

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1690

SPONSOR: Governmental Oversight and Productivity Committee and Senator Campbell

SUBJECT: Public Records; Trade Secrets

DATE: April 5, 2000 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Rhea	Wilson	GO	Favorable/CS
2.			RC	
3.				
4.				
5.				

I. Summary:

This committee substitute provides an exemption from public records requirements for trade secrets, as defined by s. 812.081, F.S., that are received by an agency in the process of procuring commodities or services. It also establishes procedures, similar to those in another section of law, for determining whether documents claimed as trade secrets are protected before the documents are released under a public records request.

The committee substitute requires a person filing such material with the agency to file an affidavit of confidentiality and provides requirements with respect thereto. It establishes a procedure to compel the disclosure of the material, as well as provides for attorney's fees and costs.

This committee substitute creates section 287.0573, Florida Statutes.

II. Present Situation:

A. Public Records

Florida has a long history of providing public access to the records of governmental and other public entities. The first law granting access to public records was enacted by the Florida Legislature in 1909. In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level.¹ Article I, s. 24 of the State Constitution, expresses Florida's public policy regarding access to public records by providing that:

- (a) Every person has the right to inspect or copy any public records 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

¹Article I, s. 24 of the State Constitution.

section or specifically made confidential by this Constitution. This section 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.

In addition to the State Constitution, the Public Records Law² specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. Section 119.07(1)(a), F.S., requires:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee. . . .

The Public Records Law states that, unless specifically exempted, all agency³ records are to be available for public inspection. The term "public record" is broadly defined to mean:

All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.⁴

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.⁵ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.⁶

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must:

- ▶ state with specificity the public necessity justifying the exemption;
- ▶ be no broader than necessary to accomplish the stated purpose of the law; and

²Chapter 119, F.S.

³The word "agency" is defined in s. 119.011(2), F.S., 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." The Florida Constitution also establishes a right of access to 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 those records exempted by law or the state constitution.

⁴Section 119.011(1), F.S.

⁵*Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁶*Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

- ▶ not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject and provisions relating to enforcement.⁷

The Open Government Sunset Review Act of 1995⁸ states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and 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. The three statutory criteria are if the exemption:

- ▶ allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- ▶ protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or
- ▶ protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.⁹

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Public Meetings Law. Section 119.15, F.S., requires the Division of Statutory Revision 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 by June 1 of each year.

B. Trade Secrets

Section 812.081(2), F.S., provides:

Any person who, with intent to deprive or withhold from the owner thereof the control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, steals or embezzles an article representing a trade secret or without authority makes or causes to be made a copy of an article representing a trade secret is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083, F.S.

A “trade secret” is defined by s. 812.081(1)(c), F.S., to mean:

⁷Art. I, s. 24(c) of the State Constitution.

⁸Section 119.15, F.S.

⁹Section 119.15(4)(b), F.S.

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. 'Trade secret' includes any scientific, technical, or commercial information, including 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.

Under current law, when a public records request is made, agencies must choose between potential liability for committing a felony by releasing a trade secret under s. 812.081, F.S., or potential liability for committing a misdemeanor for failing to release a public record. The Attorney General's office has interpreted ch. 119, F.S., to require agencies to notify an author of claimed trade secrets that the agency intends to release those trade secrets within a certain time frame. The agency then must release the trade secrets unless the author files judicial proceedings to prevent disclosure. The Attorney General has stated:

. . . the fact that information constitutes a trade secret does not remove it from the requirements of the Public Records Law. Previous Attorney General's Opinions have concluded that an agency is under a duty to release public records even though such records may constitute trade secrets when there is no statute making the information confidential or exempt from disclosure under chapter 119, Florida Statutes.¹⁰

Further, the Second District Court of Appeal recently allowed a company to proceed with its claim that a state agency caused economic damages by divulging the company's trade secrets, including formulas and techniques, to a competitor.¹¹

III. Effect of Proposed Changes:

The committee substitute creates s. 287.0573, F.S., which provides that trade secrets, as defined by s. 812.081, F.S., which are received by an agency procuring commodities or services are confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

¹⁰Op. Att'y Gen. 97-87 (1997), citing Op. Att'y Gen. 92-43 (1992) (stating that s. 812.081, F.S., does not constitute a general exemption to ch. 119, F.S.).

¹¹Discovery Experimental and Development, Inc. v. State of Florida, No. 98-01347 (2nd DCA April 30, 1999).

The committee substitute requires a vendor or other person filing trade secret information with an agency to file an affidavit along with it in order for the agency to designate the material as being confidential and exempt.

Subsection (3) of the committee substitute requires the affidavit to:

- ▶ contain a general claim of confidentiality;
- ▶ identify the basis upon which the claim of confidentiality is made; and
- ▶ contain supporting argument, precedent, legal citation, or other supporting documentation to enable the agency to satisfy itself that the claim of confidentiality is not merely specious.

The committee substitute does not delegate to the agency the duty to inquire into the legal or technical sufficiency of a claim of confidentiality that meets the minimum requirements of the provision.

In the event the agency is satisfied as to the facial validity of the claim of confidentiality, the agency shall keep confidential the affidavit and supporting documentation as well as the filed material and may not disclose the affidavit, documentation, or filed material to any third party, except upon administrative order pursuant to ch. 120 or upon circuit court order.

The committee substitute also gives party standing to the vendor or other person who filed the material in the event of any administrative or circuit court proceeding relating to any third-party attempt to compel disclosure of filed material or to challenge the confidentiality thereof. Reasonable attorney's fees and costs are authorized for the prevailing party.

Subsection (6) of the committee substitute provides that in the event that an administrative law judge or court determines that the filed material is not trade secret information, the subsequent disclosure by the agency of the filed material pursuant to s. 119.07(1), F.S., is not to be construed as a commission of an offense against intellectual property with the meaning of s. 815.04, F.S., nor shall the prior refusal of the agency to disclose the filed material subject the agency to penalty or attorney's fees under ch. 119, F.S.

The provision is made subject to the Open Government Review Act of 1995 and repeals October 2, 2005, unless reviewed and saved from repeal through reenactment by the Legislature.

The committee substitute also contains a statement of public necessity for the exemption to public records requirements. The stated justification for the exemption is that it is a felony to disclose trade secret information, and it is a public necessity that such information be made confidential and exempt to protect public employees who have access to such information. Disclosure of trade secrets in an agency's possession would negatively impact the business interests of those providing an agency such trade secrets by damaging them in the market place, and those entities and individuals disclosing such trade secrets would hesitate to cooperate with that agency, which would impair the effective and efficient administration of governmental functions. As a result, the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from disclosure, and the public's ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.

The committee substitute is effective October 1, 2000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Legislature is expressly authorized to create exemptions to public records requirements. Article I, s. 24 of the State Constitution permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must:

- ▶ state with specificity the public necessity justifying the exemption;
- ▶ be no broader than necessary to accomplish the stated purpose of the law; and
- ▶ not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject and provisions governing enforcement.¹²

The committee substitute creates an exemption to public records requirements, and establishes an enforcement process which involves the filing of an affidavit by the vendor or other person filing material that is claimed to be a trade secret.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The committee substitute will require vendors or other person who expect governmental entities to maintain the confidentiality of trade secrets to file an affidavit regarding the status of the information. This affidavit must contain specific information, including the basis upon which the claim is made, and supporting argument, precedent, legal citation, or other documentation. This could entail some additional expense for vendors and other persons.

¹²Art. I, s. 24(c) of the State Constitution.

C. Government Sector Impact:

The committee substitute will require the agency to perform a review of the affidavit to determine the facial validity of the affidavit.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The committee substitute authorizes the agency to disclose material that is claimed to be trade secret information “[i]n the event that an administrative law judge or court determines that the filed material is not trade secret information” and provides that the subsequent disclosure of the material by the agency under a public records request is not to be construed as the commission of an offense against intellectual property under s. 815.04, F.S. Under the Administrative Procedure Act, however, an administrative law judge usually issues only a *recommended* order, with the final order being issued by the department head. As written, the bill does not address this distinction. As a result, in order to maintain the status of the material as trade secret information subject to protection until the *final* order is issued, the bill should be clarified to ensure that the agency does not release the information upon the issuance of a recommended order.

Further, whether it is the administrative law judge or the department head who issues the final order, final orders of administrative agencies are appealable to the district court of appeal and, thereafter, to the Florida Supreme Court. If a civil suit is brought instead of an administrative action, the circuit court order could also be appealed to a higher court. As a result, in order to ensure that the agency is not compelled to release trade secret information until the last order is issued and until after the time for any remaining appeals has run, the bill should be modified to require the agency to maintain the confidentiality of the filed material until the time for appeal of the administrative order or circuit court order has expired or until the last appellate court has issued its order and the time for any remaining appeals has run.

VIII. Amendments:

None.