



# The Florida Senate

Issue Brief 2009-325

October 2008

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Committee on Governmental Operations

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## GENERAL PUBLIC RECORDS EXEMPTION FOR TRADE SECRETS

### Statement of the Issue

Since the enactment of ch. 2005-251, L.O.F., which co-located general agency public records exemptions and required consideration of the merger of exemptions in the Open Government Sunset Review process,<sup>1</sup> the Legislature has attempted to eliminate redundant exemptions and create general exemptions where appropriate. The creation of general or uniform exemptions reduces the number of exemptions, provides more uniformity of application of exemptions, and also provides more clarity regarding the status of records for agencies and the public.

Chapter 119, F.S., the Public Records Act (the “act”), contains general exemptions for those types of records that are typically held by agencies. For example, among numerous other general exemptions, s. 119.071, F.S., contains general exemptions for sealed bids or proposals, security system plans, social security numbers, and data processing software obtained under a licensing agreement.

Currently, s. 119.071, F.S., does not contain a general exemption for trade secrets held by agencies. The First District Court of Appeal, however, in *Sepro Corporation v. Department of Environmental Protection*,<sup>2</sup> found that information meeting the definition of “trade secret” as defined in s. 812.081, F.S., was protected by s. 815.045, F.S. That section was the public necessity statement in a bill creating an exemption for data, programs or supporting documentation which exists internal or external to a computer, computer system, or computer network, which is now codified as s. 815.04(3), F.S. While Art. I, s. 24 of the State Constitution requires each bill that creates an exemption to contain a statement of public necessity establishing the reasons why the exemption is necessary, these statements typically are not placed in statute nor are they regularly determined to be freestanding exemptions. Though review of *Sepro* was denied by the Florida Supreme Court,<sup>3</sup> it may be appropriate for the Legislature to consider creating a general exemption for trade secrets in the Public Records Act.

### Discussion

#### General Public Records Exemptions

Under Article I, s.24 of the State Constitution, as well as s. 119.07(1), F.S., information received pursuant to law or ordinance or in connection with the transaction of official business by an agency is a public record and, absent an applicable exemption, such information must be released upon request unless an exemption applies. Only the Legislature may enact public records or meetings exemptions under the constitutional provision. While exemptions may be counted differently, it is estimated there are 1,084 exemptions in current law.

Since at least the 2002 legislative session, the Legislature has considered bills that would reduce the number of exemptions by merging existing exemptions into general or uniform exemptions. During the 2005 legislative session, the Legislature completely reorganized ch. 119, F.S., the Public Records Act, and in that process, identified and co-located exemptions which apply to agencies generally.<sup>4</sup> Further, as part of a revision to the Open Government Sunset Review Act, the Legislature required exemptions undergoing sunset review to be examined to determine if another provision of law provides the same protection for the information and to determine if multiple exemptions for the same type of record or meeting could be appropriately merged.<sup>5</sup>

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<sup>1</sup> Section 119.15, F.S.

<sup>2</sup> 839 So. 2d 781 (Fla. 1st DCA 2003).

<sup>3</sup> *Crist v. Florida Department of Environmental Protection*, 911 So.2d 792 (Fla. 2005).

<sup>4</sup> See, ch. 2005-251, L.O.F.

<sup>5</sup> Section 119.15(6)(a)5. and 6., F.S.

The Public Records Act has separate sections containing general exemptions for executive branch agencies<sup>6</sup> and separate sections for specific executive branch agencies that have not yet been transferred to agency-specific sections of law.<sup>7</sup> Additionally, there are separate sections of general exemptions for local government agencies<sup>8</sup> and the courts.<sup>9</sup>

Further, s. 119.071, F.S., contains general exemptions grouped under subsections that apply to agencies generally, as defined in s. 119.011, F.S.<sup>10</sup> The “Agency Administration” subheading includes general exemptions for licensure examinations and answers, sealed bids or proposals, and data processing software obtained under a license agreement that prohibits its disclosure if that software is a trade secret. Under the subheading “Agency Investigations” are general exemptions for criminal intelligence and investigative information held by criminal justice agencies and surveillance techniques. Under the subheading “Security,” general exemptions are provided for security system plans, as well as certain building plans and blueprints. Under the subheading “Agency Personnel Information,” general exemptions are provided for agency employee social security numbers and medical information. The last subheading, “Other Personal Information,” includes general exemptions for social security numbers of the public and telecommunications subscriber information, among other exemptions.<sup>11</sup>

The Public Records Act does not currently provide a general exemption for trade secrets received by agencies.

### Trade Secrets

At least two subsections in different chapters of the *Florida Statutes* define the term “trade secret.” The first definition is part of the Uniform Trade Secrets Act<sup>12</sup> and is found in s. 688.002(4), F.S. That section defines “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 second definition for “trade secrets” is found in s. 812.081(1) (c), F.S., which is part of a chapter of law that deals with theft, robbery and related crimes. Section 812.08(1) (c), F.S., defines “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. “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:

1. Secret;

<sup>6</sup> Section 119.0711, F.S.

<sup>7</sup> Section 119.0712, F.S.

<sup>8</sup> Section 119.0713, F.S.

<sup>9</sup> Section 119.0714, F.S.

<sup>10</sup> For purposes of the Public Records Act, “agency” is defined 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.”

<sup>11</sup> The cited general exemptions in this paragraph are provided by way of example only and are not a complete list of the general exemptions contained in these subsections.

<sup>12</sup> Section 688.001-688.009, F.S.

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.

Business entities often provide agencies with information meeting the definition of “trade secrets” under one of the foregoing sections. For example, a corporation which is negotiating with an economic development agency to relocate to Florida may provide that agency with trade secret information as part of the negotiation process.<sup>13</sup> Another example is the receipt of trade secret information by the State Board of Administration during its consideration of an alternative investment under s. 215.44, F.S. In both of these examples, trade secret information is protected by exemptions that are either specific to the agency or to a program.

As part of this review, state and local agencies were surveyed regarding their collection of trade secrets.<sup>14</sup> Of the 58 respondents, just under half (47.1%) stated that they received trade secret information. Of the agencies that obtain trade secret information, 52.6% stated that the trade secret information they obtain is protected by multiple exemptions.

While the multiple trade secret exemptions cited by respondent agencies were often agency or program specific, one of the trade secret exemptions often cited by agency respondents was s. 815.045, F.S. That section states:

The Legislature finds that it is a public necessity that trade secret information as defined in s. 812.084 and as provided for in s. 815.043 be expressly made confidential and exempt from the public records law because it is a felony to disclose such records. Due to the legal uncertainty as to whether a public employee would be protected from a felony conviction if otherwise complying with chapter 119, and with s. 24(a), Art. I of the State Constitution, it is imperative that a public records exemption be created. The Legislature in making disclosure of trade secrets a crime has clearly established the importance attached to trade secret protection. Disclosing trade secrets in an agency's possession would negatively impact the business interests of those providing an agency such trade secrets by damaging them in the marketplace, and those entities and individuals disclosing such trade secrets would hesitate to cooperate with that agency, which would impair the effective and efficient administration of governmental functions. Thus, the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from disclosure, and the public's ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.

The section quoted above, which is now codified as s. 815.045, F.S., was created by ch. 94-100, L.O.F. That section made confidential and exempt:

Data, programs, or supporting documentation which is a trade secret as defined in s. 812.081 which resides or exists internal or external to a computer, computer system, or computer network which is held by an agency as defined in chapter 119. . .

Section 815.045, F.S., which was Section 2 of ch. 94-100, L.O.F., was the required public necessity statement for this exemption.<sup>15</sup> A law creating an exemption must meet certain requirements under Article I, s. 24(c) of the State Constitution. One of those is a requirement that it “. . . shall state with specificity the public necessity justifying the exemption . . .” Public necessity statements typically follow the section in the bill that creates the exemption, with the effective date of the bill following in the subsequent section. This was the same format followed in Senate Bill 102.

<sup>13</sup> Section 288.075, F.S.

<sup>14</sup> The Legislative Committee on Intergovernmental Relations (LCIR) sent surveys to 1, 489 state and local agencies.

<sup>15</sup> See, s. 2, ch. 94-100, L.O.F.

While the format of the bill<sup>16</sup> creating the exemption in s. 815.04, F.S., was typical for a bill creating an exemption, placement of the public necessity statement for that exemption in statute was atypical. Even more unusual, the public necessity statement was separated from the underlying exemption and placed in an entirely separate chapter of law. The bill created the exemption as s. 815.04, F.S., but the statement of public necessity originally was placed in s. 119.165, F.S. The following year, s. 119.165, F.S., was moved to s. 815.045, F.S., which placed it next to the exemption for which it was the statement of public necessity. The decision to place the statement of public necessity in the Public Records Act, first as s. 119.165 in the 1994 Supplement<sup>17</sup> and then to move it in 1995 to its current location in ch. 815, F.S., was an editorial and organizational decision made at the Division of Statutory Revision. That division is authorized to determine the placement of statutes under s. 11. 242(2), F.S.,<sup>18</sup> but not to establish legislative intent.<sup>19</sup>

Nevertheless, in *SEPRO Corporation v. Florida Department of Environmental Protection*,<sup>20</sup> the First District Court of Appeal found that s. 815.045, F.S., “. . . 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.”

In this case, SEPRO contracted with the Department of Environmental Protection to assist in the eradication of hydrilla from certain lakes. A public records request was made by another party for information relating to SEPRO and its processes for treating hydrilla. Upon discovering the request had been made, SEPRO’s counsel informed the department that certain documents should be protected as trade secrets. The department advised that it intended to release the documents as the documents were not timely marked as confidential prior to receipt of the public records request.<sup>21</sup> The department did not release the documents as suit was filed to prevent disclosure. The circuit court found that certain documents could be disclosed and others could not. SEPRO appealed and the district court affirmed, finding that the documents that the corporation failed to mark as confidential prior to the public records request could be disclosed and held that the trade secret exemption applied to electronic mail sent to the department. Noting that it is a felony to release trade secret information under s. 815.04(3), F.S., the court stated:

Due to the legal uncertainty as to whether a public employee would be protected from a felony conviction if otherwise complying with chapter 119, and with s. 24(a), Art. I of the State Constitution, it is imperative that a public records exemption be created. Currently, s. 812.081, F.S., provides a definition for “trade secret” and makes it a felony of the third degree for any person to intentionally deprive or withhold from the owner the control of a trade secret, or to intentionally appropriate, use, steal, embezzle or copy the trade secret. . . . The original placement (of the exemption) . . . evinces a contemporaneous view that the exemption . . . applies to more than computer data, programs or supporting documentation. . .

The court makes much of the original placement of the statement of public necessity in the Public Records Act, stating:

The original placement in Chapter 119 evinces a contemporaneous view that the exemption from the public records disclosure requirements that section two of chapter 94-100, law of Florida (1994), enacted applied to more than computer data, programs or supporting documentation. Just as the trial court ruled, the language of this provision should be read to exempt from disclosure as public records all trade secrets as defined in s. 812.081(1)(c), Florida Statutes (2001), whether or not they are stored on or transmitted by computers.<sup>22</sup>

<sup>16</sup> Senate Bill 102 by the Committee on Criminal Justice.

<sup>17</sup> Section 119.165, F.S. (1994 Supp.)

<sup>18</sup> Section 11.242, F.S., establishes the powers and duties of the Division of Statutory Revision.

<sup>19</sup> Unless specified by statute or arising by necessary implication, a section heading has no legal significance. See, *Agner V. Smith*, 167 So.2d 86 (Fla. 1<sup>st</sup> DCA 1964). Statutory section headings inserted by statutory revisers and or legislative service bureau as convenient visual references to content are not themselves part of statute. *Askew v. MGIC Development Corp. of Fla.*, 262 So.2d 227 (Fla. 4<sup>th</sup> DCA 1972).

<sup>20</sup> 839 So. 2d 781 (Fla. 2003)

<sup>21</sup> Section 688.002(4)(b), F.S., requires documents containing trade secrets to be marked.

<sup>22</sup> *Sepero* at 785.

As noted previously, the decision to place in statute the public necessity statement for the exemption in s. 815.04, F.S., was made at the Division of Statutory Revision.

The Florida Supreme Court denied review of the case on August 29, 2005.<sup>23</sup> While the Florida Supreme Court denied review, it is possible that another district court of appeal could issue an opinion contrary to the opinion in *Sepero*. Given the importance of protecting trade secrets, and given the history of s. 815.045, F.S., it may be appropriate for the Legislature to consider explicitly creating a general exemption for trade secrets.

Another issue affecting trade secrets held by agencies is the process by which trade secrets are identified, the amount of reliance upon that identification by the trade secret owner given by the agency, and what process is followed when a public records request includes trade secret information. The current “general” exemption for trade secrets found in s. 815.045, F.S., as determined by the district court in *Sepero*, establishes no procedures to be followed by agencies when dealing with trade secrets.

Based upon the survey results, the procedures for identifying trade secret information obtained by agencies, as well as for releasing such information upon a public records request, vary. Of those agencies responding to the survey, 84.2% require the person who submits trade secrets to identify or mark such information. According to survey responses, 47.4% of agencies perform an independent analysis to determine if the information is a trade secret, but the majority of agencies (52.6%) rely upon the identification or mark made by the person submitting the alleged trade secret. It is not always clear, however, that agency reliance upon the trade secret owner’s identification is well-placed. Information may appear to a trade secret to the owner, but it may not meet either definition of “trade secret” currently provided in statute. Further, as the custodian of the record, it is the agency that is responsible for responding to a public records request, which includes redaction of exempt information. Determinations of what is or is not a trade secret, however, is not as simple as redaction of other exempt information. It is quite possible that an agency may not have the ability to determine if certain information is in fact a trade secret. As a result, agencies respond to requests for information that may be a trade secret differently.

Ten percent of agencies stated that they would release information marked as a trade secret upon a public records request if it was clear on the face of the document that the information was not a trade secret; 21% of agencies stated they still would not release the information. The majority of agencies (68%), however, have developed methods for providing notice to the trade secret owner that a request has been made for the information and advising that owner that the information will be released within a certain period unless the owner seeks to protect the information in court. While the Legislature has expressly provided this option to the State Board of Administration for requests for records containing proprietary confidential business information received for alternative investments,<sup>24</sup> no such process has been expressly authorized for public records requests for information that is a trade secret.

Under the alternative investments exemption, a request to inspect or copy a record that contains proprietary confidential business information must be granted if the proprietor of the information fails, within a reasonable period of time after the request is received, to verify<sup>25</sup> in a written declaration:

- a. That the requested record contains proprietary confidential business information and the specific location of such information within the record;
- b. If the proprietary confidential business information is a trade secret, verification that it is a trade secret as defined in s. 688.002;
- c. That the proprietary confidential business information is intended to be and is treated by the proprietor as private, is the subject of efforts of the proprietor to maintain its privacy, and is not readily ascertainable or publicly available from any other source; and
- d. That the disclosure of the proprietary confidential business information to the public would harm the business operations of the proprietor.

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<sup>23</sup> *Crist v. Florida Department of Environmental Protection*, 911 So.2d 792 (2005).

<sup>24</sup> Section 215.44(8)(c)3., F.S.

<sup>25</sup> Section 95.525, F.S.

Under subparagraph 4, any person may petition a court of competent jurisdiction for an order for the public release of those portions of any record made confidential and exempt under the provision. An action under the provision must be brought in Leon County, Florida, and the petition or other initial pleading must be served on the State Board of Administration and, if determinable upon diligent inquiry, on the proprietor of the information sought to be released.

In any order for the public release of a record, the court must make a finding that it is not a trade secret as defined in s. 688.002, F.S., that a compelling public interest is served by the release of the record or portions thereof which exceed the public necessity for maintaining the confidentiality of such record, and that the release of the record will not cause damage to or adversely affect the interests of the proprietor of the released information, other private persons or business entities, the State Board of Administration, or any trust fund, the assets of which are invested by the State Board of Administration.

When queried regarding the creation of a general exemption for trade secret information, 44% of responding agencies opposed such an exemption. Agencies that opposed the creation of a general exemption expressed the concern that such a general exemption might impose a duty upon the agency to make a determination of whether information was a trade secret and felt they did not have the expertise to do so. Others who opposed the creation of a general exemption for trade secrets worried that that they would lose their own specific trade secret exemption if a general exemption for trade secrets were to be enacted. Other agencies did not support a general exemption for trade secrets because they never collect trade secret information.

On the other hand, 56% of responding agencies recommend the creation of a general exemption. Further, 63% of agencies recommended creation of a general process that all agencies must follow when implementing public records requests for trade secret information. Some agencies that supported a general exemption for trade secret information also supported inclusion of “competitive intelligence” information, which they identified as “sales data and pricing information.” Such information might be called “proprietary confidential business information,” which is what the exemption for the State Board of Administration protects. Typically, “trade secrets” are included within such information.

Given the importance of protecting trade secret information, as well as ensuring that such information receives the same treatment at each agency where it resides, it may be appropriate for the Legislature to consider strengthening the protection for trade secrets held by agencies by the explicit creation of an exemption for trade secrets which also provides a uniform procedure by which agencies process this information and respond to public requests for it. Further, given that “trade secrets” are often part of “proprietary confidential business information,” it may be appropriate to create a general exemption for this latter type of information that includes trade secrets.