

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 Commerce and Tourism

BILL: SB 566

INTRODUCER: Senator Richter

SUBJECT: Public Records/Trade Secrets

DATE: March 27, 2015

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Harmsen	McKay	CM	Pre-meeting
2. _____	_____	GO	_____
3. _____	_____	RC	_____

I. Summary:

SB 566 reenacts several public records exemptions of trade secret information to conform to the new definition of trade secret proposed in SB 564, which adds “financial information” into the definition. The exemption for trade secret information, which is “any scientific, technical, commercial, or financial information that is used in the operation of a business and which provides the business an advantage over those who do not know or use the trade secret,” allows state agencies to refuse to disclose such information pursuant to a public records request.

The bill provides that the public record exemption is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2020, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a public necessity statement as required by the Florida Constitution.

II. Present Situation:

Public Records and Open Meetings Requirements

The Florida Constitution provides that the public has the right to access government records and meetings. The public may inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or of persons acting on their behalf.¹ The public also has a right to be afforded notice and access to meetings of any collegial public body of the executive branch of state government or of any local government.² The Legislature’s meetings must also be open and noticed to the public, unless there is an exception provided by the constitution.³

¹ FLA. CONST., art. I, s. 24(a).

² FLA. CONST., art. I, s. 24(b).

³ FLA. CONST., art. I, s. 24(b).

In addition to the Florida Constitution, the Florida Statutes specify conditions under which public access must be provided to government records and meetings. The Public Records Act⁴ guarantees every person's right to inspect and copy any state or local government public record.⁵ The Sunshine Law⁶ requires all meetings of any board or commission of any state or local agency or authority at which official acts are to be taken to be noticed and open to the public.⁷

The Legislature may create an exemption to public records or open meetings requirements.⁸ An exemption must specifically state the public necessity justifying the exemption⁹ and must be tailored to accomplish the stated purpose of the law.¹⁰

Open Government Sunset Review Act

The Open Government Sunset Review Act ("OGSR Act") prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹¹ The OGSR Act provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.¹²

⁴ Chapter 119, F.S.

⁵ 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." Section 119.011(2), F.S., defines "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 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." The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992). The Legislature's records are public pursuant to s. 11.0431, F.S.

⁶ Section 286.011, F.S.

⁷ Section 286.011(1)-(2), F.S. The Sunshine Law does not apply to the Legislature; rather, open meetings requirements for the Legislature are set out in the Florida Constitution. Article III, s. 4(e) of the Florida Constitution provides that legislative committee meetings must be open and noticed to the public. In addition, prearranged gatherings, between more than two members of the Legislature, or between the Governor, the President of the Senate, or the Speaker of the House of Representatives, the purpose of which is to agree upon or to take formal legislative action, must be reasonably open to the public.

⁸ FLA. CONST., art. I, s. 24(c). There is a difference between records the Legislature designates as exempt from public records requirements and those the Legislature designates *confidential* and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ FLA. CONST., art. I, s. 24(c).

¹¹ Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR Act does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S.

¹² Section 119.15(3), F.S.

The OGSR 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.¹³ An exemption serves an identifiable purpose if it meets one of the following criteria:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;¹⁴
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;¹⁵ or
- It protects trade or business secrets.¹⁶

In addition, the Legislature must find that the identifiable public purpose is compelling enough to override Florida's open government public policy and that the purpose of the exemption cannot be accomplished without the exemption.¹⁷

The OGSR Act also requires specified questions to be considered during the review process.¹⁸ In examining an exemption, the OGSR Act asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.¹⁹ If the exemption is reenacted without substantive changes or if the exemption is 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.²⁰

Trade Secrets

Florida law contains a variety of provisions making trade secret information confidential and/or exempt from public records requirements. For example:

- Section 119.071(1)(f), F.S., exempts data processing software obtained by an agency under a licensing agreement that prohibits its disclosure where the software is trade secret;
- Section 125.0104(9)(d), F.S., exempts trade secrets held by a county tourism promotion agency;

¹³ Section 119.15(6)(b), F.S.

¹⁴ Section 119.15(6)(b)1., F.S.

¹⁵ Section 119.15(6)(b)2., F.S.

¹⁶ Section 119.15(6)(b)3., F.S.

¹⁷ Section 119.15(6)(b), F.S.

¹⁸ 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?

¹⁹ FLA. CONST., art. I, s. 24(c).

²⁰ Section 119.15(7), F.S.

- 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;²¹
- Section 365.174(3), F.S., makes trade secret business information submitted to the E911 Board or the 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) 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., makes trade secret information provided to the Department of Business and Professional Regulation (DBPR) in a prescription drug permit application confidential and exempt;
- Section 499.0121(7), F.S., makes trade secret information reported to DBPR in a list of prescription drug wholesalers confidential and exempt;
- Section 499.051(7), F.S., makes trade secret information obtained by DBPR during an investigation of a permit holder confidential and exempt;
- Section 499.931, F.S., makes trade secret information submitted to DBPR for medical gas permitting purposes confidential and exempt;
- Section 502.222, F.S., makes trade secret information of a dairy industry business held by the Department of Agriculture and Consumer Services (DACS) confidential and exempt;
- Section 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 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; and
- Section 815.04(3), makes trade secret information that is held by an agency and exists internal or external to a computer, computer system, computer network, or electronic device confidential and exempt.

²¹ 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 above-described statutes define the term “trade secret” in accordance with s. 812.081(1)(c), F.S., as “any scientific, technical, commercial, *or financial* information, including 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.”

Section 812.081, F.S., further defines a “trade secret” as information 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 for in statute, 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.²²

Courts similarly use this factor test to determine whether a document is trade secret subject to protection from public records laws. In *Sevro v. Department of Environmental Protection*,²³ the court held that a document was subject to disclosure because the business failed the first prong of the test (that the document be secret) because it had not actively protected or held out the document as a trade secret.

III. Effect of Proposed Changes:

The bill conforms and reenacts provisions that make trade secrets confidential and exempt to the new definition of trade secret proposed by SB 564, which adds “financial information” into the definition.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Section 24(c), Art. I of the Florida Constitution requires a two-thirds vote of the members present and voting for passage of a newly created or expanded public-records or public-meetings exemption. Therefore, this bill requires a two-thirds vote for passage.

Public Necessity Statement

²² Section 812.081(1)(c), F.S.

²³ 839 So. 2d 781 (Fla. 1st DCA 2003).

Section 24(c), Art. I of the Florida Constitution requires a public necessity statement for a newly created or expanded public-records or public-meetings exemption. Therefore, this bill includes a public necessity statement.

Breadth of Exemption

Section 24(c), Article I 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 limited to trade secret information, including financial information. Generally, the exemption does not appear to be in conflict with the constitutional requirement that the exemption be no broader than necessary to accomplish its purpose. However, section 9 of the bill appears to broaden the exemption to include not only trade secret information, but also “all information obtained by the department (of Agriculture and Consumer Services) pursuant to the investigation”

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Businesses previously hesitant to enter into contracts with the state because of fear of release of their financial trade secrets may now attempt to enter that marketplace.

C. Government Sector Impact:

The Criminal Justice Impact Conference (CJIC) met March 11, 2015, and determined that HB 91, which is identical to this bill, will have a positive insignificant impact on state prison beds. This means CJIC estimates that this bill may increase the department’s prison bed population by less than 10 inmates annually. The bill may also have a negative jail bed impact on local governments because it expands the application of a misdemeanor offense.

VI. Technical Deficiencies:

None.

VII. Related Issues:

State agencies must balance this exemption against the general policy that “all state, county, and municipal records shall be open for personal inspection by any person.”²⁴ This may prove difficult because what constitutes “financial information” under the bill may entail a highly fact-

²⁴ Section 119.01(1), F.S.

specific determination based on, e.g., the business' treatment of the information as secret and the value of the information to the business. This may result in the same type of information being classified as trade secret for one business, but not another.

Section 9 of the bill appears to broaden the proposed exemption, but the public necessity statement does not address the need for "information obtained by the department [of Agriculture and Consumer Services] pursuant to the investigation" to be subject to a public records exemption.

VIII. Statutes Affected:

This bill substantially amends sections 119.071, 125.0104, 288.1226, 331.326, 365.174, 381.83, 403.7046, 403.73, 499.051, 502.222, 570.48, 573.123, 601.10, 601.15, 601.152, 601.76, and 815.04 of the Florida Statutes.

This bill reenacts sections 499.012 and 499.0121 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.