

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 Committee on Governmental Oversight and Accountability

BILL: CS/SB 564

INTRODUCER: Commerce and Tourism Committee and Senator Richter

SUBJECT: Trade Secrets

DATE: April 6, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	Fav/CS
2.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 564 expands the definition of the term “trade secret”, as provided in s. 812.081, F.S., to expressly include financial information.

An individual who steals, copies without authorization, or misappropriates a trade secret is subject to a third degree felony under s. 812.081, F.S.

II. Present Situation:

Trade Secret

Section 812.081, F.S., defines a “trade secret” as information¹ used in the operation of a business, which provides the business an advantage or an opportunity to obtain an advantage, over those who do not know or use it. The test provided for in statute, and adopted by Florida courts,² requires that a trade secret be actively protected from loss or public availability to any person not selected by the secret’s owner to have access thereto, and be:

- Secret;
- Of value;
- For use or in use by the business; and

¹ A trade secret may manifest as any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Section 812.081, F.S.

² See, e.g., *Sepro Corp. v. Dep’t. of Env’t. Prot.*, 839 So. 2d 781 (Fla. 1st DCA 2003).

- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.³

Penalties

Florida law criminalizes the disclosure or theft of trade secrets. For example:

- Section 815.04, F.S., makes it a third degree felony⁴ for a person to willfully, knowingly, and without authorization disclose or take data, programs, or supporting documentation that are trade secrets that reside or exist internal or external to a computer, computer system, computer network, or electronic device.⁵
- Section 812.081, F.S., makes it a third degree felony for a person to steal, embezzle, or copy without authorization an article that represents a trade secret, when done with an intent to:
 - Deprive or withhold from the trade secret's owner the control of a trade secret, or
 - Appropriate a trade secret to his or her own use or to the use of another.
- Section 581.199, F.S., makes it unlawful for a designated employee, inspector, or collaborator of the Florida Department of Agriculture and Consumer Services' Division of Plant Industry or the United States Department of Agriculture who, in an official capacity obtains under ch. 581, F.S., any information entitled to protection as a trade secret, to use such information for personal gain or to reveal it to an unauthorized person.

A number of statutes also provide non-criminal protections for trade secrets. The majority of these statutes provide public record exemptions for trade secrets,⁶ but others provide procedural safeguards or civil remedies instead.⁷

Related Definitions and Law

The federal Freedom of Information Act exempts "trade secrets and commercial or financial information" from public disclosure.⁸ In order to withhold financial or commercial information from public review, it must be shown that the release of the information is likely to (1) impair the government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.⁹ "Substantial harm" may manifest as the disclosure of a company's assets, profits, losses, and market shares.¹⁰

Florida law also defines "trade secret" in the Florida Uniform Trade Secrets Act¹¹ as a "formula, pattern, compilation, program, device, method, technique, or process" that derives actual or potential economic independent economic value from not being generally known to, and not

³ Section 812.081(1)(c), F.S.

⁴ A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. (ss. 775.082 and 775.083, F.S.)

⁵ The offense is a second degree felony if committed for the purpose of creating or executing any scheme or artifice to defraud or to obtain property.

⁶ Sections 119.071(1)(f), 125.0104(9)(d), 288.1226(8), 331.326, 365.174, 381.83, 403.7046(2)-(3), 403.73, 499.012(g), (m), 499.0121(7), 499.051(7), 499.931, 502.222, 570.48(3), 573.123(2), 581.199, 601.10(8)(a), 601.15(7)(d), 601.152(8)(c), 601.76, and 815.045, F.S.

⁷ Sections 721.071 and 812.035, F.S.

⁸ 5 USC §552(b)(4).

⁹ 110 Am. Jur, Trials 367, Pt. 3 (February 2015).

¹⁰ *Id.*

¹¹ Section 688.002(4), F.S.

being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use when it is the subject of reasonable efforts under the circumstances to maintain its secrecy.

III. Effect of Proposed Changes:

Section 1 adds financial information to protected information classified as a trade secret, which is exempt from public records disclosure requirements.¹²

Section 2 provides an effective date of October 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

This bill will expand the definition of trade secrets as found in s. 812.081. The companion public records bill, SB 564, addresses this issue.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Businesses previously hesitant to enter into contracts with the state because of fear of release of their trade secrets may now feel more secure entering into such contracts.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) met March 11, 2015, and determined that HB 91, which is substantively identical to this committee substitute, will have a positive insignificant impact on state prison beds. This means CJIC estimates that this bill may increase the department's prison bed population by less than 10 inmates annually.

In response to public records requests, state agencies will be required to interpret what constitutes a financial information trade secret. In turn, agencies may incur costs related

¹² Section 119.07 and s. 24(a), Art. I, Fla. Const.

to litigation regarding its determination to protect a document as trade secret or provide it as a public record.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill does not define what type of documents constitute “financial information.”

VIII. Statutes Affected:

This bill substantially amends section 812.081, of the Florida Statutes.

IX. Additional Information:

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

CS by Commerce and Tourism on March 30, 2015:

The committee substitute deletes Section 2 of the bill, which unnecessarily reenacted s. 499.931, F.S., requiring trade secret information submitted to the Department of Business and Professional Regulation in the administration and enforcement of medical gas to be maintained as required by s. 499.051, F.S. CS/SB 566’s amendment to s. 499.051, F.S. provides the necessary update to the definition of “trade secret” in s. 499.931, F.S.

- B. **Amendments:**

None.