

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 Rules

BILL: CS/SB 1378

INTRODUCER: Judiciary Committee and Senator Bradley

SUBJECT: Corporate Espionage

DATE: March 23, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Jones	CJ	Favorable
2.	Bond	Cibula	JU	Fav/CS
3.	Cellon	Phelps	RC	Favorable

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1378 creates the “Combating Corporate Espionage in Florida Act” within s. 812.081, F.S.

The bill creates, amends, and reorganizes current definitions in s. 812.081(1), F.S. The bill amends the current third degree felony for theft of a trade secret to simplify language and move the offense from level 1 to level 3 on the offense severity chart.

The bill also creates a new second degree felony for trafficking in trade secrets. A person who traffics in, or attempts to traffic in, trade secrets commits the offense. Trafficking in trade secrets is a level 5 offense on the offense severity ranking chart.

The bill adds that, if a person commits either of the felony offenses described above with the intent to benefit a foreign government, foreign agent, or foreign instrumentality, the offense felony is reclassified as one degree higher, and the reclassified offense is increased one level on the offense severity ranking chart.

A court must order restitution if a person is convicted of violating s. 812.081, F.S., and the restitution must include the value of the benefit derived from the offense. The value of the benefit derived from the offense includes any expenses for research and design and other costs of reproducing the trade secret which the person has avoided by committing the offense. The bill also creates a civil cause of action for a victim of trade secret theft. The victim is entitled to injunctive relief and, where an injunction is not equitable, the victim is entitled to royalties.

The bill creates a defense to criminal and civil liability for a person who confidentially discloses a trade secret to an attorney, law enforcement officer, or government official, for purposes of reporting or investigating an offense. A disclosure made under seal in a legal proceeding is also protected.

The bill may have a positive indeterminate (i.e. unquantifiable increase) prison bed impact on the Department of Corrections. See Section V. Fiscal Impact Statement.

The bill is effective October 1, 2021.

II. Present Situation:

Trade Secrets

Section 812.081, F.S., defines a “trade secret” as information¹ 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 in statute, and adopted by Florida courts,² 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.³

Section 812.081(2), F.S., makes it a third degree felony⁴ for a person to deprive or withhold from the owner the control of a trade secret or to intentionally misappropriate a trade secret from its owner, including stealing or embezzling an article representing a trade secret or without authority making or causing to be made a copy of an article representing a trade secret. It is not a defense, if a person returned or intended to return the article stolen, embezzled, or copied.⁵

What is Corporate (or Economic) Espionage?

According to the Federal Bureau of Investigation (FBI), historically, economic espionage has targeted defense-related and high-tech industries. But recent FBI cases have shown that no industry, large or small, is immune to the threat. Any company with a proprietary product, process, or idea can be a target; any unprotected trade secret is vulnerable to theft by those who

¹ A trade secret may manifest as “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” pursuant to s. 812.081(1)(c), F.S.

² See, e.g., *Sevro Corp. v. Dep’t. of Env’t. Prot.*, 839 So. 2d 781 (Fla. 1st DCA 2003).

³ Section 812.081(1)(c), F.S.

⁴ A third degree felony is punishable by up to 5 years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

⁵ Section 812.081(3), F.S.

wish to illegally obtain innovations to increase their market share at a victim company's expense.⁶ Examples of corporate espionage include:

- A person acting on behalf of himself or herself such as where a dissatisfied employee breaks into company records of his or her employer in order to cause damage to the company; or
- A person acting on behalf of a competitor company, such as where a company hires an employee (or an outside party) to illegally investigate a competitor's business.⁷

Technology-based companies are prone to industrial espionage issues, especially with regards to novel ideas or technology products. For instance, biotechnology companies, software firms, and automobile companies tend to be the target of corporate espionage. Transferring stolen company property or stolen trade secrets can also be considered espionage.⁸

The FBI reports that economic espionage is a problem that costs the American economy hundreds of billions of dollars per year. While it is not a new threat, it is a growing one, and theft attempts by foreign competitors and adversaries are becoming more brazen and varied. These foreign competitors deliberately target economic intelligence in advanced technologies and flourishing U.S. industries.⁹

Foreign Influence Uncovered in University Research Programs

According to a National Institutes of Health (NIH) Advisory Committee report, some foreign governments have initiated systematic programs to unduly influence and capitalize on U.S.-conducted research. Small numbers of scientists have committed serious violations of policies and systems by not disclosing foreign support (i.e., grants), laboratories, or funded faculty positions in other countries. These efforts by foreign governments to obtain a competitive advantage in critical areas of research and innovation at the cost of the research enterprises and those that fund them are few, but serious.¹⁰

For example, in 2019, four faculty members left the University of Florida (UF) after the university and the National Institutes of Health found possible ties to foreign institutions that may have violated funding and research rules.¹¹ The NIH first reached out to universities across the nation in August 2018 with a letter that expressed concerns about foreign entities trying to influence U.S. research. The NIH later identified two UF faculty members who may have been

⁶ FBI, What We Investigate, *Counterintelligence, Economic Espionage*, available at <https://www.fbi.gov/investigate/counterintelligence> (last visited March 5, 2021). See also FBI, What We Investigate, *Counterintelligence, Economic Espionage, News, Stories, Trade Secret Theft, Investigation into Theft of Intellectual Property from GE Leads to Two Guilty Pleas*, July 29, 2020, available at <https://www.fbi.gov/news/stories/two-guilty-in-theft-of-trade-secrets-from-ge-072920> (last visited Mar. 5, 2021).

⁷ LegalMatch, *What is Industrial Espionage?*, available at <https://www.legalmatch.com/law-library/article/industrial-espionage-lawyers.html> (last visited Mar. 5, 2021).

⁸ *Id.*

⁹ FBI, What We Investigate, *Counterintelligence, Economic Espionage*, available at <https://www.fbi.gov/investigate/counterintelligence> (last visited Mar. 5, 2021).

¹⁰ NIH Advisory Committee to the Director (ACD), *ACD Working Group for Foreign Influences on Research Integrity*, December 2018 Report, p. 5, available at https://acd.od.nih.gov/documents/presentations/12132018ForeignInfluences_report.pdf (last visited Mar. 4, 2021).

¹¹ Emily Mavrakis, *UF: Former faculty did not disclose China affiliations*, THE GAINESVILLE SUN, January 22, 2020, available at <https://www.gainesville.com/news/20200122/uf-former-faculty-did-not-disclose-china-affiliations> (last visited Mar. 4, 2021).

connected to foreign entities. Through the university's own assessments, two additional faculty members raised concerns.¹² For example:

- One faculty member (“Faculty 1”) had been employed by UF since 1995. In addition to serving as the vice president at a China university since at least 2017, Faculty 1 was the director of an institute at a different Chinese university. While conducting research at UF, Faculty 1 served as the principal investigator for one NIH-funded project. None of Faculty 1’s foreign affiliations was reported to UF nor the NIH.
- “Faculty 3” joined UF as a postdoctoral associate in the College of Medicine, and was appointed as a part-time research associate professor in 2012. The researcher focused on virology, gene therapy and traditional Chinese medicine. Faculty 3 was the principal investigator on one NIH-funded project and co-principal investigator for a second project prior to termination. That faculty member received an undisclosed grant from China, had an appointment at a Chinese university since 2017 and received a Chinese Thousand Talents award.¹³

During a meeting of the Florida House Select Committee on the Integrity of Research Institutions, a national security spokesman for the U.S. Department of Justice said in a prepared statement that China is implicated in more than 80 percent of all economic espionage charges brought by the department since 2012.¹⁴

Federal Law

The Economic Espionage Act of 1996

The Economic Espionage Act of 1996 (EEA) was the first federal law to define¹⁵ and punish the theft or misappropriation of trade secrets. The EEA criminalizes theft of trade secrets and economic espionage, as follows:

- *Theft of trade secrets* means the intentional conversion of a trade secret to the economic benefit of someone other than the owner of the trade secret, with intent or knowledge that the offense will injure the owner.¹⁶ Theft of trade secrets is punishable by up to 10 years in federal prison and specified fines for an individual or a corporation.¹⁷

¹² *Id.* The NIH provided UF with more than \$208 million in research grant money in 2019.

¹³ *Id.*

¹⁴ *Id.* See also, Bill Gertz, ‘Economic Espionage’: Special DOJ unit cracks down on China’s illicit activities, THE WASHINGTON TIMES, January 8, 2020, available at <https://www.washingtontimes.com/news/2020/jan/8/justice-department-special-china-unit-targets-beij> (last visited Mar. 4, 2021).

¹⁵ Under the EEA, a trade secret means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if: the owner thereof has taken reasonable measures to keep such information secret; and the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public. 18 U.S.C. 1839.

¹⁶ 18 U.S.C. 1832.

¹⁷ An individual may be fined up to \$250,000 or twice the value of the loss or gain associated with the offense, and a corporation may be fined up to \$5 million, twice the value of the loss or gain associated with the offense, or three times the value of the stolen trade secret. 18 U.S.C. 1832(a), 3571(c). Here and elsewhere, 18 U.S.C. 3571(d) provides as a general matter that the maximum for a criminal fine of any federal criminal offense is the greater of the standard amount set for the particular offense (e.g., \$250,000 for individuals convicted of a felony) or twice the gain or loss resulting from the offense.

- *Economic espionage* refers to theft of a trade secret with the intent or knowledge that such theft will benefit a foreign government, foreign instrumentality, or foreign agent.¹⁸ Economic espionage is punishable by up to 15 years in federal prison and specified fines for an individual or corporation.¹⁹

The EEA requires a sentencing court to order restitution, provides that property derived from, or used to facilitate, commission of the offense may be subject to confiscation under either civil or criminal forfeiture procedures, and the court may issue an order to protect the confidentiality of a trade secret during prosecution and the government may appeal its failure to do so.

Defend Trade Secrets Act

The Defend Trade Secrets Act of 2016²⁰ (DTSA) amended the remedies available under the EEA by establishing additional remedies for theft of a trade secret or corporate espionage, including, but not limited to, the following:

- The Attorney General may sue for injunctive relief.
- A trade secret's owner may bring a private civil action for damages, equitable and injunctive, court costs, and attorney fees.
- A civil seizure mechanism is available as a preventative measure prior to a formal finding that a trade secret has been misappropriated.
- The court may require affirmative actions be taken to protect the trade secret.
- In exceptional circumstances rendering an injunction inequitable, the court may condition future use of a trade secret on payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited.²¹

Because the DTSA does not preempt existing state trade secret law, a trade secret owner may choose to pursue a civil action for an offense in state or federal court.

III. Effect of Proposed Changes:

The bill creates the “Combating Corporate Espionage in Florida Act” in s. 812.081, F.S.

Definitions

The bill creates the following new definitions in s. 812.081(1), F.S.:

- “Endeavor” means to attempt or try.
- “Foreign agent” means any officer, employee, proxy, servant, delegate, or representative of a foreign government.
- “Foreign instrumentality” means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government.

¹⁸ 18 U.S.C. 1831(a).

¹⁹ An individual may be fined up to \$5 million or twice the value of the loss or gain associated with the offense, and a corporation may be fined up to \$10 million, twice the value of the loss or gain associated with the offense, or three times the value of the stolen trade secret. 18 U.S.C. 1831(a).

²⁰ 18 U.S.C. 1836.

²¹ *Id.*

- “Obtain or use” has the same meaning as provided in s. 812.012(3), F.S.;²² and
- “Person” means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.
- “Traffic” has the same meaning as provided in s. 812.012(8), F.S.²³

The bill amends the definition of “trade secret” to specify that a trade secret may be in tangible or intangible form; and is a trade secret regardless of whether or how it is stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing.

The bill repeals definitions of the terms “article,” “representing,” and “copy.”

Criminal Offenses Related to Trade Secrets

The bill amends the current third degree felony related to trade secrets to create the offense of Theft of a Trade Secret. The offense of theft of a trade secret is committed when a person willfully and without authorization obtains or uses a trade secret, or endeavors to obtain or use a trade secret, whether temporarily or permanently, if the person:

- Deprives or withholds the control or benefit of a trade secret; or
- Appropriates a trade secret for his or her own use, or for use by a person not entitled to the trade secret.

The bill creates a new second degree felony²⁴ offense of Trafficking in Trade Secrets. The offense is committed when a person traffics in, or endeavors to traffic in, trade secrets.

Reclassification of Offenses

If a person commits the felony offenses described above, the bill reclassifies these crimes one felony degree higher should he or she commit the offense with the intent to benefit a foreign government, foreign agent, or a foreign instrumentality.

Sentencing

The bill moves the third degree felony offense amended to become Theft of a Trade Secret from a Level 1 offense to a Level 3 offense on the offense severity ranking chart. The effect of this move is that the offender will be assessed more points when computing the sentence score.

²² Section 812.012(3), F.S., defines the term “obtains or uses” to mean any manner of:

- Taking or exercising control over property.
- Making any unauthorized use, disposition, or transfer of property.
- Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
- Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or other conduct similar in nature.

²³ Section 812.012(8), F.S., defines the term “traffic” to mean to sell, transfer, distribute, dispense, or otherwise dispose of property; or to buy, receive, possess, obtain control of, or use property with the intent to sell, transfer, distribute, dispense, or otherwise dispose of such property.

²⁴ A second degree felony is punishable by up to 15 years in prison and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

The bill places the new second degree offense of Trafficking in Trade Secrets at level 5 on the offense severity ranking chart.

Where either of these offense are reclassified to one felony degree higher, the offense is also increased one level on the offense severity ranking chart.

Restitution, Injunctive Relief, Civil Action

The bill adds the requirement that the sentencing court must order restitution if a person is convicted of either offense. The restitution must include the value of the benefit derived from the offense. The value of the benefit derived from the offense includes any expenses for research and design and other costs of reproducing the trade secret that the person has avoided by committing the offense.

The bill also creates civil causes of action for the victim of theft or trafficking in a trade secret. The victim may seek an injunction against continued improper use of the trade secret. In the injunction, the court may require the defendant to take affirmative steps to protect the trade secret. Where exceptional circumstances render an injunction inequitable, the court may require payment of royalties to the victim, which must last no longer than time such use of the trade secret could have been protected by law.

Defense

The bill creates two defenses to criminal or civil liability for theft of a trade secret or trafficking in trade secrets:

- A disclosure of a trade secret made confidentially to an attorney, a law enforcement officer, or any other federal, state, or local government official for the purpose of reporting or investigating a suspected violation of law.
- A disclosure of a trade secret made in a document filed under seal in a civil action.

The bill is effective October 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill appears to be exempt from the requirements of article VII, section 18(d) of the Florida Constitution, relating to unfunded mandates.

B. Public Records/Open Meetings Issues:

None.

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 Criminal Justice Impact Conference, which provides the final, official estimate of the prison bed impact, if any, of legislation, has not yet reviewed CS/SB 1378. However, since the bill creates a new third degree felony and provides for the reclassification of certain offenses in specified instances, it will likely have a positive indeterminate (i.e., unquantifiable increase) in prison bed impact on the Department of Corrections.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 812.081, and 921.0022.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS by Judiciary on March 15, 2021:**

The committee substitute:

- Changed the name of the act to the “Combating Corporate Espionage in Florida Act.”
- Added new defined terms “endeavor,” “foreign agent,” and “foreign instrumentality”; and added repeals of currently defined terms “article,” “copy,” and “representing.”

- Changed the definition of “trade secret” to include all forms of possible trade secret.
- Modified the offense of obtaining or using a trade secret by renaming it as theft of a trade secret, clarifying language, and increasing the offense level from a level 1 to level 3 offense.
- Replaced the new third degree felony related to receiving or buying a trade secret with a new second degree felony of trafficking in trade secrets, placing it at level 5 in the offense severity chart. Like the offense of obtaining or using a trade secret, the offense of trafficking in trade secrets is reclassified as one felony degree higher and one level higher on the offense severity chart if committed with the intent to benefit a foreign government, a foreign agent or foreign instrumentality.
- Added a new civil cause of action to enjoin the continued improper use of a trade secret or to pay royalties if exceptional circumstances warrant.
- Added limited defenses to criminal and civil liability.

B. Amendments:

None.