

**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: SB 7028

INTRODUCER: Regulated Industries Committee

SUBJECT: OGSR/Data Processing Software

DATE: April 19, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
	<u>Oxamendi</u>	<u>Imhof</u>		<b>RI Submitted as Comm. Bill/Fav</b>
1.	<u>McVaney</u>	<u>McVaney</u>	<u>GO</u>	<b>Favorable</b>
2.	<u>Oxamendi</u>	<u>Phelps</u>	<u>RC</u>	<b>Pre-meeting</b>

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## I. Summary:

SB 7028 saves from repeal the public records exemption for data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081, F.S., and agency-produced data processing software that is sensitive.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal to continue the exempt status of the qualified trade secrets and sensitive information.

The bill is not expected to impact state and local revenues and expenditures.

The bill takes effect October 1, 2021.

## 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>1</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>2</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.,

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<sup>1</sup> FLA. CONST. art. I, s. 24(a).

<sup>2</sup> *Id.*

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>3</sup> Florida Rule of Judicial Administration 2.420 governs public access to judicial branch records.<sup>4</sup> Lastly, chapter 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>5</sup>

A public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>6</sup> The Florida Supreme Court has interpreted the statutory definition of “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>7</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>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</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>10</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>11</sup>

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<sup>3</sup> See Rule 1.48, *Rules and Manual of the Florida Senate*, (2020-2022) and Rule 14.1, *Rules of the Florida House of Representatives*, (2020-2022).

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

<sup>5</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>6</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.”

<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>8</sup> Section 119.07(1)(a), F.S.

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST. art. I, s. 24(c).

<sup>11</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).

General exemptions from the public records requirements are contained in the Public Records Act.<sup>12</sup> Specific exemptions often are placed in the substantive statutes relating to a particular agency or program.<sup>13</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>14</sup> Custodians of records designated as “confidential and exempt” may not disclose the record except under circumstances specifically defined by the Legislature.<sup>15</sup>

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

The Open Government Sunset Review Act<sup>16</sup> (the act) prescribes a legislative review process for newly created or substantially amended<sup>17</sup> public records or open meetings exemptions, with specified exceptions.<sup>18</sup> It requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.<sup>19</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>20</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>21</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>22</sup> or

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<sup>12</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>13</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>14</sup> See *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).

<sup>15</sup> *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>16</sup> Section 119.15, F.S.

<sup>17</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>18</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.

<sup>19</sup> Section 119.15(3), F.S.

<sup>20</sup> Section 119.15(6)(b), F.S.

<sup>21</sup> Section 119.15(6)(b)1., F.S.

<sup>22</sup> Section 119.15(6)(b)2., F.S.

- It protects information of a confidential nature concerning entities, such as trade or business secrets.<sup>23</sup>

In examining an exemption, the act directs the Legislature to carefully question the purpose and necessity of reenacting the exemption. The act requires the Legislature to consider the following specific questions in such a review:<sup>24</sup>

- 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?

If the exemption is continued and expanded, then a public necessity statement and a two-thirds vote for passage are required.<sup>25</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>26</sup>

## **Trade Secrets Public Records Exemptions**

### ***Criminal Prohibition***

Section 812.081(2), F.S., prohibits the intentional misappropriation of 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. A violation is a felony of the third degree.<sup>27</sup>

Section 812.081(1)(c), F.S., defines a “trade secret” to mean:

...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:

<sup>23</sup> Section 119.15(6)(b)3., F.S.

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

<sup>25</sup> See generally s. 119.15, F.S.

<sup>26</sup> Section 119.15(7), F.S.

<sup>27</sup> Section 775.082, F.S., provides that a felony of the third degree is punishable by a term of imprisonment not to exceed five years. Section 775.083, F.S., provides that a felony of the third degree is punishable by a fine not to exceed \$5,000.

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.

The following sections of the Florida Statutes exempt from public disclosure trade secrets, as defined by s. 812.081(1)(c), F.S.:

- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency.
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation (Visit Florida).
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt; makes portions of meetings in which trade secrets are discussed exempt from open meetings requirements; recordings of closed meetings are confidential and exempt.<sup>28</sup>
- Section 365.174, F.S., makes trade secret business information submitted to the E911 Board or the Technology Program under Department of Management Services 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., make trade secret information reported to the Department of Environmental Protection pursuant to specified regulations confidential and exempt.
- Section 499.012(8)(g) and (m), F.S., provides that trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.0121(7), F.S., provides that trade secret information reported to DBPR in a list of prescription drug wholesalers is confidential and exempt pursuant to its inspection authority under s. 499.051, F.S.
- Section 499.051(7), F.S., makes trade secret information contained in a complaint and obtained by DBPR during an investigation of a permit holder under the Florida Drug and Cosmetic Act confidential and exempt.
- Section 499.931, F.S., makes trade secrets related to the regulation of medical gases that are submitted to DBPR by an applicant or permit holder confidential and exempt.

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<sup>28</sup> Records designated as exempt from public record requirements by the Legislature are distinct from those deemed confidential and exempt. Exempt records 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). Confidential and exempt records may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. *See Op. Att’y Gen. Fla. 85-62* (1985).

- 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 570.48(3), F.S., makes records containing trade secrets held by DACS Division of Fruit and Vegetables confidential and exempt.
- Section 573.123(2), F.S., makes records containing trade secrets provided to DACS by specified persons under a marking order confidential and exempt.
- Section 601.10(8)(a), F.S., makes any information held by the Department of Citrus that contains trade secrets confidential and exempt.
- Section 601.15(7)(d), F.S., makes trade secret information that is provided by noncommodity advertising and promotional program participants to Department of Citrus confidential and exempt.
- Section 601.152(8)(c), F.S., makes trade secret information provided by citrus handlers to Department of Citrus confidential and exempt.
- Section 601.76, F.S., makes formulas containing trade secrets that are submitted to DACS confidential and exempt.
- Section 815.04(3), F.S., makes data, programs, and supporting documentation held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

### ***Uniform Trade Secrets Act***

Florida's Uniform Trade Secrets Act in ch. 688, F.S., provides a separate civil process for the protection of trade secrets, including injunctive relief to preserve a trade secret,<sup>29</sup> and the right to recover damages for the misappropriation of a trade secret.<sup>30</sup> Chapter 688, F.S., does not provide criminal prohibitions or penalties to preserve trade secrets. The trade secret protections in ch. 688, F.S., are for civil remedies by private persons seeking to preserve a trade secret.<sup>31</sup>

Section 688.002(4), F.S., defines the term "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 definition in s. 812.081(1)(c), F.S., may be considered a broader definition than that provided in s. 688.002(4), F.S. For example, the definition of "trade secret" in s. 812.081(1)(c), F.S., expressly includes financial information and that the subject of the trade secret be of advantage to the business, or provide an opportunity to obtain an advantage, over those who do not know or use it. Section 688.002(4), F.S., does not explicitly reference financial information

<sup>29</sup> Section 688.003, F.S.

<sup>30</sup> Section 688.004, F.S. Federal law provides comparable remedy for the preservation of trade secrets under 18 U.S.C. § 1831, *et seq.*

<sup>31</sup> See Section 688.008, F.S.

or reference the issue business advantage. The definition in s. 688.002(4), F.S., may also be interpreted as less clear. For example, s. 688.002(4), F.S., requires that the information has “independent economic value,” rather than just be “of value,” as required under s. 812.081(1)(c), F.S.

The following sections of the Florida Statutes make the specified records confidential and exempt from public disclosure. These provisions exempt “trade secrets” as defined in s. 688.002(4), F.S., or include “trade secrets” as defined in s. 688.002(4), F.S., within the meaning of the term “proprietary confidential information” or “proprietary business information” when exempting such records from disclosure:

- Section 73.0155, F.S., exempts business information containing a trade secret provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., specified business information provided by the owner of a business to a governmental condemning authority as part of an offer of business damages under s. 73.015, F.S., confidential and exempt.
- Section 119.0713, F.S., exempts proprietary confidential information held by a public utility.
- Section 215.4401, F.S., exempts proprietary confidential information held by the State Board of Administration to administer the real estate investment program.
- Section 288.075, F.S., exempts a trade secret held by an economic development agency.
- Section 288.9626, exempts proprietary confidential information held by the Florida Opportunity Fund, as defined in s. 288.9623, F.S.
- Section 288.9627(2), F.S., exempts a trade secret held by the Institute for Commercialization of Florida Technology established by s. 288.9625, F.S.
- Section 334.049, F.S., exempts any information containing a trade secret obtained by the Department of Transportation as a result of research and development projects and revealing a method of process, production, or manufacture.
- Section 395.3035(2)(c), F.S., exempts a trade secret held by a public hospital, including reimbursement, methodologies, and notes.
- Section 408.185, F.S., exempts specified information containing a trade secret held by the Office of the Attorney General, which is submitted by a member of the health care community pursuant to a request for an antitrust no-action letter.
- Section 408.910(14), F.S., exempts proprietary confidential information containing a trade secret held by Florida Health Choices Program.
- Section 409.91196(1), F.S. exempts a trade secret held by the Agency for Health Care Administration has identified for negotiation of supplemental rebate agreements.
- Section 440.108(1), F.S., exempts a trade secret related to an investigation by the Division of Workers' Compensation of the Department of Financial Services after an investigation is completed or ceases to be active.
- Section 494.00125(1)(c), F.S., exempts consumer complaints and other information containing a trade secret in an investigation or examination by the Office of Financial Regulation.
- Section 497.172(4), F.S., exempts a trade secret held by the Department of Financial Services or the Board of Funeral, Cemetery, and Consumer Services.
- Section 501.171(11), F.S., exempts information that would reveal a trade secret held pursuant to an investigation by the Department of Legal Affairs or a law enforcement agency.

- Section 517.2015(1)(b), F.S., exempts information containing a trade secret held pursuant to an investigation or examination by the Office of Financial Regulation.
- Section 520.9965(1)(b), F.S., exempts a trade secret held by the Department of Financial Services after an investigation or examination related to the regulation of sales and finance is completed or ceases to be active.
- Section 556.113(2), F.S., exempts a trade secret held by Sunshine State One-Call of Florida, Inc., for the purpose of describing the extent and root cause of damage to an underground facility or using the member ticket management software system.
- Section 559.5558(2)(b), F.S., exempts information that would reveal a trade secret held by the Office of Financial Regulation of the Financial Services Commission pursuant to an investigation or examination related to consumer collection practices regulated under part VI of ch. 559, F.S.
- Section 560.129, F.S., exempts information that would reveal a trade secret held by the Department of Financial Services pursuant to an investigation or examination related to the money service businesses regulated under ch. 560, F.S.
- Section 569.215, F.S., exempts proprietary confidential business information received by the Governor, the Attorney General, or outside counsel representing the State of Florida in negotiations for settlement payments pursuant to the tobacco settlement agreement, as amended, in the case of *State of Florida et al. v. American Tobacco Company et al.*, or received by the Chief Financial Officer or the Auditor General for any purpose relating to verifying settlement payments made pursuant to the settlement agreement.
- Section 607.0505(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements under s. 607.0505, F.S.
- Section 617.0503(6), F.S., exempts information containing a trade secret provided to, and records and transcriptions of testimony obtained by, the Department of Legal Affairs pursuant to the registered agent requirements for corporations not for profit under s. 617.0503, F.S.
- Section 624.4212, F.S., exempts proprietary confidential information held by the Office of Insurance Regulation of the Financial Services Commission pursuant to the Insurance Code in ch. 624, F.S.
- Section 626.84195, F.S., exempts proprietary business information which concerns trade secrets provided to the Office of Insurance Regulation by a title insurance agency or insurer.
- Section 626.884(2), F.S., exempts any trade secret in the book and records of an insurance administrator accessed by the Office of Insurance Regulation for the purpose of examination, audit, or inspection.
- Section 627.0628(3)(g), F.S., exempts any trade secret used in designing and constructing a hurricane or flood loss model provided to the Florida Commission on Hurricane Loss Projection Methodology, the Office of Insurance Regulation, or consumer advocate appointed pursuant to s. 627.0613, F.S.
- Section 627.3518(11), F.S., exempts proprietary business information provided to the Citizens Property Insurance Corporation's clearinghouse by insurers with respect to identifying and selecting risks for an offer of coverage.
- Section 655.057, F.S., exempts a trade secret contained in any record or information held by the Office of Financial Regulation during an investigation or after an investigation relating to an enforcement action is completed or ceases to be active.



- Section 1004.30(2), F.S., exempts trade secrets held by a university health services support organization.
- Section 1004.43(7), F.S., exempts a trade secret in proprietary confidential business information contained in the records of a Florida not-for-profit corporation, or its subsidiaries, organized solely for the purpose of governing and operating the H. Lee Moffitt Cancer Center and Research Institute.
- Section 1004.4472, F.S., exempts a trade secret held by Florida Institute for Human and Machine Cognition, Inc., or its subsidiary.

### ***Protection of a Trade Secret by its Owner***

The trade secret owner must label a trade secret as such or specify in writing upon delivery to a state agency that the information provided to the agency is a trade secret in order for the information to be considered confidential and exempt under the public records law.<sup>32</sup> In *Sepero v. Department of Environmental Protection*, the court held that information provided to the agency by the appellant was subject to disclosure because the appellant had failed to actively protect the information or label information as a trade secret.<sup>33</sup>

### ***Trade Secrets Exemption for Data Processing Software***

Section 119.071(1)(f), F.S., exempts from public records copying and inspection requirements data processing software obtained by an agency under a licensing agreement that prohibits its disclosure where the software is trade secret, as defined in s. 812.081, F.S., and agency-produced data processing software that is sensitive.<sup>34</sup>

In 2016, the definition of “trade secret” in s. 812.081, F.S., was expanded to include financial information. As a result, this public record exemption in s. 119.07(1)(f), F.S., was also reenacted in 2016 to incorporate the new definition of “trade secret.”<sup>35</sup> This exemption is subject to the Act in accordance with s. 119.15, F.S., and will be repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.<sup>36</sup>

Section 119.10(1), F.S., provides that any public officer who violates any provision of ch. 119, F.S., commits a noncriminal infraction punishable by fine not exceeding \$500. If the public officer violated the provisions of s. 119.07(1), F.S., the person is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree.<sup>37</sup>

<sup>32</sup> *Sepero v. Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).

<sup>33</sup> *Id.*

<sup>34</sup> Section 119.011(14), F.S., defines the term “sensitive” for the purposes of defining agency-produced software, to mean: ...only those portions of data processing software, including the specifications and documentation, which are used to:

- (a) Collect, process, store, and retrieve information that is exempt from s. 119.07(1), F.S.;
- (b) Collect, process, store, and retrieve financial management information of the agency, such as payroll and accounting records; or
- (c) Control and direct access authorizations and security measures for automated systems.

<sup>35</sup> Chapter 2016-5, Laws of Fla.

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

<sup>37</sup> Section 775.082, F.S., provides that a misdemeanor of the first degree is punishable by a term of imprisonment not to exceed one year. Section 775.083, F.S., provides that a misdemeanor of the first degree is punishable by a fine not to exceed \$1,000.

Section 119.10(2), F.S., provides that any person who willfully and knowingly violates any of the provisions of this chapter commits a misdemeanor of the first degree.<sup>38</sup>

### **Open Government Sunset Review Questionnaires**

In September 2020, the Professional Staff of the Senate Regulated Industries Committee sent an Open Government Sunset Review Questionnaire (questionnaire) to several state agencies and to the Florida League of Cities and the Florida Association of Counties for transmittal to those associations' member-agencies. Twenty-three state and local agencies responded to the questionnaires, representing 15 state agencies, five city governments, one county government, and two school boards. Staff reviewed the responses to the questions to be considered by the Legislature in accordance with s. 119.15(6)(a), F.S.

The majority of responding agencies stated that they have data processing software licensing agreements in place that require the software to be kept confidential as a trade secret. The number of such agreements for an agency ranged from one licensing agreement to more than 4,000 agreements. Section 119.071, F.S., does not require a licensing agreement for the exemption to apply, but such an agreement may evidence the labeling of a trade secret as such or the trade secret owner's written notice to the agency that the information provided to the agency is a trade secret. As noted by the Department of Highway Safety and Motor Vehicles, most commercial off-the-self software is typically subject to a licensing agreement which restricts the duplication, copying, or other disclosure.<sup>39</sup>

The questionnaire asked the agencies if it would be more appropriate for the public record exemption under review to use the definition of "trade secret" provided for in s. 688.002(4), F.S., as opposed to the definition in s. 812.081(1)(c), F.S. Of the agencies that responded to this question, 11 stated that the exemption should not be changed, three respondents recommended that the definitions should be revised to be identical or merged into a single definition, one respondent stated that either definition was appropriate, and one agency stated that the definition in s. 688.002(4), F.S., was the more appropriate definition. Eight respondents did not offer an opinion.

Advising that the exemption should continue to use the current definition in s. 812.081(1)(c), F.S., the Department of Corrections (DOC) stated that changing the definition would "upend years of case law. The definition of a "trade secret" in section 812.081, F.S., has been referenced by Chapter 119 since the exemption was created in 1985." The DOC noted that such a change "would be detrimental to records custodians as their guidance would have to be altered. The elements for each test differ and adopting the elements in section 688.002(4), F.S., would require a determination of "reasonableness" that is often hard to define and easy to litigate. Section 688.002(4), F.S., does not encompass the same level of specificity as section 812.081, F.S., and this would create confusion for both custodians and the public."<sup>40</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> See *Open Government Sunset Review Questionnaire* response from the Florida Department of Highway Safety and Motor Vehicles, dated Oct. 20, 2020, and on file with the Senate Committee on Regulated Industries.

<sup>40</sup> See *Open Government Sunset Review Questionnaire* response from the Florida Department of Corrections, dated Oct. 22, 2020, and on file with the Senate Committee on Regulated Industries.

Several of the agencies also noted that the public records exemption in s. 815.04(3), F.S., relating to trade secret data, programs, and supporting documentation that is a trade secret, as defined in s. 812.081(1)(c), F.S., and held by an agency and that exists internal or external to a computer, computer system, computer network, or electronic device, is similar the public records exemption in s. 119.071(1)(f), F.S.

None of the agencies surveyed recommended that the exemption in s. 119.071(1)(f), F.S., should not be reenacted.

Only one respondent made a recommendation to amend the exemption that did not relate to the definition of the term trade secret in ss. 688.002(4) and 812.081(1)(c), F.S. The City of Clearwater recommended that s. 119.071(1)(f), F.S., should be reenacted and amended to "include language applicable to Remote Software Service Providers and/or "Cloud" provided software and services."<sup>41</sup>

### III. Effect of Proposed Changes:

The bill amends s. 119.071(1)(f), F.S., to remove the scheduled repeal of the public records exemption for data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081, F.S., and agency-produced data processing software that is sensitive.

This public record exemption would stand repealed on October 2, 2021, unless it is reenacted by the Legislature under the Open Government Sunset Review Act. The bill removes the scheduled repeal of the exemption. Thus, the qualified trade secrets and sensitive information remain exempt from public disclosure.

The bill takes effect October 1, 2021.

### IV. Constitutional Issues:

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

Not applicable. The bill does not 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.

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

##### **Vote Requirement**

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a bill creating or expanding an exemption to the

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<sup>41</sup> See *Open Government Sunset Review Questionnaire* response from the City of Clearwater, dated Oct. 22, 2020, and on file with the Senate Committee on Regulated Industries.

public records requirements. This bill does not create or expand an exemption, thus, the bill does not require a two-thirds vote to be enacted.

### **Public Necessity Statement**

Article I, s. 24(c) of the State Constitution requires a bill creating or expanding an exemption to the public records requirements to state with specificity the public necessity justifying the exemption. This bill does not create or expand an exemption. Thus, a statement of public necessity is not required.

### **Breadth of Exemption**

Article I, s. 24(c) of the State Constitution requires an exemption to the public records requirements to be no broader than necessary to accomplish the stated purpose of the law. The exemption in the bill does not appear to be broader than necessary to accomplish the purpose of the law.

**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:**

The private sector will continue to be subject to the cost, to the extent imposed, associated with an agency making redactions and/or making copies in response to public records requests.

**C. Government Sector Impact:**

Agencies will continue to incur costs related to the redaction of exempt records and copying associated with responding to public records requests.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends s. 119.071 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

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

None.

**B. Amendments:**

None.

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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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