

**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.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: CS/HB 1055

INTRODUCER: Government Operations Subcommittee and Representative Gregory and others

SUBJECT: Pub. Rec./Trade Secrets

DATE: April 19, 2021

REVISED: 04/20/21

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ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Ponder</u>	<u>Phelps</u>	<u>RC</u>	<b>Fav/1 amendment</b>

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**Please see Section IX. for Additional Information:**

AMENDMENTS - Significant amendments were recommended

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**I. Summary:**

CS/HB 1055 creates s. 688.01, F.S., within the Uniform Trade Secret Act, to make a trade secret held by an agency confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

The bill defines the term “trade secret” to have the same meaning as in s. 688.002, F.S.<sup>1</sup> The bill requires a person submitting a record to an agency to which a claim of trade secret attaches to provide notice of trade secret at the time such record is submitted. Failure to provide notice constitutes a waiver of any claim to trade secret.

The bill requires a person who submits a record claimed to contain a trade secret to an agency to mark the record clearly with the words “trade secret” and to submit with the record a notice verifying, under penalty of perjury, that the record contains a trade secret.

The bill authorizes an agency to disclose a trade secret, together with the notice of trade secret, to an officer or 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.

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<sup>1</sup> Section 688.002(4), F.S., defines “trade secret” to mean 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.

The bill specifies that an agency employee who, while acting in good faith and in the performance of his or her duties, releases records pursuant to the process created by the bill is not liable, civilly or criminally, for release of the records.

The bill provides for repeal of the exemption on October 2, 2026, unless reviewed and saved form repeal through reenactment by the Legislature.

## **II. Present Situation:**

### **Access to Public Records - Generally**

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>2</sup> The right to inspect or copy applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>3</sup>

Additional requirements and exemptions related to public records are found in various statutes and rules, depending on the branch of government involved. For instance, s. 11.0431, F.S., provides public access requirements for legislative records. Relevant exemptions are codified in s. 11.0431(2)-(3), F.S., and the statutory provisions are adopted in the rules of each house of the legislature.<sup>4</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>5</sup> Lastly, ch. 119, F.S., provides requirements for public records held by executive agencies.

### **Executive Agency Records – The Public Records Act**

Chapter 119, F.S., known as the Public Records Act, provides that all state, county, and municipal records are open for personal inspection and copying by any person, and that providing access to public records is a duty of each agency.<sup>6</sup>

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>7</sup> The Florida Supreme Court has interpreted the statutory definition of

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<sup>2</sup> Fla. Const. art. I, s. 24(a).

<sup>3</sup> *Id.*

<sup>4</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2018-2020) and Rule 14.1, *Rules of the Florida House of Representatives*, Edition 2, (2018-2020).

<sup>5</sup> *State v. Wooten*, 260 So. 3d 1060 (Fla. 4th DCA 2018).

<sup>6</sup> Section 119.01(1), F.S. Section 119.011(2), F.S., defines “agency” as “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.”

<sup>7</sup> 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.”

“public record” to include “material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.”<sup>8</sup>

The Florida Statutes specify conditions under which public access to public records must be provided. The Public Records Act guarantees every person’s right to inspect and copy any public record at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.<sup>9</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>10</sup>

The Legislature may exempt public records from public access requirements by passing a general law by a two-thirds vote of both the House and the Senate.<sup>11</sup> The exemption must state with specificity the public necessity justifying the exemption and must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>12</sup>

General exemptions from the public records requirements are contained in the Public Records Act.<sup>13</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>14</sup>

When creating a public records exemption, the Legislature may provide that a record is “exempt” or “confidential and exempt.” Custodians of records designated as “exempt” are not prohibited from disclosing the record; rather, the exemption means that the custodian cannot be compelled to disclose the record.<sup>15</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>16</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act<sup>17</sup> (the Act) prescribes a legislative review process for newly created or substantially amended<sup>18</sup> public records or open meetings exemptions, with specified exceptions.<sup>19</sup> It requires the automatic repeal of such exemption on October 2nd of the

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<sup>8</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>9</sup> Section 119.07(1)(a), F.S.

<sup>10</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>11</sup> FLA. CONST. art. I, s. 24(c).

<sup>12</sup> *Id. See, e.g., Halifax Hosp. Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999) (holding 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); *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004) (holding that a statutory provision written to bring another party within an existing public records exemption is unconstitutional without a public necessity statement).

<sup>13</sup> *See, e.g., s. 119.071(1)(a), F.S.* (exempting from public disclosure examination questions and answer sheets of examinations administered by a governmental agency for the purpose of licensure).

<sup>14</sup> *See, e.g., s. 213.053(2)(a), F.S.* (exempting from public disclosure information contained in tax returns received by the Department of Revenue).

<sup>15</sup> *See Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>16</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>17</sup> Section 119.15, F.S.

<sup>18</sup> An exemption is considered to be substantially amended if it is expanded to include more records or information or to include meetings as well as records. Section 119.15(4)(b), F.S.

<sup>19</sup> Section 119.15(2)(a) and (b), F.S., provide that exemptions that are required by federal law or are applicable solely to the Legislature or the State Court System are not subject to the Open Government Sunset Review Act.

fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>20</sup>

The 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.<sup>21</sup>

An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivisions to effectively and efficiently administer a governmental program, and administration would be significantly impaired without the exemption;<sup>22</sup>
- It protects sensitive, personal information, the release of which would be defamatory, cause unwarranted damage to the good name or reputation of the individual, or would jeopardize the individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;<sup>23</sup> or
- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>24</sup>

The Act also requires specified questions to be considered during the review process.<sup>25</sup> In examining an exemption, the Act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>26</sup> If the exemption is continued without substantive changes or if the exemption is continued and 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.<sup>27</sup>

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<sup>20</sup> Section 119.15(3), F.S.

<sup>21</sup> Section 119.15(6)(b), F.S.

<sup>22</sup> Section 119.15(6)(b)1., F.S.

<sup>23</sup> Section 119.15(6)(b)2., F.S.

<sup>24</sup> Section 119.15(6)(b)3., F.S.

<sup>25</sup> Section 119.15(6)(a), F.S. The specified questions are:

- 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?

<sup>26</sup> See generally s. 119.15, F.S.

<sup>27</sup> Section 119.15(7), F.S.

## Trade Secrets

Florida law contains a variety of provisions that make trade secret information exempt or confidential and exempt<sup>28</sup> from public record requirements. Many of these exemptions cite to one of the two primary statutory definitions of trade secret rather than providing a definition within the exemption provision.

Section 812.081(1)(c), F.S., defines trade secret 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. 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.

The Florida Uniform Trade Secrets Act (FUTSA) defines “trade secret” to mean:

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.<sup>29</sup>

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<sup>28</sup> 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).

<sup>29</sup> Section 688.002(4), F.S.

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

Exemptions citing “trade secret” as defined in 688.002, F.S.	Exemptions citing “trade secret” as defined in 812.081, F.S.
Section 624.4212, F.S., makes filings and related documents held by the Office of Insurance Regulation that include proprietary business information, including trade secrets, confidential and exempt.	Section 119.071(1)(f), F.S., exempts data processing software that is a trade secret and obtained by an agency under a licensing agreement that prohibits its disclosure, and agency produced data processing software that is sensitive.
Section 215.4401, F.S., makes proprietary confidential business information, including trade secrets, held by the State Board of Administration confidential and exempt.	Section 125.0104(9)(d)3, F.S., exempts trade secret information held by a county tourism promotion agency.
Section 395.3035, F.S., makes records and information including trade secrets of any hospital subject to chapter 119 and s. 24(a), Art. I of the State Constitution confidential and exempt.	Section 331.326, F.S., makes trade secrets held by Space Florida or discussed by Space Florida’s board confidential and exempt.
Section 288.9627, F.S., makes proprietary confidential business information, including trade secrets, provided to the Institute for Commercialization of Florida Technology confidential and exempt.	Section 815.04(3), F.S., makes data, programs, and supporting documentation that is a trade secret and resides or exist internal or external to a computer, computer system, computer network, or electronic device and that is held by an agency confidential and exempt.

In *SePRO v. Fla. Dep’t of Env’tl. Prot.*, 839 So. 2d 781, (Fla. 1<sup>st</sup> DCA 2003), the First District Court of Appeal considered the definition of trade secret in s. 688.022(4), F.S., as well as s. 812.081, F.S., in determining whether certain information was exempt from the Public Records Act. Under *SePRO*, to preserve a claim that information submitted to a public entity contains trade secret, a trade secret owner must label the trade secret as such or otherwise specify in writing to the entity that the information is exempt.<sup>30</sup>

Many statutory exemptions incorporate a *SePRO* notice process for a trade secret owner submitting trade secret information to an agency. Additionally, some provisions impose certain duties on an agency receiving trade secret information. For example, s. 381.83, F.S., requires a person submitting trade secret information to the Department of Health (DOH) to request that it be kept confidential and inform the DOH of the basis for the claim of trade secret. This section further authorizes the DOH, upon notice and opportunity for hearing, to determine whether the information, or portions thereof, claimed to be trade secret is or is not a trade secret.

Section 624.4213, F.S., requires a party submitting trade secret information to the Office of Insurance Regulation (OIR) or the Department of Financial Services (DFS) to provide notice, to

<sup>30</sup> *SePRO*, 839 So. 2d at 784.

mark each page of a trade secret document as such, and submit an affidavit meeting specific requirements. Additionally, this section provides that failure to provide a notice of trade secret constitutes a waiver of trade secret.<sup>31</sup> If the OIR or the DFS receives a public records request for a document or information that is marked and certified as a trade secret, the agency must promptly notify the person that certified the document as a trade secret. The person has 30 days following receipt of such notice to file an action in circuit court seeking a determination whether the document in question contains trade secrets and an order barring public disclosure of the document. The failure to file an action within 30 days constitutes a waiver of any claim of confidentiality, and the office or department shall release the document as requested.

### **Document Verification via Section 92.525, Florida Statutes**

When it is authorized or required by law, by rule of an administrative agency, or by a rule or order of court that a document be verified by a person, the verification may be accomplished either:

- Under oath or affirmation taken or administered by or before a court officer, notary public, or other officer authorized by s. 92.50, F.S., to administer oaths;<sup>32</sup>
- Under oath or affirmation taken or administered by a law enforcement or correctional officer authorized under s. 117.10, F.S., to administer oaths;<sup>33</sup> or
- By the signing of a written declaration.<sup>34</sup>

A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration. Where a verification on information or belief is permitted by law, the words "to the best of my knowledge and belief" may be added.<sup>35</sup> The written declaration must be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.<sup>36</sup> The verification requirement means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect.<sup>37</sup>

### **III. Effect of Proposed Changes:**

**Section 1** creates s. 688.01, F.S., to make a trade secret held by an agency confidential and exempt from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution.

This section applies to any "agency" as defined in s. 119.011, F.S.<sup>38</sup>

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<sup>31</sup> Section 624.4213(1), F.S.

<sup>32</sup> Section 92.525(1)(a), F.S.

<sup>33</sup> Section 92.525(1)(b), F.S.

<sup>34</sup> Section 92.525(1)(c), F.S.

<sup>35</sup> Section 92.525(2), F.S.

<sup>36</sup> *Id.*

<sup>37</sup> Section 92.525(4)(c), F.S.

<sup>38</sup> Section 119.011(2), F.S., defines the term "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 chapter 119, F.S., the Commission on Ethics, the Public Service Commission, and the Office of

The term “trade secret” is defined to have the same meaning as in s. 688.002, F.S. Section 688.002(4), F.S., defines a “trade secret” to mean information, including 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.

The bill requires a person who submits a record claimed to contain a trade secret to an agency also to submit at the same time a notice of trade secret. Failure to provide this notice to the agency constitutes a waiver of any claim by such a person that the record contains a trade secret. This section requires the notice to include the name, telephone number, and mailing address of the person claiming the record contains a trade secret. Such person is responsible for updating his or her contact information with the agency.

This section requires each page of a record or specific portion of a record that contains a trade secret must be clearly marked with the words “trade secret.” When submitting a notice of trade secret to the agency, the submitting party must also verify to the agency, via a written declaration, in the manner provided in s. 92.525, F.S., the following:

[...I have/my company has...] read the definition of a trade secret in s. 688.002, Florida Statutes, and [...I believe/my company believes...] the information contained in this record is a trade secret as defined in s. 688.002, Florida Statutes.

[...I have/my company has...] taken measures to prevent the disclosure of the record or specific portion of the record claimed to be a trade secret to anyone other than those who have been selected to have access for limited purposes, and [...I intend/my company intends...] to continue to take such measures.

The record or specific portion of the record claimed to be a trade secret is not, and has not been, reasonably obtainable without [...my/our...] consent by other persons by use of legitimate means.

The record or specific portion of the record claimed to be a trade secret is not publicly available elsewhere.

The bill authorizes an agency to disclose a trade secret, together with the notice of trade secret, to an officer or 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.



The bill specifies that an agency employee who, while acting in good faith and in the performance of his or her duties, releases records pursuant to the process created by the bill is not liable, civilly or criminally, for release of the records.

The bill provides for repeal of the exemption on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.

**Sections 2 and 3** amend ss. 688.001 and 668.006, F.S., respectively, to conform cross references.

**Section 4** provides a public necessity statement as required by the Florida Constitution, specifying that the public record exemption is necessary to protect trade secret information created by an agency in furtherance of the agencies duties and responsibilities and that disclosure of such information would be detrimental to the effective and efficient operation of the agency. If the trade secret information were made available to the public, the agency could suffer great economic harm. In addition, the exemption is necessary to protect trade secret information provided to an agency by an individual or business and disclosure of such information would be detrimental to those businesses.

**Section 5** provides the bill takes effect upon becoming a law.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties' or municipalities' ability to raise revenue, or reduce the percentage of state tax shared with counties and municipalities.

##### **B. Public Records/Open Meetings Issues:**

###### ***No Vote Requirement***

Article I, s. 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The 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 Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a new public record exemption; thus, it includes a public necessity statement.

###### ***Breadth of Exemption***

Article I, s. 24(c) of the Florida Constitution requires a newly created public record or public meeting exemption 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 be in 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 identified.

**V. Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

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 creation of the public record exemption. In addition, agencies could incur costs associated with redacting the confidential and exempt information prior to releasing a record.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates the following sections of the Florida Statutes: 688.01.

This bill amends the following sections of the Florida Statutes: 688.001 and 688.006.

**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:****Barcode 418456 by Rules on April 20, 2021:**

The amendment (WITH TITLE AMENDMENT):

- Creates a general public records exemption for a trade secret held by an agency as defined in chapter 119, F.S.
- Defines the term “trade secret” to have the same meaning as in s. 688.002, F.S.,<sup>39</sup> part of the Uniform Trade Secrets Act.
- Authorizes an agency to disclose a trade secret to an officer or 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.
- Provides that an agency employee who, while acting in good faith and in the performance of his or her duties, releases records pursuant to the process created by the bill is not liable, civilly or criminally, for release of the records.
- Provides for repeal of the exemption on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature.
- Provides a public necessity statement as required by the Florida Constitution, specifying that the public record exemption is necessary to protect trade secret information (i) created by an agency and (ii) submitted by an individual or business to an agency.

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

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<sup>39</sup>Section 688.002(4), F.S., defines “trade secret” to mean 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.