Typically the statutes call for a licensed physician or registered nurse to make a medical determination that an individual is dead. *See, e.g.*, NEV. REV. STAT. § 440.415(7)(d) (2008) ("'Pronouncement of death' means a declaration of the time and date when the cessation of the cardiovascular and respiratory functions of a patient occurs as recorded in the patient's medical record by the attending provider of health care."). A pronouncement of death is a separate process from a certification of death; the pronouncement of death typically comprises a section of information within the certificate of death. *See, e.g.*, D.C. CODE § 7-211(i) (2001) ("Each death certificate shall contain a pronouncement of death section.").

110 *See, e.g.*, ALASKA STAT. § 18.50.230(a) (2012) ("A death certificate for each death that occurs in the state shall be filed with the local registrar . . . ."); CONN. GEN. STAT. § 7-62b(a) (2012) ("A death certificate for each death which occurs in this state shall be . . . filed with the registrar of vital statistics . . . ."); DEL. CODE ANN. tit. 16, § 3123(a) (2011) ("A certificate of death for each death which occurs in this State shall be filed with the Office of Vital Statistics."); IOWA CODE § 144.26.1 (2011) ("A death certificate for each death which occurs in this state shall be filed as directed by the state registrar."); MONT. CODE ANN. § 50-15-403(2) (2011) ("The person in charge of disposition . . . shall . . . file the death or fetal death certificate with the local registrar . . . .").

111 *See, e.g.*, GA. CODE ANN. § 31-10-15 (2011) ("The [county] custodian of records shall file such death certificate as a part of the permanent records of such office.").

system in the United States.[112] Most states direct the attending physician, coroner, medical examiner, or funeral director[113] to enter vital information and sign and file the certificate with the local health department within a specified period of time, usually within three to five days of the decedent's passing.[114] The filer typically files the death certificate in the local jurisdiction where the death transpired or where the decedent's body was found.[115]

The death certificate can be highly valuable to public and private interests due in part to the medical information it contains. Individual state statutes generally instruct a physician to input and certify the medical section within the death certificate,[116] and as these medical certifiers[117] complete the section, they identify the deceased and input

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112 *See* CDC CORONERS' HANDBOOK, *supra* note 9, at 4 ("The registration of deaths . . . is a State function supported by individual State laws and regulations."). Every state bears the responsibility to issue and maintain death certificates as part of its vital records system. *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 767 (2008) (discussing vital records system); James A. Weed, *Vital Statistics in the United States: Preparing for the Next Century*, 61 POPULATION INDEX 527, 527 (1995) (discussing vital records system).

113 Funeral directors typically complete death certificates. Non-medical sections are completed with input from those closest to the decedent. *See* CDC CORONERS' HANDBOOK, *supra* note 9, at 9. Medical personnel, coroners, or medical examiners typically complete the medical portions of the certificates. *See infra* note 114. *See also* LA. REV. STAT. ANN. § 40:34(B)(2)(r) (2012) ("In the absence of a physician, the parish coroner shall sign the [death] certificate.").

114 *See, e.g.*, ALA. CODE § 22-9A-14(a) (2011) ("A certificate of death . . . shall be filed . . . within five days of the death."); KAN. STAT. ANN. § 65-2412(a) (2011) ("A death certificate . . . shall be filed . . . within three days after such death."). Each state uses its own prescribed death certificate form, with most mimicking the US Standard Certificate of Death model certificate. *See, e.g.*, NEV. REV. STAT. § 440.350 (2011) (adopting the US standard death certificate form); Nat'l Ctr. for Health Statistics, *U.S. Standard Death Certificate* (1989), http://www.cdc.gov/nchs/data/dvs/std-dcrt.pdf [hereinafter *Death Certificate*].

115 *See, e.g.*, GA. CODE ANN. § 31-10-15(a) (2011) ("A certificate of death . . . shall be filed with the local registrar of the county in which the death occurred or the body was found."); IOWA CODE § 144.26.3 (2011) ("The county in which a dead body is found is the county of death.").

116 *See, e.g.*, ALA. CODE § 22-9A-14(a) (2012) ("The completion of the medical certification of cause of death on the death certificate by the physician . . . shall constitute authorization."); CAL. HEALTH & SAFETY CODE § 102825 (West 2012) ("[T]he physician. . . . [of] a deceased person shall state on the [death] certificate . . . any . . . medical and health section data as may be required on the certificate."); IND. CODE § 16-37-3-5 (2012) (physician to certify cause of death upon the death certificate). Commentators have reflected that the attending physician's completion of the death certificate is the last act of patient care that a physician performs for her patient. *See* DEPT. HEALTH & HUMAN SERVS., PUB. NO. (PHS) 2003-1108, PHYSICIAN'S HANDBOOK ON MEDICAL CERTIFICATION OF DEATH 4 (2003) [hereinafter CDC PHYSICIAN'S HANDBOOK].

117 The attending physician is typically the certifier of death; when the attending physician is unavailable, the medical examiner usually certifies. *See, e.g.*, MO. REV. STAT. § 58.720(4) (2011) ("The medical examiner shall certify the cause of death in any case where death occurred without medical attendance or where an attending physician refuses to sign a certificate of death."). The certifier attests that, to the best of his or her knowledge, the decedent died of the cause(s) and circumstances reported on the certificate. *See, e.g.*, WASH. REV.

information concerning the causes and circumstances surrounding the death.[118] For instance, the certifier will specify the immediate cause of death and describe any underlying, contributing medical factors that ultimately led to the person's death.[119] The certifier then draws conclusions to form a manner-of-death classification,[120] which classifies the death according to certain statutorily delineated[121] categories. Options for classification include natural, accident, suicide, homicide or undetermined death.[122] Beyond the medical information it proffers, the certificate collects additional vital information, such as the decedent's age, race, gender, and education, and the time and place of death.[123]

To some, the death certificate is "the most important legal document in existence."[124] It serves several legal purposes. Functioning as legitimate proof of death, it legally changes one's status from living to dead.[125] Consequently, private parties use the certificate to facilitate settlement of the decedent's estate, to transfer real or personal property, to

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CODE § 70.58.170 (2012) (stating that the certifier must "certify the cause of death according to his or her best knowledge and belief.").

118 Nat'l Ass'n of Med. Exam'r, *Guide for Manner of Death Classification* (2002), http://thename.org/index.php?option=com_docman&task=cat_view&gid=38&Itemid=26 [hereinafter *NAME Guide*].

119 The CDC defines the "cause of death" as either "the disease or injury that initiated the train of morbid events leading directly to death, or . . . the circumstances of the accident or violence that produced the fatal injury." CDC PHYSICIAN'S HANDBOOK, *supra* note 116, at 10. The medical certifier will specify the immediate cause of death (the "final disease, injury or complication directly causing death") and the underlying cause of death ("the disease or injury that initiated the chain of events that led directly and inevitably to death"). *Id.* The medical certifier must list all other major diseases, conditions and injuries that contributed to death as well. CDC CORONERS' HANDBOOK, *supra* note 9, at 12.

120 *NAME Guide*, *supra* note 118, at 5.

121 *See* S.C. CODE ANN. § 17-5-5(9) (2011) ("'Manner of death' refers to the means or fatal agency that caused a death. Manner of death is classified in one of the five following categories: A. natural, B. accident, C. homicide, D. suicide, and E. undetermined"); *NAME Guide*, *supra* note 118, at 3. Certifiers aim to be objective while completing manner of death determinations, but such determinations nevertheless represent the certifier's opinions. *NAME Guide*, *supra* note 118, at 4. Because manner-of-death determinations have an element of subjectivity, certifiers are warned that "[m]anner-of-death classification should not be formulated on the basis of trying to facilitate prosecution, avoiding challenging publicity, building a political base, or promoting a personal philosophy or agenda." *Id.* at 6.

122 *NAME Guide*, *supra* note 118, at 3. The cause and manner of death information have quasi-judicial elements and so in completing the certificate, the certifier has "quasi-judicial responsibility derived from the enabling law in the [certifier's] relevant jurisdiction." *Id.* at 8. The medical section has additional questions beyond causes and manner of death that relate to the existence of any injuries and whether an autopsy was performed. CDC CORONERS' HANDBOOK, *supra* note 9, at 11.

123 *See Death Certificate*, *supra* note 114.

124 *See Documenting Death—The Certificate*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/post-mortem/things-to-know/death-certificates.html (last visited Apr. 9, 2012).

125 *See* People (*In re* Interest of E.W. and R.W), 780 P.2d 32, 33–34 (Colo. App. 1989) (affirming the admission of death certificate where certificate "was submitted to corroborate trial testimony that [a particular individual] was dead."); *NAME Guide*, *supra* note 118, at 4.

apply for insurance benefits, and for other affairs.[126] The government also uses the information as the basis to assess taxes, terminate benefits, and carry out other administrative functions.[127] Moreover, by identifying the medical circumstances surrounding the death, the document may "provide family members closure, peace of mind, and documentation of the cause of death."[128] Beyond its legal and medical importance, a death certificate carries genealogical,[129] statistical,[130] and research[131] value. Once filed, the certificates become part of the state's official records of death.[132]

B. *Documenting beyond the Death Certificate: The Role of Forensic Death Investigations and Autopsy Reports*

If an individual's death does not appear to be the result of natural causes, concerned parties may contact the local medical-legal death investigation office, which examines certain types of deaths to discern whether criminal laws have been broken or public health or safety issues exist.[133] A "medical–legal officer,"[134] either a coroner or medical exam-

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126 *See, e.g.*, Connecticut Probate Courts, *Guidelines for Administration of Decedents' Estates*, 4 (2012), http://www.jud.ct.gov/probate/GuideDecEstate.pdf (illustrating that a death certificate may be necessary for settling a decedent's estate and related activities); *see also* Judith S. Kaye, *The Legal Community's Response to 9/11: Public Service in a Time of Crisis*, 31 FORDHAM URB. L.J. 831, 870–71 (2004) (explaining that "almost every aspect of . . . legal and financial recovery" after the death of a loved one requires a death certificate). "Insurance companies insist on a death certificate before making payment on . . . policies; banks require a death certificate before allowing [account] access . . . ; governments require death certificates before transferring title to property; wills cannot be probated, or asset distributed, without a death certificate." *Id.*

127 *See, e.g.*, Internal Revenue Service, *Form 706*, 3 (2011), *available at* http://www.irs.gov/pub/irs-pdf/f706_10.pdf (requiring death certificate to be attached to Form 706 for filing). A death certificate once certified may also function legally as prima facie evidence of all facts contained within the certificate. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 191.052 (West 2012) ("A copy of a birth, death, or fetal death record registered under this title that is certified by the state registrar is prima facie evidence of the facts stated in the record.").

128 CDC CORONERS' HANDBOOK, *supra* note 9 at 2.

129 *See* CDC CORONERS' HANDBOOK, *supra* note 9, at 2–5; *What Is Genealogy ?*, BRITISH COLUMBIA VITAL STATISTICS AGENCY, http://www.vs.gov.bc.ca/genealogy/what_is_genealogy.html (Apr. 9, 2012) (describing genealogical purposes of death certificates).

130 Death certificates contain data crucial for generating mortality statistics that may be used to assess health at local, regional, state and national levels. *See* CDC CORONERS' HANDBOOK, *supra* note 9, at 2 (describing mortality statistics).

131 Death certificates offer a host of research possibilities. For instance, researches may systematically catalogue causes of morbidity and mortality, and public health officials may develop funding priorities and public health and safety programs based upon research results that use data pulled from death certificates. *See* CDC CORONERS' HANDBOOK, *supra* note 9 at 2. Research projects using death certificates may, *inter alia*, analyze health statuses at local, state and national levels. *Id.*

132 *See supra* text accompanying note 114 (describing death certificate filing procedures).

133 CDC CORONERS' HANDBOOK, *supra* note 9, at 1.

134 *Id.*

iner, manages these offices, as directed by state statute.[135] Coroners and medical examiners (C/MEs)[136] are public officers who function as medical detectives by performing investigative services pertaining to the deceased.[137] They may physically examine the dead and commence an investigation into the circumstances surrounding the death if certain conditions are present. They may also respond to and investigate all deaths relating to hazards, including terrorism and mass fatality events, and the identification of the unidentified dead.[138] They assume jurisdiction over these and other types of deaths, as defined by statute.[139] Medical and law enforcement personnel refer approximately one million death cases to C/ME offices nationally, which constitute approximately 40 percent of all deaths in the United States.[140]

C/MEs are required by statute to investigate and determine the cause(s) of death where needed, and they must specify whether the investigated death was due to unnatural causes.[141] Conducting an autopsy, an internal and external examination of the decedent's body, is a crucial part

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135 *See* NAT'L ASS'N OF MED. EXAM'R, MEDICAL-LEGAL DEATH INVESTIGATION (2003), http://thename.org/index.php?option=com_docman&task=cat_view&gid=38&Itemid=26 ("Every state has a Medical-Legal Death Investigation system in place. It may be statewide, regional or county based."). Roughly 2,400 C/ME offices provide investigation services across the country. STRENGTHENING FORENSIC SCIENCE, *supra* note 107, at 243.

136 Local governments investigate deaths by either using a medical examiner system or a coroner system. The coroner system is the older, more traditional system, whereas the medical examiner system is the more modern and professional system. Both systems work in conjunction with local law enforcement agencies to investigate deaths. *See* LAWYERS' MEDICAL CYCLOPEDIA, *supra* note 11, § 32A.1a (detailing differences between coroners and medical examiners); STRENGTHENING FORENSIC SCIENCE, *supra* note 107, at 245 (same).

137 *See* Sizemore v. West Jefferson Gen. Hosp, 260 So. 2d 800, 802 (La. Ct. App. 1972) ("[T]he Coroner's primary duty is to determine the possibility of violations of criminal law or of the existence of public health hazards in certain cases of death.").

138 The scope of death investigation services are statutorily defined and may include "death scene investigations, medical investigations, reviews of medical records, medicolegal autopsies, determination of the cause and manner of death, and completion of the certificate of death." STRENGTHENING FORENSIC SCIENCE, *supra* note 107, at 243. C/MEs' responsibilities include: (1) identifying and documenting pathologic findings in suspicious or violent deaths; (2) testifying as expert medical witnesses in court; (3) "surveil[ing] for index cases of infection or toxicity that may herald biological or chemical terrorism"; (4) identifying diseases with epidemic potential; and (5) documenting injury trends. *Id.* at 244.

139 *See* STRENGTHENING FORENSIC SCIENCE, *supra* note 107, at 244 ("Classes may include deaths resulting from injury, such as by violence or by poisoning; by circumstance, such as related to fire or under anesthesia; by decedent status, such as prisoners or mental health patients; or by time-frame, such as deaths that occur within 24 hours of admission to a hospital.").

140 BUREAU OF JUSTICE STATISTICS, MEDICAL EXAMINERS AND CORONERS' OFFICES, 2004, at 1 (2007). The ME/C offices conduct additional investigations on roughly half of all cases referred to it, screening out and resolving the others without further examination. *Id.* After investigation, roughly 40 to 50 percent will be attributed to natural causes, 27 to 40 percent to accident, 12 to 15 percent to suicide, 7 to 10 percent to homicide, and 1 percent as undetermined. STRENGTHENING FORENSIC SCIENCE, *supra* note 107, at 244.

141 18 AM. JUR. 2d *Coroners or Medical Examiners* § 7 (2004).

of the process.[142] C/MEs must draft and file autopsy reports that document conclusive findings from their investigations as to the true cause of death.[143] C/MEs have a statutory duty to file an autopsy report, as a certified written record of their examinations, when investigating certain types of deaths, such as when a death appears unexplained, violent, unusual or suspicious, or when a body is mysteriously found.[144] The autopsy report functions as an official, in-depth report of the cause of death. The C/MEs are required to draft these reports "for the welfare of society and in the interest of public justice."[145]

III. AN ANALYSIS OF LEGISLATIVE AND JUDICIAL RESPONSES TO PUBLIC DEMANDS FOR DEATH RECORD ACCESS: CONFLICTING LAWS AND RECOMMENDATIONS FOR REFORM

Members of the public may wish to access government files that document individual deaths, for numerous reasons, and their document requests raise an overarching legal question that looms over the government's entire death investigation process: should the public have access to records which document and investigate an individual's death? Historically, death records, particularly death certificates and autopsy reports, were open to the public for inspection. In recent years, jurisdictions have split in their approaches, with some continuing to provide open access, others blocking public access entirely, citing privacy concerns, and still others releasing or withholding requested death records after weighing the particular public benefits and privacy interests pertinent to each request.

This Part explores the tension between public demands to access, through freedom of information act requests, government agency records that address an individual's death and the privacy rights afforded to the decedent and his or her family. Focusing on public access to death certificates and autopsy reports, this Part analyzes legislative and judicial responses to public access demands for these types of records, and rec-

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142 An autopsy is "the systematic external and internal examination of a body to establish the presence or absence of disease by gross and microscopic examination of body tissues." STRENGTHENING FORENSIC SCIENCE, *supra* note 107, at 248. In addition to determining the cause and manner of death, autopsies are conducted to "collect medical evidence that may be useful for public health or the courts; and develop information that may be useful for reconstructing how the person received a fatal injury." *Id.*

143 *See* Michele Goodwin, *Rethinking Legislative Consent Law?*, 5 DEPAUL J. HEALTH CARE L. 257, 272 n.71 (2002) (listing typical components of autopsy statutes).

144 Additional examples include all deaths where criminal violence appears to have taken place, suicides, deaths following an unlawful abortion, deaths related to occupational illness or injury, death in any correctional facility or mental health institution, death due to poison or substance abuse, accidents. *See, e.g.*, MASS. GEN. LAWS ch. 38, § 3 (2011) (defining circumstances requiring notification of medical examiner).

145 LeJeune v. Causey, 634 So. 2d 34, 37 (La. Ct. App. 1994).

ommends particular reforms to reshape the current set of death record access laws, so that these laws more effectively serve the public interest.

A. *Public Access to Death Certificates*

1. Death Certificate Access: Legislative Treatment

State public health laws govern the maintenance of death certificates as part of a larger vital records system.[146] Every state has a set of laws that controls the form, content, use and accessibility of any death certificates generated.[147] This area of jurisprudence is uniquely state-based, as the federal government does not issue death certificates.[148] When crafting and maintaining its vital records system, each state inevitably faces the issue of access and must decide whether to treat death certificates as either public records that are open to inspection and copying under its freedom of information law, or as confidential records that are off-limits to the general public.

Historically, many states began officially issuing death certificates in the 19th century,[149] and for decades thereafter, the states generally treated death certificates as public records that were open for the public to inspect and receive copies at the local county clerk's office.[150] This practice was part of a common law right to inspect public documents.[151] As states began to ratify freedom of information acts, the long-time practice of granting public access to death certificates harmonized with the government transparency principles inherent in the public access laws.

Beginning roughly in the 1970s,[152] a growing number of states enacted laws that restrict access to death certificates and other vital records

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146 *See* MD. CODE ANN., HEALTH-GEN. §§ 4-201 to 212 (LexisNexis 2011) (exemplifying a set of laws that governs a state's vital records system).

147 *See* MD. CODE ANN., HEALTH-GEN. § 4-212 (LexisNexis 2011) (exemplifying statutory law governing death certificates).

148 CTR. FOR DISEASE CONTROL & PREVENTION, INDICATORS FOR CHRONIC DISEASE SURVEILLANCE (Sept. 10, 2004) ("In the United States, state laws require death certificates to be completed for all deaths . . . .").

149 *See, e.g.*, KING COUNTY ARCHIVES, *Historical King County Death Records* (Dec. 1, 2011), http://www.kingcounty.gov/operations/archives/vital/death.aspx; MISSOURI SECRETARY OF STATE, *Missouri Vital Records*, http://www.sos.mo.gov/archives/resources/bdrecords.asp (last visited Apr. 9, 2012).

150 *See* State v. Pabst, 121 N.W. 351, 360 (Wis. 1909) ("A death certificate . . . is made a public record . . . . [and] [i]ts contents are published to the world and are no longer treated as privileged."); Robinson v. Supreme Commandery, 77 N.Y.S. 111, 144 (N.Y. App. Div. 1902) (death certificates are made public by statute); *see also* 88 Op. N.H. Att'y Gen. 39, 1988 N.H. AG LEXIS 24, at *4 (Aug. 16, 1988) ("In New Hampshire, death certificates have long been subject to inspection and copying for legitimate purposes.")

151 *See* Home News v. State, Dep't of Health, 677 A.2d 195, 198 (N.J. 1996) (reviewing the common-law right to inspect public documents and its application to death certificates).

152 *See, e.g.*, Eugene Cervi & Co. v. Russell, 519 P.2d 1189, 1190 (Colo. 1974) (holding that Colorado law permits the release of a death certificate only to qualified individuals); State v. Jacobus, 348 N.Y.S.2d 907, 913 (Sup. Ct. 1973) (noting that under New York law, the

by removing them from the public's reach.[153] Under these laws, only certain categories of individuals, such as the deceased's next-of-kin, may access a given death certificate on file with the state.[154] Many state legislatures have provided vague justifications for these laws through proclamations that they enacted the laws "to protect the integrity of vital records, to insure their proper use, and to insure the efficient proper administration of the system of vital statistics."[155] Other states have explained more directly their reasons for enacting the laws, positing that the laws are to "provide for adequate standards of security and confidentiality of vital records."[156]

Presently, state legislatures take three differing approaches to enabling public access to death certificates: they provide full, partial, or no access to the public. Approximately ten states (open-access states) continue to grant full public access to death certificates, disclosing the certificates in their entirely.[157] These open-access states view access to death certificates as a right held by the general public, pursuant to specific statutory decree[158] and reinforced through state freedom of information legislation.[159] The open-access states treat death certificates as public records and require their disclosure upon request, as directed by the state freedom of information laws and their underlying, open government public policies.[160]

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issuance of copies of death certificates is "limited to those showing some interest entitling them to receive such documents").

153 *See* Yeste v. Miami Herald Pub. Co., 451 So. 2d 491, 492 (Fla. Dist. Ct. App. 1984) (holding that FLA. STAT. § 382.35(4) (1983) prohibits public access to certain portions of death certificates); *see also* 91 Op. Ky. Att'y Gen. 25, 1991 Ky. AG LEXIS 25, at *3 (Feb. 8, 1991) ("Until recently, birth and death certificates . . . have been considered public records which were open for public inspection . . .").

154 *See, e.g.*, N.H. REV. STAT. ANN. §5-C:9 (2012) (explaining that death certificates may only be released to applicants with a "direct and tangible interest" in the document).

155 IOWA CODE § 144.43.1 (2011). *See also* ALA. CODE § 22-9A-21 (2011); OKLA. STAT. tit. 63 § 1-323.A (2012); R.I. GEN. LAWS § 23-3-23(a) (2012); VA. CODE ANN. § 32.1-271.A (2011).

156 TENN. CODE ANN. § 68-3-205(a)(2) (2011). *See also* DEL. CODE ANN. tit. 16, § 3110(a) (2011); OR. REV. STAT. § 432.121(1) (2009).

157 *See* CAL. CIV. PROC. CODE § 130(h) (West 2012) (death certificates are publicly accessible documents); GA. CODE ANN. § 31-10-25(f) (2011) (same); MICH. COMP. LAWS § 333.2882(c) (2012) (same); MONT. CODE ANN. § 50-15-121(4) (2011) (same); NEV. REV. STAT. § 440.650.1 (2011) (same); N.C. GEN. STAT. § 130A-99(a) (2011) (same); OHIO REV. CODE ANN. § 3705.23(A)(1) (2012) (same); S.D. CODIFIED LAWS § 1-27-1.5(2) (2011) (same); WASH. REV. CODE § 70.58.104(1) (2012). *See also* WISCONSIN DEPARTMENT OF HEALTH SERVICES, *Request for a Death Certificate* (Jan. 6, 2012), http://www.dhs.wisconsin.gov/vitalrecords/death.htm (proclaiming that a "copy of a death certificate is available to anyone who applies").

158 *See id.* (exemplifying statutory provisions specifically granting public access to death certificates).

159 *See, e.g.*, 2007 Op. Ga. Att'y Gen. 4 (July 11, 2007) (justifying state's death certificate access law as part of state open records act).

160 *See* Soc'y of Prof'l Journalists v. Sexton, 324 S.E.2d 313, 315 (S.C. 1984).

The partial-access approach grants public access only to the non-medical portions of the death certificates, shielding any medical information within the certificates under a privacy cloak. Approximately three states have adopted this bifurcated approach, withholding the death certificate's medical information by statute,[161] but disclosing the remaining information upon request through the states' freedom of information laws.[162] The partial-access states' reasoning is straightforward: medical information "represents sensitive and generally private information [that] [i]f made public, . . . could cause public embarrassment to the deceased's family."[163] States following this approach grant only certain family members, those with an interest in the decedent's estate, and their legal representatives the ability to view the confidential portions of a decedent's death certificate.[164]

The closed-access approach flatly prohibits public access to death certificates in their entirety. Over thirty states have adopted this approach by enacting statutes that specifically exempt death certificates from the state freedom of information laws.[165] These statutes, in effect, mechanically separate death certificates from other public records[166] by eliminating the possibility of obtaining a death certificate through the state freedom of information request process.[167] As in the partial-access approach, legislators adopting a closed-access approach have largely

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161 *See* FLA. STAT. § 382.008(6) (2012) ("All information relating to cause of death in all death . . . records . . . [is] confidential and exempt from [state public access laws]."); IND. CODE § 16-37-3-9 (2011) (opening to public inspection only non-medical information within death certificates); N.D. CENT. CODE, § 23-02.1-27 (2011) (providing that death records are confidential).

162 *See* FLA. STAT. § 382.025(2)(a) (2012) (permitting public access to non-medical portion of death certificates); IND. CODE § 16-37-3-9(b) (declaring death certificates' non-medical information "shall be open to public inspection"); N.D. CENT. CODE, § 23-02.1-27.2 (permitting public access to "informational death record[s]" that do not contain the decedent's cause of death).

163 Yeste v. Miami Herald Publ'g Co., 451 So. 2d 419, 494 (Fla. Dist. Ct. App. 1984).

164 *See* FLA. STAT. § 382.025(2)(a)(1) (listing categories of persons entitled to access confidential portions of death certificates); IND. CODE § 16-37-1-8(a) (2011) (listing determinations the local health officer must make before issuing a death certificate).

165 *See, e.g.*, TEX. GOV'T CODE ANN. § 552.115(a) (West 2012) (stating that death certificates are confidential records that are exempt from state's freedom of information requirements and consequently may not be disclosed to the public); CONN. GEN. STAT. § 7-51a(a) (2012) (providing that certain death records may be released to researchers and genealogists); UTAH CODE. ANN. § 26-2-22(1)(c) (LexisNexis 2012) (providing that copies of "vital records" are only issued to a party with a "direct, tangible, and legitimate interest").

166 *See infra* note 198 and accompanying text (defining "public record").

167 *See* Wharten, 63 Op. Md. Att'y Gen. 659, 666 (1978) (holding that state freedom of information law "cannot be used as a vehicle for disclosure of . . . death certificates where disclosure is not permitted under the particular statutory provisions applicable to them.").

cited confidentiality concerns as the impetus for enacting these restrictive laws.[168]

States following the closed-access approach have authorized only limited categories of eligible persons to inspect and receive copies of death certificates under procedures that exist outside of the state freedom of information system.[169] Closed-access statutes typically restrict death certificate access to specified "eligible parties"[170] or those who have "a direct and tangible interest"[171] in the certificate. Who qualifies as "eligible" to access a certificate or as having the requisite interest in the certificate varies considerably from state to state. Virtually all closed-access statutes deem spouses, children, parents, their legal representatives, and those with a court order to qualify,[172] but how far the statutes expand their definitions of qualified persons beyond these categories of people differs significantly among states.[173] Some states have explicitly granted the following groups of people and business entities access rights: grandchildren,[174] beneficiaries of the decedent's estate,[175] those who need access to a death certificate "for the determination or protection of their personal or property rights,"[176] and insurance companies, banks or hospitals with which the decedent had entered into business transactions.[177]

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168 *See supra* notes 155–56 and accompanying text (describing purpose of laws limiting access to death certificates).

169 *See* IDAHO CODE ANN. § 39-270 (2011) (delineating death certificate access procedures); ME. REV. STAT. tit. 22, § 2706 (2011) (same); *see also* Hannevig, AP 2010-0091, 2010 PA O.O.R.D. at 3 (Feb. 25, 2010) ("[T]he requested death certificate, a vital statistics record, is not publicly available through the [state's freedom of information law].").

170 CONN. GEN. STAT. § 7-51(a) (2012).

171 HAW. REV. STAT. § 338-18(b) (2011).

172 *See, e.g.*, OR. REV. STAT. § 432.121 (2011); TENN. CODE. ANN. § 68-3-205(d)(2)(D) (2011).

173 Statutes may vary widely in the number of qualified parties to which they will explicitly provide access. For instance, New York's death certificate access law, known as one of the strictest in the country, essentially permits access only to spouses, children, and parents of the deceased, and those with certain legal claims or a court order. *See* N.Y. PUB. HEALTH LAW § 4174.1(a)(2), (6)–(7) (McKinney 2012); *see also* William Heisel, *A Public Death: State Laws Hiding Death Certificates Can Hurt the Living*, REPORTING ON HEALTH (Dec. 12, 2011), http://www.reportingonhealth.org/blogs/2011/12/12/public-death-state-laws-hiding-death-certificates-can-hurt-living (commenting that New York "laws around death records are among the most restrictive in the country"). Minnesota, on the other hand, liberally allows access to anyone with a "tangible interest" in a requested death certificate, which by definition includes several different types of family members, those with certain personal or property rights, estate administrators, or any attorney who shows their bar license. *See* MINN. STAT. § 144.225(7)(a)(1), (3) (2011).

174 *See, e.g.*, N.J. ADMIN. CODE § 8:2A-2.1(a)(3) (2012).

175 *See* TENN. CODE. ANN. § 68-3-205(d)(2)(D)(iii).

176 DEL. CODE ANN. tit. 16, § 3110(b) (2011).

177 *See* ARIZ. ADMIN. CODE § R9-19-405(3) (2011).

Interestingly, a handful of states following the closed-access approach enacted statutory sunset provisions that dissolve any death certificate public-access restrictions, allowing public access to inspect and copy an individual's death certificate once a specified number of years elapse after that individual's death.[178] The specific number of years needed to release the certificates differs among states, as the mandated time periods across these sunset provisions vary from 25[179] to 40[180] to 50[181] to 75[182] to 100 years.[183] With such variation among sunset provisions, each state legislature's selection of the exact number of years for a sunset provision seems arbitrary. While the sunset provisions' statutory texts[184] and legislative histories[185] largely do not reveal the policy considerations underlying these provisions, this type of provision is likely a legislative compromise between the privacy concerns of decedents' families and the public's right to inspect public records.[186] Not all states following the closed-access approach have chosen to enact sunset provisions. Many flatly prohibit the public release of death certificates regardless of the age of the death certificate.[187]

2. Death Certificate Access: Judicial Treatment

Courts generally agree that expanding or restricting access to death certificates is fundamentally a legislative function.[188] They have held that legislatures have the power to confer rights upon the public to access death certificates, as well as the power to exempt the certificates from

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178 *See, e.g.*, ALA. CODE § 22-9A-21(f) (2011) (including sunset provision that releases death certificates to the public once 25 years elapse after the decedent's death); TEX. GOV'T CODE ANN. § 552.115(a)(2) (West 2012) (same).

179 *See, e.g.*, ME. REV. STAT. tit. 22, § 2706.7 (2011) (providing that death certificates become public records "25 years from the date of death").

180 *See* DEL. CODE ANN. tit. 16, § 3110(f) (deeming death certificates to be accessible to the public once "40 years have elapsed after the date of death").

181 *See, e.g.*, S.C. CODE ANN. § 44-63-84 (2011) (anyone may obtain a copy of a death certificate once 50 years elapse after the date of death).

182 *See* HAW. REV. STAT. § 338-18(e) (2011) (permitting anyone "working on genealogy projects" access to death certificates if 75 years have passed since the date of death).

183 *See* CONN. GEN. STAT. § 7-51a(a) (2012) (restricting access to death certificates less than 100 years old).

184 *See supra* notes 178–83 (listing examples of statutory provisions).

185 *See, e.g.*, SENATE APPROPRIATIONS COMM., FISCAL NOTE, S.B. 361, (Pa. 2011) (illustrating legislative history of statutory sunset provision enactment).

186 *See infra* Part III.A.3 (discussing the public interests involved in open access to death certificates).

187 *See, e.g.*, MISS. CODE. ANN. § 41-57-2 (2011) (lacking sunset provision in statute governing access to death certificates); MO. REV. STAT. § 193.255 (2012) (same); N.Y. PUB. HEALTH LAW § 4174 (McKinney 2012) (same).

188 *See, e.g.*, Soc'y of Prof'l Journalists v. Sexton, 324 S.E.2d 313, 314 (S.C. 1984) (restricting the class of persons who may access death certificates is a legislative function).

disclosure by statute and regulation.[189] Accordingly, courts have generally upheld statutes that provide full, partial, or no public access to death certificates as valid exercises of legislative authority[190] that do not give rise to any constitutional violation.[191]

When no particular statute governs the disclosure of death certificates, courts often find that the certificates are "public records maintained by a public body and are subject to [state] FOIA disclosure requirements."[192] At the same time, courts generally also uphold statutes and corresponding regulations[193] that place restrictions on the public's access to death certificates, finding that these laws create exceptions to the state freedom of information law's general duty to disclose.[194] Some courts recognize that the statutes prohibiting public access to death certificates "acknowledge the privacy interests of the [deceased's] family members."[195]

3. Statutes Restricting Access to Death Certificates Harm the Public Interest and Are in Need of Legislative Reform

The following sections analyze the public and privacy interests inherent in providing access to death certificates and demonstrate how access-prohibitive statutes clash with several public interest considerations. The sections also question whether the privacy concerns, which apparently underlie the access-prohibitive statutes, are in fact misplaced and/or unwarranted. Recommendations for substantive statutory revision, so that the death certificate access statutes more effectively serve the public interest, follow a critique of the competing interests underlying the current set of death certificate access statutes.

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189 *See* Shuttleworth v. City of Camden, 610 A.2d 903, 913 (N.J. Super. Ct. App. Div. 1992) ("An exception to access under [state FOIA] may also be established by statute and regulation . . . .").

190 *See* Yeste v. Miami Herald Publ'g. Co., 451 So. 2d 491, 492 (Fla. Dist. Ct. App. 1984) (upholding statute providing the public with partial access to death certificates); Justice v. Fuddy, 253 P.3d 665, 670–71 (Haw. Ct. App. 2011) (upholding statute providing no public access to death certificates); Swickard v. Wayne County Med. Exam'r, 475 N.W.2d 304, 326 n.48 (Mich. 1991) (acknowledging state statute provides full public access to death certificates).

191 *See* Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc., 379 So. 2d 633, 640–41 (Fla. 1980) (rejecting argument that a constitutional right of privacy prevents public disclosure of documents of a personal nature).

192 *Sexton*, 324 S.E.2d at 314. *See also* 88 Op. N.H. Att'y Gen. 39, 1988 N.H. AG LEXIS 24, at *1 (Aug. 16, 1988) (reviewing state court decisions).

193 *See* 12 VA. ADMIN. CODE 5-550-470 (2011) (example of a state regulation governing access to death certificates).

194 *See Fuddy*, 253 P.3d at 670–71 (examining statute that exempts public health records from state FOIA disclosure).

195 Ohio v. Watkins, No. 91-T-4555, 1991 Ohio App. LEXIS 6414, at *25 (Dec. 31, 1991).

a) Open-Access to Death Certificates Benefits the Public

One may argue that the content contained within death certificates is a private matter and that members of society might seek such information for nothing more than "idle curiosity."[196] This argument ignores the numerous ways in which the public benefits from open access to death certificates. For instance, statutes that provide full public access to death certificates: (1) harmonize with the principles underlying the freedom of information laws; (2) allow any interested party to inspect a set of death certificates in order to uncover instances of government wrongdoing; (3) permit relatives, friends, significant others, and anyone else close to the deceased to access a decedent's death certificate for emotional closure; (4) enable the media and other concerned parties to uncover specific instances of medical malpractice and other types of harmful health practices by analyzing information within death certificates; (5) allow any interested individual or group to research public health and safety trends based upon data collected from death certificates; and (6) permit individuals and groups interested in family ancestry to conduct genealogical research. The following sections explore these enumerated public benefits.

i) Open-Access Statutes Align with the Policies Motivating Freedom of Information Laws

First, open-access statutes align with the pro-transparency, open-government principles that motivate state freedom of information laws.[197] The public has a general right to inspect public records held by government agencies under these laws, and, under a straightforward FOIA-type analysis, death certificates are unmistakably public records. They are records maintained by local and state government agencies that officially memorialize the legal fact of an individual's death.[198]

More specifically, providing access to death certificates can inform citizens of "what their government is up to," which is the primary purpose of FOIA as interpreted by the Supreme Court.[199] For instance, access to death certificates can apprise the public of error rates and trends in death certificates completed by local coroners, medical examiners,

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196 *See* Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment*, 27 SEATTLE UNIV. L. Rev. 721, 740 (2004) (discussing "idle curiosity" arguments in public access disputes).

197 *See supra* Part I.A (discussing open-government policies that motivate FOIA laws).

198 *See, e.g.*, Wash. Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 905 (D.C. Cir. 1996) (defining a "public record" as "a government document created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived.").

199 U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

physicians employed by public agencies, and others acting in a public capacity.[200] Errors in death certificates are a prevalent issue nationally, with empirical studies demonstrating multiple errors in the majority of death certificates reviewed.[201] Common glaring errors include incomplete certificates, illegible handwriting, inscrutable abbreviations, and no specific cause of death entered.[202] Essentially any citizen without medical training could spot these common errors while reviewing a sample of requested death certificates.

Death certificate errors have significant consequences by creating inaccuracies in vital statistics reporting and in population-based research, which relies on vital statistics and plays a significant role in the allocation of public health resources.[203] Opening death certificates to the public may boost transparency and benefit society by enabling members of the public to inspect death certificates for errors and hold accountable any public officials who, in the performance of their duties, routinely create errors in the death certificates they complete. Such beneficial opportunities are not present in states that have prohibited public access to death certificates.

ii) Open-Access Statutes Help Provide Closure to Anyone with a Close Relationship to the Deceased

Society also benefits from open-access to death certificates by allowing any relative or significant other to access the deceased's death certificate. Federal and state government agencies recognize that viewing a death certificate provides important personal benefits by providing

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200 *See supra* Part II.A (discussing the role of physicians, coroners, and medical examiners in completing death certificates).

201 *See* Bobbi S. Pritt et al., *Death Certification Errors at an Academic Institution*, 129 ARCHIVES OF PATHOLOGY & LAB. MED. 1476–79 (2005) (identifying multiple errors within 82% of a death certificate sample and concluding that death certificate errors are common); Stephen J. Cina et al., *Accuracy of death certification in two tertiary care military hospitals*, 164 MIL. MED. 897–899 (1999) (finding high prevalence of errors in sample of death certificates); Adil T. Degani et al., *The Effect of Student Training on Accuracy of Completion of Death Certificates*, 14 MED. EDUC. ONLINE. 17 (2009), http://med-ed-online.net/index.php/meo/article/download/4510/4690 (noting that "[a]ccurate completion of death certificates is generally poor.").

202 *See* Pritt, *supra* note 201, at 1476 (describing common mistakes within death certificates); Vermont Dept. of Health, Examples of Common Mistakes on Death Certificates, http://healthvermont.gov/hc/death_certificate/mistakes.htm (last visited Apr. 9, 2012) (same).

203 Pritt, *supra* note 201, at 1476 (explaining how death certificates contain "epidemiologic data that are essential for formulating vital statistics and allocating public health resources.").

the deceased's loved ones in many instances with emotional closure, peace of mind, and documentation of the cause of death.[204]

Most closed-access statutes explicitly provide only certain categories of family members with access rights, and the statutes usually do not include siblings, grandparents, grand-children, great-grand-children, aunts, uncles, nieces, nephews, cousins, step-parents or step-children in their seemingly artificial access categories.[205] Accordingly, the closed-access statutes treat these family members like any other member of the public by prohibiting them in the ordinary course from viewing or receiving copies of their deceased relative's death certificate. Moreover, if the decedent was in a relationship with an unmarried partner, the closed-access statutes almost never grant to the unmarried partner explicit access rights to the death certificate.[206] Ironically, the bonds that had been developed by the deceased with these extended family members and significant others may be equally strong or stronger than those with the more traditional family members, such as spouses, parents and children, who often have special access rights via the closed-access statutes.

The delineated relationship access categories in many closed-access statutes and the unfair treatment they create raise significant policy concerns. If the driving purpose behind closed-access statutes is to protect the family's privacy interests, then it is unclear why many closed-access states categorically exclude certain family members from death certificate access while including others. Equally unclear is the process by which state legislators settled upon the relationship category barrier distinctions. Such issues are absent in open-access jurisdictions, where the states have created no barriers to access, and where anyone may experience emotional closure through receiving a death certificate.

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204 *See* Ctr. for Disease Control and Prevention, *Completion of Death Certificates in the Aftermath of a Hurricane*, http://www.cdc.gov/nchs/data/dvs/hurricane_certification.pdf (last visited Apr. 9, 2012); State of Oklahoma, *Importance of Death Registration*, at http://www.ok.gov/health/Data_and_Statistics/Center_For_Health_Statistics/Training_&_Materials/Importance_of_Death_Registration.html (last visited Apr. 9, 2012).

205 *See supra* Part III.A.1 (describing relationship categories in closed-access statutes). *See also* DEL. CODE ANN. tit. 16, § 3110(b) (2003) (permitting spouse, children, parents or guardians with death certificate access rights); TENN. CODE ANN. § 68-3-205(d)(2)(D)(i) (2011) (permitting spouse, children, parents, or other next-of-kin with death certificate access rights).

206 Two exceptions are Maine and New Jersey, which have closed-access statutes that permit death certificate to registered domestic partners, among others. *See* ME. REV. STAT. ANN. tit. 22, § 2706.5 (2004); N.J. ADMIN. CODE § 8:2A-2.1(a)(3)(iii) (2012). Many people in closed-access jurisdictions have shared their stories in public forums of being denied access to their deceased partner's death certificate. *See, e.g.*, Tara Parker-Pope, *How Hospitals Treat Same-Sex Couples*, N.Y. TIMES WELL BLOG (Sept. 14, 2012, 8:06 PM), http://well.blogs.nytimes.com/2009/05/12/how-hospitals-treat-same-sex-couples/ (noting experience of individual being denied his deceased same-sex partner's death certificate).

iii) Open-Access Statutes Bring Additional Benefits to the Public

Open-access statutes benefit the public interest in additional ways. Because these statutes permit anyone to inspect death certificates, journalists, media organizations, and motivated members of the public in open-access jurisdictions have the ability to detect, investigate, and expose specific instances of medical malpractice and other types of harmful and unethical health practices by examining individual death certificates. Such examinations have led to "countless investigative stories in the public interest."[207] One journalist pointed out that, due to California's open-access statute, he obtained death certificates that led him to spot and reveal to the public several news stories covering physician malpractice and discipline, painkiller abuse, medical errors, and organ trafficking.[208] For these reasons, obtaining death certificates as investigative tools could ultimately raise public awareness on harmful health practices and elicit changes in health policy. Such opportunities are not present in states that adopted closed-access statutes.[209]

Open-access statutes also allow any person, organization, or institution interested in broad public health and safety trends to conduct research and potentially advance scientific knowledge in these areas by using information from death certificates as data sources. Death certificates offer a wealth of data for public health researchers to analyze,[210] as the certificates contain medical information regarding the causes and manner of death, as well as a host of demographic information.[211] Some closed-access statutes permit researchers to use death certificates as data sources too, but a subset has imposed overly restrictive conditions on the

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207 Heisel, *supra* note 173; *see also* Hannah Bergman, *Unearthing an Unusual Privacy Battle*, 33 THE NEWS MEDIA & THE LAW, 19 (2009) (stating that for journalists, death certificates "have been crucial in piecing together stories; the Omaha World-Herald used them in its investigation of coroner training.").

208 *See* Heisel, *supra* note 173; *see also* Chelsea Conaboy, *Private lives, public deaths?*, BOSTON (Sept. 14, 2012, 20:12 PM) http://www.boston.com/2011/12/12/clipboard/2HlN7IYf4LOggEopD4YPBL/story.html (discussing how death certificate access may be valuable in addressing the widespread problem of deaths due to medical errors committed by health care professionals).

209 As an example of the difficulties encountered by investigators attempting to obtain death certificates in closed-access jurisdictions, *see* Chris Dickerson, *Writer Sues Cabell Officials over Access Records*, WEST VIRGINIA RECORD (Jan. 11, 2012), http://wvrecord.com/news/240879-writer-sues-cabell-officials-over-access-to-records (describing freelance journalist's attempts to compel a death certificate release of a woman who died at the hands of a physician with an extended history of malpractice).

210 E.M. O'Sullivan, *Using Epidemiological Surveillance Systems and Routine Data Sets to Study Place of Care and Place of Death*, 25 PALLIATIVE MED. 94 (2011) ("[D]eath certificates have a long tradition in public health research either as primary data sources or in combination with administrative databases, chart reviews, interviews and questionnaires.").

211 *See supra* Part II.A (discussing the form and content of death certificates).

type of research being conducted[212] and on the types of investigators permitted to conduct the research.[213] These overly restrictive conditions within certain closed-access statutes obstruct potentially beneficial research.[214] Other closed-access statutes plainly do not include researchers in their list of approved persons who have special access to death certificates.[215] The closed-access statutes that prohibit research access or place unnecessary restrictions upon investigators' abilities to conduct research hinder a process that could otherwise produce useful scientific findings for the benefit of society.[216]

Finally, open-access statutes carry the social advantage of allowing families, historians, and other interested parties to conduct genealogy[217] research by freely examining death certificates for ancestry information. Genealogical research, the tracing of ancestry, provides substantive benefits to society; as one court explained:

> "The 'benefits' to be derived from . . . genealogical activity are highly intangible, but nevertheless real. Self-knowledge can only lead to greater family stability, benefiting both the individual and society, and a greater appreciation of the common heritage shared by all Americans."[218]

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212 Some state-imposed research restrictions are justifiable, though others seem superfluous. *See, e.g.*, LA. REV. STAT. ANN. § 40:41(D)(2)(a) (2012) (putting forth a vague standard that the research must be in "the best interest of the state or the public health of its citizens"); ILL. ADM. CODE tit. 77, § 500.70(c) (2012) (listing conditions by which researchers must comply, including that the "research will not duplicate other research already underway using the same data"); WASH. ADMIN. CODE § 246-490-030.4(b) (2011) (permitting state agency to deny research requests if the agency deems the request to be without merit).

213 *See, e.g.*, LA. REV. STAT. ANN. § 40:41(D)(2)(b) (putting forth vague standard that a researcher must be "well qualified to conduct research"); ILL. ADM. CODE tit. 77, § 500.70(c)(5) (setting forth similar restrictions).

214 For an example of an individual's request for death certificates in order to carry out legitimate research efforts, *see* Charles v. Office of the Armed Forces Med. Exam'r, 730 F. Supp. 2d 205, 208 (D.D.C. 2010) (describing thwarted efforts of retired veteran and vice-chair of "Soldiers for Truth" non-profit organization to obtain death certificates of fallen soldiers with bullet wounds in torso areas in order to conduct research investigating the effectiveness of U.S. military's body armor issued to service members). If a person unaffiliated with a government or university research enterprise, such as the plaintiff in *Charles*, attempted to obtain death certificates from state vital records offices, virtually all vital records offices in closed-access jurisdictions with limited research exemptions would reject the request due to the lack of qualifications.

215 *See, e.g.*, MISS. CODE. ANN. § 41-57-2 (West 2007) (research purposes not included in death certificate access statute's identification of parties with access permission).

216 For an example of a study that has produced useful scientific findings through death certificate data analysis, *see* Abdirahman Mahamud et al., *Herpes Zoster-Related Deaths in the United States: Validity of Death Certificates and Mortality Rates, 1979-2007*, 55 CLINICAL INFECTIOUS DISEASES 960 (2012).

217 Genealogy can be defined as "the study of families generationally." *See, e.g.*, Gristede's Foods, Inc. v. Unkechuage Nation, 660 F. Supp. 2d 442, 447 (E.D.N.Y. 2009).

218 Callaway Family Ass'n v. Comm'r, 71 T.C. 340, 342 (1978).

Genealogy can be a hobby for some[219] and a profession for others,[220] though all engaging in genealogical research will likely turn to death certificates and other vital records to carry out a significant amount of their work. Indeed, government agencies have acknowledged that genealogists usually need to inspect death certificates in order to trace family lineage adequately.[221]

Closed-access statutes generally prevent genealogy researchers from accessing death certificates, unless a requester otherwise meets one of the statutes' limited access categories, such as being the next-of-kin.[222] If the closed-access statute contains a sunset provision that releases death certificates to the public after a certain number of years, the genealogy researcher may need to wait for decades until the agency releases the certificate for inspection.[223] Such issues are avoided in open-access jurisdictions.

b) Examining the Privacy Concerns Inherent in Releasing Death Certificates to the Public

Legislatures and the judiciary agree that the disclosure of information contained within death certificates implicates privacy interests,[224] and state government officials indicate that privacy concerns have propelled the enactment of closed-access statutes.[225] While these privacy concerns are oft-referenced, substantive analysis of these concerns as they pertain to death certificates is absent in statutory text, judicial opinions and legal scholarship.[226] Determining whose privacy interests are

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219 *See, e.g.*, *Starting Your Family Tree*, N.Y. STATE LIBRARY, http://www.nysl.nysed.gov/genealogy/famtree.htm (last visited Aug. 28, 2012) (providing an introduction to genealogy research as a hobby).

220 *Gristede's Foods*, 660 F. Supp. 2d at 447 (owner of genealogy consulting business and former federal agency genealogy researcher providing testimony as genealogy expert witness).

221 *See* 87 Op. Ind. Att'y Gen. 6, 1987 Ind. AG LEXIS 17, at *1 (July 24, 1987) ("The records generally required in family geneology [sic] research are birth, adoption and death records."); *Genealogy Requests*, S.D. HEALTH DEP'T, http://doh.sd.gov/vitalrecords/genealogy.aspx (last visited Aug. 28, 2012) (death certificates and other records available for genealogical research).

222 *See supra* Part III.A.1 (describing closed-access statutes' relationship categories). Some closed-access statutes contain provisions that grant limited access to death certificates for genealogical purposes. *See, e.g.*, DEL. CODE ANN. tit. 16, § 3110(b) (2011) (granting death certificate access to those who demonstrate that the record is needed "for genealogical purposes").

223 *See supra* Part III.A.1 (detailing the nature and function of sunset provisions within certain closed-access statutes).

224 *See supra* notes 163, 168 and accompanying text, (describing privacy-related purpose of laws limiting access to death certificates).

225 *See* 188 Op. Ariz. Att'y Gen. 130, 1988 Ariz. AG LEXIS 127, at *11–12 (Dec. 30, 1988); 1949 Op. N.M. Att'y Gen. 36, 1949 New Mexico AG LEXIS 30, at *3 (April 26, 1949).

226 The closed-access statutory text does not address the nature of the privacy interests inherent in a death certificate's public release. *See supra* notes 154–55 and accompanying

implicated in a death certificate's release, and the exact nature of those interests, requires exploration.

Common law precedents have firmly established that the deceased have no privacy rights.[227] Litigation parties in the past have attempted to persuade courts that an agency's death certificate disclosure impinges upon the deceased's privacy rights, but courts have uniformly dismissed this argument.[228] The overwhelming weight of authority applying common law rights of privacy[229] holds that such rights do not survive one's death,[230] and that a decedent's family cannot enforce a privacy right on the decedent's behalf.[231]

Courts in several jurisdictions recognize that, while the information within death certificates generally refer to the decedents only, the decedents' family members have their own set of privacy interests pertaining to their feelings towards, and memories of, the deceased.[232] Outside access to death certificates creates tension with these interests due to the sensitive medical information contained within the certificates, particularly the "cause of death" section. The sensitive information, if disclosed, "might cause embarrassment and unwanted public attention to the

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text. Judicial opinions occasionally reference privacy considerations in passing when addressing public disclosure of death certificates. *See, e.g.*, Yeste v. Miami Herald Publ'g Co., 451 So. 2d 491, 494 (Fla. Dist. Ct. App. 1984); Schoeneweis v. Hamner, 221 P.3d 48, 52–53 (Ariz. Ct. App. 2009). Analysis of the topic as it pertains to death certificates has been largely unaddressed in legal scholarship.

227 *See, e.g.*, Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2019 (2010) (discussing common law precedent holding that the deceased have no privacy rights); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 664 (1991) (noting that any common law privacy right dies with the person).

228 *See* Tri-State Publ'g Co. v. City of Port Jervis, 138 Misc. 2d 147, 150–51 (N.Y. App. Div. 1988) (dismissing respondent's argument that the deceased possess privacy rights); Soc'y of Prof'l Journalists v. Sexton, 324 S.E.2d 313, 315 (S.C. 1984) (same).

229 The doctrine of common-law privacy protects information that is: (1) highly intimate or embarrassing, such that its disclosure would be highly objectionable to a reasonable person; and (2) of no legitimate interest to the public. *See* Indus. Found. v. Texas Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976).

230 *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 6521 (1965) ("Except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."); Hendrickson v. California Newspapers, Inc., 48 Cal. App. 3d 59, 62 (Cal. Ct. App. 1975) ("[The] right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded . . . . Further, the right does not survive but dies with the person.").

231 *See, e.g.*, Swickard v. Wayne Cnty. Med. Exam'r, 475 N.W.2d 304, 312 (Mich. 1991) ("A deceased person loses the right of privacy, and the right cannot be asserted by the next of kin."); Fretz v. Anderson, 300 P.2d 642, 646 (Utah 1956) ("[T]he right of privacy is a personal one which in the absence of statute, dies with the person to whom it is of value and cannot be claimed by his estate or next-of-kin.").

232 *See* Yeste v. Miami Herald Publ'g Co., 451 So. 2d 491, 494 (Fla. Dist. Ct. App. 1984); Meriden Record Co. v. Browning, 294 A.2d 646, 649 (Conn. Cir. Ct. 1971); Ohio *ex rel.* Vindicator Printing Co. v. Watkins, No. 91-T-4555, 1991 Ohio App. LEXIS 6414, at *24–25 (Ohio Ct. App. Dec. 31, 1991).

relatives of the deceased."[233] Case law cites examples of such sensitive information, as when a death certificate notes that the deceased committed suicide or died from a drug overdose or a sexually transmitted disease.[234] In the words of a former New Mexico Attorney General, "[A]lcoholic or paretic death may be a fact, but no public official should be required to make it a published fact."[235]

Closed-access statutes keep death certificates and their attendant sensitive medical information confidential, which "spare[s] the feelings of the deceased's family."[236] Otherwise, the family risks uncomfortable situations such as confrontation and embarrassment from outsiders' recitation of the deceased's cause of death. Such confrontations could easily intrude upon the family's grieving process. The family's interest in grieving the deceased free from disrespectful public intrusion appears to be the underlying crux of the family's privacy concerns in the death certificate disclosure framework. The U.S. Supreme Court acknowledged this interest in a separate context, noting that family members have a stake in mourning their dead and opposing unwarranted public intrusion that may degrade the family's respect for the deceased.[237] Closed-access statutes protect this interest against harm that could result from the death certificate's release to individuals who have improper motives and lack some direct or tangible interest in the death certificate.

In states with open-access statutes, it is unclear how frequently spouses and other family members of the deceased face harassment, stigmatization, and other types of intrusion from outsiders after they learn sensitive medical information from the deceased's death certificate. Case law references to this phenomenon—unwanted public intrusion resulting from open death certificate access—are highly uncommon and are generally discussed in only hypothetical terms.[238] Furthermore, there appears to be neither organized public movement within states with open-access statutes to restrict access to death certificates, nor any news

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233 Galvin v. Freedom of Info. Comm., 518 A.2d 64, 71 (Conn. 1986).

234 *See Yeste*, 451 So. 2d at 494; *Meriden Record Co.*, 294 A.2d at 648 (referencing commissioner of health's claim that "syphilis, miscarriages, cancer, tuberculosis, alcoholism . . . [are] matters which at least some people would feel constitute an invasion of privacy").

235 1949 Op. N.M. Att'y Gen. 36, 1949 N.M. AG LEXIS 30, at *3–4 (April 26, 1949).

236 *Yeste*, 451 So. 2d at 494.

237 *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004) ("Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that . . . tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.").

238 *See, e.g.*, *Yeste*, 451 So. 2d at 494 ("If made public, this information could cause public embarrassment to the deceased's family, as, for example, where the deceased has died from an illegal drug overdose, by suicide, or from a socially distasteful disease such as venereal disease.").

articles or other published commentary that substantively criticizes these states for their open-access policies.[239]

Some suggest that the privacy concerns touted as the principal justification behind the closed-access statutes' enactment are disingenuous, in that the real resistance behind releasing death certificates to the public is the administrative burden it creates for state agencies.[240] When a state agency faces multiple requests for death certificates, responding to the requests consumes employee time and drains resources. State governments' motivation to suppress access to death certificates in order to mitigate administrative burdens seems plausible, given that multiple sources have indicated that death certificates are among the most commonly sought-after records in freedom of information requests.[241] In a 1991 Attorney General Opinion, the Kentucky Attorney General confirmed these suspicions to some degree:

> In the past, thousands of researchers have visited the Office of Vital Statistics in order to inspect various birth and death records stored there. Due to the overwhelming number of requests, meeting the various requests to inspect the birth and death records has sometimes presented a burden to the employees of the Office of Vital Statistics. Apparently in response to some of the problems incurred at the Office of Vital Statistics, the 1990 Kentucky General Assembly enacted [a closed-access statute] . . . which . . . limited public access to vital records. The sponsors of the new law apparently intended to . . . limit what the Cabinet for Human Resources perceived as an overwhelming burden in complying with various researchers' requests to inspect birth and death records.[242]

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239 Such conclusions were drawn after the author conducted a set of online searches on the topic. To the extent that family privacy concerns surround death certificate open-access statutes, those concerns do not appear to be publicly discussed in a widespread manner.

240 *See Yeste*, 451 So. 2d at 494 (addressing defendant's argument that administrative cost-efficiency purpose lies behind partial-disclosure statute passage); *In re* Rosier v. Snohomish Cnty, 717 P.2d 1353, 1367 (Wash. 1986) (relaying investigation team's account where "[o]fficials denied us access to the [death] certificates, first on privacy grounds, later contending that the staff lacked the time which would be required to get us the information we sought.").

241 Kyle Niederpruem, *Audit by Newspapers Finds Indiana Officials Routinely Violate the Law*, EVANSVILLE COURIER (Feb. 22, 1998), http://www.nfoic.org/audit-by-newspapers ("Among the most sought records are death certificates."); *Family History Driving Much of Citizens' Public Records Searching*, OREGON LIVE (March 25, 2008), http://www.rcfp.org/node/96454 (finding that death certificates are among the "most frequently sought by the average citizen").

242 91 Op. Ky. Att'y Gen. 25, 1991 Ky. AG LEXIS 25, at *3–4 (Feb. 8, 1991).

If certain states have restricted public access to death certificates due to the administrative burden that access creates, citizens of those states ultimately suffer. At minimum, such a possibility should increase skepticism when state officials cite family privacy concerns as the principal justification for maintaining closed access statutes.

4. Balancing the Public and Private Interests Inherent in Death Certificate Access: A Case for Legislative Reform

An examination of the benefits and shortcomings of partial- and closed-access statutes, currently adopted by a majority of states, reveals that the unnecessarily restrictive statutes should be substantively amended. The statutes contravene freedom of information laws and their effects hamper broad areas of social activity that would otherwise benefit the public.[243] Accordingly, as statutory amendment is a legislative function, state legislatures should revise these statutes so that they more effectively serve the public interest. Specific recommendations for statutory revision follow a critique of the statutes that makes clear the statutes' limited benefits and multiple shortcomings.

As a foundational matter, death certificates meet the requirements for state freedom of information disclosure, putting aside any statutory exemption applications, because they qualify as "agency records."[244] They are records maintained by local and state government agencies that officially memorialize the legal fact of individuals' deaths.[245] Thus, the central issue surrounding death certificate access is whether the immediate family's privacy considerations should exempt the certificates from disclosure and thereby trump the public policy that public records are open for reasonable inspection.

Structurally, the partial- and closed-access statutes address this central issue through blanket per se non-disclosure, which offends the transparency principles behind the freedom of information laws. Closed-access statutes withhold the entire death certificate from the public, and partial-access statutes withhold the cause of death portion, for all certificates, purportedly in order to protect the privacy concerns of those families who might face public embarrassment stemming from sensitive medical information contained within the deceased's death certificates.

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243 *See supra* Part III.A.3 (analyzing how partial- and closed-access statutes harm the public interest).

244 *See supra* Part I.B (explaining that state freedom of information laws apply to state agency records).

245 *See, e.g.*, Wash. Legal Found. v. U.S. Sentencing Comm'n, 89 F.3d 897, 905 (D.C. Cir. 1996) (defining a "public record" as "a government document created and kept for the purpose of memorializing or recording an official action, decision, statement, or other matter of legal significance, broadly conceived."); *see also supra* note 157 (providing examples of states that treat death certificates as public records).

Hence, the statutes embody a regulatory policy of general non-disclosure in order to protect isolated instances where sensitive medical information is present. For this reason, the general non-disclosure policy is inconsistent with the balancing approach adopted in FOIA jurisprudence, which evaluates the public and privacy interests on a case-by-case basis before deciding whether to disclose.[246] The partial- and closed-access statutes' blanket non-disclosure approach is a weak exercise of the state legislatures' rulemaking authority.

The special, category-based access to death certificates that partial- and closed-access statutes provide to the immediate family—those who "have a direct and tangible interest"[247] in the certificates—and others who meet specific relationship categories similarly offends freedom of information laws and broader public policy principles. For example, federal and state freedom of information laws generally permit any person to request government agency records, for any public or private purpose, without the need to explain or justify the reason for the request, because the requester's identity generally has no bearing on the merits of the request.[248] By forcing requesters to identify their relationship with the deceased, the partial- and closed-access statutes' relationship categories clash with this nondiscriminatory aspect of the freedom of information laws.

In effect, limiting death certificate access to a select few, based upon artificially narrow categories, turns away certain family members, friends, public health investigators, researchers, and others with legitimate interests in the certificates, which in turn rails against the public interest on multiple levels. For instance, restricting the public's access to death certificate access may: (1) allow certain types of improper government conduct to go unnoticed; (2) hinder investigations of harmful and unethical health practices; (3) encumber certain types of beneficial research activities; (4) prevent many from fully tracing family ancestries; and (5) block many people close to the deceased from retrieving information that will assist their grieving process.[249]

Moreover, the statutes unfairly assume that the deceased's immediate family, along with any others who meet the statutes' relationship categories, are the only parties who are legitimately affected enough by the decedent's passing to warrant death certificate access for closure, peace of mind, and other coping-based purposes. The following example from the New York Times' Ethicist column highlights the fallacy behind the

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246 *See supra* Part I.A.2 (describing balancing tests under FOIA jurisprudence).

247 *Supra* note 171 and accompanying text.

248 *See supra* Part I.A.1 (explaining role of requester identity in FOIA requests).

249 *See supra* Part III.A.3 (describing ways in which open-access statutes benefit the public).

statutes' assumption. The Times' columnist gave this advice to a reader who inquired whether it would be "wrong" for him to check his friend's death certificate, given that his late friend's widow gave evasive answers to his question as to whether his friend had been suddenly ill, leaving the reader feeling unsettled as to his friend's death:

> It might vex the widow to discover that you acquired this information, but that need not deter you. Your long friendship with her late husband has its own claims. It is a natural and honorable thing to want to know how a close friend died. And it is estimable in itself to gain a deeper understanding of the world, including knowledge that is steeped in sadness. Even if your friend himself had wished to conceal these bleak details, you could seek them now: He is beyond being harmed by your doing so. The dead have no claims to privacy, something reflected not only in ethics but also in law . . . .[250]

States should permit anyone affected by an individual's death to inspect the death certificate to help with the grieving process, but this possibility is absent in states that have adopted partial- and closed-access statutes.

This Article acknowledges the release of particularly sensitive medical information that death certificates may contain as a legitimate area of concern. In situations where such information is present, the immediate family's privacy interest to avoid unwanted public attention, potential embarrassment and harassment carries weight. However, the problematic manner in which the partial- and closed-access statutes protect this interest has created a significant burden at the public's expense, for the reasons discussed above. These statutes could be revised in the following manner to mitigate their detrimental effects.

Perhaps the simplest and most effective reform for state legislatures to adopt would be to convert partial- and closed-access statutes into open-access statutes by enabling the release of any death certificate in its entirety to anyone who submits a freedom of information request. Enacting this change eliminates the access barriers extended family members, friends, public health investigators, and researchers, among others, currently face. The revised statutes would also harmonize with the strong government transparency principles inherent in federal and state freedom of information laws.

While this approach would allow anyone to access potentially sensitive medical information contained within a death certificate, merely ac-

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250 Randy Cohen, *Cause of Death?*, N.Y. TIMES (Nov. 12, 2006), http://www.nytimes.com/2006/11/12/magazine/12wwln_ethicist.html.

cessing the information does not necessarily create the feared privacy intrusion; the third party's disrespectful accosting of a family member does. If third parties inspect a death certificate and in turn intrude upon the privacy of the deceased's family members, those family members may have potential recourse through invasion of privacy causes of action against the tortfeasors.[251] The remedies in tort may serve as a deterrent against this type of public intrusion.

If a state legislature is uncomfortable with adopting open-access statutes due to family privacy concerns, the legislature could adopt measures that mitigate the privacy concerns and slightly modify the shift to death certificate open public access. These mitigation measures could operate as follows. In circumstances where a death certificate contains sensitive medical information, the deceased's next-of-kin or personal representative could elect to have that sensitive portion of the death certificate redacted, while the remaining, non-redacted portions of the certificate would be released for public inspection and copying.[252] If the death certificate requester wished to obtain access to the redacted information, she could request judicial review, where the applicable court would assess the public and private interests at hand by conducting a balancing test similar in procedure to that of FOIA Exemptions 6 and 7(C).[253] These features would ensure the withholding of any unsettling conditions the family members would rather not have become part of the public's image of their loved one.

B. Public Access to Autopsy Reports

Mirroring the discord surrounding access to death certificates, jurisdictions are similarly divided on whether or not to grant public access to autopsy reports. The autopsy report, a written record of the autopsy proceedings, fits the state freedom of information definitions of public records, as C/MEs are required by statute to prepare and file these documents.[254] Some states accordingly permit access to autopsy reports with

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251 Under the *Restatement (Second) of Torts*, an intrusion is tortious when it involves intentional interference with the "solitude or seclusion of another or his private affairs or concerns" and "would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B; *see also* Galella v. Onassis, 487 F.2d 986, 994–995 (2d Cir. 1973) (affirming invasion of privacy finding when defendant's conduct constituted harassment under New York law).

252 To qualify as sufficiently sensitive to warrant redaction, the information would need to "be of a kind that would shock the sensibilities of surviving kin," and based upon community standards. Badhwar v. U.S. Dept. of Air Force, 829 F.2d 182, 185–86 (D.C. Cir. 1987).

253 *See supra* Part I.A.2 (describing FOIA Exemptions 6 and 7(C) balancing tests).

254 *See supra* Part II.A (detailing substance of autopsy reports and discussing procedures that address their creation and filing).

minimal restrictions,[255] while other states block public access to the reports, largely due to the privacy concerns of the deceased's immediate family.[256] The resulting governing law in this area is a peculiar assortment of statutory pronouncements and common law precedent.

After an autopsy report is initially filed, virtually all jurisdictions prohibit its public release if the report is implicated in ongoing law enforcement crime investigation efforts.[257] Under this prohibition, known in some jurisdictions as the "police secrets rule,"[258] the autopsy reports cannot be released if such release "would substantially impede, obstruct, or interfere with an ongoing [criminal] investigation."[259] Otherwise, a report's release could enable violators to evade detection, which "would defeat the very purpose of the report" in these circumstances.[260] Once the investigation has concluded and the case is closed, the reports are eligible for release,[261] and it is at this point where states mainly diverge in their approach to disclosure.

The controversy encompassing public access to autopsy records pits the relational right of privacy against the public's right to access official government records, but, as compared to the realm of death certificates, the privacy concerns regarding autopsy reports are heightened due to the significant volume of highly sensitive medical information routinely contained within the reports.[262] The following sections analyze these issues, in conjunction with an examination of the legislative and judicial treatments of autopsy disclosure, and conclude with recommendations for reforming this area of jurisprudence.

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255 *See, e.g.*, ALA. CODE § 36-18-2 (2011) (providing that autopsy reports "shall be public records and shall be open to public inspection at all reasonable times."); Burroughs v. Thomas, 937 P.2d 12, 15 (Kan. Ct. App. 1997) (holding that autopsy reports are public records and thereby open to public for inspection).

256 *See, e.g.*, IOWA CODE § 22.7(41) (2011) (blocking public access to autopsy reports); Globe Newspaper Co. v. Chief Med. Exam'r, 533 N.E.2d 1356, 1358 (Mass. 1989) (same).

257 Journal/Sentinel, Inc. v. Aagerup, 429 N.W.2d 772, 776 (Wis. Ct. App. 1988) (holding that autopsy report implicated in particular crime detection efforts exempted from public disclosure); *see also* N.M. STAT. ANN. § 14-2-1.A(4) (2012) (exempting from disclosure autopsy reports that pertain to ongoing criminal investigations).

258 78 Op. Fla. Att'y Gen. 23, 1978 Fla. AG LEXIS 142, at *9–10 (Feb. 21, 1978) ("The only exemption which could arguably serve to exempt autopsy reports [from public disclosure] . . . is the principle commonly known as the 'police secrets rule.'").

259 *In re* Buchanan, 823 A.2d 147, 153 (Pa. Super. Ct. 2003). Under these circumstances, the Government typically must show that the autopsy report's release "would have a substantial negative impact on its investigation—for example, by keeping witnesses from coming forth or preventing investigators from verifying information that they receive from informants." *Id.*

260 78 Op. Fla. Att'y Gen. 23, at *9.

261 *See* Shuttleworth v. City of Camden, 610 A.2d 903, 914 (N.J. Super. Ct. App. Div. 1992) ("In the absence of any ongoing . . . investigation, and indeed precisely because the investigation was closed without the filing of charges, we agree . . . that the public interest would be served by release of the autopsy report.").

262 *See supra* Part II.A (discussing autopsy report content).

1. Autopsy Report Access: Legislative Treatment

Historically, autopsy reports were generally open to public inspection under the common law.[263] As a customary practice, coroners and medical examiners would typically treat autopsy reports as public records and make the documents available to the public upon request.[264] Beginning in the 1960s, a number of states enacted legislation to exempt autopsy reports from disclosure under state freedom of information laws.[265] Privacy concerns are a motivating force behind the enactment of these statutes,[266] with some State Attorneys General issuing opinions that call for the withholding of autopsy reports from the public for privacy reasons.[267] The movement to withhold the public release of autopsy reports continues to the present, with roughly one-quarter of all states expressly prohibiting public access via statute.[268] The statutes largely permit instances of conditional disclosure by allowing the relevant agency to furnish requested autopsy reports to the decedent's next-of-kin, personal representatives, and attending physicians,[269] prosecuting attorneys,[270] public health officials,[271] and researchers,[272] among others.

Other states have chosen to continue to provide public access to autopsy reports in accordance with their freedom of information laws, once any criminal investigation has concluded.[273] A number of these

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263 83 Op. S.C. Att'y Gen. Unnumbered, 1983 S.C. AG LEXIS 62, at *3 (1983) (autopsy reports were open for public inspection under the common law).

264 *See, e.g.*, Swickard v. Wayne County Med. Exam'r, 475 N.W.2d 304, 314 n.15 (Mich. 1991) (discussing longstanding practice to release autopsy reports).

265 *See* N.Y. COUNTY LAW § 677.3(b) (McKinney 1965) (exempting autopsy reports from public disclosure).

266 *See, e.g.*, Galvin v. Freedom of Info. Comm., 518 A.2d 64, 71 (Conn. 1986) ("[T]he legislature might reasonably have considered the information contained in autopsy reports to be sufficiently sensitive to warrant the imposition of disclosure restrictions . . . .").

267 81 Op. S.C. Att'y Gen. Unnumbered, 1981 S.C. AG LEXIS 74, at *1 (Oct. 27, 1981) ("In my opinion, this autopsy should not be disclosed to the public [because] it will invade the privacy of [the next-of-kin] and also because it would be detrimental to the public interest that this material be publicly displayed."); 82 Op. Nev. Att'y Gen. 12, 1982 Nev. AG LEXIS 22, at *8 (June 15, 1982) (concluding that based upon a strong public policy to keep the "secrets of a person's body" private and confidential, autopsy reports should not be open to public inspection).

268 *See, e.g.*, ALASKA STAT. § 12.65.020(b) (2012) (exempting autopsy reports from state FOIA public disclosure); IOWA CODE § 22.7(41) (2011) (same); LA. REV. STAT. ANN. § 44:19(A)(1) (2012) (same); MASS. GEN. LAWS ch. 38, § 2 (2011) (same); N.D. CENT. CODE § 23-01-05.5.2 (2011) (same); OR. REV. STAT. 192.501(36) (2009) (same); N.H. REV. STAT. ANN. § 611-B:21.III (2012) (same); UTAH CODE ANN. § 26-4-17(4) (LexisNexis 2012) (same); VA. CODE ANN. § 32.1-283.4(A) (2012) (same); WASH. REV. CODE § 68.50.105 (2012) (same); W. VA. CODE § 61-12-10 (2011) (same).

269 *See, e.g.*, UTAH CODE ANN. § 26-4-17(3) (LexisNexis 1997).

270 *See, e.g.*, W. VA. CODE § 61-12-10 (2010).

271 *See, e.g.*, WASH. REV. CODE § 68.50.105 (2007).

272 *See, e.g.*, N.H. REV. STAT. ANN. § 611-B:21.III (2001).

273 *See, e.g.*, TENN. CODE ANN. § 38-7-110(c), (d)(2)(2012) ("[A]utopsy reports shall be public documents . . . .").

states explicitly permit access by statute,[274] and generally emphasize the notion that autopsy reports are public records that must be made available for public inspection;[275] several state attorneys general issued opinions reinforcing this reasoning.[276]

2. Autopsy Report Access: Judicial Treatment

A number of states lack statutory laws that address the accessibility of autopsy reports nor has Congress enacted a specific statute that explicitly speaks to the accessibility of autopsy reports held by federal agencies.[277] For these jurisdictions, the judiciary plays a critical role in determining whether members of the public may access autopsy reports.

Few courts touched upon the public inspection of autopsy reports prior to the 1980s.[278] Since that time, in jurisdictions where the legislature has not expressly addressed the public's right to inspect autopsy reports, courts essentially have taken three different approaches to address the issue: disclosure, privacy, and balancing approaches.

In the disclosure approach, courts hold that autopsy reports are generally open to the public for inspection under the relevant jurisdiction's freedom of information law.[279] Some of the decisions brush aside arguments pertaining to the privacy concerns of the decedent's immediate

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274 *See, e.g.*, MD. CODE ANN. STATE GOV'T § 10-617(b)(2)(i) (LexisNexis 2012) (autopsy reports are open to the public); N.C. GEN. STAT. § 130A-389(a) (2012) (same); WYO. STAT. ANN. § 7-4-105(a) (2012) (autopsy report in the form of a "written docket" is open to the public).

275 *See* ALA. CODE § 36-18-2 (LexisNexis 2011) (autopsy reports "shall be public records and shall be open to public inspection at all reasonable times.").

276 *See, e.g.*, 2007 Op. Ala. Att'y Gen. 15, 2006 Ala. AG LEXIS 142, at *2 (Dec. 4, 2006) (opining that autopsy reports are public records generally open to public inspection); 97 Op. Ark. Att'y Gen. 294 (Sept. 25, 1997) ("Autopsy reports that have been released by the State Crime Laboratory . . . are subject to the provisions of the Freedom of Information Act."); 63 Op. Md. Att'y Gen. 659, 1978 Md. AG LEXIS 49, at *17 (June 1, 1978) (opining that autopsy reports are available to members of the public as directed by statute); *see also* 2011 Ltr. Rul. Tex. Att'y Gen. 10369 (July 20, 2011) ("[Autopsy reports] are subject to required public disclosure in accordance with the [state FOIA].").

277 Federal agencies may conduct autopsies and generate autopsy reports. *See, e.g.*, 18 U.S.C. § 4045 (2006) (granting certain federal officers with the authority to order autopsies to be performed).

278 *See* 82 Op. Nev. Att'y Gen. 12, 1982 Nev. Att'y Gen. 47, LEXIS 22, at *3 (June 15, 1982) ("Extensive research has uncovered but one decision by a sister state upon this precise question of public inspection of an autopsy report . . ."); People v. Williams, 345 P.2d 47, 63 (Cal. Ct. App. 1959) ("An autopsy report is a record that the coroner is required to keep . . . and is therefore, a public record.").

279 *See* Denver Publ'g Co. v. Dreyfus, 520 P.2d 104, 106–07 (Colo. Ct. App. 1974); Shuttleworth v. City of Camden, 610 A.2d 903, 914 (N.J. Super. Ct. App. Div. 1992) (upholding trial court's conclusion that public interest would be served by release of the autopsy report).

family members, giving paramount importance to the transparency of the autopsy report to the public.[280]

In the privacy approach, courts maintain that autopsy reports are not open to the public due to the privacy concerns raised by the reports' content.[281] The decisions effectively create common law access restrictions to match other jurisdictions' access-blocking legislation.[282] Courts taking the balancing approach resolve the autopsy report access question on a case-by-case basis.[283] If the family member privacy interests outweigh the public's interest in disclosure, courts typically prevent the relevant autopsy report's inspection. The federal courts[284] and a handful of state courts[285] have generally followed this approach.

3. Assessing the Public and Privacy Interests in Autopsy Report Access

Although some courts have criticized the release of medical information within autopsy reports as "fulfill[ing] no purpose other than to satisfy a prurient interest,"[286] such criticisms ignore that disclosing autopsy reports may serve the public interest. Disclosure may help the public to monitor the government's administration of justice in instances where there have been suspicious deaths.[287] A set of autopsy reports may serve as an indicator of a medical examiner's job performance by

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280 *See* Swickard v. Wayne County Med. Exam'r, 475 N.W.2d 304, 304 (Mich. 1991); Findlay Publ'g Co. v. Schroeder, 669 N.E.2d 835, 838 (Ohio 1996).

281 *See* Lawson v. Meconi, 897 A.2d 740, 747 (Del. 2006) (recognizing privacy protections provided for decedent's family members and prohibiting release of autopsy report); Globe Newspaper Co. v. Chief Med. Exam'r, 533 N.E.2d 1356, 1358 (Mass. 1989) (prohibiting release of autopsy report due to "strong public policy . . . that favors confidentiality as to medical data about a person's body").

282 *See supra* note 268 and accompanying text (listing statutes that block access to autopsy reports).

283 *See infra* notes 284–85 and accompanying text (detailing federal and state court approaches).

284 The federal courts have applied Exemption 6 and 7(C) balancing test analyses when evaluating whether autopsy reports held by federal agencies may be disclosed under FOIA. *See* Badhwar v. U.S. Dept. of Air Force, 829 F.2d 182, 185–86 (D.C. Cir. 1987) (finding that the FOIA Exemption 6 balancing test may apply to the release of autopsy reports); Bowen v. FDA, 925 F.2d 1225, 1228 (9th Cir. 1991) (applying FOIA Exemption 6 to the release of autopsy report); Coleman v. FBI, 13 F. Supp. 2d 75, 79 (D.D.C. 1998) (applying FOIA Exemption 7 to the release of autopsy records); *see also supra* Part I.A.2 (detailing FOIA Exemption 6 and 7(C) analyses). In *Badhwar*, the court inquired whether disclosure would constitute a "clearly unwarranted invasion of personal privacy," and noted that "[s]ome autopsy reports, presumably, would not be of a kind that would shock the sensibilities of surviving kin. Others clearly would." 829 F.2d at 185–86.

285 *See* Carlson v. Pima County, 687 P.2d 1242, 1246 (Ariz. 1984); Home News v State, Dep't. of Health, 677 A.2d 195, 198 (N.J. 1996); Journal/Sentinel Inc. v. Aagerup, 429 N.W.2d 772, 775 (Wis. Ct. App. 1988).

286 Johnson Tribune Publ'g Co. v. Ross, 871 A.2d 324, 329 (Pa. Commw. Ct. 2005).

287 *See infra* note 293 (discussing problematic autopsies in certain homicide-related cases).

signaling, particularly to those with a medical background, the incompetence, negligence, or misconduct of those conducting autopsies.[288] This is especially important given that the public has a great interest in ensuring that a medical examiner carries out his or her duties in a responsible manner.[289]

The formal duty of a coroner or medical examiner is "to inform the public of the cause and manner of suspicious deaths."[290] Autopsy reports are essentially records of the opinions of C/MEs on these issues.[291] By disclosing to the public an autopsy report, the official examination of the cause and manner of death,[292] the C/ME releases this information for evaluation. A suspicious death raises the possibility of criminal activity and potential threats to public safety and order; whether the government properly administers justice in a given instance may depend on the quality of the autopsy conducted. In this sense, the autopsy report may function to hold autopsy performers accountable for their official actions.[293]

More broadly, opening autopsy reports to the public for inspection maintains harmony with the overarching goals of the freedom of information laws. As argued by a Pennsylvania state senator in favor of public transparency, coroners are public officials "paid with the public dime [to] provide impartial information. We don't want to put a burden on families of victims of some tragedy . . . [but] coroners['] . . . obligation is to provide [autopsy] information to the public."[294]

While the public interest in the open access to government documents and the administration of justice may be strong in the context of autopsy reports, the privacy interests involved may arguably be stronger when balancing the competing interests. Autopsy reports "yield detailed,

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288 *See* Marjorie A. Shields, *Civil Liability in Conjunction with Autopsy*, 97 A.L.R.5th 419 (2010) (outlining civil liability for misconduct in performing an autopsy).

289 *See* Campus Commc'ns., Inc. v. Earnhardt, 821 So. 2d 388, 401 (Fla. Ct. App. 2002) ("[T]he public obviously has a great interest in making certain its government, the medical examiner in the instant case, carries out its duties in a responsible fashion . . . .").

290 *Johnson Tribune Publ'g Co.*, 871 A.2d at 329.

291 *See* CDC CORONERS' HANDBOOK, *supra* note 9, at 11 ("Causes of death on the death certificate represent a medical opinion that might vary among individual medical-legal officers.").

292 *Id.*

293 *See* Matthew Henry, *Autopsy Mistakes Leave Family with Questions about Death*, AVALANCHE-JOURNAL (July 26, 1997), http://lubbockonline.com/news/072797/autopsy.htm (discussing how "foul play may have been involved in . . . [decedent's] death and a sloppy autopsy may have failed to detect it"); Ryan Gabrielson, *Solano County Opens Review into Autopsies by Doctor with Checkered Past*, CALIFORNIA WATCH (Feb. 24, 2011), http://californiawatch.org/dailyreport/solano-county-opens-review-autopsies-doctor-checkered-past-8894 (authorities examining over two dozen autopsies "from homicide cases performed by a doctor with a history of errors and misdiagnosed rulings on causes of death").

294 Evamarie Socha, *Autopsy Bill Curbs Public Right to Information*, THE DAILY ITEM (Sept. 28, 2011), http://dailyitem.com/0100_news/x1304574800/Autopsy-bill-curbs-public-right-to-information.

intimate information about the subject's body and medical condition."[295] While the reports contain information regarding the decedent's cause and manner of death, they also reveal "much more than the cause and manner of death . . . [t]he report may contain sensitive . . . information related to the decedent's medical history, such as whether he or she was HIV-positive."[296] The Pennsylvania Supreme Court has captured the intrusive nature of autopsies:

> An autopsy is an interrogation of the body. It is not pleasant for the "layman" to contemplate what actually is done to accomplish an autopsy; politely put, it is comprehensively deconstructive of the body. Being necessarily comprehensive, autopsies reveal volumes of information, much of which is sensitive medical information, irrelevant to the cause and manner of death. Private medical information protected in life does not automatically become less private because of the person's death.[297]

Courts have highlighted the inherent unfairness of exposing sensitive details of a decedent's health condition to the public as the result of a statute requiring a medical examiner to file an autopsy report.[298] "If the autopsy revealed that the decedent had AIDS or some other venereal disease or that his body contained cocaine or some other illegal drug why should a member of the public have a right to know this?"[299]

Courts have also recognized that releasing such sensitive medical information for public inspection may traumatize the decedent's surviving family members, particularly during their time of mourning.[300] The release may violate "[c]ultural norms and common law traditions [that] recognize a family's need to honor and mourn their loved one without interference from the public."[301] By prohibiting the release of autopsy reports with sensitive medical content, the government arguably protects

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295 Globe Newspaper Co. v. Chief Med. Exam'r, 533 N.E.2d 1356, 1357 (Mass. 1989).

296 Johnson Tribune Publ'g Co. v. Ross, 871 A.2d 324, 329 (Pa. Commw. Ct. 2005); *see also* 81 Op. S.C. Att'y Gen. Unnumbered, 1981 S.C. AG LEXIS 74, at *1 (Oct. 27, 1981) ("The details of an autopsy report are of such an intimate, personal nature concerning vivid medical allusions to parts of the human body, their description and indications of prior history.").

297 Penn Jersey Advance, Inc. v. Grim, 962 A.2d 632, 638 (Pa. 2009) (Eakin, J., concurring and dissenting); *see also* 82 Op. Nev. Att'y Gen. 47 (June 15, 1982) ("The fact that a person dies in . . . [a way] which may require an autopsy is no justification for enabling public knowledge of that which was closely guarded throughout his lifetime.").

298 Everett v. Southern Transplant Serv., Inc., 700 So. 2d 909, 911 (La. Ct. App. 1997).

299 *Id.*

300 Prison Legal News v. Exec. Office for U.S. Att'ys, No. 08-01055, 2009 U.S. Dist. LEXIS 84589, at *8 (D. Colo. Sept. 16, 2009).

301 *Id.*

the emotional sensibilities of a decedent's family members and their interest in preserving their memory of the decedent in a dignified manner.

4. A Note on Death Scene and Autopsy Photographs

Photographs of the decedent at the scene of death, during an autopsy, or both, may accompany an autopsy report in the decedent's autopsy file maintained by coroner or medical examiner, and the photos accordingly face release as public records under various freedom of information laws. The disclosure of such photographs and their subsequent publication by the media is a major source of controversy.[302] A substantive body of scholarship has explored this controversy and has examined the legal issues inherent in the accessibility of death scene and autopsy photographs.[303] To round out the overview of death record access law, a brief summary of this area of jurisprudence follows.

Legislatures and courts have accorded greater privacy protection to autopsy and death scene photographs than to any other type of death record.[304] Numerous state statutes explicitly render these photographs inaccessible to the public.[305] Federal courts have applied the FOIA Exemptions 6 and 7(C) balancing tests to consistently find that the families' privacy interest in keeping their deceased relative's photographs out of the public realm outweighs the public's "practically nonexistent"[306] in-

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302 *See* Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs*, 10 COMM. L. & POL'Y 313, 315 (2005) (discussing the public controversy surrounding access to autopsy and death scene photographs); Clay Calvert, *Privacy of Death*, 26 LOY. L.A. ENT. L. REV. 133, 134 (2006) ("Autopsy photographs, death-scene images of suicides, pictures of the dead . . . are frequently found at the center of privacy-of-death controversies.").

303 *See, e.g.*, Terilli & Splichal, *supra* note 302, at 315; Calvert, *supra* note 302, at 134; Martin E. Halstuk, *When Is an Invasion of Privacy Unwarranted under the FOIA?*, 16 U. FLA. J.L. & PUB. POL'Y 361, 374 (2005); Hoefges, *supra* note 6, at 7; Autumn M. Montague, Note, *Do Not Disturb: Defining the Meaning of Privacy under the Freedom of Information Act*, 49 HOW. L.J. 643, 650 (2006); David Hamill, Note, *Privacy of Death on the Internet*, 25 J. C.R. & ECON. DEV. 833, 835 (2011).

304 *See, e.g.*, Shuttleworth v. City of Camden, 610 A.2d 903, 915 (N.J. Super. Ct. App. Div. 1992) ("While the autopsy [report] is a 'public record' under the [state's FOIA], autopsy photographs are not.").

305 *See, e.g.*, GA. CODE ANN. § 45-16-27(d) (2011); ME. REV. STAT. ANN. tit. 22 § 3022(8)(F) (2011); N.J. STAT. ANN. § 47:1A-1.1 (West 2012); N.C. GEN. STAT. § 130A-389.1 (2011); 65 PA. CONS. STAT. § 67.708(b)(20) (2012); S.C. CODE ANN. § 17-5-535 (2011). In addition to death scene and autopsy photographs, the statutes typically restrict public access to audio and video recordings of the autopsy. *See, e.g.*, IND. CODE § 5-14-3-4(a)(11) (2012).

306 Epps v. U.S. Dept. of Justice, 801 F. Supp. 787, 793 (D.D.C. 1992).

terest[307] in the photographs.[308] State courts have generally reached similar findings.[309]

The special danger inherent in a photograph's release is its unseemly, sensationalistic mass reproduction, particularly through the Internet.[310] Courts have acknowledged this danger and have found that public dissemination of these graphic photographs would cause devastating trauma to the decedent's family, exacerbating their grief and suffering.[311] "[One] cannot deny the powerful sense of invasion bound to be aroused in close survivors by wanton publication of gruesome [photographic] details of death by violence."[312] Conversely, courts have typically found no legitimate public value in the details revealed in such photos.[313]

5. An Analysis of Autopsy Record Disclosure Laws and Recommendations for Legal Reform

In many jurisdictions, legislatures and courts have analyzed autopsy reports in the abstract to conclude on privacy grounds that the records should not be disclosed to members of the public. This Article argues

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307 Courts have routinely found no social value in the release of post-mortem photographs of decedents. *See, e.g.*, Catsouras v. Dept. of California Highway Patrol, 181 Cal. App. 4th 856, 874 (2010) ("[Photograph's release constituted] pure morbidity and sensationalism without legitimate public interest . . . .").

308 The United States Supreme Court has recognized surviving family members' right to personal privacy regarding the death-scene photographs of their deceased relative and has prevented the public release of such photographs under FOIA Exemption 7(C). *See* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004); *see also* Hale v. U.S. Dep't of Justice, 973 F.2d 894 (10th Cir. 1992); Accuracy in Media, Inc. v. Nat'l Park Serv., 194 F.3d 120, 123 (D.C. Cir. 1999).

309 *See, e.g.*, Campus Commc'ns., Inc. v. Earnhardt, 821 So. 2d 388 (Fla. Dist. Ct. App. 2002).

310 *See* Favish v. Office of Indep. Counsel, 217 F.3d 1168, 1173 (9th Cir. 2000) (noting that "it is not the production of the records that would cause the harms . . . but their exploitation by the media including publication on the Internet" and that "[t]he intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead."); *Catsouras*, 181 Cal. App. 4th at 863 ("[decedent's death scene] photographs were strewn about the Internet and spit back at the family members, accompanied by hateful messages.").

311 *See Catsouras*, 181 Cal. App. 4th at 863; *see also* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 536–37 (2006) (discussing how families of those decedents portrayed in released autopsy photos may experience mental anguish over the photos' release).

312 *Accuracy in Media*, 194 F.3d at 123; *see also* Prison Legal News v. Exec. Office for U.S. Att'ys, No. 08-01055, 2009 U.S. Dist. LEXIS 84589, at *11 (D. Colo. Sept. 16, 2009) ("Given the graphic nature of the photographs, public dissemination of these images could impede the family's ability to mourn [the deceased's] death in private and achieve emotional closure."). The vast majority of cases involving the release of death images feature graphic and gruesome content. *See, e.g.*, Showler v. Harper's Magazine Found., 222 Fed. Appx. 755, 762 (10th Cir. 2007).

313 *See Catsouras*, 181 Cal. App. 4th at 907 (finding the absence of any legitimate public interest in the death scene photos' release).

that such blanket prohibitions clash with freedom of information principles and violate public policy. It is possible that an autopsy report may contain graphic, upsetting, and embarrassing content that raises significant privacy concerns, but not all such records contain such content. A more prudent approach calls for an examination of the public and privacy interests pertaining to each requested autopsy record in order to determine whether the record should be available to the public.

As discussed in Part III.B.1, a significant number of statutes place blanket prohibitions on public access to autopsy reports; these statutes are overly broad and should be revised. The statutes are broader than necessary to achieve their purpose of protecting sensitive medical information within autopsy reports. Protecting sensitive medical information is a valid, humane purpose, as recognized in a multitude of judicial opinions.[314] Under the blanket non-disclosure statutes, however, legislatures have exempted more autopsy reports than necessary to meet the statutory purpose, as there are undoubtedly autopsy reports that contain minimal to no sensitive information but are nevertheless blocked from public release. Such outcomes thwart the government transparency principles inherent in freedom of information laws.

Moreover, in some cases, it may be in the public's best interest to access certain autopsy reports, despite any sensitive medical information within the reports. Examples of such beneficial releases include disclosure to address substantive concerns regarding a medical examiner's job performance in conducting autopsies, or, more generally, the government's proper administration of justice when a suspicious death has occurred.[315] By preventing access in these circumstances, blanket non-disclosure statutes do not serve the public interest.

Legislatures should replace these blanket non-disclosure statutes with statutes that adopt a balancing test approach better aligned with the freedom of information laws' principles of open government. For each autopsy report request submitted by a member of the public, the balancing test could evaluate the public's interest in accessing a requested autopsy report against the privacy interests in keeping the report confidential.[316] Such a balancing test could mirror, in procedure, the balancing tests of FOIA Exemptions 6 and 7(C).[317] In particular, if a re-

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314 *See supra* Part III.B.2 (discussing judicial opinions that address the merits of protecting sensitive medical information in autopsy reports).

315 *See supra* note 293 (describing public reports of medical examiner incompetence and suspicious deaths).

316 Courts may look to the newsworthiness of the autopsy record, in addition to determine the strength of the public interest in an autopsy records release, to survey government activity. *See* Calvert, *supra* note 196, at 724 (discussing how newsworthiness is a key consideration in obtaining public access to government records that implicate privacy concerns).

317 *See supra* Part I.A.2 (detailing the balancing tests of FOIA Exemptions 6 and 7(C)).

quester is dissatisfied with an agency's decision to withhold an autopsy report, she should have the right to petition the appropriate court for judicial review. After applying a balancing test weighing the competing interests, the court should order the report's release unless it finds that releasing the report would constitute a "clearly unwarranted invasion of privacy."[318] A court could also order sensitive information redacted and dispositive content preserved, if possible.

Legislatures should also revise statutes that block public access to death scene and autopsy photos by shifting from a blanket non-disclosure approach to a balancing test approach as well. Such legislative reform would more effectively serve the public by allowing the release of these records when the public interest in access outweighs any privacy interest. While public access to these documents is seemingly minimal, members of the public should have the opportunity to demonstrate how access in a particular case serves the public interest, by, for instance, contributing to the public's oversight of a government agency. As Professors Terilli and Splichal recommend, legislatures should also consider inspection-only access rights when addressing the accessibility of these photographs, given the special concerns regarding image reproduction and massive electronic distribution of what may be highly graphic visual material.[319]

CONCLUSION

Jurisdictions throughout the country have acknowledged the privacy concerns inherent in public access to death records maintained by the government. While in many instances, sensitive medical information within certain death records justifies public withholding, some jurisdictions have gone too far in prohibiting access to death records in the name of privacy.

The public interests in death certificate access are valid, and these public records should be accessible to any member of the public who submits a proper freedom of information request. Autopsy records implicate stronger privacy concerns and warrant withholding in some instances, depending on the presence of sensitive medical information within the records. Agencies and courts should evaluate autopsy record requests on a case-by-case basis to determine whether the public interests in the requested record's release outweigh any privacy interests present. These proposed reforms should better align death record access laws with the pro-transparency, open government principles of our freedom of information laws.

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318 Badhwar v. U.S. Dept. of Air Force, 829 F.2d 182, 186 (D.C. Cir. 1987).

319 *See* Terilli & Splichal, *supra* note 302, at 346 (discussing inspection-only approaches to death photograph access).