

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/CS/SB 182

INTRODUCER: Governmental Oversight and Accountability Committee, Commerce and Tourism
Committee and Senator Richter

SUBJECT: Public Records and Meetings/Trade Secrets

DATE: November 18, 2015 REVISED: _____

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

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 182 reenacts several public records exemptions of trade secret information to conform to the definition of trade secret proposed in CS/SB 180, which expressly includes financial information in the definition of “trade secret” in s. 812.081, F.S. This exemption protects financial information deemed to be a trade secret from public disclosure.

The bill provides that the public record exemptions are subject to the Open Government Sunset Review Act and stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a public necessity statement as required by the Florida Constitution.

Because this bill expands public records and meetings exemptions, it will require a two-thirds vote of each house in order to pass.

The bill takes effect on October 1, 2016, contingent upon CS/SB 180 or similar legislation becoming a law.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access governmental meetings and to inspect or copy government records. The public may inspect or copy any records made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.¹ The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government, counties, municipalities, school districts, or special districts at which public business is transacted or discussed.² The Legislature's meetings must be open and noticed to the public, unless there is an exception provided by the constitution.³

The Florida Statutes specify conditions under which public access must be provided to government records and meetings. Chapter 119, Florida Statutes, the "Public Records Act," constitutes the main body of public records laws, and states that:

It is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.⁴

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.⁵ The Florida Supreme Court interprets "public records" as "any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type."⁶ A violation of the Public Records Act may result in civil or criminal liability.⁷

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ FLA. CONST., art. I, s. 24(b). Meetings of the Legislature are governed by Article III, section 4(e) of the Florida Constitution, which states: The rules of procedure of each house shall further provide that all prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon formal legislative action that will be taken at a subsequent time, or at which formal legislative action is taken, regarding pending legislation or amendments, shall be reasonably open to the public.

⁴ Section 119.01(1), F.S.

⁵ Section 119.011(12), F.S., defines "public record" to mean "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." Section 119.011(2), F.S., defines "agency" 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." The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.

⁶ *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

⁷ Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are penalties for violations of those laws.

Section 286.011, Florida Statutes, the “Sunshine Law,”⁸ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁹

The Legislature may, by two-thirds votes of the House and the Senate,¹⁰ create an exemption to public records or open meetings requirements.¹¹ An exemption must explicitly state the public necessity of the exemption¹² and must be tailored to accomplish the stated purpose of the law.¹³ A statutory exemption which does not meet these two criteria may be found unconstitutional, and efforts may not be made by the court to preserve the exemption.¹⁴

Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of public records and public meeting exemptions, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR Act).

The OGSR Act prescribes a legislative review process for newly created or substantially amended public records and open meetings exemptions.¹⁵ The OGSR Act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹⁶ In practice, many exemptions are continued by repeal of the sunset date rather than reenactment of the exemption.

⁸ *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693, 695 (Fla. 1969).

⁹ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, s. 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

¹² FLA. CONST., art. I, s. 24(c).

¹³ FLA. CONST., art. I, s. 24(c).

¹⁴ *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional.

¹⁵ Sections 286.0111 and 119.15, F.S. Section 286.0111, F.S. provides that the OGSR Act’s provisions found in s. 119.15, F.S., apply to s. 286.011, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered substantially amended if it is expanded to include more information or to include meetings. The OGSR Act does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. While the OGSR process is currently being followed, however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one Legislature cannot bind a future Legislature. *Scott v. Williams*, 107 So. 3d 379 (Fla. 2013).

¹⁶ Section 119.15(3), F.S.

Under the OGSR Act, the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following specific questions in such a review:¹⁷

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

The OGSR Act provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.¹⁸ An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁹
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;²⁰ or
- It protects trade or business secrets.²¹

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.²²

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.²³ If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.²⁴

Trade Secrets

A "trade secret" in accordance with s. 812.081(1)(c), F.S., is

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

¹⁷ Section 119.15(6)(a), F.S.

¹⁸ Section 119.15(6)(b), F.S.

¹⁹ Section 119.15(6)(b)1., F.S.

²⁰ Section 119.15(6)(b)2., F.S.

²¹ Section 119.15(6)(b)3., F.S.

²² Section 119.15(6)(b), F.S.

²³ FLA. CONST., art. I, s. 24(c).

²⁴ Section 119.15(7), F.S.

the prior art, and the level of skill in the business, art, or field to which the subject matter pertains.

Section 812.081, F.S., further defines a “trade secret” as information 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, 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
- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.²⁵

Courts similarly use this factor test to determine whether a document is trade secret subject to protection from public records laws. In *Sepro v. Department of Environmental Protection*,²⁶ the court held that a document was subject to disclosure because the business failed the first prong of the test (that the document be secret) because it had not actively protected or held out the document as a trade secret.

Florida law contains a variety of provisions making trade secret information exempt or confidential and exempt from public records requirements. The following sections of the Florida Statutes exempt from public disclosure trade secrets as defined by s. 812.081, F.S.:

- Section 119.071(1)(f), F.S., exempts data processing software obtained by an agency under a licensing agreement that prohibits its disclosure where the software is trade secret;
- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency;
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida);
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt;²⁷
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services confidential and exempt;
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt;

²⁵ Section 812.081(1)(c), F.S.

²⁶ 839 So. 2d 781 (Fla. 1st DCA 2003).

²⁷ Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records may be disclosed under certain circumstances. See *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Attorney General Opinion 85-62 (August 1, 1985).

- Sections 403.7046(2) and (3)(b) and 403.73, F.S., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt;
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.;
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.;
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt;
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt;
- Section 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt;
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt;
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt;
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt;
- Section 601.152(8)(c), F.S., makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt;
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt; and
- Section 815.04(3), F.S., makes trade secret information that is held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.
- Section 815.045, F.S., is the public necessity statement for s. 815.04(3), F.S., which has been interpreted by the First District Court of Appeals as a general public records exemption for trade secrets “whether or not they are stored on or transmitted by computers.”²⁸

Currently, financial information is expressly protected from public disclosure in certain instances. Examples of public records exemptions which protect financial information include:

- Trade secrets and commercial or financial information, as defined under federal law, held by a county tourism promotion agency, pursuant to s. 125.0104(9)(d)2.c., F.S.

²⁸ *Sepero Corp. v. Florida Dept. Of Environmental Protection*, 839 So. 2d 781, 785 (Fla. 1st DCA 2003). For a more extensive discussion, please see *The Florida Senate Issue Brief 2009-325*, October 2008 by the Committee on Governmental Operations.

- Private corporations or businesses who request that “information concerning plans, intentions or interests... to relocate or expand” that is held by an economic development agency pursuant to s. 288.075(2), F.S.²⁹ or proprietary business information pursuant to s. 288.075(3), F.S.
- Sealed bids, proposals or replies provided to an agency during a competitive solicitation, pursuant to s. 119.071(1)(b), F.S.
- Financial statements required to prequalify to bid on a public works project held by any governmental agency pursuant to s. 119.071(1)(c), F.S.

III. Effect of Proposed Changes:

The bill reenacts various statutory provisions that make trade secrets exempt or confidential and exempt to conform to the expanded definition of trade secret in CS/SB 180 which adds “financial information” to the current definition.

By adding “financial information” to the definition of trade secrets, all the public records exemptions which cite to s. 812.081, F.S., are also affected. Some trade secret exemptions were enacted before the Florida Constitution was amended in 1992. The constitutional amendment made the records of all three branches of state government public record but still preserved any public records exemption which existed before the constitutional amendment was enacted.³⁰ This bill amends the older statutes to make them exempt from the public records requirements of the Florida Constitution.

This bill expands the public meetings exemption for Space Florida, if those meetings include discussions about trade secrets, because the definition of trade secret is expanded to include financial information.³¹

The bill subjects most public records and meetings exemptions which relate to trade secrets defined in s. 812.081, F.S., to review and repeal on October 2, 2021, unless the Legislature continues the exemptions, pursuant to the OGSR Act.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

To the extent this bill requires a city or county to expend funds to comply with its terms, the provisions of Article VII, section 18(a) of the Florida Constitution, may apply. However, Article VII, section 18(d) of the Florida Constitution exempts bills having an insignificant fiscal impact on cities and counties from the mandates provisions.

This bill makes certain financial information submitted to cities and counties confidential and exempt from public disclosure. As a result, cities and counties holding such

²⁹ Attorney General Opinion 2004-19 states “[d]evelopment plans, financial records, financial commitment letters and draft memoranda of understanding between the city and a developer regarding a redevelopment project appear to come within the scope of this exemption.”

³⁰ FLA. CONST. art. 1, s. 24.

³¹ Section 286.011, F.S. and FLA. CONST. art. 1, s. 24(b).

information may incur costs associated with redacting such information before providing related documents to the public. However, the costs incurred by the cities and counties are anticipated to be insignificant.

B. Public Records/Open Meetings Issues:

Vote Requirement

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

Public Necessity Statement

Section 24(c) of Article I of the Florida Constitution requires a public necessity statement for a newly created or expanded public-records or public-meetings exemption. The Florida Constitution provides that an exemption must state with specificity the public necessity of the exemption.

This public necessity statement provides that disclosure of financial information comprising a trade secret would be detrimental to businesses because that information could be disclosed to competitors and adversely affect the businesses in the marketplace.

Breadth of Exemption

Section 24(c) of Article I of the Florida Constitution requires a public record or public meeting exemption to be no broader than necessary to accomplish the stated purpose of the law.

CS/SB 180 expands public record exemptions to include financial information in the definition of trade secret, however, CS/SB 180 does not define ‘financial information.’ The public necessity statement in this bill does not address the scope of what financial information entails for public records and meetings purposes.

Generally, the exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Businesses required to submit financial information that falls within the “trade secret” definition contained in s. 812.081, F.S., (as modified by CS/SB 180) to public entities will have greater protection of that information from disclosure to competing businesses. This may result in more private sector businesses competing for public sector contracts.

C. Government Sector Impact:

Government entities will have to train their staff to exclude trade secret financial information from public disclosure.

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 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:

State agencies must balance this exemption against the general policy that “all state, county, and municipal records shall be open for personal inspection by any person.”³² This may prove difficult because what constitutes “financial information” under the bill may entail a highly fact-specific determination based on the business’ treatment of the information as secret and the value of the information to the business. This may result in the same type of information being classified as trade secret for one business but not another. At the same time, by expressly including financial information in the definition of a trade secret, agencies and private entities may have more certainty that financial information will be protected if the private entity claims a trade secret exemption.

In addition to the definition of trade secrets located in ch. 812, F.S., the Uniform Trade Secrets Act, ch. 688, F.S., also contains a statutory definition of trade secrets. Under current law the two definitions are very similar but differ in that ch. 812, F.S., is a criminal statute and ch. 688, F.S., is a civil statute. Section 688.002(4), F.S. provides:

“Trade secret” means 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.

³² Section 119.01(1), F.S.

Thirty-two public records or meetings exemptions use the trade secrets definition located in s. 688.002, F.S.,³³ while 21 public records or meetings exemptions use the definition found in s. 812.081, F.S. This bill may inadvertently create two classes of public records exemptions if a court finds that financial information does not constitute a trade secret under s. 688.002, F.S., for public records purposes. This could occur if a court reasons that the Legislature chose to expressly include financial information in its definition of trade secret in s. 812.081, F.S., but deliberately did not make the same change in s. 688.002, F.S. for the purposes of a public records or meetings exemption.

Finally, the bill does not reenact the trade secret exemption in s. 815.045, F.S., which has been interpreted by certain courts to be a general public records exemption for trade secrets.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 119.071, 125.0104, 288.1226, 331.326, 365.174, 381.83, 403.7046, 403.73, 499.012, 499.0121, 499.051, 499.931, 502.222, 570.48, 573.123, 601.10, 601.15, 601.152, 601.76, and 815.04.

IX. Additional Information:

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

CS/CS by Governmental Oversight and Accountability on November 17, 2015:

The bill divided s. 499.051(7), F.S., into two paragraphs in order to subject trade secret exempt information to an OGSR. The committee substitute makes a technical change to reduce ambiguity created by the restructuring of s. 499.051(7), F.S.

CS by Commerce and Tourism on October 5, 2015:

The committee substitute:

- Subjects the entirety of s. 365.174, F.S., to the Open Government Sunset Review Act;
- Clarifies that trade secret information contained in the complaint and obtained by the department pursuant to its investigation constitutes a trade secret; and
- Removed the republication of a criminal prohibition.

- B. **Amendments:**

None.

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

³³ The number of exemptions may differ depending on how they are counted. For the purposes of this bill analysis, the following sections were used to arrive at 32: ss. 73.0155, 215.4401, 288.075, 288.9626, 288.9627, 334.049, 377.24075, 395.3035, 408.185, 408.910, 409.91196, 440.108, 494.00125, 497.172, 501.171, 517.2015, 520.9965, 548.062, 556.113, 559.5558, 560.129, 569.215, 607.0505, 617.0503, 624.4212, 626.84195, 626.884, 627.0628, 665.057, 1004.30, 1004.43, and 1004.447, F.S.