

ECONOMIC DEVELOPMENT RECORDS

Excerpt from Florida's 2008 *Government-In-The-Sunshine Manual*

(2) Business location or expansion plans

Section 288.075(2)(a), F.S., provides that upon written request from a private entity, information held by an economic development agency concerning the plans, intentions, or interests of such entity to locate or expand its business activities in Florida is confidential and exempt from disclosure for 12 months after the date an economic development agency receives a request for confidentiality or until the information is otherwise disclosed, whichever occurs first.

Confidentiality may be extended for up to an additional 12 months upon the written request of the private entity if the agency finds that the private entity is still actively considering locating or expanding its business activities in Florida.

Section 288.075(2)(b), F.S. A public officer or employee may not enter into a binding agreement with any corporation, partnership, or person who has requested confidentiality of the information under this subsection until 90 days after the information is made public unless: 1. The public officer or employee is acting in an official capacity, 2. The agreement does not accrue to the personal benefit of such public officer or employee,; and 3. In the professional judgment of the officer or employee, the agreement is necessary to effectuate an economic development project. Section 288.075(2)(c), F.S.

Development plans, financial records, financial commitment letters and draft memoranda of understanding between a Florida city and a company that is interested in locating its business activities in the city and developing a large project there would appear to be "records which contain or would provide information concerning plans, intentions, or interests of such private corporation . . . to locate, relocate, or expand any of its business activities" in Florida. AGO 04-19. However, the burden is on the economic development agency "to carefully and in good faith distinguish between those documents clearly covered by the exemption and those not covered." *Id.*

A written request for confidentiality under s. 288.075(2), F.S., may constitute or contain information required to be held confidential under that statute; however, such a determination must be made by the custodian on a case-by-case basis as to whether a particular record or portion of a record falls within the scope of the exemption. AGO 07-15. The section, however, may be cited by the records custodian as statutory authority for withholding information from public inspection and copying under the Public Records Law without violating the required confidentiality provisions of the statute. *Id.*

Trade secrets, as defined in s. 812.081, F.S., contained in the records of the economic development agency relating to the plans, intentions, or interests of a private entity which has requested confidentiality, remain confidential for 10 years after the date an agency receives a request for confidentiality or until otherwise disclosed, whichever occurs first. Section 288.075(3), F.S. *Cf.*, AGO 80-78 (county industrial development authority permitted to withhold access only to those records "clearly falling" within the exemption provided in s. 288.075; "policy considerations" do not justify nondisclosure of public records).

Proprietary confidential business information held by an economic development agency is confidential and exempt until such information is otherwise publicly available or is no longer treated by the proprietor as proprietary confidential business information. Section 288.075(4), F.S. Federal employer identification numbers, unemployment compensation account numbers, or Florida sales tax registration numbers held by an economic development agency are confidential and exempt. Section 288.075(5), F.S. In addition, section 288.075(6), F.S., makes certain other information held by an economic development agency pursuant to the administration of an economic incentive program for qualified businesses confidential and exempt for a period not to exceed the duration of the incentive agreement, including an agreement authorizing a tax refund or tax credit, or upon termination of the incentive agreement.

The term "economic development agency" means the state Office of Tourism, Trade, and Economic Development, an industrial development authority, Space Florida, the public economic development agency of a county or municipality, or a research and development authority. Also included are the county or municipal officers or employees assigned the duty to promote the general business interests or industrial interests of that county or municipality or the related responsibilities, if the county or municipality does not have a public economic development agency. The term also includes private persons or agencies authorized by the state, a county or a municipality to promote the general business interests of the state or that municipality or county. Section 288.075(1)(a), F.S. *Cf.*, s. 288.9551, F.S. (Scripps Florida Funding Corporation).

TRADE SECRET EXEMPTIONS

Excerpt from Florida's 2008 *Government-In-The-Sunshine Manual*

The Legislature has created an exemption for data processing software which has been obtained by an agency under a licensing agreement prohibiting its disclosure and which is a trade secret as defined in s. 812.081, F.S. Section 119.071(1)(f), F.S. In order for the exemption to apply, two conditions must be present: The licensing agreement must prohibit disclosure of the software, and the software must meet the statutory definition of "trade secret" found in s. 812.081, F.S. See, AGOs 90-104 and 90-102.

Section 815.04(3)(a), F.S., provides that data, programs, or supporting documentation which is a trade secret as defined in s. 812.081, F.S., which resides or exists internal or external to a computer, computer system, or computer system network is confidential and exempt from s. 119.07(1), F.S. This exemption applies to trade secrets marked as confidential and sent via electronic mail to an agency. *Sepero Corporation v. Department of Environmental Protection*, 839 So. 2d 781, 785 (Fla. 1st DCA 2003), *review denied sub nom., Crist v. Department of Environmental Protection*, 911 So. 2d 792 (Fla. 2005).



THE FLORIDA SENATE
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State and local governmental entities in Florida obtain trade secret information from businesses for a variety of reasons, including when reviewing bids, attempting to attract businesses for economic development, and regulating certain industries. While the *Florida Statutes* contain specific exemptions for trade secrets held by particular governmental entities, the Public Records Act does not contain a general exemption for trade secret information or a standard process for responding to public record requests for trade secret information. As a result, current law may leave gaps in protecting trade secrets.

The Committee on Governmental Operations has been assigned an interim project to review whether there is a need to create a uniform exemption for trade secrets in the Public Records Act. Your participation in this survey will assist our review of the issue and in making a determination whether to recommend that a uniform trade secret exemption be created. Please feel free to attach additional comments or explanations to the survey response.

If you have any questions, please call James Rhea, Chief Legislative Analyst, Senate Governmental Operations Committee, at 850.487.5177. Thank you for your timely cooperation.

PLEASE RETURN THIS QUESTIONNAIRE BY AUGUST 22, 2008 TO:

James Rhea, Chief Legislative Analyst
Senate Governmental Operations Committee
rhea.jim@flsenate.gov

Agency responding to survey: _____

Name of person completing the survey: _____

Title of person completing the survey: _____

Telephone number of person completing the survey: _____

E-mail address of person completing the survey: _____

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Applicable Definitions

The Florida Statutes contain at least two definitions of "trade secrets." The **first definition** is contained in Section 812.081(1)(c), F.S., and it 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;*
- 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.

The **second definition**, which is found in the Uniform Trade Secrets Act at s. 688.002(4), F.S., 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.

Survey Questions

1. Does your agency receive information that is a trade secret under either definition above?
Yes _____ No _____
If "No," please proceed to Question No. 11.

2. If a public record request is made to your agency for information that is a trade secret, is there one or more statutory public record exemptions that would protect that information?
None ___ One exemption ___ More than one exemption ___

If "One" or "More than one" please identify each statutory trade secret exemption that applies to your agency:

3. Do you require a person who submits information that is a trade secret to identify or mark such information as a trade secret?
Yes ___ No ___

4. Do you file or store information that is a trade secret separately from information that is not a trade secret?
Yes ___ No ___

If "No," how do you ensure that trade secret information is not released in a public records request?

5. Upon receipt of a public records request, how does your agency determine if the information that has been requested is a trade secret?

6. If a document submitted to your agency is marked "Trade Secret" by the submitter, does your agency rely on the mark to determine if the information is a trade secret or perform an independent analysis to determine if the information meets one of the two statutory definitions?
Rely on the mark ___ Perform independent analysis ___

7. If a document marked "Trade Secret" is held by your agency but it is clear on the face of the document that it does not meet the statutory definition, how would your agency respond to a public records request for that record?
Release the record upon request ___ Refuse to release the record ___ Other ___
If "Other," please explain:

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8. If a document marked "Trade Secret" is held by your agency but it is unclear whether the document meets the statutory definition, how would your agency respond to a public records request for that record?

Release the record upon request _____ Refuse to release the record _____ Other _____

If "Other," please explain:

9. Is the process your agency uses to determine if requested information is a trade secret required by statute or established by your agency?

a. Required by statute _____ (please cite statute: _____)

b. Established by agency _____

c. If "Established by your agency," does specific statutory authority exist authorizing your agency to establish this process?

Yes _____ (please cite the statute: _____) No _____

10. In the case, *SEPRO Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781 (Fla. App. 1 Dist., 2003), the First District Court of Appeal held that s. 815.045, F.S., exempts trade secrets, as defined in s. 812.081(1)(c), F.S. Does your agency feel that as a result of this judicial opinion all trade secret information that you receive is protected even no specific exemption protects the information?

Yes _____ No _____

If "No," why not

11. Would it be helpful to your agency if the Public Records Act contained a general exemption for trade secrets?

Yes _____ No _____

12. Would it be helpful to your agency if the Public Records Act contained a general process all agencies must follow when implementing public records requests for trade secrets information?
Yes ____ No ____

13. Would your agency recommend the creation of a general exemption for trade secret information?
Yes ____ No ____

14. Would your agency recommend the creation of a general process that all agencies must follow when implementing public records requests for trade secret information?
Yes ____ No ____
If "No," would your answer change to "Yes," if the uniform or general process did not supersede a pre-existing more specific statutory process? Yes ____ No ____

15. Please provide any additional information or comments that you think would be helpful in this review:
