

Florida Bar Business Law Section – Intellectual Property Committee

White Paper on Bills Relating to Public Records and Trade Secrets

CS HB 0801 & HB 0799 / SB 1532 & SB 1534

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**I. INTRODUCTION**

According to the House of Representatives Staff Analysis, CS HB 0799 “creates a uniform public records exception for trade secrets that applies to most agencies that are subject to public record requirements.” This bill “defines the term ‘trade secret’ and creates a process for an individual or entity to follow when submitting a trade secret to an agency.” The new definition allows for public disclosure of certain information that had previously been argued to be a trade secret, including the parties to a contract with an agency, the amount of money paid by the agency, the nature of the items purchased, the unit prices paid, and the deliverables provided to the agency.

CS HB 0799 is linked to HB 0801, and each are effective only upon enactment of the other. According to the House of Representatives Staff Analysis, HB 0801 “repeals most public record exemptions for trade secrets in current law, all associated processes for designating a trade secret, and most references to trade secret contained in definitions for proprietary business information.”

Similar legislation has also been introduced in the Senate, with CS 1532 being the analog of HB 0799, and CS 1534 being similar to HB 0801.

The Intellectual Property Committee takes no position on whether these two sets of companion bills should be enacted as laws. The purpose of this White Paper is to propose technical modifications to each of the bills to address issues of concern with the legislation.

**II. PROPOSED MODIFICATIONS**

A. PROPOSED MODIFICATIONS TO CS HB 0799 & SB 1532 AND RATIONALE

1. Issue of Concern

As presently drafted, these bills provide that any person or entity that submits a record to an agency that contains purported trade secrets must, *inter alia*, (1) submit to the agency at the time of submission a notice that the record contains a trade secret, and (2) sign a declaration attesting to their belief that the information constitutes a trade secret. Failure to do so constitutes a waiver of trade secret protection. The bills further require the submitter to clearly mark each appropriate page of the submission with the words “trade secret.” Whether the failure to so mark the pages is a waiver is unclear.

Because the referenced bills represent modifications to approximately 86 pending statutes spanning a wide array of agencies and their vendors, there is a concern that vendors (or others) who submit information containing trade secrets to an agency will not be aware of the new requirements, and thus may inadvertently waive valuable trade secret protection through a non-compliant submission.

It is therefore proposed that language be added to the bills to require the agency to provide advance notice to any person or entity that may submit a trade secrets of the requirements of the bill and the consequences for failing to comply to those requirements. Because a waiver of trade secret protection anywhere (such as to an agency) serves as a complete waiver everywhere (i.e., in the market, against their competitors, etc.), companies who inadvertently waive trade secret protection will likely be forced into litigation with the agency to have a court declare that there was no knowing waiver. Likewise, it is expected that any software companies that inadvertently waive valuable and valid trade secret protection would be required to object vigorously to maintain its valuable intellectual property rights and thereby create bad press for the State, and thus act as a disincentive for others to do business with Florida agencies.

2. *Proposed modification to avoid this issue*

The following four sections should be added to CS HB 0799 & SB 1532:

(8) Each Agency shall, during the process of requesting from any person or entity bids for the sale or license of goods or services that may contain trade secrets, provide the following written notice to the person or entity, in advance of accepting such bids:

**NOTICE:** Any person or entity that submits formal or informal bids that may contain trade secrets to any agency of Florida (including to any county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government) is advised that there are strict requirements that must be followed to avoid losing trade secret protection for those submissions. The requirements include submission of a notice to the agency that (a) indicates that the bid contains a trade secret, (b) includes the following: the name, telephone number, and mailing address of the person claiming that the bid contains a trade secret; (c) an acknowledgement of the obligation to update his or her contact information with the agency; (d) the obligation to mark each page of the submission or specific portion of a record that contains a trade secret with the words “trade secret”; and (e) the need to verify to the agency through a written declaration certain statements as required by Florida Statute 688.01. In ALL circumstances the following information related to any contract, or addendum thereto, with any agency is NOT protected as a trade secret once the bid is submitted to the agency: (a) the names of the parties to the contract or agreement, or an addendum thereto; (b) the amount of money paid, any payment structure or plan, expenditures,

incentives, bonuses, fees, or penalties; (c) the nature or type of commodities or services purchased; and (d) applicable contract unit prices and deliverables.

(9) Each Agency shall, during the process of requesting from any person or entity records or information that may contain trade secrets, provide the following written notice to the person or entity, in advance of requesting such records:

**NOTICE:** Any person or entity that submits records or information that may contain trade secrets to any agency of Florida (including to any county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government) is advised that there are strict requirements that must be followed to avoid losing trade secret protection for those submissions. The requirements include submission of a notice to the agency that (a) indicates that the records or information contains a trade secret, (b) includes the following: the name, telephone number, and mailing address of the person claiming that the records or information contains a trade secret; (c) an acknowledgement of the obligation to update his or her contact information with the agency; (d) the obligation to mark each page of the submission or specific portion of the record or information that contains a trade secret with the words "trade secret"; and (e) the need to verify to the agency through a written declaration certain statements as required by Florida Statute 688.01. In ALL circumstances the following information related to any contract, or addendum thereto, with any agency is NOT protected as a trade secret once the bid is submitted to the agency: (a) the names of the parties to the contract or agreement, or an addendum thereto; (b) the amount of money paid, any payment structure or plan, expenditures, incentives, bonuses, fees, or penalties; (c) the nature or type of commodities or services purchased; and (d) applicable contract unit prices and deliverables.

(10) Each agency shall obtain written acknowledgement from the person or entity that submitted records or information that the person or entity timely received the required Notice, and the agency shall maintain a record of such acknowledgement.

(11) In the event an Agency fails to timely provide the required notice(s) set forth at Sections 8 and 9 of this Section to any person or entity, and proof of acknowledgement required by Section 10 of this Section from such person or entity, then the waiver provision of Section 3(a) shall not apply to such person or entity.

#### B. PROPOSED MODIFICATIONS TO CS HB 0801 & SB 1534 AND RATIONALE

##### 1. First Issue of Concern

Currently Florida Statute §119.071(1)(f) exempts from public inspection "Data processing software obtained by an agency under a licensing agreement that prohibits its disclosure and which software is a trade secret, as defined in s. 812.081, and agency-produced data processing software that is sensitive."

CS HB 0801 & SB 1534 propose to strike the underlined language above from §119.071(1)(f), thus removing the protections and allowing public disclosure of any trade secrets contained in such software. See CS HB 0801 at lines 247-249; SB 1534 at lines 255-257. Removing this protection and allowing public disclosure of trade secrets would be a strong deterrent and likely to prevent any vendor of commercial software from licensing their software to state agencies.

2. *Proposed modification to avoid this issue*

Do not strike the underlined language as indicated at CS HB 0801 at lines 247-249 and SB 1534 at lines 255-257, thus maintaining protection of trade secrets embedded within the software as currently provided by 119.071(1)(f). This will allow Florida agencies to continue entering licenses with software companies, rather than requiring agencies to write their own software, which would likely be prohibitively expensive.

3. *Second Issue of Concern*

Currently Florida Statute §815.04(1) makes it a criminal offense to “introduce a computer contaminant or modify or render unavailable data, programs, or supporting documentation residing or existing internal or external to a computer, computer system, computer network, or electronic device.” According to §815.04(3), this criminal statute also exempts from public disclosure all:

Data, programs, or supporting documentation that is a trade secret as defined in s. 812.081, that is held by an agency as defined in chapter 119, and that resides or exists internal or external to a computer, computer system, computer network, or electronic device is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

CS HB 0801 & SB 1534 propose to strike the underlined language above from §815.04(3), thus removing the protections from public disclosure of any trade secrets contained in such data, software, or supporting documentation that resides on an agency computer. See CS HB 0801 at lines 2006-2017 and SB 1534 at lines 2. Removing this protection would be a strong deterrent and likely to prevent any vendor of software containing trade secrets from licensing their software to state agencies.

4. *Proposed modification to avoid this issue*

Do not strike the underlined language CS HB 0801 at lines 2006-2017 and SB 1534 at lines 2102-2111, thus maintaining trade secret protection for any software that resides on an agency computer as currently provided by from §815.04(3).