

## HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

**BILL #:** HB 873 Pub. Rec./Execution Information

**SPONSOR(S):** Maney and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1204

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**FINAL HOUSE FLOOR ACTION:** 84 Y's

32 N's

**GOVERNOR'S ACTION:** Approved

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### SUMMARY ANALYSIS

HB 873 passed the House on March 2, 2022, and subsequently passed the Senate on March 7, 2022.

Section 922.105, F.S., requires a death sentence to be carried out by lethal injection unless the person sentenced to death affirmatively elects to be executed by electrocution. The Secretary of the Department of Corrections (DOC) is responsible for developing the protocols for executing a person under sentence of death by lethal injection or electrocution, including selecting and procuring the drugs and equipment which are used in a lethal injection.

Because of the controversial nature of the death penalty, a person involved in carrying out an execution could be subject to harassment, intimidation, or physical harm. Similarly, an entity involved in supplying the drugs or equipment used in administering a lethal injection could be the subject of negative publicity and a resulting loss of business. Recognizing this, the Legislature enacted s. 945.10(1)(g), F.S., which provides that information which identifies an executioner, or any person prescribing, preparing, compounding, dispensing, or administering a lethal injection is confidential and exempt from disclosure as a public record. This public records exemption clearly applies to the executioner and persons participating in an execution, however, because the exemption does not explicitly exempt manufacturers and retailers that are the source of the drugs and equipment used in lethal injections, it is unclear if a court would determine the exemption includes such entities.

The bill creates s. 945.10(1)(j), F.S., to exempt information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including persons or entities administering, compounding, dispensing, distributing, maintaining, manufacturing, ordering, preparing, prescribing, providing, purchasing, or supplying drugs, chemicals, supplies, or equipment necessary to conduct an execution in compliance with law. The bill provides the exemption applies to information and records held by DOC before, on, or after the date the bill becomes a law. The bill ensures that the identities of the manufacturers and retailers that supply lethal injection drugs to DOC are exempt from disclosure and ensures DOC will be able to obtain the drugs necessary to carry out executions in the future.

The exemption is subject to the Open Government Sunset Review Act and will be automatically repealed on October 2, 2027, unless the Legislature reenacts the exemption.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on May 12, 2022, ch. 2022-115, L.O.F., and became effective on that date.

# I. SUBSTANTIVE INFORMATION

## A. EFFECT OF CHANGES:

### Background

#### Public Records

Article I, section 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. The section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for exemption from public records requirements provided the exemption passes by two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption (public necessity statement), and is no broader than necessary to meet its public purpose.<sup>1</sup>

The Florida Statutes also address the public policy regarding access to government records. Section 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Furthermore, the Open Government Sunset Review Act<sup>2</sup> provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose and the "Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption."<sup>3</sup> An identifiable public purpose is served if the exemption meets one of the following purposes:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision; or
- Protect trade or business secrets.<sup>4</sup>

Pursuant to s. 119.15(3), F.S., a new public records exemption or substantial amendment of an existing public records exemption is repealed on October 2 of the fifth year following enactment, unless the Legislature reenacts the exemption.

#### Executions

##### *Methods of Execution*

Section 922.105, F.S., requires a death sentence to be carried out by lethal injection unless the person sentenced to death affirmatively elects to be executed by electrocution. The Secretary of DOC is responsible for developing the protocols for executing a person under sentence of death by lethal injection or electrocution, including selecting and procuring the drugs and equipment which are used in a lethal injection.<sup>5</sup> Currently, Florida uses a combination of three drugs to carry out a death sentence: etomidate, rocuronium bromide, and potassium acetate.<sup>6</sup> Etomidate is a sedative that induces unconsciousness, rocuronium bromide is a paralytic, and potassium acetate stops the heart.<sup>7</sup>

##### *Public Records Exemption*

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<sup>1</sup> Art. I, s. 24(c), Fla. Const.

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

<sup>3</sup> S. 119.15(6)(b), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> S. 922.105(1), F.S.

<sup>6</sup> Florida Department of Corrections, *Lethal Injection Protocol*, <http://www.dc.state.fl.us/ci/docs/Lethal-Injection-Protocol-2021-05-07.pdf> (last visited Mar. 9, 2022).

<sup>7</sup> Death Penalty Information Center, *Overview of Lethal Injection Protocols*, <https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols> (last visited Mar. 9, 2022).

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### *Objection to Use of Lethal Injection Drugs*

In recent years, in response to public pressure and Europe's prohibition against the export of execution drugs, many pharmaceutical companies have objected to states using drugs which they manufacture in lethal injections, including major drug companies such as Pfizer, Roche, and Janssen (Johnson & Johnson).<sup>8</sup> As such, many drug manufacturers have either placed strict controls on the sale of drugs commonly used in lethal injections, or have refused to supply such drugs to correctional agencies in states that have the death penalty.<sup>9</sup> In response, many states, including Florida, have had to repeatedly amend their lethal injection protocols to account for the difficulty in obtaining lethal injection drugs.<sup>10</sup> Florida last changed the drugs used in the lethal injection protocol in January 2017 when it began using etomidate and potassium acetate instead of midazolam hydrochloride and potassium chloride.<sup>11</sup>

### **Effect of the Bill**

The bill creates s. 945.10(1)(j), F.S., to exempt information or records that identify or could reasonably lead to the identification of any person or entity that participates in, has participated in, or will participate in an execution, including persons or entities administering, compounding, dispensing, distributing, maintaining, manufacturing, ordering, preparing, prescribing, providing, purchasing, or supplying drugs, chemicals, supplies, or equipment necessary to conduct an execution in compliance with ch. 922, F.S. The bill provides the exemption applies to information and records held by DOC before, on, or after the date the bill becomes a law. The bill ensures that the identities of the manufacturers and retailers that supply lethal injection drugs to DOC are exempt from disclosure and ensures DOC will be able to obtain the drugs necessary to carry out executions in the future.

The exemption is subject to the Open Government Sunset Review Act and will be automatically repealed on October 2, 2027, unless the Legislature reenacts the exemption.

The bill became effective on May 12, 2022.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

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<sup>8</sup> Erick Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, New York Times (May 13, 2016), <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html> (last visited Mar. 9, 2022); Death Penalty Information Center, *Statements from drug manufacturers and medical professionals*, <https://deathpenaltyinfo.org/executions/lethal-injection/statements-from-drug-manufacturers-and-medical-professionals> (last visited Mar. 9, 2022).

<sup>9</sup> Death Penalty Information Center, *Johnson & Johnson unit speaks out at planned death row drug use*, [https://files.deathpenaltyinfo.org/legacy/files/pdf/2017.08.21\\_JansenStatement\\_LethalInjection.pdf](https://files.deathpenaltyinfo.org/legacy/files/pdf/2017.08.21_JansenStatement_LethalInjection.pdf) (last visited Mar. 9, 2022).

<sup>10</sup> Bernie Woodall, *Florida set to carry out execution with drug not previously used in lethal injections*, Reuters (Aug. 24, 2017), <https://www.reuters.com/article/florida-execution/corrected-florida-set-to-carry-out-execution-with-drug-not-previously-used-in-lethal-injections-idUSL2N1L805A> (last visited Mar. 9, 2022).

<sup>11</sup> Dara Kam, *Florida changes lethal injection drugs*, News4Jax (Jan. 5, 2017), <https://www.news4jax.com/news/2017/01/05/florida-changes-lethal-injection-drugs/> (last visited Mar. 9, 2022).

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.