

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 461 Pub. Rec./Trade Secrets Held by an Agency
SPONSOR(S): Government Accountability Committee; Oversight, Transparency & Administration
Subcommittee; Massullo, MD
TIED BILLS: CS/CS/HB 459 **IDEN./SIM. BILLS:** SB 958

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Administration Subcommittee	13 Y, 0 N, As CS	Moore	Harrington
2) Government Accountability Committee	19 Y, 0 N, As CS	Moore	Williamson

SUMMARY ANALYSIS

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt from public record requirements. Some exemptions only protect trade secrets, while others protect “proprietary business information” and define that term to specifically include trade secrets. Some exemptions also provide a specific process that an agency must use when protecting trade secret information under the exemption.

House Bill 459 (2018), which this bill is linked to, repeals most public record exemptions for trade secrets in current law, all associated processes for designating a trade secret, and most references to trade secrets contained in definitions for proprietary business information.

This bill creates a public record exemption for trade secrets that applies to most agencies that are subject to public record requirements.

The bill defines the term “trade secret” and specifically excludes from the definition certain information related to any contract or agreement, or an addendum thereto, with an agency. Such information includes the parties to the contract or agreement; the amount of money paid, any payment structure or plan, expenditures, incentives, bonuses, fees, or penalties; the nature or type of commodities or services purchased; and applicable contract unit prices and deliverables.

The bill requires a person who submits a record claimed to be a trade secret to an agency to mark the record clearly with the words “trade secret” and to submit with the record a notice verifying, under penalty of perjury, that the record contains a trade secret. If an agency receives a public record request for a record that is marked and verified as a trade secret, and the person requesting the record confirms he or she wishes to pursue access to such record, the agency must notify the person that verified the record that, in order to avoid disclosure of the trade secret, he or she must file an action in circuit court within 30 days seeking a declaratory judgment that the record in question contains a trade secret and an order barring public disclosure of the record. The bill provides an expedited court process for such civil actions and specifies that a declaratory judgment finding a record to be a trade secret is valid for 3 years after the date of the judgment.

The bill provides for repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a public necessity statement as required by the State Constitution.

The bill may have a minimal fiscal impact on the state and local governments. See Fiscal Comments section.

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h0461c.GAC

DATE: 2/9/2018

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This 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 the exemption of records from the requirements of Article I, s. 24(a) of the Florida Constitution.¹ The general law must state with specificity the public necessity justifying the exemption² and must be no more broad than necessary to accomplish its purpose.³

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act⁴ provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no more broad than necessary to meet one of the following purposes:⁵

- 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.
- Protect trade or business secrets.

The Act also requires the automatic repeal of a public record exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.⁶ Specified questions must be considered by the Legislature during the review process.⁷

Trade Secrets

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt⁸ from public record requirements. Some exemptions only protect trade secrets, while others protect "proprietary business information" and define that term to specifically include trade secrets.

¹ FLA. CONST. art. I, s. 24(c).

² This portion of a public record exemption is commonly referred to as a "public necessity statement."

³ FLA. CONST. art. I, s. 24(c).

⁴ Section 119.15, F.S.

⁵ Section 119.15(6)(b), F.S.

⁶ Section 119.15(3), F.S.

⁷ Section 119.15(6)(a), F.S., requires the Legislature to consider the following questions as part of the review process: 1) What specific records or meetings are affected by the exemption? 2) What specific parties does the exemption affect? 3) What is the public purpose of the exemption? 4) Can the information contained in the records or meetings be readily obtained by alternative means? If so, how? 5) Is the record or meeting protected by another exemption? 6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

⁸ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So.2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So.2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

The following are examples of public record exemptions for trade secrets:

- Section 119.071(1)(f), F.S., exempts data processing software obtained by an agency under a licensing agreement that prohibits its disclosure where the software is a trade secret;
- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency;
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation;
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt;
- Section 334.049(4), F.S., makes certain trade secret information obtained by the Department of State as a result of research and development projects confidential and exempt;
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt;
- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt;
- Section 440.108(2), F.S., makes trade secrets contained in records held by the Department of Financial Services relating to workers' compensation employer compliance investigations confidential and exempt;
- Section 499.012(3)(c), F.S., makes trade secret information provided to the Department of Business and Professional Regulation in a prescription drug permit application confidential and exempt;
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt;
- Section 526.311(2), F.S., makes trade secrets contained in investigative records related to the sale of liquid fuel and brake fuel obtained by DACS confidential and exempt;
- Section 560.129(2), F.S., makes information obtained by the Office of Financial Regulation in the course of an investigation of a money service business that is a trade secret confidential and exempt;
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS' Division of Fruit and Vegetables confidential and exempt;
- Section 601.10(8)(b), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt;
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt;
- Section 626.884(2), F.S., makes information contained in insurance administrators' records obtained by the Office of Insurance Regulation confidential and exempt; and
- Section 815.04(3) and (6), F.S., makes trade secret information that is held by an agency and exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

While some of these exemptions do not define the term "trade secret," a majority of them rely on one of two different statutory definitions. Some of the exemptions define the term in accordance with Florida's criminal statutes, which define the term as follows:

"Trade secret" means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it

when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.⁹

Other exemptions define the term in accordance with the Uniform Trade Secrets Act,¹⁰ which defines the term as follows:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹¹

In addition, some exemptions provide a specific process that an agency¹² must use when protecting trade secret information under the exemption. For instance, some exemptions require the party that submits information claimed to be a trade secret to designate the information as protected, and some exemptions require the agency to determine whether information claimed to be a trade secret constitutes a trade secret.¹³

House Bill 459 (2018)

House Bill 459 (2018), which this bill is linked to, repeals most public record exemptions for trade secrets in current law, all associated processes for designating a trade secret, and most references to trade secrets contained in definitions for proprietary business information.

Effect of the Bill

The bill, which is linked to the passage of HB 459 or similar legislation, creates a public record exemption for trade secrets that applies to most agencies that are subject to public record requirements.

The bill defines the term “trade secret” to have the same meaning as the definition currently codified in the Uniform Trade Secrets Act, which includes information that is a formula, pattern, compilation, program, device, method, technique, or process that:

- Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

⁹ Section 812.081(1)(c), F.S.

¹⁰ Sections 688.001 through 688.009, F.S.

¹¹ Section 688.002(4), F.S.

¹² The term “agency” is defined to mean any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency. Section 119.011(2), F.S.

¹³ See s. 381.83, F.S.

However, the bill specifically excludes from the definition the following information related to any contract or agreement, or an addendum thereto, with an agency:

- The parties to the contract or agreement, or an addendum thereto.
- The amount of money paid, any payment structure or plan, expenditures, incentives, bonuses, fees, or penalties.
- The nature or type of commodities or services purchased.
- Applicable contract unit prices and deliverables.

The bill requires a person who submits a record claimed to be a trade secret to an agency to mark the record clearly with the words "trade secret" and to submit with the record a notice verifying that the record contains a trade secret. Verification occurs by signing a written declaration under penalty of perjury. Failure to submit the notice constitutes a waiver of any claim by the submitter that the record contains a trade secret.

If an agency receives a public record request for a record that is marked and verified as a trade secret, the agency must, as soon as practical, notify the person who requested the record. The notice must inform the person of the process described below and direct such person to respond to the notice if he or she desires access to the record marked and verified as containing a trade secret. If the person indicates he or she desires access to such record, the agency must promptly notify the person who verified the record. The notice must inform the person that, in order to avoid disclosure of the trade secret, he or she must file an action in circuit court within 30 days after the date of the notice seeking a declaratory judgment that the record in question contains a trade secret and an order barring public disclosure of the record. If an action is filed, the agency must notify the person who requested the record.

The petition must be served on the agency and the action must be brought in the county in which the agency in possession of the record is headquartered. The agency may not release the record pending the outcome of the legal action. However, failure to file an action within 30 days constitutes a waiver of any claim of confidentiality, and the agency must release the record as requested.

When an action is filed, the court must set an immediate hearing and give the case priority over other pending cases. If the court determines that the record in question does not contain a trade secret, the agency must make the record available to the requester within two business days after the date of the court order, unless otherwise provided by the court issuing the order, or unless an appellate court issues a stay order within the 2-day period. Upon service of a petition or other initial pleading in the action, the agency may not transfer custody, alter, destroy, or otherwise dispose of the record requested until the court makes a determination regarding whether the record contains a trade secret.

If the person who requested the record marked and verified as containing a trade secret notifies the agency that he or she no longer desires access to the record, the agency must notify the person who verified the record as containing a trade secret that the request has been withdrawn and that obtaining a declaratory judgment is no longer necessary. If the request is withdrawn before a judicial determination is made, the agency must continue to maintain the confidentiality of the record.

The bill specifies that a declaratory judgment finding a record to be a trade secret is valid for 3 years after the date of the judgment.

The bill requires a court to preserve the secrecy of an alleged trade secret in an action brought under the bill's provisions.

The bill authorizes an agency to disclose a trade secret, together with the notice of trade secret, to an officer or employee of another agency or governmental entity whose use of the trade secret is within the scope of his or her lawful duties and responsibilities.

The bill specifies that an agency employee who, while acting in good faith and in the performance of his or her duties, releases records pursuant to the process created by the bill is not liable, civilly or criminally, for release of the records.

The bill also specifies that the public record exemption does not apply to research institutes created or established in law, divisions of sponsored research at state universities, or technology transfer centers at Florida College System institutions.

The bill provides a public necessity statement as required by the State Constitution, specifying that the public record exemption is necessary to protect trade secret information provided to an agency by an individual or business because disclosure of such information to competitors of those businesses would be detrimental to the businesses. In addition, the exemption is necessary to protect trade secret information created by an agency in furtherance of the agency's duties and responsibilities, and disclosure of such information would be detrimental to the effective and efficient operation of the agency.

The bill provides for repeal of the exemption on October 2, 2023, unless reviewed and saved from repeal through reenactment by the Legislature.

B. SECTION DIRECTORY:

Section 1. creates s. 688.01, F.S., relating to a trade secret exemption from inspecting or copying public records.

Section 2. amends s. 688.001, F.S., relating to a short title.

Section 3. amends s. 688.006, F.S., relating to preservation of secrecy.

Section 4. provides a public necessity statement.

Section 5. provides an effective date of the same date that HB 459 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have an impact on state government revenues.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may create costs associated with the declaratory judgment process created in the bill for businesses that submit trade secret information to agencies that do not currently use the process created in the bill. Such costs are indeterminate.

D. FISCAL COMMENTS:

The bill could have a minimal fiscal impact on agencies because agency staff responsible for complying with public record requests may require training related to creation of the public record exemption. In addition, agencies could incur costs associated with redacting the exempt information prior to releasing a record and with the additional requirements to provide notice to the record requester and the person that verified the record regarding the court process. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of agencies.

The bill may have an indeterminate negative fiscal impact on agencies that do not currently use the declaratory judgment process created in the bill. In addition, the bill may have an indeterminate negative fiscal impact on the courts as a result of more agencies using the declaratory judgment process created in the bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Vote Requirement

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a new public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption for trade secrets held by an agency. As such, the exemption does not appear to be in conflict with the constitutional requirement that it be no broader than necessary to accomplish its purpose.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 17, 2018, the Oversight, Transparency & Administration Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified what constitutes financial information;
- Required an agency to inform a person requesting a record that includes a trade secret to confirm that the requester still wishes to pursue access to such record;
- Provided that if the requester withdraws the request for such record, the owner of the trade secret does not have to pursue a declaratory judgment and the agency must maintain the confidentiality of the record; and
- Provided for an expedited court proceeding.

On February 8, 2018, the Government Accountability Committee adopted an amendment and reported the bill favorably as a committee substitute. The amendment:

- Clarified what types of information are not a trade secret;
- Required an agency to make a record available to the requester within 2 business days after a court determines that the record does not contain a trade secret, rather than within 48 hours;
- Provided that a declaratory judgment finding a record to be a trade secret is valid for 3 years after the date of the judgment;
- Provided that the public record exemption does not apply to research institutes created or established in law, divisions of sponsored research at state universities, or technology transfer centers at Florida College System institutions.

This analysis is drafted to the committee substitute as approved by the Government Accountability Committee.