

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Commerce and Consumer Services Committee

BILL: CS/SB 1142

SPONSOR: Commerce and Consumer Services Committee and Senator Argenziano

SUBJECT: Public Records & Meetings

DATE: April 19, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siebert	Cooper	CM	Fav/CS
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This committee substitute provides that a trade secret held by a state agency is exempt from disclosure under the public-records law if the information meets the statutory definition of a trade secret and the proprietor of the trade secret verifies in a written declaration to the agency that the information is a trade secret. This committee substitute also provides that any portion of a meeting at which information concerning a trade secret is discussed is exempt from public-meetings requirements. Further, this committee substitute provides for future repeal and legislative review of the exemption under the Open Government Sunset Review Act of 1995.

This committee substitute creates one undesignated section of the Florida Statutes.

II. Present Situation:

The Senate Committee on Governmental Oversight and Productivity was assigned a multi-year interim project to clarify and streamline public records and meetings requirements. During the 2004 legislative session, the first stage of the project was enacted by ch. 2004-335, L.O.F. That portion of the project reorganized the substantive requirements of ch. 119, F.S., the Public Records act topically. During the second stage of the review, the committee began the process of examining public records exemptions.

There are approximately 900 exemptions to public records and meetings requirements.¹ Exemptions are contained in the Public Records Act, in ch. 289, F.S., and throughout the *Florida Statutes*. The Legislature is authorized to create exemptions to public records and meetings

¹ This estimate may be an undercount in that many statutory sections that are counted as a single exemption often protect multiple types of information.

requirements pursuant to Article I, s. 24 of the State Constitution. An exemption, however, only may be enacted pursuant to a public necessity identified by the Legislature and that exemption must be narrowly tailored to meet the stated necessity. While an agency is under a constitutional and statutory duty to provide access to public records, an agency also must redact exempt or confidential information prior to providing such access. Given the current lack of organization of exemptions and the growing number of exemptions, preservation of exempt or confidential records may be becoming increasingly difficult for agencies. Further, given the growth of identify theft and Internet fraud, the potential for damage to persons through the release of exempt or confidential information is significant. As a result, in the second stage of the interim project, the Committee Substitute for Senate Bill 1144 provides for a complete reorganization of the exemptions in the Public Records Act.²

In addition to a topical reorganization of exemptions, methods of reducing the number of exemptions were considered. The Committee Substitute for Senate Bill 1144 also modified the Open Government Sunset Review Act so that during a review of an exemption, consideration will be given to the existence of other similar exemptions and whether it would appropriate to merge those exemptions into a uniform or general exemption. A general or uniform exemption may be defined as an exemption that applies to all agencies subject to open records or meetings requirements.

Trade Secrets

One uniform exemption that would help agencies, as well as the businesses who must file sensitive information with regulatory agencies, involves trade secret information. There are multiple exemptions for trade secrets for specific agencies,³ but there is no exemption that applies to all agencies. A uniform exemption would reduce the number of exemptions, create more uniformity, and prevent agencies who receive trade secret information from having to release that information when they do not have an exemption.⁴ The creation of a uniform exemption for this information would also help to resolve a problem that was addressed in a recent case, *SEPRO Corporation v. Department of Environmental Protection* that is currently on appeal to the Florida Supreme Court. In that case, the statement of public necessity⁵ for an exemption for “. . . data, programs or supporting documentation which is a trade secret as defined in s. 812.081, F.S., which resides or exists internal or external to a computer, computer system, or computer network . . .,” that is found in s. 815.04, F.S., was interpreted by a district

² The Committee Substitute for SB 1144 passed the full Senate on April 14, 2005, by a 40-0 vote.

³ For example, s. 1004.4472(1)(a), F.S., contains an exemption for specific information held by the Florida Institute for Human and Machine Cognition, Inc. Specifically, the exemption protects material relating to methods of manufacture or production, potential trade secrets, patentable material, actual trade secrets as defined in s. 688.002, F.S., or proprietary information received, generated, ascertained or discovered during the course of research conducted by or through the Florida Institute for Human and Machine Cognition, Inc., and its subsidiaries, and business transactions resulting from some research.

⁴ Given the process for review and repeal of new exemptions under the Open Government Sunset Review Act, it would be advisable to retain all other exemptions during the period prior to the review of a uniform exemption to ensure the viability of existing exemptions until it is clear the uniform exemption will be retained.

⁵ Section 815.045, F.S., which begins . . . “[t]he Legislature finds that it is a public necessity that trade secret information as defined in s. 812.081, and as provided for in s. 815.04(3), be expressly made confidential and exempt . . .” is the required public necessity statement for s. 812.081, F.S.

court to be an exemption.⁶ This interpretation had the result of extending protection to certain information that had been filed with an agency, but the interpretation may not withstand Supreme Court review.

SEPRO contracted with the Department of Environmental Protection to assist in the eradication of hydrilla from certain lakes. A public records request was made by another party for information relating to SEPRO and its processes for treating hydrilla. Upon discovering the request, SEPRO's counsel informed the department that certain documents should be protected as trade secrets. The department advised that it intended to release the documents as the documents were not timely marked as confidential prior to receipt of the public records request.⁷ The department did not release the documents as suit was filed to prevent disclosure. The circuit court found that certain documents could be disclosed and others could not. SEPRO appealed and the district court affirmed, finding that the documents that the corporation failed to mark as confidential prior to the public records request could be disclosed and held that the trade secret exemption applied to electronic mail sent to the department. Noting that it is a felony to release trade secret information under s. 815.04(3), F.S., the court stated:

Due to the legal uncertainty as to whether a public employee would be protected from a felony conviction if otherwise complying with chapter 119, and with s. 24(a), Art. I of the State Constitution, *it is imperative that a public records exemption be created.* Currently, s. 812.081, F.S., provides a definition for "trade secret"⁸ and makes it a felony of the third degree for any person to intentionally deprive or withhold from the owner the control of a trade secret, or to intentionally appropriate, use, steal, embezzle or copy the trade secret. . . . The original placement (of the exemption) . . . evinces a contemporaneous view that the exemption . . . applies to more than computer data, programs or supporting documentation. . . (*emphasis added*).

III. Effect of Proposed Changes:

Section 1 is created to provide that a trade secret as defined by s. 668.002, F.S., or s. 812.081, F.S., which is held by a state agency, is exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the state constitution if the proprietor of the trade secret:

- Identifies the trade secret;
- Certifies that the identified information is a trade secret;
- Certifies that the identified information derives independent economic value from not being generally known to, and not readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure;

⁶ Article I, s. 24 of the State Constitution requires each exemption bill to contain a public necessity statement that supports it. Typically, a public necessity statement is published in the *Laws of Florida*, but not in the *Florida Statutes*. CS/SB 1678 from 2004 struck two public necessity statements from the *Florida Statutes* but retained s. 815.045, F.S., because it was on appeal.

⁷ Section 688.002(4)(b), F.S., requires documents containing trade secrets be marked.

⁸ Section 812.081(1)(c), F.S., states in part: "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. . .

- Certifies the identified information is the subject of efforts of the proprietor to maintain its secrecy; and
- Certifies that the identified information is not readily ascertainable or publicly available by proper means by other persons from any other source.

This section also provides that a trade secret is confidential and exempt if the identified information is not readily ascertainable or publicly available by “proper means” by another person from any other source. A price or cost that is included in a response to a competitive solicitation that is submitted to an agency is not a trade secret that is confidential and exempt from disclosure.

As long as the requirements for an exemption are met, the exemption is applicable to all trade secrets held by an agency before, on, or after October 1, 2005.

This section also provides that any portion of a meeting at which a trade secret that is exempt from public disclosure is discussed is exempt from the requirement that all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision are open to the public.

The exemption is subject to the Open Government Sunset Review Act of 1995 and shall be repealed on October 2, 2010, unless reviewed and saved from repeal through reenactment by the legislature.

Section 2 is created to provide the public statement of necessity. A trade secret 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. A state agency, in performing its lawful responsibilities and duties, including obtaining bids for agency purchases or regulating businesses, may need to obtain information that is a trade secret from the proprietor. Without an exemption from public-records requirements for a trade secret held by a state agency, that trade secret becomes a public record when received by the agency and must be divulged upon request. Divulgence of any trade secret under public-records or public-meetings laws would destroy the value of that property to the proprietor, causing a financial loss not only to the proprietor but also to the state due to loss of tax revenue and employment opportunities for state residents. Release of that information would give business competitors an unfair advantage and weaken the position of the proprietor of the trade secret in the marketplace. In addition, without protecting information concerning a trade secret during meetings at which the information is discussed, competitors and other persons may attend those meetings and discover the trade secret. Thus, the Legislature finds that it is a public necessity that a trade secret held by an agency be made exempt from public-meetings requirements and confidential and exempt from public-records requirements.

Section 3 provides that s. 815.045, F.S., stating a public necessity that trade secret information be expressly made confidential and exempt from the public records law, is repealed.

Section 4 provides an effective date of October 1, 2005.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

Section 24(c), Art. I of the State Constitution authorizes the Legislature to create exemptions to public records and meetings requirements by general law. These exemptions must be no broader than necessary to accomplish the stated purpose of the law. A law creating an exemption must contain only exemptions from the public records and meetings requirements and provisions governing enforcement and must relate to one subject. This proposed committee substitute appears to relate to one subject and contain only provisions creating exemptions.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

If a business wants to use the public records exemption for trade secrets, there may be cost associated with identifying the trade secret as provided for in this proposed committee substitute.

C. Government Sector Impact:

There may be a costs associated with redacting confidential and exempt trade secrets prior to releasing a record.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
