

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 Commerce and Tourism

BILL: SB 1414

INTRODUCER: Senator Gruters

SUBJECT: Public Records/Trade Secrets Held by an Agency

DATE: March 22, 2019

REVISED: _____

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

I. Summary:

SB 1414 creates a public record exemption for trade secrets in records held by Florida agencies or entities that are subject to Florida public record laws (agencies). The bill defines a “trade secret” and excludes from the definition certain information related to a contract or agreement, or addendum thereto, with an agency. Additionally, the bill provides a uniform process for submission to and notification of a trade secret to an agency.

The bill provides a public necessity statement as required by the Florida Constitution. This exemption will be repealed on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

The bill will take effect as law concurrent with SB 1416, or similar legislation, if adopted in the same legislative session or an extension thereof.

II. Present Situation:

Public Record Law

The Florida Constitution provides that the public has the right to inspect or copy government records generated by the legislative, executive, and judicial branches of government.¹ The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, section 24(a) of the Florida Constitution by a two-thirds vote of the members present and voting in each house of the Legislature.² The law must specifically state the

¹ FLA. CONST., art. I, s. 24(a). The Public Record Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public record exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.

² FLA. CONST., art. I, s. 24(c). This portion of a public record exemption is referred to as the “public necessity statement.”

public necessity justifying the exemption³ and must be no broader than necessary to accomplish its stated purpose.

Chapter 119, F.S., the “Public Records Act,”⁴ provides further public policy regarding access to government records. Section 119.07(1)(a), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record. The Open Government Sunset Review Act⁵ provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose that is limited in scope to meet one of the following purposes:⁶

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, the administration of which would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual’s safety; or
- Protect trade or business secrets, the disclosure of which would injure the affected party in the marketplace.

The Open Government Sunset Review Act also requires the automatic repeal of a public record exemption on October 2nd of the fifth year after its creation or substantial amendment, unless the Legislature reenacts the exemption.⁷ The Legislature must consider specific questions during the review for possible reenactment.⁸

The Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’⁹ Records designated as ‘confidential and exempt’ may be released only under circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at a records custodian’s discretion under certain circumstances.¹⁰

Trade Secrets

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt¹¹ from public record requirements. Some exemptions only protect trade

³ *Id.*

⁴ Public record laws are found throughout the Florida Statutes.

⁵ Section 119.15, F.S.

⁶ Section 119.15(6), F.S.

⁷ Section 119.15(3), F.S.

⁸ Section 119.15(6)(a), F.S., requires the Legislature to consider the following questions as part of the review process: 1) What specific records or meetings are affected by the exemption? 2) What specific parties does the exemption affect? 3) What is the public purpose of the exemption? 4) Can the information contained in the records or meetings be readily obtained by alternative means? If so, how? 5) Is the record or meeting protected by another exemption? 6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

⁹ 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).

¹⁰ *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991).

¹¹ There is a difference between records the Legislature designates as exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure 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). If the Legislature designates a record as confidential and exempt from

secrets, while others protect “proprietary business information” and define that term to specifically include trade secrets.

The following are examples of public record exemptions for trade secrets:

- 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 a 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;
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt;
- Section 334.049(4), F.S., makes certain trade secret information obtained by the Department of State as a result of research and development projects confidential and exempt;
- Section 381.83, F.S., makes trade secret information obtained by the Department of Health confidential and exempt;
- Sections 403.7046(2),(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 440.108(2), F.S., makes trade secrets contained in records held by the Department of Financial Services relating to workers’ compensation employer compliance investigations confidential and exempt;
- Section 499.012(3)(c), F.S., makes trade secret information provided to the Department of Business and Professional Regulation in a prescription drug permit application 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 526.311(2), F.S., makes trade secrets contained in investigative records related to the sale of liquid fuel and brake fuel obtained by DACS confidential and exempt;
- Section 560.129(2), F.S., makes information obtained by the Office of Financial Regulation in the course of an investigation of a money service business that is a trade secret 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 601.10(8)(b), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt;
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt;
- Section 626.884(2), F.S., makes information contained in insurance administrators’ records obtained by the Office of Insurance Regulation confidential and exempt; and

public disclosure, such record 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).

- Section 815.04(3) and (6), F.S., makes trade secret information that is held by an agency and exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

While some of these exemptions do not define the term “trade secret,” a majority of them rely on one of two different statutory definitions. Some of the exemptions define the term in accordance with Florida’s criminal statutes, which define the term as follows:

“Trade secret” means 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. The term includes any scientific, technical, or commercial information, including financial information, and includes 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.¹²

Other exemptions define the term in accordance with the Uniform Trade Secrets Act,¹³ which defines the term as follows:

“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.¹⁴

¹² Section 812.081(1)(c), F.S.

¹³ Sections 688.001 through 688.009, F.S.

¹⁴ Section 688.002(4), F.S.

In addition, some exemptions provide a specific process that an agency¹⁵ must use to protect exempted trade secret information. For instance, some exemptions require the party that submits information claimed to be a trade secret to designate the information as protected, while other exemptions require the agency to determine whether information claimed to be a trade secret constitutes a trade secret.¹⁶

Senate Bill 1416

Senate Bill 1416 (2019 Regular Session), to which this bill is linked, repeals most public record exemptions for trade secrets in current law, all associated processes for designating a trade secret, and most references to trade secrets contained in definitions for proprietary business information.

III. Effect of Proposed Changes:

Section 1 creates s. 688.01, F.S., which provides a public record exemption for trade secrets in records held by most Florida agencies that are subject to public record requirements.

Similar to the Florida Uniform Trade Secrets Act, the bill defines “trade secret” as information that is a formula, pattern, compilation, program, device, method, technique, or process that:

- 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
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

However, the bill excludes from its definition of trade secrets the following information related to any contract or agreement, or addendum thereto, with a Florida agency:

- The parties to the contract or agreement, or an addendum thereto;
- The amount of money paid, any payment structure or plan, expenditures, incentives, bonuses, fees, or penalties;
- The nature or type of commodities or services purchased; and
- Applicable contract unit prices and deliverables.

A person who desires to protect their trade secret information from disclosure as a public record must submit a notice of trade secret (notice) to the agency at the time he or she submits the documents that include trade secret information. This notice must include the submitter’s contact information, which must be updated as needed by the submitter. A failure to submit this notice with the record constitutes a waiver of any claim that the record contains a trade secret.

The submitter must also mark the documents that contain a trade secret with “trade secret” on each page or specific portion that contains a trade secret. Additionally, the submitter must

¹⁵ The term “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. Section 119.011(2), F.S.

¹⁶ See s. 381.83, F.S.

provide a written verification made under penalty of perjury that he or she believes the information to be a trade secret based on a reading of s. 688.01, F.S., and that the information has been properly treated as a trade secret prior to its submission to the agency.

The bill authorizes an agency to disclose a trade secret, with the notice of trade secret, to an employee of another agency or governmental entity whose use of the trade secret is within the scope of his or her lawful duties and responsibilities.

An agency employee who, while acting in good faith during the performance of his or her duties, releases a record that contains a trade secret is not criminally or civilly liable for the release.

The bill specifies that the public record exemption does not apply to research institutes created or established in Florida law, divisions of sponsored research at state universities, or technology transfer centers at Florida College System institutions.

The bill provides for repeal of the exemption on October 2, 2024, unless reviewed and saved from repeal through reenactment by the Legislature.

Sections 2 and 3 make technical, conforming changes.

Section 4 provides a public necessity statement, which specifies that the public record exemption created by the bill is necessary to protect trade secret information provided to an agency by an individual or business because disclosure of such information to competitors of those businesses would be detrimental to the business. In addition, the exemption is necessary to protect trade secret information created by an agency in furtherance of the agency's duties and responsibilities, and disclosure of such information would be detrimental to the effective and efficient operation of the agency.

Section 5 provides an effective date that is contingent upon, and concurrent with, adoption of SB 1416 (2019 Regular Session) or similar legislation in the 2019 Regular Session, or an extension thereof.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the public records requirements. This bill creates a new public record exemption; thus, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill creates a new public record exemption; thus, it includes a public necessity statement.

Breadth of Exemption

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The bill creates a public record exemption for trade secrets held by an agency. As such, the exemption does not appear to conflict with the constitutional requirement that it be no broader than necessary to accomplish its purpose.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

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

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Agencies may incur costs related to training and implementation of the new processes required to implement this policy. Specifically, agencies may incur costs associated with redaction of exempt information prior to release of a record.

VI. Technical Deficiencies:

Line 135 of the bill should be amended to reflect that the bill takes effect upon becoming a law if SB 1416 or similar legislation is adopted in the same legislative session or an extension thereof and takes effect.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 688.01, F.S., and substantially amends ss. 688.001, 688.006, and 119.07 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

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