

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

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

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Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

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BILL: SPB 7038

INTRODUCER: For consideration by the Governmental Oversight and Accountability Committee

SUBJECT: Public Records/Proprietary Confidential Business Information

DATE: February 11, 2009

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	Wilson		<b>Pre-meeting</b>
2.				
3.				
4.				
5.				
6.				

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**I. Summary:**

This bill creates a new public records exemption for proprietary confidential business information held by a state agency.

This bill substantially amends section 119.071, and repeals section 815.045, of the Florida Statutes.

**II. Present Situation:**

**General Public Records Exemptions-** Under Article I, s.24 of the State Constitution, as well as s. 119.07(1), F.S., information received pursuant to law or ordinance or in connection with the transaction of official business by an agency is a public record and, absent an applicable exemption, such information must be released upon request unless an exemption applies. Only the Legislature may enact public records or meetings exemptions under the constitutional provision. While exemptions may be counted differently, it is estimated there are 1,084 exemptions in current law.

Since at least the 2002 legislative session, the Legislature has considered bills that would reduce the number of exemptions by merging existing exemptions into general or uniform exemptions. During the 2005 legislative session, the Legislature completely reorganized ch. 119, F.S., the Public Records Act, and in that process, identified and co-located exemptions which apply to agencies generally.<sup>1</sup> Further, as part of a revision to the Open Government Sunset Review Act, the Legislature required exemptions undergoing sunset review to be examined to determine if

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<sup>1</sup> See, ch. 2005-251, L.O.F.

another provision of law provides the same protection for the information and to determine if multiple exemptions for the same type of record or meeting could be appropriately merged.<sup>2</sup>

The Public Records Act has separate sections containing general exemptions for executive branch agencies<sup>3</sup> and separate sections for specific executive branch agencies that have not yet been transferred to agency-specific sections of law.<sup>4</sup> Additionally, there are separate sections of general exemptions for local government agencies<sup>5</sup> and the courts.<sup>6</sup>

Further, s. 119.071, F.S., contains general exemptions grouped under subsections that apply to agencies generally, as defined in s. 119.011, F.S.<sup>7</sup> The “Agency Administration” subheading includes general exemptions for licensure examinations and answers, sealed bids or proposals, and data processing software obtained under a license agreement that prohibits its disclosure if that software is a trade secret. Under the subheading “Agency Investigations” are general exemptions for criminal intelligence and investigative information held by criminal justice agencies and surveillance techniques. Under the subheading “Security,” general exemptions are provided for security system plans, as well as certain building plans and blueprints. Under the subheading “Agency Personnel Information,” general exemptions are provided for agency employee social security numbers and medical information. The last subheading, “Other Personal Information,” includes general exemptions for social security numbers of the public and telecommunications subscriber information, among other exemptions.<sup>8</sup>

**Trade Secrets-** At least two subsections in different chapters of the Florida Statutes define the term “trade secret.” The first definition is part of the Uniform Trade Secrets Act<sup>9</sup> and is found in s. 688.002(4), F.S. That section defines “trade secret” to mean:

. . . 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.

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<sup>2</sup> Section 119.15(6)(a)5. and 6., F.S.

<sup>3</sup> Section 119.0711, F.S.

<sup>4</sup> Section 119.0712, F.S.

<sup>5</sup> Section 119.0713, F.S.

<sup>6</sup> Section 119.0714, F.S.

<sup>7</sup> For purposes of the Public Records Act, “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.”

<sup>8</sup> The cited general exemptions in this paragraph are provided by way of example only and are not a complete list of the general exemptions contained in these subsections.

<sup>9</sup> Section 688.001-688.009, F.S.

The second definition for “trade secrets” is found in s. 812.081(1)(c), F.S., which is part of a chapter of law that deals with theft, robbery and related crimes. Section 812.081(1)(c), F.S., defines “trade secret” to mean:

. . . 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.

Business entities often provide agencies with information meeting the definition of “trade secrets” under one of the foregoing sections. For example, a corporation which is negotiating with an economic development agency to relocate to Florida may provide that agency with trade secret information as part of the negotiation process.<sup>10</sup> Another example is the receipt of trade secret information by the State Board of Administration during its consideration of an alternative investment under s. 215.44, F.S. In both of these examples, trade secret information is protected by exemptions that are either specific to the agency or to a program.

Section 815.045, F.S. provides that:

The Legislature finds that it is a public necessity that trade secret information as defined in s. 812.084 and as provided for in s. 815.043 be expressly made confidential and exempt from the public records law because it is a felony to disclose such records. 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. The Legislature in making disclosure of trade secrets a crime has clearly established the importance attached to trade secret protection. Disclosing 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 marketplace, and those entities and individuals disclosing such trade secrets would hesitate to cooperate with that

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<sup>10</sup> Section 288.075, F.S.

agency, which would impair the effective and efficient administration of governmental functions. Thus, 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 section quoted above, which is now codified as s. 815.045, F.S., was created by ch. 94-100, L.O.F. That section made confidential and exempt:

Data, programs, or supporting documentation which is a trade secret as defined in s. 812.081 which resides or exists internal or external to a computer, computer system, or computer network which is held by an agency as defined in chapter 119. . .

Section 815.045, F.S., which was Section 2 of ch. 94-100, L.O.F., was the required public necessity statement for this exemption.<sup>11</sup> A law creating an exemption must meet certain requirements under Article I, s. 24(c) of the State Constitution. One of those is a requirement that it “. . . shall state with specificity the public necessity justifying the exemption . . .” Public necessity statements typically follow the section in the bill that creates the exemption, with the effective date of the bill following in the subsequent section. This was the same format followed in Senate Bill 102.

While the format of the bill<sup>12</sup> creating the exemption in s. 815.04, F.S., was typical for a bill creating an exemption, placement of the public necessity statement for that exemption in statute was atypical. Even more unusual, the public necessity statement was separated from the underlying exemption and placed in an entirely separate chapter of law. The bill created the exemption as s. 815.04, F.S., but the statement of public necessity originally was placed in s. 119.165, F.S. The following year, s. 119.165, F.S., was moved to s. 815.045, F.S., which placed it next to the exemption for which it was the statement of public necessity. The decision to place the statement of public necessity in the Public Records Act, first as s. 119.165 in the 1994 Supplement<sup>13</sup> and then to move it in 1995 to its current location in ch. 815, F.S., was an editorial and organizational decision made at the Division of Statutory Revision. That division is authorized to determine the placement of statutes under s. 11. 242(2), F.S.,<sup>14</sup> but not to establish legislative intent.<sup>15</sup>

Nevertheless, in *SEPRO Corporation v. Florida Department of Environmental Protection*,<sup>16</sup> the First District Court of Appeal found that s. 815.045, F.S., “. . . should be read to exempt from

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<sup>11</sup> See, s. 2, ch. 94-100, L.O.F.

<sup>12</sup> Senate Bill 102 by the Committee on Criminal Justice.

<sup>13</sup> Section 119.165, F.S. (1994 Supp.)

<sup>14</sup> Section 11.242, F.S., establishes the powers and duties of the Division of Statutory Revision.

<sup>15</sup> Unless specified by statute or arising by necessary implication, a section heading has no legal significance. See, *Agner v. Smith*, 167 So.2d 86 (Fla. 1<sup>st</sup> DCA 1964). Statutory section headings inserted by statutory revisers and or legislative service bureau as convenient visual references to content are not themselves part of statute. *Askew v. MGIC Development Corp. of Fla.*, 262 So.2d 227 (Fla. 4<sup>th</sup> DCA 1972).

<sup>16</sup> 839 So. 2d 781 (Fla. 2003)

disclosure as public records all trade secrets as defined in s. 812.081(1)(c), F.S., whether or not they are stored on or transmitted by computers.”

In this case, 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 had been made, 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.<sup>17</sup> 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. . .

The court makes much of the original placement of the statement of public necessity in the Public Records Act, stating:

The original placement in Chapter 119 evinces a contemporaneous view that the exemption from the public records disclosure requirements that section two of chapter 94-100, Laws of Florida (1994), enacted applied to more than computer data, programs or supporting documentation. Just as the trial court ruled, the language of this provision should be read to exempt from disclosure as public records all trade secrets as defined in s. 812.081(1)(c), Florida Statutes (2001), whether or not they are stored on or transmitted by computers.<sup>18</sup>

As noted previously, the decision to place in statute the public necessity statement for the exemption in s. 815.04, F.S., was made at the Division of Statutory Revision.

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<sup>17</sup> Section 688.002(4)(b), F.S., requires documents containing trade secrets to be marked.

<sup>18</sup> *Sepero* at 785.

The Florida Supreme Court denied review of the case on August 29, 2005.<sup>19</sup> While the Florida Supreme Court denied review, it is possible that another district court of appeal could issue an opinion contrary to the opinion in *Sepero*.

Another issue affecting trade secrets held by agencies is the process by which trade secrets are identified, the amount of reliance upon that identification by the trade secret owner given by the agency, and what process is followed when a public records request includes trade secret information. The current “general” exemption for trade secrets found in s. 815.045, F.S., as determined by the district court in *Sepero*, establishes no procedures to be followed by agencies when dealing with trade secrets. Most state agencies have developed methods for providing notice to the trade secret owner that a request has been made for the information and advising that owner that the information will be released within a certain period unless the owner seeks to protect the information in court.

### **III. Effect of Proposed Changes:**

The bill creates, in s. 119.071(1)(h), F.S., a public records exemption for proprietary confidential business information held by a state agency. The bill provides that a public records request to inspect or copy proprietary confidential business information will be granted under certain specified conditions, after giving the proprietor an opportunity to protect the information. The bill also provides that a court may, after petition and making certain findings, order the release of those portions of a record protected by the exemption.

In accordance with Section 25(a), Article I of the State Constitution and s. 119.071, F.S., the bill specifies the date by which this exemption will be repealed unless reenacted, and the public necessity statement finding that it is a public necessity that proprietary confidential business information held by an agency be made confidential and exempt from public-records requirements.

The bill also repeals s. 815.045, F.S., and provides an effective date of July 1, 2009.

### **IV. Constitutional Issues:**

#### **A. Municipality/County Mandates Restrictions:**

None.

#### **B. Public Records/Open Meetings Issues:**

This bill creates a new public records exemption for proprietary confidential business information held by a state agency, specifies the date by which this exemption will be repealed unless reenacted, and provides that creating the exemption is a public necessity.

The bill also repeals from the Florida Statutes a public necessity statement that has been interpreted to create an independent public records exemption.

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<sup>19</sup> *Crist v. Florida Department of Environmental Protection*, 911 So.2d 792 (2005).

C. Trust Funds Restrictions:

None.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Unknown.

C. Government Sector Impact:

Unknown.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

A. Committee Substitute – Statement of Substantial Changes:  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.