

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 801 Public Records

SPONSOR(S): Oversight, Transparency & Public Management Subcommittee, Gregory

TIED BILLS: HB 799 **IDEN./SIM. BILLS:** SB 1534

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Public Management Subcommittee	13 Y, 0 N, As CS	Villa	Smith
2) Commerce Committee	21 Y, 0 N	Willson	Hamon
3) State Affairs Committee			

SUMMARY ANALYSIS

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt from public record requirements. Some exemptions only protect trade secrets, while others protect “proprietary business information” and define that term to specifically include trade secrets. While some of the exemptions do not define the term “trade secret,” a majority of them rely on one of two different statutory definitions: the definition contained in Florida’s criminal law statutes or the definition in the Uniform Trade Secrets Act. Some exemptions also provide a specific process that an agency must use when protecting trade secret information under the exemption.

House Bill 799 (2020), which this bill is linked to, creates a uniform public record exemption for trade secrets that applies to most agencies that are subject to public record requirements. That bill defines the term “trade secret” and creates a process for an individual or entity to follow when submitting a trade secret to an agency.

This bill 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.

The bill repeals s. 815.045, F.S., which is a public necessity statement for a trade secret exemption that was inadvertently codified in the Florida Statutes.

The bill may have a minimal fiscal impact on the state and local governments. See Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Public Records

Article I, s. 24(a) of the Florida Constitution sets forth the state's public policy regarding access to government records. This section guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. The Legislature, however, may provide by general law for the exemption of records from the requirements of Article I, s. 24(a) of the Florida Constitution.¹ The general law must state with specificity the public necessity justifying the exemption² and must be no more broad than necessary to accomplish its purpose.³

Public policy regarding access to government records is addressed further in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act⁴ provides that a public record exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no more broad than necessary to meet one of the following purposes:⁵

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual may be exempted under this provision.
- Protect trade or business secrets.

Florida's Second District Court of Appeal has held that an amendment eliminating a public record exemption applies prospectively from the effective date of the amendment.⁶ Further, s. 119.15(7), F.S., provides that records created before the date of the repeal of an exemption may not be made public unless otherwise provided by law.

Trade Secrets

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt⁷ from public record requirements. Some exemptions only protect trade 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:

¹ Art. I, s. 24(c), FLA. CONST.

² This portion of a public record exemption is commonly referred to as a "public necessity statement."

³ Art. I, s. 24(c), FLA. CONST.

⁴ Section 119.15, F.S.

⁵ Section 119.15(6)(b), F.S.

⁶ *Baker v. Eckerd Corporation*, 697 So. 2d 970 (Fla. 2d DCA 1997).

⁷ 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 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 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(9), 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 Transportation 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) and (3)(b) and 403.73, F.S., makes 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
- Section 815.04(3), 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 of the term. 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.⁸

Other exemptions define the term in accordance with the Uniform Trade Secrets Act,⁹ 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.¹⁰

In addition, some exemptions provide a specific process that an agency¹¹ must use when protecting trade secret information under the exemption. For instance, some exemptions require the party that submits information claimed to be a trade secret to designate the information as protected, and some exemptions require the agency to determine whether information claimed to be a trade secret constitutes a trade secret.¹²

Section 815.045, F.S., contains the statement of public necessity¹³ for a public record exemption for data, programs, or supporting documentation that is a trade secret as defined in s. 812.081, F.S., that is held by an agency as defined in chapter 119, F.S., and that resides or exists internal or external to a computer, computer system, computer network, or electronic device. In *SePRO Corporation v. Florida Department of Environmental Protection*,¹⁴ the public necessity statement was interpreted by a district court to be a public record exemption. This interpretation had the result of extending protection to certain information that had been filed with an agency.

House Bill 799 (2020)

House Bill 799 (2020), which this bill is linked to, creates a uniform public record exemption for trade secrets that applies to most agencies that are subject to public record requirements. The bill defines the term “trade secret” and creates a process for an individual or entity to follow when submitting a trade secret to an agency.

Effect of the Bill

The bill, which is linked to the passage of HB 799 (2020) or similar legislation, repeals most public record exemptions for trade secrets in current law, all associated processes for designating a trade

⁸ Section 812.081(1)(c), F.S.

⁹ Sections 688.001 through 688.009, F.S.

¹⁰ Section 688.002(4), F.S.

¹¹ 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 chapter 119, F.S., 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.

¹² See s. 381.83, F.S.

¹³ Section 815.045, F.S., which begins “[t]he Legislature finds that it is a public necessity that trade secret information as defined in s. 812.081, and as provided for in s. 815.04(3), be expressly made confidential and exempt” is the required public necessity statement for s. 815.04(3), F.S., and it was inadvertently codified in the Florida Statutes. Public necessity statements are codified in the Laws of Florida.

¹⁴ See *SePRO Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).

secret, and most references to trade secrets contained in definitions for proprietary business information.

The bill repeals s. 815.045, F.S., which is a public necessity statement for a trade secret exemption that was inadvertently codified in the Florida Statutes.

The bill specifies that trade secrets held by the H. Lee Moffitt Cancer Center and Research Institute, the Florida Institute for Human and Machine Cognition, Inc., and divisions of sponsored research at state universities are confidential and exempt if they meet the definition of “trade secret” in HB 799.

The bill also authorizes the Florida Office of Insurance Regulation (OIR) to make information reported to and collected by OIR available on an aggregate basis, even if marked trade secret pursuant to HB 799 (2020).

B. SECTION DIRECTORY:

Section 1. amends s. 73.0155, F.S., deleting provisions relating to public records exemptions for trade secrets held by governmental condemning authorities.

Section 2. amends s. 119.071, F.S., deleting a provision declaring that certain data processing software exempt from public records requirements is considered a trade secret; removing the scheduled repeal of the public record exemption.

Section 3. amends s. 119.0713, F.S., deleting a provision exempting trade secrets held by local government agencies from public records requirements.

Section 4. amends s. 125.0104, F.S., deleting a provision exempting trade secrets held by county tourism development agencies from public records requirements.

Section 5. amends s. 163.01, F.S., deleting a provision exempting trade secrets held by public agencies that are electric utilities from public records requirements.

Section 6. amends s. 202.195, F.S., deleting a provision exempting trade secrets obtained from a telecommunications company or franchised cable company for certain purposes from public records requirements.

Section 7. amends s. 215.4401, F.S., deleting provisions relating to confidentiality of trade secrets held by the State Board of Administration.

Section 8. amends s. 252.88, F.S., deleting provisions exempting certain information from public records requirements under the Florida Emergency Planning Community Right-to-Know Act.

Section 9. repeals s. 252.943, F.S., relating to a public record exemption under the Florida Accidental Release Prevention and Risk Management Planning Act.

Section 10. amends s. 287.0943, F.S., deleting provisions relating to confidentiality of certain information relating to applications for certification of minority business enterprises.

Section 11. amends s. 288.047, F.S., deleting a provision exempting potential trade secrets from public records requirements.

Section 12. amends s. 288.075, F.S., deleting provisions relating to a public records exemption for trade secrets held by economic development agencies.

Section 13. amends s. 288.1226, F.S., deleting provisions relating to a public records exemption for trade secrets held by the Florida Tourism Industry Marketing Corporation.

Section 14. amends s. 288.776, F.S., deleting provisions relating to a public record exemption for trade secrets held by the Florida Export Finance Corporation.

Section 15. amends s. 288.9520, F.S., deleting provisions relating to a public record exemption for trade secrets and potential trade secrets held by Enterprise Florida, Inc., and related entities.

Section 16. amends s. 288.9607, F.S., deleting provisions relating to a public record exemption for trade secrets held by the Florida Development Finance Corporation.

Section 17. amends s. 288.9626, F.S., deleting provisions relating to a public record exemption for trade secret and potential trade secrets held by the Florida Opportunity Fund; conforming provisions to changes made by the act.

Section 18. amends s. 288.9627, F.S., deleting provisions relating to a public records exemption for trade secrets and potential trade secrets held by the Institute for Commercialization of Florida Technology; conforming provisions to changes made by the act.

Section 19. amends s. 331.326, F.S., deleting provisions relating to a public records exemption for trade secrets held by Space Florida; conforming a provision to changes made by the act.

Section 20. amends s. 334.049, F.S., deleting provisions relating to a public records exemption for trade secrets held by the Department of State.

Sections 21. and 22. amend ss. 350.121 and 364.183, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Florida Public Service Commission.

Section 23. amends s. 365.174, F.S., deleting provisions relating to public record exemptions for trade secrets held by the E911 Board and the Division of State Technology within the Department of Management Services.

Section 24., 25., and 26. amend ss. 366.093, 367.156, and 368.108, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Florida Public Service Commission.

Section 27. repeals s. 381.83, F.S., relating to confidentiality of certain information containing trade secrets obtained by the Department of Health.

Section 28. amends s. 395.3035, F.S., deleting provisions relating to a public record exemption for trade secrets of hospitals.

Section 29. amends s. 403.7046, F.S., revising provisions relating to a public record exemption for trade secrets contained in certain reports to the Department of Environmental Protection.

Section 30. repeals s. 403.73, F.S., relating to confidentiality of certain information containing trade secrets obtained by the Department of Environmental Protection.

Section 31. amends s. 408.061, F.S., deleting a requirement that certain trade secret information submitted to the Agency for Healthcare Administration be clearly designated as such.

Section 32. amends s. 408.185, F.S., deleting provisions relating to public record exemptions for certain trade secrets held by the Office of the Attorney General.

Section 33. amends s. 408.910, F.S., deleting provisions relating to public record exemptions for trade secrets held by Florida Health Choices, Inc. as part of the Florida Health Choices Program.

Section 34. amends s. 409.91196, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Agency for Healthcare Administration; conforming provisions to changes made by the act.

Section 35. amends s. 440.108, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Department of Financial Services.

Section 36. amends s. 494.00125, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Office of Financial Regulation.

Section 37. amends s. 497.172, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.

Section 38., 39., 40., and 41. amend ss. 499.012, 499.0121, 499.05, and 499.051, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Department of Business and Professional Regulation.

Section 42. repeals s. 499.931, F.S., relating to maintenance of information held by the Department of Business and Professional Regulation that is deemed to be a trade secret.

Section 43. amends s. 501.171, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Department of Legal Affairs.

Section 44. repeals s. 502.222, F.S., relating to trade secrets of a dairy business held by DACS.

Section 45. and 46. amend ss. 517.2015 and 520.9965, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Office of Financial Regulation.

Section 47. amends s. 526.311, F.S., deleting provisions relating to public record exemptions for trade secrets held by DACS.

Section 48. amends s. 548.062, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Florida State Boxing Commission.

Section 49. amends s. 556.113, F.S., deleting provisions relating to public record exemptions for trade secrets held by Sunshine State One-Call of Florida, Inc.

Section 50. amends s. 559.5558, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Office of Financial Regulation.

Section 51. amends s. 559.9285, F.S., revising provisions specifying that certain information provided to DACS does not constitute a trade secret.

Section 52. amends s. 560.129, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Office of Financial Regulation.

Section 53. amends s. 570.48, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Division of Fruit and Vegetables within DACS.

Section 54. amends s. 570.544, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Division of Consumer Services within DACS.

Section 55. amends s. 573.123, F.S., deleting provisions relating to public record exemptions for trade secrets held by DACS.

Section 56. repeals s. 581.199, F.S., relating to a prohibition on the use of trade secret information obtained under specified provisions for personal use or gain.

Sections 57., 58., and 59. amend ss. 601.10, 601.15, and 601.152, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Department of Citrus within DACS.

Section 60. amends s. 601.76, F.S., relating to a public record exemption for certain formulas filed with DACS.

Sections 61. and 62. amend ss. 607.0505 and 617.0503, F.S., deleting provisions relating to public record exemptions for certain information that might reveal trade secrets held by the Department of Legal Affairs.

Section 63. amends s. 624.307, F.S., authorizing the Florida Office of Insurance Regulation to report certain information on an aggregate basis.

Section 64. amends s. 624.315, F.S., authorizing the Florida Office of Insurance Regulation to make certain information available on an aggregate basis.

Section 65. amends s. 624.4212, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Florida Office of Insurance Regulation.

Section 66. repeals s. 624.4213, F.S., relating to trade secret documents submitted to the Department of Financial Services or the Florida Office of Insurance Regulation.

Sections 67. and 68. amend ss. 626.84195 and 626.884, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Florida Office of Insurance Regulation.

Section 69. amends s. 626.9936, F.S., revising provisions relating to a public record exemption for trade secrets held by the Florida Office of Insurance Regulation.

Section 70. amends s. 627.0628, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Florida Hurricane Loss Projection Methodology; conforming a provision to changes made by the act.

Section 71. amends s. 627.3518, F.S., deleting provisions relating to public record exemptions for trade secrets held by the Citizens Property Insurance Corporation.

Section 72. amends s. 655.057, F.S., deleting and revising provisions relating to a public record exemption for trade secrets held by the Office of Financial Regulation.

Section 73. repeals s. 655.0591, F.S., relating to trade secret documents held by the Office of Financial Regulation.

Section 74. amends s. 663.533, F.S., revising a cross-reference.

Section 75. repeals s. 721.071, F.S., relating to trade secret documents filed with the Division of Florida Condominiums, Timeshares, and Mobile Homes of the Department of Business and Professional Regulation.

Section 76. amends s. 815.04, F.S., deleting a public record exemption for certain trade secret information relating to offenses against intellectual property.

Section 77. repeals s. 815.045, F.S., relating to trade secret information.

Section 78. amends s. 1004.22, F.S., revising provisions relating to public record exemptions for trade secrets and potential trade secrets received, generated, ascertained, or discovered during the course of research conducted within the state universities.

Section 79. amends s. 1004.30, F.S., revising provisions relating to public record exemptions for trade secrets held by state university health support organizations.

Section 80. amends s. 1004.43, F.S., revising provisions relating to public record exemptions for trade secrets and potential trade secrets held by the H. Lee Moffitt Cancer Center and Research Institute.

Section 81. amends s. 1004.4472, F.S., revising provisions relating to public record exemptions for trade secrets and potential trade secrets held by the Florida Institute for Human and Machine Cognition, Inc.

Section 82. amends s. 1004.78, F.S., deleting provisions relating to public record exemptions for trade secrets and potential trade secrets held by the technology transfer centers at Florida College System institutions.

Section 83. amends s. 601.80, F.S., correcting a cross-reference.

Sections 84., 85., and 86. amend ss. 663.533, 721.13, and 921.0022, F.S., conforming provisions to changes made by the act.

Section 87. provides an effective date of becoming a law if HB 799 or similar legislation is adopted in the same legislative session or an extension thereof and becomes law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have an impact on state revenues.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill could have a minimal fiscal impact on agencies because agency staff responsible for complying with public record requests may require training related to the repeal of the public record exemptions or the change in the definition of the term "trade secret." The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of agencies.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create the need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 16, 2020, the Oversight, Transparency & Public Management Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment corrected a cross reference.

This analysis is drafted to the committee substitute as passed by the Oversight, Transparency & Public Management Subcommittee.