



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The bill decreases public access to records and meetings regarding trade secrets.

**Promote personal responsibility** – The bill requires a business to submit a verified written request in order to gain entitlement to the public records exemption for trade secrets.

#### B. EFFECT OF PROPOSED CHANGES:

##### Background

Current law provides multiple public records exemptions for trade secrets that are agency specific, but there is no uniform 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.

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.<sup>1</sup> In that case, the statement of public necessity<sup>2</sup> for a public records 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 court to be an exemption. 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.

Enactment of a uniform public records exemption for trade secrets, along with removal of s. 815.045, F.S., from the Florida Statutes, would provide general protection for trade secrets and also ensure that statements of public necessity are not interpreted as exemptions.

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<sup>1</sup> 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. 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” 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*).

<sup>2</sup> 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., and it was inadvertently codified in the Florida Statutes. Public necessity statements are codified in the Laws of Florida.

## Effect of Bill

The bill creates a uniform public records exemption for a trade secret held by any agency provided the proprietor of the trade secret submits to the agency holding the trade secret a verified,<sup>3</sup> written declaration, and provided the information is not readily ascertainable or publicly available by proper means. The verified written request must identify the trade secret, and must certify that the identified information:

- Is a trade secret as defined in current law;<sup>4</sup>
- Derives independent economic value 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 not otherwise readily ascertainable or publicly available from any other source.

The bill also creates a public meetings exemption for agency meetings wherein confidential and exempt trade secrets are discussed.

The bill provides for future review and repeal of the exemptions on October 2, 2010, pursuant to the Open Government Sunset Review Act of 1995. It also provides a statement of public necessity, and provides for retroactive application of the public records exemption.

The bill repeals s. 815.045, F.S., which is a public necessity statement for a trade secret exemption that was inadvertently codified in the Florida Statutes.

### C. SECTION DIRECTORY:

Section 1 creates an unnumbered section of law to create a public records and public meetings exemptions for trade secrets.

Section 2 provides a statement of public necessity.

Section 3 repeals s. 815.045, F.S., relating to trade secrets.

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

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

None. The bill does not create, modify, amend, or eliminate a state revenue source.

#### 2. Expenditures:

See "FISCAL COMMENTS" section.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None. The bill does not create, modify, amend, or eliminate a local revenue source.

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<sup>3</sup> The request must be verified as provided in s. 92.525, F.S. The section provides that a request is verified if made under oath or affirmation taken or administered before an officer authorized to administer oaths, or by signing a written declaration.

<sup>4</sup> Current definitions are found in ss. 688.002 and 812.081, F.S.

2. Expenditures:

See "FISCAL COMMENTS" section.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

A business could incur costs associated with the time taken to identify trade secrets submitted to an agency, but only if the business wants entitlement to the public records exemption for trade secrets.

D. FISCAL COMMENTS:

The bill could create a fiscal impact on state and local governments, because agency staff would have to be trained with regards to the newly created trade secret exemption, in addition to the verification process. State and local governments could also incur costs associated with redacting confidential and exempt trade secrets prior to releasing a record.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not: require counties or municipalities to spend funds or to take an action requiring the expenditure of funds; reduce the percentage of a state tax shared with counties or municipalities; or reduce the authority that municipalities have to raise revenue.

2. Other:

Article I, s. 24(c) of the State Constitution, requires a two-thirds vote of the members present and voting for passage of a newly created public records or public meetings exemption. Thus, this bill requires a two-thirds vote for passage.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

#### **Public Records and Public Meetings Laws**

Article I, s. 24(a), 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. Article I, s. 24(b), Florida Constitution, sets forth the state's public policy regarding access to government meetings. The section requires all meetings of the executive branch and local government to be open and noticed to the public.

The Legislature may, however, provide by general law for the exemption of records and meetings from the requirements of Article I, s. 24, Florida Constitution. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Public policy regarding access to government records and meetings is also addressed in the Florida Statutes. Section 119.07(1), F.S., also guarantees every person a right to inspect, examine, and copy any state, county, or municipal record, and s. 286.011, F.S., requires that all state, county, or municipal meetings be open and noticed to the public. Furthermore, the Open Government Sunset Review Act of

1995<sup>5</sup> provides that a public records or public meetings exemption may be created or maintained only if it serves an identifiable public purpose, and may be no broader than is necessary to meet one of the following public purposes: 1. Allowing the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption; 2. Protecting 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, 3. Protecting trade or business secrets.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

None.

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<sup>5</sup> Section 119.15, F.S.