

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 93 Pub. Rec./Trade Secrets
SPONSOR(S): Criminal Justice Subcommittee; Pilon
TIED BILLS: CS/HB 91 **IDEN./SIM. BILLS:** SB 566

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---------------------------------------|-----------|---------|--|
| 1) Criminal Justice Subcommittee | 12 Y, 0 N | Keegan | Cunningham |
| 2) Government Operations Subcommittee | | | |
| 3) Judiciary Committee | | | |

SUMMARY ANALYSIS

Florida law contains a variety of provisions making trade secret information confidential and/or exempt from public records. Many of these statutes define the term "trade secret" in accordance with s. 812.081(1)(c), F.S.

CS/HB 91, which is tied to this bill, expands the definition on "trade secret" contained in s. 812.081(1)(c), F.S., to include *financial information*.

This bill, which is linked to the passage of CS/HB 91 or similar legislation, reenacts ss. 119.071(1)(f), 125.0104(9)(d), 288.1226(8), 331.326, 365.174(3), 381.83, 403.7046(2), 403.7046(3)(b), 403.73, 499.012(8)(g), 499.012(8)(m), 499.0121(7), 499.051(7), 499.931, 502.222, 570.48(3), 573.123(2), 601.10(8)(a), 601.15(7)(d), 601.152(8)(c), 601.76, and 815.04(3), F.S., to incorporate the changes to the definition of "trade secret" made by CS/HB 91.

The bill provides for repeal of the reenacted exemptions on October 2, 2020, unless they are reviewed and saved from repeal by the Legislature. It also provides a public necessity statement as required by the Florida Constitution.

This bill is tied to CS/HB 91, which provides a new category of trade secret information that is exempt from public records disclosure. Together, the bills may have a minimal impact on state and local government expenditures because they may require agencies to provide personnel training on the expanded exemptions.

The bill will be effective on the same date CS/HB 91 or similar legislation takes effect.

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 newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

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.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. Furthermore, the Open Government Sunset Review Act⁴ provides that a public record or public meeting 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.⁵

The 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. Specified questions must be considered by the Legislature during the review process.⁶

Trade Secrets

Florida law contains a variety of provisions making trade secret information confidential and/or exempt from public records disclosure. 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;
- Section 288.1226(8), F.S., exempts trade secrets relating to projects conducted by the Florida Tourism Industry Marketing Corporation;
- Section 331.326, F.S., makes trade secrets held by Space Florida confidential and exempt;
- 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;

¹ FLA. CONST. art. I, s. 24(c).

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

³ FLA. CONST. art. I, s. 24(c).

⁴ s. 119.15, F.S.

⁵ s. 119.15(6)(b), F.S.

⁶ Section 119.15(6)(a), F.S. requires the Legislature to consider the following questions as part of the review process: 1) What specific records or meetings are affected by the exemption? 2) What specific parties does the exemption affect? 3) What is the public purpose of the exemption? 4) Can the information contained in the records or meetings be readily obtained by alternative means? If so, how? 5) Is the record or meeting protected by another exemption? 6) Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

- 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 (DOC) 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 DOC confidential and exempt;
- Section 601.152(8)(c), F.S., makes trade secret information provided by citrus handlers to DOC 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.

The above-described statutes define the term "trade secret" in accordance with s. 812.081(1)(c), F.S., which defines 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. "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.

During the 2015 Legislative Session, CS/HB 91, which is tied to this bill, amends s. 812.081(1)(c), F.S., to expand the definition of "trade secret" to include *financial information*.

Effect of the Bill

The bill, which is linked to the passage of CS/HB 91 or similar legislation, reenacts all of the above-described public records exemptions to incorporate the changes to the definition of “trade secret” in s. 812.081(1)(c), F.S., made by CS/HB 91.

The bill provides for repeal of the reenacted exemptions on October 2, 2020, unless they are reviewed and saved from repeal by the Legislature. It also provides a public necessity statement as required by the Florida Constitution.

B. SECTION DIRECTORY:

Section 1. Reenacts s. 119.071(1)(f), F.S., relating to general exemptions from inspection or copying of public records.

Section 2. Reenacts s. 125.0104(9)(d), F.S., relating to tourist development tax; procedure for levying; authorized uses; referendum; enforcement.

Section 3. Reenacts s. 288.1226(8), F.S., relating to Florida Tourism Industry Marketing Corporation; use of property; board of directors; duties; audit.

Section 4. Reenacts s. 331.326, F.S., relating to information relating to trade secrets confidential.

Section 5. Reenacts s. 365.174(3), F.S., relating to proprietary confidential business information.

Section 6. Reenacts s. 381.83, F.S., relating to trade secrets; confidentiality.

Section 7. Reenacts s. 403.7046(2) and (3)(b), F.S., relating to regulation of recovered materials.

Section 8. Reenacts s. 403.73, F.S., relating to trade secrets; confidentiality.

Section 9. Reenacts s. 499.012(8)(g) and (m), F.S., relating to permit application requirements.

Section 10. Reenacts s. 499.0121(7), F.S., relating to storage and handling of prescription drugs; recordkeeping.

Section 11. Reenacts s. 499.051(7), F.S., relating to inspections and investigations.

Section 12. Reenacts s. 499.931, F.S., relating to trade secret information.

Section 13. Reenacts s. 502.222, F.S., relating to information relating to trade secrets confidential.

Section 14. Reenacts s. 570.48(3), F.S., relating to Division of Fruit and Vegetables; powers and duties; records.

Section 15. Reenacts s. 573.123(2), F.S., relating to maintenance and production of records.

Section 16. Reenacts s. 601.10(8)(a), F.S., relating to powers of the Department of Citrus.

Section 17. Reenacts s. 601.15(7)(d), F.S., relating to advertising campaign; methods of conducting; assessments; emergency reserve fund; citrus research.

Section 18. Reenacts s. 601.152(8)(c), F.S., relating to special marketing orders.

Section 19. Reenacts s. 601.76, F.S., relating to manufacturer to furnish formula and other information.

Section 20. Reenacts s. 815.04(3), F.S., relating to offenses against intellectual property; public records exemption.

Section 21. Provides an Open Government Sunset Review date.

Section 22. Provides a public necessity statement.

Section 23. Provides an effective date to be the same as that of CS/HB 91 or similar legislation, if such legislation is adopted in the same legislative session or an extension thereof and becomes law.

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:

This bill is tied to CS/HB 91, which provides a new category of trade secret information that is exempt from public records disclosure. Together, the bills may have a minimal impact on state expenditures because they may require agencies to provide personnel training on the expanded exemptions.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

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

2. Expenditures:

This bill is tied to CS/HB 91, which provides a new category of trade secret information that is exempt from public records disclosure. Together, the bills may have a minimal impact on local government expenditures because they may require agencies to provide personnel training on the expanded exemptions.

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:

Vote Requirement

Article I, section 24(c) of the Florida Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public record or public meeting

exemption. The bill creates a public record exemption; therefore, it requires a two-thirds vote for final passage.

Public Necessity Statement

Article I, section 24(c) of the Florida Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption. The bill creates a public record exemption; therefore, it includes a public necessity statement.

Breadth of Exemption

Article I, section 24(c) 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 expands the definition of trade secrets that qualify for specified public records exemptions. 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.

Requirements for Legislative Review

Section 119.15(3), F.S., requires that any public records exemption must be repealed five years after the enactment or substantial amendment of the exemption unless reviewed and saved from repeal by the Legislature. When reviewing an exemption, s. 119.15(6)(a), F.S., requires the Legislature to consider the following matters:

- 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?

B. RULE-MAKING AUTHORITY:

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

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 4, 2015, the Criminal Justice Subcommittee adopted an amendment and reported the bill as favorable as a committee substitute. The amendment reenacted the trade secret public records exemption in s. 499.931, F.S.

This analysis is drafted to the committee substitute as passed by the Criminal Justice Subcommittee.