

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 Governmental Oversight and Accountability

BILL: SB 366

INTRODUCER: Senator Brandes

SUBJECT: Public Records/Trade Secrets/Computers

DATE: March 18, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Wiehle</u>	<u>Caldwell</u>	<u>CU</u>	Favorable
2.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	Favorable
3.	<u>Kim</u>	<u>McVaney</u>	<u>GO</u>	Pre-meeting
4.	_____	_____	<u>RC</u>	_____

I. Summary:

SB 366 expands an existing public records exemption for data, programs, or supporting documentation that contain trade secrets as defined in s. 812.081, F.S., reside or exist internal or external to a computer, computer system, or computer network, and are held by an agency. This bill is the public records companion to CS/CS/SB 364, which provides criminal penalties for computer related crimes.

The exemption is subject to the Open Government Sunset Review Act and will automatically repeal on October 2, 2019, unless reviewed and reenacted by the Legislature.

The bill contains a statement of public necessity as required by the Florida Constitution.

Because this bill expands a public records exemption, it requires a two-thirds vote of the members present and voting in each house of the Legislature for passage.

II. Present Situation:

Florida's Public Records Law

The Florida Constitution provides every person the right to 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 records of the legislative, executive, and judicial branches are specifically included.²

¹ FLA. CONST., art. I, s. 24(a).

² *Id.*

The Florida Statutes also specify conditions under which public access must be provided to government records. The Public Records Act³ guarantees every person's right to inspect and copy any state or local government public record⁴ at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.⁵

Only the Legislature may create an exemption to public records requirements.⁶ Such an exemption must be created by general law and must specifically state the public necessity justifying the exemption.⁷ Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law. A bill enacting an exemption may not contain other substantive provisions⁸ and must pass by a two-thirds vote of the members present and voting in each house of the Legislature.⁹

The Open Government Sunset Review Act (the Act) prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.¹⁰ 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.¹¹ 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 to meet such public purpose.¹²

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 to meet such public purpose.¹³ An exemption serves an identifiable purpose if it meets one of the

³ Chapter 119, F.S.

⁴ Section 119.011(12), F.S., defines "public records" 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 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." The Public Records Act does not apply to legislative or judicial records (*see Locke v. Hawkes*, 595 So.2d 32 (Fla. 1992)).

⁵ Section 119.07(1)(a), F.S.

⁶ 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 (*see WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (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 2004); and *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 the statutory exemption (*see Attorney General Opinion 85-62*, August 1, 1985).

⁷ FLA. CONST., art. I, s. 24(c).

⁸ The bill may, however, contain multiple exemptions that relate to one subject.

⁹ FLA. CONST., art. I, s. 24(c).

¹⁰ Section 119.15, F.S. An exemption is substantially amended if the amendment expands the scope of the exemption to include more records or information or to include meetings as well as records (s. 119.15(4)(b), F.S.). The requirements of the Act do not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System (s. 119.15(2), F.S.).

¹¹ Section 119.15(3), F.S.

¹² Section 119.15(6)(b), F.S.

¹³ Section 119.15(6)(b), F.S.

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 subdivision to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- It protects 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; or
- It protects trade or business secrets.¹⁴

The Act also requires specified questions to be considered during the review process.¹⁵

Offenses Against Intellectual Property- Public Records Exemption

Section 815.04(3), F.S, makes data, programs, or supporting documentation that are a trade secret as defined in s. 812.081, F.S., reside or exist internal or external to a computer, computer system, or computer network, and are held by an agency as defined in chapter 119, confidential and exempt from the provisions of s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. A person who willfully, knowingly, and without authorization discloses or takes such information commits an offense against intellectual property.

III. Effect of Proposed Changes:

SB 366 is a public records bill linked to CS/CS/SB 364, which addresses computer crimes. CS/CS/SB 364 amends the law on computer related crimes by expanding terminology and creating additional offenses, including crimes related to electronic devices.¹⁶

¹⁴ *Id.*

¹⁵ Section 119.15(6)(a), F.S. provides specified questions which the Legislature must consider:

- 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?

¹⁶ Appropriations Subcommittee on Criminal and Civil Justice Pre-Meeting Analysis, filed on March 11, 2014. The Summary section of the Analysis states:

CS/CS/SB 364 recognizes that advancements in technology have led to an increase in computer related crimes while greatly extending their reach. CS/CS/SB 364 addresses this increase in computer crimes by updating and expanding terminology used to define these crimes and creating additional offenses. Three crimes are added to "offenses against users of computer networks and electronic devices" including:
 Audio and video surveillance of an individual without that individual's knowledge by accessing any inherent feature or component of a computer, computer system, computer network, or electronic devices;
 Intentionally interrupting the transmittal of data to or from, or gaining unauthorized access to a computer, computer system, computer network, or electronic device belonging to a mode of public or private transit; and
 Disrupting a computer, computer system, computer network, or electronic device that affects medical equipment used in the direct administration of medical care or treatment to a person.
 "Offenses against public utilities" are created in the bill and two additional crimes are created, including:
 Gaining access to a computer, computer system, computer network, or electronic device owned, operated, or used by a public utility while knowing that such access is unauthorized, a third degree felony; and

SB 366 expands an existing public records exemption for computer related crimes to include electronic devices. SB 366 is subject to the Open Government Sunset Review Act. This bill will stand repealed on October 2, 2019, unless reviewed and saved through reenactment by the Legislature prior to that date.

SB 366 contains a finding of public necessity for this exemption. The public necessity statement provides:

that it is a public necessity that trade secrets and intellectual property be protected from disclosure by persons gaining unauthorized access into computer networks and electronic devices. Trade secrets and intellectual property are already afforded public records exemptions because of the immense importance of this type of proprietary information to the economic competition between this state and other states and nations. As technology continues to evolve, it is important that the existing public records exemption for trade secrets and intellectual property expand accordingly to encompass new technology used in association with sensitive trade secrets and intellectual property. Thus the Legislature declares that it is a public necessity that data, programs, and supporting documentation that are trade secrets, are held by an agency and reside or exist internal or external to a computer, computer system, computer network, or electronic device be confidential and exempt from the requirements of s. 119.07(1), F.S., and s. 24(a), Article I of the State Constitution.

The bill takes effect on the same date that CS/CS/SB 364 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof and becomes a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The Florida Constitution provides that every person has the right to 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 persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.¹⁷ However, the Legislature may provide for the exemption of records from these requirements by general law passed by a two-thirds vote of each house, provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the

Physically tampering with, inserting software into, or otherwise transmitting commands or electronic communications to a computer, computer system, computer network, or electronic device which cause a disruption in any service delivered by a public utility, a second degree felony.

¹⁷ Art. I, s. 24(c) of the State Constitution.

law.¹⁸ Such laws may contain only exemptions from these requirements and must relate to one subject.¹⁹

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Those persons who have trade secrets contained in documents held by agencies on computers and electronic devices will be better protected.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

As drafted, the public necessity statement does not clearly cite governmental administration or state a business can be adversely affected if there is no exemption for electronic devices.²⁰ A more explicit public necessity statement, or one that resembles s. 815.045, F.S.²¹ would make this bill stronger.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Section 119.15(6)(1), F.S. provides:

An exemption may be created, revised, or maintained only if it serves an identifiable public purpose, and the exemption may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or

3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

²¹ Section 815.045, F.S., which is titled “[t]rade secret information” provides:

The Legislature finds that it is a public necessity that trade secret information as defined in s. 812.081, and as provided for in s. 815.04(3), 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

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 815.04 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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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.