

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 91 Trade Secrets  
**SPONSOR(S):** Pilon  
**TIED BILLS:** HB 93 **IDEN./SIM. BILLS:** SB 564

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee		Keegan	Cunningham
2) Justice Appropriations Subcommittee			
3) Government Operations Subcommittee			
4) Judiciary Committee			

### SUMMARY ANALYSIS

Florida law currently imposes criminal penalties for a variety of acts relating to the theft, unauthorized copying, and misappropriation of trade secrets. Florida law also contains a variety of provisions that provide public record exemptions for trade secrets. For purposes of many of these statutes, the term “trade secret” is defined in accordance with s. 812.081, F.S., to include “any scientific, technical, or commercial information” that otherwise qualifies as trade secret.

The bill expands the definition of “trade secret” to include “any scientific, technical, commercial, or *financial* information” that otherwise qualifies as trade secret.

Section 815.04(3), F.S., provides a public record exemption for data, programs, or supporting documentation that is a trade secret, that is held by an agency, and that resides or exists internal or external to a computer, computer system, computer network, or electronic device. The public necessity statement for this exemption is contained in s. 815.045, F.S. Since its enactment, the First District Court of Appeal held that the public necessity statement in s. 815.045, F.S., applies more generally, and “. . . should be read to exempt from disclosure as public records all trade secrets as defined in s. 812.081(1)(c), F.S., whether or not they are stored on or transmitted by computers.”

The bill repeals s. 812.045, F.S. This may have an impact on the validity and enforceability of the public record exemption provided by s. 815.04, F.S., as well as the general exemption for all trade secrets established through case law.

The bill may have a negative prison bed impact on the Department of Corrections and a negative jail bed impact on local governments because it expands the definition of “trade secret,” thereby expanding the application of criminal trade secret offenses.

This bill is effective October 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Trade Secrets

Florida law currently prohibits a variety of acts relating to trade secrets. For example:

- Section 815.04, F.S., makes it a third degree felony<sup>1</sup> for a person to willfully, knowingly, and without authorization disclose or take data, programs, or supporting documentation that is a trade secret that is residing or existing internal or external to a computer, computer system, computer network, or electronic device.<sup>2</sup>
- Section 812.081, F.S., makes it a third degree felony for a person to steal, embezzle, or copy without authorization an article representing a trade secret, when done with an intent to:
  - Deprive or withhold from the trade secret's owner the control of a trade secret, or
  - Appropriate a trade secret to his or her own use or to the use of another.
- Section 581.199, F.S., makes it a first degree misdemeanor<sup>3</sup> for a designated employee, inspector, or collaborator of the division or the United States Department of Agriculture who, in an official capacity obtains under ch. 581, F.S., any information entitled to protection as a trade secret, to use such information for personal gain or to reveal it to an unauthorized person.

A number of statutes also provide non-criminal protections for trade secrets. The majority of these statutes provide public record exemptions for trade secrets;<sup>4</sup> however, a small number of these statutes provide other types of protections, such as procedural safeguards and civil remedies.<sup>5</sup>

For purposes of the above-described statutes, the term "trade secret" is defined in accordance with s. 812.081, F.S., as:

"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. "Trade secret" includes any scientific, technical, or commercial 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, a trade secret is considered to 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

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.<sup>6</sup>

#### Effect of the Bill

<sup>1</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

<sup>2</sup> The offense is a second degree felony if committed for the purpose of creating or executing any scheme or artifice to defraud or to obtain property.

<sup>3</sup> A first degree misdemeanor is punishable by up to one year in jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

<sup>4</sup> ss. 119.071(1)(f), 125.0104(9)(d), 288.1226(8), 331.326, 365.174, 381.83, 403.7046(2)-(3), 403.73, 499.012(g), (m), 499.0121(7), 499.051(7), 499.931, 502.222, 570.48(3), 573.123(2), 581.199, 601.10(8)(a), 601.15(7)(d), 601.152(8)(c), 601.76, and 815.045, F.S.

<sup>5</sup> ss. 721.071 and 812.035, F.S.

<sup>6</sup> s. 812.081(1)(c), F.S.

The bill expands the definition of “trade secret” in s. 812.081(1)(c), F.S., to include “any scientific, technical, commercial, or *financial* information” that otherwise qualifies as a trade secret. As indicated above, the current definition does not include financial information.

## **Public Records**

Article I, section 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, section 24(a) of the Florida Constitution.<sup>7</sup> The general law must state with specificity the public necessity justifying the exemption (a public necessity statement) and must be no more broad than necessary to accomplish its purpose.<sup>8</sup>

Public policy regarding access to government records is further addressed in s. 119.07(1)(a), F.S., which guarantees every person a right to inspect and copy any state, county, or municipal record. Furthermore, the Open Government Sunset Review Act<sup>9</sup> provides that a public record or exemption may be created or maintained only if it serves an identifiable public purpose. In addition, it may be no more broad than necessary to meet one of the following purposes:

- 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.<sup>10</sup>

Section 815.04(3), F.S., provides a public record exemption for data, programs, or supporting documentation that is a trade secret,<sup>11</sup> that is held by an agency, and that resides or exists internal or external to a computer, computer system, computer network, or electronic device. Such trade secrets are confidential and exempt<sup>12</sup> from public records when held by an agency.

As noted above, a bill that creates a public record exemption must include a public necessity statement that states “with specificity the public necessity justifying the exemption.”<sup>13</sup> Section 815.045, F.S., currently provides the public necessity statement for the public record exemption created in s. 815.04(3), F.S.<sup>14</sup>

Since its enactment, the First District Court of Appeal held that the public necessity statement in s. 815.045, F.S., applies more generally, and “. . . should be read to exempt from disclosure as public records all trade secrets as defined in s. 812.081(1)(c), F.S., whether or not they are stored on or transmitted by computers.”<sup>15</sup>

## **Effect of the Bill**

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<sup>7</sup> FLA. CONST. art. I, s. 24(c).

<sup>8</sup> *Id.*

<sup>9</sup> s. 119.15, F.S.

<sup>10</sup> s. 119.15(6)(b), F.S.

<sup>11</sup> As defined in s. 812.081(1)(c), F.S.

<sup>12</sup> If information is made *confidential and exempt*, the information may not be disclosed to the public and may only be released to the persons or organizations designated in statute. If records are not *confidential* but are only *exempt*, the exemption does not prohibit the showing of such information. *WFTV, Inc. v. Sch. Bd. Of Seminole Cnty.*, 874 So. 2d 48 (Fla. 5th DCA 2004).

<sup>13</sup> FLA. CONST. art. I, s. 24(c).

<sup>14</sup> Ch. 94-100, Laws of Fla.

<sup>15</sup> *SEPRO Corp. v. Fla. Dep’t of Env’tl. Prot.*, 839 So. 2d 781 (Fla. 1st DCA 2003), *cert. denied*, *Crist v. Fla. Dep’t of Env’tl. Prot.*, 911 So. 2d 792 (Fla. 2005).

The bill repeals the public necessity statement in s. 815.045, F.S. This may have an impact on the validity and enforceability of the public record exemption provided in s. 815.04, F.S., as well as the general exemption for all trade secrets established through case law.

The bill also reenacts s. 499.931, F.S., to reference and reincorporate the amendments to s. 812.081, F.S.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 812.081, F.S., relating to trade secrets; theft, embezzlement; unlawful copying; definitions; penalty.

Section 2. Repeals s. 815.045, F.S., relating to trade secret information.

Section 3. Reenacts s. 499.931, F.S., relating to trade secret information.

Section 4. Provides an effective date of October 1, 2015.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

The bill does not appear to have any impact on state revenues.

**2. Expenditures:**

The Criminal Justice Impact Conference has not yet met to determine the fiscal impact of this bill. However, as noted above, ss. 815.04 and 812.081, F.S., impose felony penalties on persons who commit certain acts relating to trade secrets. Because the bill expands the definition of "trade secret," for purposes of those sections, it may have a negative prison bed impact on the Department of Corrections.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

The bill does not appear to have any impact on local government revenues.

**2. Expenditures:**

As noted above, s. 581.199, F.S., makes it a first degree misdemeanor for certain persons to use trade secret information in specified ways. Because the bill expands the definition of "trade secret," for purposes of this offense, it may have a negative jail bed impact on local governments.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to 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.

##### 2. Other:

###### Public Records Legislation

Article I, section 24(c), of the Florida Constitution limits bills that enact public record exemptions to relate to one subject, and to only contain public record exemptions and provisions governing the enforcement of public records laws. The bill reenacts s. 499.931, F.S., which appears to contain a public record exemption for trade secret information. This may violate Article I, section 24(c), of the Florida Constitution.

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create the need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill repeals s. 815.045, F.S. This may have an impact on the validity and enforceability of the public record exemption provided in s. 815.04, F.S., as well as the general exemption for all trade secrets established through case law.<sup>16</sup>

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

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<sup>16</sup> *SEPRO Corp. v. Fla. Dep't of Env'tl. Prot.*, 839 So. 2d 781 (Fla. 2003).