

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/HB 1055 Pub. Rec./Trade Secrets
SPONSOR(S): Government Operations Subcommittee; Gregory and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 1446

FINAL HOUSE FLOOR ACTION: 112 Y's 2 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/HB 1055 passed the House on April 1, 2021. The bill was amended in the Senate on April 28, 2021, and returned to the House. The House concurred in the Senate amendment and subsequently passed the bill as amended on April 28, 2021.

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. Some exemptions also provide a specific process that an agency must use when protecting trade secret information under the exemption.

A majority of these exemptions rely on one of two different statutory definitions. Some of the exemptions define the term in accordance with the Uniform Trade Secrets Act, and some define the term in accordance with Florida's Criminal Statutes.

The bill creates a public record exemption for trade secrets held by an agency and defines the term "trade secret" to have the same meaning as in the Uniform Trade Secrets Act. The bill authorizes an agency to disclose a trade secret in certain instances and provides that an agency employee who, while acting in good faith and in the performance of his or her duties, releases a trade secret is not criminally or civilly liable for such release.

The bill provides for repeal of the exemption on October 2, 2026, unless reviewed and saved from repeal through reenactment by the Legislature. The bill provides a public necessity statement as required by the Florida Constitution.

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

The bill was approved by the Governor on June 29, 2021, ch. 2021-223, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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, unless the record is exempt. 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 broader 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.

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.⁶

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.

¹ Article I, s. 24(c), FLA. CONST.

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

³ Article I, s. 24(c), FLA. CONST.

⁴ Section 119.15, F.S.

⁵ Section 119.15(6)(b), F.S.

⁶ Section 119.15(3), F.S.

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).

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

- 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 125.0104(9)(d)3., F.S., exempts trade secret information held by a county tourism promotion agency.
- Section 331.326, F.S., makes trade secrets held by Space Florida or discussed by Space Florida's board confidential and exempt.
- Section 365.174(4), F.S., makes proprietary confidential business information submitted by a provider of voice communication services to the board of directors of the E911 Board, the Division of State Technology within the Department of Management Services, or the Department of Revenue as an agent of the E911 Board confidential and exempt.
- Section 381.83, F.S., makes trade secrets obtained by the Department of Health confidential and exempt.
- Section 403.7046(2) and (3)(b)2., F.S., makes trade secret information contained in certain reports to the Department of Environmental Protection and local governments confidential and exempt.
- Section 499.051(7)(b), F.S., makes trade secret information contained in a complaint or obtained by the Department of Business and Professional Regulation pursuant to an investigation under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 573.123(2), F.S., makes trade secret information subject to a marketing order issued by the Department of Agriculture and Consumer Services confidential and exempt.
- Section 601.10(8)(b), F.S., makes trade secret information held by the Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes certain formulas required to be filed with the Department of Agriculture and Consumer Services 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.

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 the Uniform Trade Secrets Act, which defines the term as follows:

"Trade Secret" means 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.⁸

Other 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

⁸ Section 688.002(4), F.S.

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.⁹

In addition, some exemptions provide a specific process that an agency¹⁰ 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.¹¹

Effect of the Bill

The bill creates a public record exemption for trade secrets held by an agency. The public record exemption would apply to those agencies that do not have an agency-specific public record exemption for trade secrets.

The bill defines the term “trade secret” to have the same meaning as the definition currently codified in the Uniform Trade Secrets Act, which includes 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.

The bill 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. The bill specifies that an agency employee who, while acting in good faith and in the performance of his or her duties, releases a record containing a trade secret pursuant to the Public Records Act¹² is not liable, civilly or criminally, for release of the records.

The bill provides a public necessity statement as required by the Florida Constitution, specifying that the public record exemption 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, it provides that 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.

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

⁹ Section 812.081(1)(c), F.S.

¹⁰ 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 ch. 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.

¹¹ See s. 381.83, F.S.

¹² Chapter 119, F.S.

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 government 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 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. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of agencies.