

2-C-22 | TRADE SECRETS AND PROPRIETARY CONFIDENTIAL BUSINESS INFORMATION

a. Trade Secrets

Prior to the adoption of s. 119.0715, F.S., "documents submitted by a private party which constitute trade secrets as defined in s. 812.081," F.S., and which were stamped as confidential at the time of submission to an agency by a private party, were found to be not subject to public access. *Sepro Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781, 784(Fla. 1st DCA 2003), review denied sub nom., *Crist v. Florida Department of Environmental Protection*, 911 So. 2d 792 (Fla. 2005). And see *Seta Corporation of Boca, Inc. v. Office of the Attorney General*, 756 So. 2d 1093 (Fla. 4th DCA 2000).

Section 119.0715(2), F.S., now expressly provides that a "trade secret held by an agency" is confidential and exempt from disclosure. An agency may disclose a trade secret to an officer or employee of another agency or government entity whose use of the trade secret is within the scope of his or her lawful duties and responsibilities. Section 119.0715(3), F.S.

The term "trade secret" has the same meaning as in s. 688.002, F.S. Section 119.0715(1), F.S. Section 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.

The trial court's conclusion as to whether specific information constitutes a trade secret "rests on factual determinations that are assailable on appeal only if unsupported by competent, substantial evidence." *Sepro*, 839 So. 2d at 785. Cf. *Managed Care of North America, Inc. v. Florida Healthy Kids Corporation*, at 286 So. 3d at 859 (appellate court's role is to strictly construe the statutory definition of trade secret, and determine if competent, substantial evidence exists to support the factual findings of the trial court; the trial court's interpretation of a

statute and its application of the law to facts are subject to de novo review); *Office of Insurance Regulation v. State Farm Florida Insurance Company*, 213 So. 3d 1104 (Fla. 1st DCA 2017) (trial court's conclusion that insurance policy statistics submitted to the Office of Insurance Regulation had "independent economic value" within the meaning of the statutory definition of trade secret in s. 688.002(4), F.S., was supported by competent, substantial evidence). Cf. *Surterra Florida, LLC v. Florida Department of Health*, 223 So. 3d 376 (Fla. 1st DCA 2017) (affirming trial court's finding that identities of investors and partners listed in applications to dispense medical cannabis were not trade secrets because the applicants "did not prove" that this information constituted a trade secret). And see *Barfield v. Florida Department of Health*, No. 2015 CA 003014 (Fla. 2d Cir. Ct. October 27, 2017), available online in the Cases database at the open government site at myfloridalegal.com (identity of consultants and related information contained in application to dispense medical cannabis qualified as a trade secret).

Similarly, the Fourth District upheld the trial court's determination, after an in camera inspection, that the aggregate number of airport pick-ups by a transportation service company and the sums of money paid to the county pursuant to a license agreement between the company and the county did not constitute trade secret information. *Rasier-DC, LLC v. B & L Service, Inc.*, 237 So. 3d 374 (Fla. 4th DCA 2018). The court also found that a provision in the agreement requiring that the county maintain the confidentiality of the company's trade secret information and assert the exempt status in response to a public records request could not transform the information into a confidential record, citing to *National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1208 (Fla. 1st DCA 2009). And see *James, Hoyer, Newcomer, Smiljanich, & Yanchunis, P.A., v. Rodale, Inc.*, 41 So. 3d 386, 389 (Fla. 1st DCA 2010), rejecting a company's claim that information in customer complaints and company responses were trade secrets; noting that such information "is not secret and is not [the company's] to control;" *Allstate Floridian Ins. Co. v. Office of Ins. Regulation*, 981 So. 2d 617 (Fla. 1st DCA 2008), review denied, 987 So. 2d 79 (Fla. 2008) (to the extent Allstate believed any documents sought by the Office of Insurance



Regulation were privileged as trade secrets, Allstate was required to timely seek a protective order in circuit court). Cf. Inf. Op. to Brown, March 11, 2016 (if an agency has received material that the sender has identified as "trade secret" and the material does not appear to meet the statutory definition of trade secret, the agency should advise the sender "that it has received a public request and will release the records and allow the sender to seek a protective order for those materials")

In addition to the general trade secret exemption in s. 119.0715, there are also specific trade secret exemptions. See, e.g., s. 570.544(8), F.S. (records of the Division of Consumer Services of the Department of Agriculture and Consumer Services are public records; however, customer lists, customer names, and trade secrets are confidential and exempt). Cf. AGO 09-02 (s. 581.199, F.S., prohibits authorized representatives of Division of Plant Industry in Department of Agriculture and Consumer Services from disclosing trade secrets obtained in carrying out their duties under Ch. 581 to any unauthorized person, provided such trade secrets fall within the statutory definition in s. 812.081, F.S., and owner of the trade secrets has taken measures to maintain the information's secrecy). More information about these exemptions may be found in the summaries located in Appendix D.

b. Proprietary Confidential Business Information

While there is no generic exemption for information claimed to be "proprietary confidential business information," the Legislature has created a number of exemptions from Ch. 119, F.S., for proprietary confidential business information held by certain agencies. The term is generally defined by the statute creating the exemption and frequently includes trade secrets. See, e.g., s. 288.075, F.S. (economic development agency); s. 288.9626, F.S. (Florida Opportunity Fund); and ss. 364.183, 366.093, 367.156, and 368.108, F.S. (Public Service Commission). Cf. *Florida Power & Light Company v. Public Service Commission*, 31 So. 3d 860 (Fla. 1st DCA 2010) (listed categories of proprietary confidential business information in s. 366.093, F.S., as exempt are not exhaustive; information relating to employees' compensation warranted confidential classification as it would have impaired utility's competitive interests). Compare *Southern Bell*

Telephone and Telegraph Company v. Beard, 597 So. 2d 873, 876 (Fla. 1st DCA 1992) (Public Service Commission's determination that statutory exemption for proprietary confidential business information should be narrowly construed and did not apply to company's internal self-analysis was "consistent with the liberal construction afforded the Public Records Act in favor of open government"). And see AGO 08-14 (lease payment amount made by a private company to the city does not constitute "proprietary confidential business information").

(Florida Office of the Attorney General // © March 9, 2023)

