

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.)

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

BILL: CS/SB 310

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Dockery

SUBJECT: Public Records/Proprietary Confidential Business Information

DATE: March 10, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Pugh	Cooper	CM	Favorable
2.	Naf	Wilson	GO	Fav/CS
3.			RC	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill makes proprietary confidential business information held by an agency confidential and exempt from the public-records requirements of s. 119.07(1), F.S., and s. 24(a), art. I of the State Constitution. The bill provides a process for petitioning for public access to such records. The bill also repeals an existing section of law in which a similar public necessity statement is codified.

The exemption is subject to legislative review and repeal under the provisions of the Open Government Sunset Review Act.¹

Because this bill creates a new public-records exemption, it requires a two-thirds vote of each house of the Legislature for passage.²

This bill substantially amends s. 119.071, F.S., and repeals s. 815.045, F.S.

¹ Section 119.15, F.S.

² Section 24(c), Art. I of the State Constitution.

II. Present Situation:

Florida's Public-Records Laws

Florida has a long history of providing public access to the records of governmental and other public entities. The Legislature enacted its first law affording access to public records in 1892. In 1992, Florida voters approved an amendment to the State Constitution which raised the statutory right of access to public records to a constitutional level.

Section 24(a), Art. I, of the State Constitution, provides that:

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 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.

The Public Records Law is contained in chapter 119, F.S., and specifies conditions under which the public must be given access to governmental records. Section 119.07(1)(a), F.S., provides that every person who has custody of a public record³ must permit the record to be inspected and examined by any person, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record. Unless specifically exempted, all agency⁴ records are to be available for public inspection.

Section 119.011(12), F.S., defines the term "public record" to include 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. 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 "intended 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

³ Section 119.011(12), F.S., defines "public records" to include "all documents, papers, letters, maps, books, tapes, photographs, film, 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 Section 119.011(2), F.S., defines "agency" as "...any state, county, district, authority, or municipal officer, department, division, 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."

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

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

Only the Legislature is authorized to create exemptions to open government requirements.⁷ Exemptions must be created by general law and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.⁸ A bill enacting an exemption⁹ may not contain other substantive provisions although it may contain multiple exemptions relating to one subject.¹⁰

There is a difference between records that the Legislature exempts from public inspection and those that the Legislature makes confidential and exempt from public inspection. If a record is made confidential with no provision for its release so that its confidential status will be maintained, such record may not be released by an agency to anyone other than the person or entities designated in the statute.¹¹ If a record is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.¹²

General Public-Records Exemptions

Since the enactment of ch. 2005-251, L.O.F., which co-located general agency public-records exemptions and required consideration of the merger of exemptions in the Open Government Sunset Review process,¹³ the Legislature has attempted to eliminate redundant exemptions and to create general exemptions where appropriate. The creation of general or uniform exemptions reduces the number of exemptions, provides more uniformity of application of exemptions, and provides more clarity regarding the status of records for agencies and the public.

Chapter 119, F.S., the Public Records Act, contains general exemptions for those types of records that are typically held by agencies. For example, among numerous other general exemptions, s. 119.071, F.S., contains general exemptions for sealed bids or proposals, security system plans, social security numbers, and data processing software obtained under a licensing agreement.

Proprietary Confidential Business Information Exemptions

Section 119.071, F.S., does not currently contain a general exemption for proprietary confidential business information held by agencies, although at least two subsections in different chapters of the Florida Statutes define the term “proprietary confidential business information.”¹⁴ The definitions focus on the rationale for the importance of keeping such information private and on efforts by the proprietors to maintain the confidentiality of such information. The definitions include trade secrets.

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

⁸ *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So.2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So.2d 567 (Fla. 1999).

⁹ Section 119.15(4)(b), F.S., provides that an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

¹⁰ Section 24(c), Art. I of the State Constitution

¹¹ Attorney General Opinion 85-62, August 1, 1985.

¹² *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d. 289 (Fla. 1991).

¹³ Section 119.15, F.S.

¹⁴ Section 288.075(1)(b), F.S., and s 215.44(8)(c)1.f., F.S.

Trade Secrets Exemptions

Section 119.071, F.S., does not currently contain a general exemption for trade secrets held by agencies, although at least two subsections in different chapters of the Florida Statutes define the term “trade secret.”¹⁵ Those definitions focus on the rationale for the importance of keeping such information confidential and on efforts by the proprietor to prevent such information from becoming public.

Business entities often provide agencies with information meeting the definition of “trade secrets” under one of the sections defining the term. 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.¹⁶ 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.

Although s. 119.071, F.S., does not provide a general exemption for trade secrets held by agencies, the First District Court of Appeal found in *Sepro Corporation v. Department of Environmental Protection*¹⁷ that information meeting the definition of “trade secret” as defined in s. 812.081, F.S.¹⁸ was protected by s. 815.045, F.S.¹⁹ That section was the public necessity statement in a bill creating an exemption for data, programs, or supporting documentation which exists internal or external to a computer, computer system, or computer network, which is now codified as s. 815.04(3), F.S. While art. I, s. 24 of the State Constitution requires each bill that creates an exemption to contain a statement of public necessity establishing the reasons why the exemption is necessary, these statements typically are not placed in statute, nor are they regularly determined to be freestanding exemptions.

¹⁵ Section 688.002(4), F.S. and s. 812.081(1)(c), F.S.

¹⁶ Section 288.075, F.S.

¹⁷ 839 So.2d 781 (Fla. 1st DCA 2003).

¹⁸ Section 812.081, F.S., defines “trade secrets” as “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. . . . 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.”

¹⁹ 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 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 is 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 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 foreclosure, and the public’s ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.”

A current 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 *SEPRO*, 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:

This bill exempts from the public-records requirements of s. 119.07(1), F.S. and s. 24(a), Art. I of the State Constitution proprietary confidential business information held by an agency. The bill also repeals an existing section of law in which similar language is inappropriately located.

Section 1 of the bill amends s. 119.071, F.S., to make confidential and exempt from public-records requirements “proprietary confidential business information,” which the bill defines as:

- Business plans;
- Internal auditing controls and reports of internal auditors;
- Reports of external auditors for privately held companies; or
- Trade secrets as defined in s. 688.002, F.S.²⁰

which a business proprietor authorized to do business in this state has designated as confidential; is intended to be and is treated as private, not readily ascertainable, or publicly available from any other source, and which would harm the proprietor’s business operations; and has not been intentionally disclosed to the public except as required by law, legal process, or administrative hearing officer.

The exemption applies retroactively. Such information held by an agency before, on, or after July 1, 2010, is confidential and exempt from s. 119.07(1), F.S., and s. 24(a), art. I of the State Constitution.

If an agency receives a public-records request for a record that contains proprietary confidential business information, that agency must notify the proprietor of the information of the request. The request will be granted unless the proprietor provides a written declaration containing the following to the custodial agency within a reasonable period of time:

- That the requested record contains proprietary confidential business information and the specific location of such information within the record;
- If the proprietary confidential business information is a trade secret, a verification that it is a trade secret as defined in s. 688.002;

²⁰ Section 688.002(4), F.S., defines “trade secret” as “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.”

- That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and
- That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.

The bill authorizes any person to petition for release of a record containing proprietary confidential business information. He or she must file suit in the appropriate court in Leon County. The petition or pleading must be served on the state agency that is the custodian of the information and, if determinable, on the proprietor of the information. The court must make a finding of the following factors in order to grant release of the record:

- The record is not a trade secret as defined in s. 668.002, F.S.;
- A compelling public interest to release the record exceeds the public purpose of maintaining its confidentiality; and
- Release of the record will not damage or adversely impact the interests of the proprietor, other private persons or businesses, or the custodial agency.

The bill specifies that this new public-records exemption will not supersede any other applicable public-records exemptions existing before or created after July 1, 2010.

The bill provides for legislative review and repeal of the exemption under the Open Government Sunset Review Act.²¹

Section 2 provides a statement of public necessity for the exemption. It justifies the exemption by explaining that release of proprietary confidential business information would result in a financial loss to both the proprietor of the information and to the government.

Section 3 repeals s. 815.045, F.S., which codifies legislative findings regarding the public necessity of maintaining the confidentiality of trade secrets maintained in electronic form.

Section 4 specifies an effective date of July 1, 2010.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), art. I of the State Constitution requires a two-thirds vote of each house of the Legislature for passage of a newly created public-records or public-meetings exemption. Because this bill creates a new public-records exemption, it requires a two-thirds vote for passage.

²¹ Section 119.15, F.S.

Subject Requirement

Section 24(c), art. I of the State Constitution requires the Legislature to create public-records or public-meetings exemptions in legislation separate from substantive law changes. This bill complies with that requirement.

Public Necessity Statement

Section 24(c), art. I of the State Constitution requires a public necessity statement for a newly-created public-records or public-meetings exemption. Because this bill creates a new public-records exemption, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

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.)

CS by Governmental Oversight and Accountability on March 10, 2010:

The committee substitute:

- Corrects a drafting error, and
- Clarifies that when an agency receives a public-records request for a record that contains proprietary confidential business information, that agency must notify the proprietor of the information of the request.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
