



# The Florida Senate

Interim Project Report 2003-214

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Committee on Criminal Justice

Senator James E. "Jim" King, Jr., President

## OPEN GOVERNMENT SUNSET REVIEW OF THE PUBLIC RECORDS EXEMPTION FOR IDENTITY OF EXECUTIONER (S. 922.106, F.S.)

### SUMMARY

Section 922.106, F.S., exempts from public disclosure information that would identify any person who prescribes, prepares, compounds, dispenses, or administers the lethal injection used to carry out a death sentence pursuant to ch. 922, F.S. This exemption is now subject to review under s. 119.15, F.S., the Open Government Sunset Review Act of 1995, for the purpose of determining whether it should be reenacted or repealed. The exemption will be automatically repealed on October 2, 2003, unless the Legislature reenacts it.

Staff recommends that s. 922.106, F.S., be reenacted. However, an exemption for all or part of this information is included in both s. 922.10, F.S., and s. 945.10, F.S. Therefore, staff recommends that consideration be given to repealing s. 922.106, F.S., and the relevant portion of s. 922.10, F.S., and making any necessary amendments to s. 945.10(g), F.S., in order to consolidate the exemption under that section.

### BACKGROUND

Prior to 1998, Florida law required that a death sentence be executed by electrocution. Section 922.10, F.S., specified electrocution as the only method of execution and exempted the executioner's identity from public disclosure. In 1998, the Legislature created s. 922.105, F.S., to permit administration of the death penalty by lethal injection if execution by electrocution was held to be unconstitutional.<sup>1</sup> The Legislature also created s. 922.106, F.S., to exempt the identity of the person who administered a lethal injection from public disclosure. In 2000, the exemption in s. 922.106, F.S., was expanded to also include persons who prescribe,

prepare, compound, or dispense a lethal injection. The same act (ch. 2000-1, Laws of Florida) also included an amendment to s. 945.10, F.S., which enumerates records or information of the Department of Corrections which are confidential and exempt. The new s. 945.10(g), F.S., exempted "[t]he identity of an executioner, or a person prescribing, preparing, compounding, dispensing, or administering a lethal injection."

**Constitutional Access to Public Records and Meetings** -- Section 24(a), Art. I of the State Constitution provides every person with "... the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution."

Section 24 specifically includes "... the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution." *Id.*

Section 24(c), Art. I of the State Constitution authorizes the Legislature to statutorily exempt "... records from the requirements of subsection (a) . . . , provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

**Open Government Sunset Review Act of 1995** -- Section 119.15, F.S., the Open Government Sunset Review Act of 1995, establishes a review-and-repeal process for exemptions to requirements relating to public records or public meetings. A new exemption, or a substantial amendment of an existing exemption, is

<sup>1</sup> In 2000, ss. 922.10 and 922.105, F.S. were amended to establish lethal injection as the method of execution unless electrocution was affirmatively chosen by the person sentenced to death.

repealed on October 2nd of the fifth year after enactment of the exemption unless the Legislature acts to reenact the exemption. “A law that enacts a new exemption or substantially amends an existing exemption must state that the exemption is repealed at the end of 5 years and that the exemption must be reviewed by the Legislature before the scheduled repeal date.” Section 119.15(3)(a), F.S.

By June 1st of the year before repeal of an exemption, the Division of Statutory Revision of the Office of Legislative Services is required to “. . . certify to the President of the Senate and the Speaker of the House of Representatives . . . the language and statutory citation of each exemption scheduled for repeal the following year which meets the criteria of an exemption as defined in [s. 119.15, F.S.]” Section 119.15(3)(d), F.S. If the exemption is not identified and certified by the Division, it is not subject to legislative review and repeal. In the event “. . . the [D]ivision fails to certify an exemption that it subsequently determines should have been certified, it shall include the exemption in the following year’s certification after that determination.” *Id.*

Section 119.15(2)(a) - (c), F.S., provides that an exemption is to be created or maintained only if:

- “(a) The exempted record or meeting is of a sensitive, personal nature concerning individuals;
- (b) The exemption is necessary for the effective and efficient administration of a governmental program; or
- (c) The exemption affects confidential information concerning an entity.”

Section 119.15(4)(a)1. - 4., F.S., requires that the following specific questions be considered as part of the open government sunset review process:

- “(1) What specific records or meetings are affected by the exemption?
- (2) Whom does the exemption uniquely affect, as opposed to the general public?
- (3) What is the identifiable public purpose or goal of the exemption?
- (4) Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?”

Section 119.15(4)(b), F.S., provides that “[a]n exemption may be created or maintained only if it serves an identifiable public purpose and may be no

broader than is necessary to meet the public purpose it serves.” Section 199.15(4)(b), F.S., also provides that an exemption serves an identifiable public purpose if 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, and if the exemption meets one of the following purposes described in s. 119.15(4)(b)1. - 3., F.S.:

- “(1) Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- (2) Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
- (3) Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.”

Section 119.15(4)(e), F.S., provides that, “[n]otwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of an exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.”

## METHODOLOGY

Staff reviewed relevant statutory provisions; surveyed the Commission on Capital Cases, the Public Defenders Coordination Office, the three Capitol Collateral Counsels, the Office of the Attorney General, the Office of the Governor, and the Florida Prosecuting Attorney’s Association, regarding the exemption; reviewed responses submitted by the Commission on Capital Cases, the Florida Prosecuting Attorney’s Association, and the Florida Public

Defenders Association (adopting a response sent by an individual public defender); reviewed the response by the Department of Corrections to a questionnaire prepared by the House Committee on State Administration; reviewed “Discovery of Public Records in Capital Cases” by Judge O.H. Eaton, Jr. in the *Florida Bar Journal* (April 2002); and reviewed relevant case law.

## **FINDINGS**

The exemption in s. 922.106, F.S., meets the statutory criteria in ss. 119.15(2) and (4), F.S., for reenactment. However, it is redundant because it duplicates the same exemption that is found in s. 945.10(g), F.S.

The exempted information is of a sensitive personal nature concerning individuals, ss. 119.15(2)(a) and (4)(b)2, F.S., and public disclosure of the information could jeopardize the safety of a person who prescribes, prepares, compounds, dispenses, or administers a lethal injection. Section 119.15(4)(b)2, F.S.

The exemption is also necessary for the effective and efficient administration of a governmental program. Sections 119.15(2)(b) and (4)(b)1, F.S. Without the exemption, the Department of Corrections would be significantly impaired in performing its duty to execute death sentences. Section 119.15(4)(b)1, F.S.

Section 119.15(4)(a), F.S., requires that the Legislature consider four questions as part of the review process. These questions and staff responses follow:

***What specific records or meetings are affected by the exemption? (s. 119.15(4)(a)1, F.S.)***

Execution protocols, death watch logs, wing logs, and other documents that could identify a person who prescribes, prepares, compounds, dispenses, or administers a lethal injection.

***Whom does the exemption uniquely affect, as opposed to the general public? (s. 119.15(4)(a)2, F.S.)***

The exemption affects the specified person whose identity is exempt, as well as persons under sentence of death, their attorneys, and the news media.

***What is the identifiable public purpose or goal of the exemption? (s. 119.15(4)(a)3, F.S.)***

As stated by the Legislature when it expanded the exemption in 2000, the exemption protects the safety and welfare of a person who prescribes, prepares, compounds, dispenses, or administers a lethal injection by preventing exposure to potential harassment, intimidation, and harm and unwarranted invasion into the person’s privacy. In *Bryan v. State*, 753 So.2d 1244 (Fla. 2000), the Florida Supreme Court found this to be a valid public purpose.

The exemption also enables the Department of Corrections to carry out its statutory responsibility to execute death sentences.

***Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? (s. 119.15(4)(a)4, F.S.)***

No.

Exemptions may be created and maintained only if they serve an identifiable public purpose, and may be no broader than is necessary to meet that public purpose. Section 119.15(4)(b), F.S. This exemption has the statutorily recognized purposes of allowing “the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption,” s. 119.15(4)(b)1, F.S.; and protecting “information of a sensitive personal nature concerning individuals, the release of which information would . . . jeopardize the safety of such individuals.” Section 119.15(4)(b)3, F.S. An identifiable public purpose can be found based upon these purposes and a Legislative finding “. . . that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption.” Section 119.15(4)(b), F.S.

There are compelling reasons for retaining the exemption. Retaining the exemption protects sensitive information regarding the identity of persons who administer a lethal injection, the disclosure of which could endanger the person, and allows the Department of Corrections to perform its statutory duties. Protection of the identity of the lethal injection administrator cannot be accomplished without the exemption.

The exemption is no broader than is necessary to meet the public purpose it serves. However, the substance of the exemption is found in two other statutes besides s. 922.106, F.S. Section 922.10, F.S., makes information confidential and exempt from disclosure under s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution if the information, if released, would identify an executioner. Section 945.10(g), F.S., makes a record or information of the Department of Corrections confidential and exempt if it includes the identity of an executioner or of a person prescribing, preparing, compounding, dispensing, or administering a lethal injection.

### **RECOMMENDATIONS**

Staff recommends that the exemption in s. 922.106, F.S., be reenacted. However, it is not necessary for the substance of the exemption to be included in three separate sections of the Florida Statutes. Therefore, staff also recommends that consideration be given to repealing s. 922.106, F.S., and the exemption language within s. 922.10, F.S., and making any necessary amendments to s. 945.10(g), F.S., in order to consolidate the exemption under that section.