

**IN THE  
SUPREME COURT OF FLORIDA**

<b>CHARLES J. CRIST, JR., ATTORNEY GENERAL,</b>	)	
	)	
<b>Intervenor/Petitioner,</b>	)	
<b>v.</b>	)	<b>Fla. Sup. Ct. Case No. SC03- ____</b>
	)	
<b>SEPRO CORPORATION,</b>	)	<b>Fla. 1<sup>st</sup> DCA Case No. 1D02-0213</b>
	)	
<b>Respondent.</b>	)	
	)	
	)	

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**PETITIONER’S BRIEF ON JURISDICTION**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE AND FACTS ..... 1

SUMMARY OF ARGUMENT ..... 3

    I.    THE *SEPRO* DECISION CONFLICTS WITH THE  
          DECISION OF OTHER DISTRICT COURTS OF  
          APPEAL. .... 5

        A.    *SePro* Conflicts with *Tribune Company v. Public  
              Records*,\_P.C.S.O. #79-35504, 493 So. 2d 480 (Fla. 2<sup>d</sup>  
              DCA, 1986) ..... 5

        B.    *SePro* Conflicts with *Enslein v. Gere*, 497 So. 2d 705 (Fla.  
              4<sup>th</sup> DCA 1986) ..... 6

    II.   THIS COURT SHOULD GRANT REVIEW BECAUSE  
          *SEPRO* VIOLATES THE OPEN GOVERNMENT  
          IMPERATIVE OF FLORIDA’S CONSTITUTION AND  
          LAWS, AND HAS PROFOUND POLICY  
          IMPLICATIONS. .... 8

CONCLUSION ..... 10

CERTIFICATE OF SERVICE ..... 11

CERTIFICATE OF COMPLIANCE ..... 12

**TABLE OF AUTHORITIES**

**CASES**

*Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775  
(Fla. 4th DCA 1985) . . . . . 6

*City of Riviera Beach v. Barfield*, 642 So. 2d 1135  
(Fla. 4th DCA 1994) . . . . . 6

*Enslein v. Gere*, 497 So. 2d 705 (Fla. 4th DCA 1986) . . . . . 4,6,7,8

*Halifax Hosp. Med. Ctr. v. News-Journal Corp.*, 724 So. 2d 567  
(Fla. 1999) . . . . . 6,10

*Miami Herald Publishing Co. v. City of North Miami*,  
452 So. 2d 572 (Fla. 3d DCA 1984) . . . . . 6

*SePro v. DEP*, 839 So. 2d 781 (Fla. 1st DCA 2003) . . . . . *passim*

*Sharer v. Hotel Corp. of America*, 144 So. 2d 813 (Fla. 1962) . . . . . 10

*Shuman v. State*, 358 So. 2d 1333 (Fla. 1978) . . . . . 8

*State v. Nourse*, 340 So. 2d 966 (Fla. 3d DCA 1976) . . . . . 6

*The Tribune Company v. Public Records*,  
P.C.S.O. #79-35504, *Miller/Jent*, 493 So. 2d 480  
(Fla. 2nd DCA 1986), *rev. den. sub nom*  
*Gillum v. Tribune Co.*, 503 So. 2d 327 (1987) . . . . . 4,5,6

*Wait v. Fla. Power & Light Co.*, 372 So. 2d 420 (Fla. 1979) . . . . . 6

**FLORIDA CONSTITUTION**

Article 1, Section 24 . . . . . 1,3,8,10

**FLORIDA STATUTES**

Section 61.1201 (1984) . . . . . 7  
Section 752.01 (1985) . . . . . 7  
Section 812.081 (2001) . . . . . 1  
Section 815.04 (2002) . . . . . 1  
Section 815.045 (2002) . . . . . *passim*

**LAWS OF FLORIDA**

Chapter 94-100 . . . . . *passim*  
Chapter 1997-196 . . . . . 9  
Chapter 1998-256 . . . . . 9  
Chapter 2000-293 . . . . . 9  
Chapter 2000-311 . . . . . 9  
Chapter 2001-35 . . . . . 9  
Chapter 2001-69 . . . . . 9  
Chapter 2001-136 . . . . . 9

Chapter 2001-151 .....	9
Chapter 2001-161 .....	9
Chapter 2001-181 .....	9
Chapter 2002-68 .....	9
Chapter 2002-396 .....	9

## STATEMENT OF CASE AND FACTS

Affirming a decision of the circuit court, the First District Court of Appeal manufactured a general trade secret exemption to Florida's Public Records Act by broadly construing Section 815.045, Florida Statutes (2002), originally enacted as Chapter 94-100, Laws of Florida, amending Chapter 815, Florida Statutes. Appx. at 3.

Section 815.045 states:

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 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.

Appx. at 3. The decision states the statute reads “more like a statement of legislative intent than a conventionally phrased provision of positive law,” and acknowledges

uncertainty about whether section 815.045 creates a trade secret exemption to the public records act and how broad any such exemption should be. *Id.* However, while admitting the law can be read narrowly, the decision nevertheless adopts a “broader view of the exemption’s reach . . . .” Appx. at 3.

Griffin L.L.C. made a public records request to the Department of Environmental Regulation (DEP) for documents that *SePro* gave DEP while fulfilling its contract to assist DEP in eradicating hydrilla from certain Florida lakes. DEP advised *SePro* of the request. *SePro* responding by claiming that some of the information was trade secret and exempt from the Public Records Act. DEP concluded that the documents were not exempt from disclosure under the Public Records Act. Appx. at 1.

*SePro* sued to stop DEP from releasing the public records. The trial court accepted the trade secret exemption argument and blocked release of all documents *SePro* had labeled confidential. Griffin and DEP appealed that decision. The trial court also determined that documents which had not been marked confidential were public records subject to disclosure. *SePro* cross appealed that decision. Appx. at 1 & 2.

To reach the “broader view” the First District decided that where the scriveners of statutory revision first placed the law in the statute books, Chapter 119, was a

“contemporaneous view” of legislative intent entitled to weight in the statute’s construction. “The original codifier’s broader view of the statute” thus established a broad, general trade secrets exemption to Florida’s Public Records Act. Appx. at 3.

Griffin and DEP moved for rehearing. The Attorney General moved to intervene as a party because of the great public interest involved in the case and also filed a motion for rehearing. The First District granted intervention and denied all motions for rehearing. The Attorney General timely invoked this Court’s discretionary jurisdiction.

### **SUMMARY OF ARGUMENT**

*SePro* works a sea change in the public records law, raises unnecessary constitutional issues, and creates significant practical problems for public agencies. Never before has an appellate court found that there is a general trade secret exemption to the Public Records Act. Historically, the legislature has enacted only narrow, specific trade secret exemptions, many of them after the adoption of section 815.045. By finding section 815.045 creates an exemption, the opinion even renders that law vulnerable to constitutional challenge since Chapter 94-100, Laws of Florida did not have a finding of public necessity.

Article I, Section 24 of the Florida Constitution establishes Florida’s overriding

public policy of open government including public records. All records are public unless (i) they are specifically exempted by a statute that is no broader than necessary and (ii) the Legislature has made a valid finding of necessity for the exemption. The result of the *SePro* decision will be that much material submitted to public agencies relative to applications, contracts, or agency investigations will routinely be labeled “trade secrets.” Agencies and courts will spend vast amounts of time and effort, as they did below, evaluating the factual accuracy of those labels. Agencies will act at great risk if they disclose any material labeled “trade secret” without a judicial determination of the claim. The public’s constitutional right to view public records will thus be severely impaired.

The *SePro* decision conflicts with many cases deciding that the public records act must be broadly construed and that exemptions to it must be narrowly construed, consistent with the Constitution’s open government imperative. *See, The Tribune Company v. Public Records, P.C.S.O. #79-35504 Miller/Jent*, 493 So. 2d 480 (Fla. 2<sup>nd</sup> DCA 1986), *rev. den. sub nom Gillum v. Tribune Co.*, 503 So. 2d 327 (1987).

The statutory construction analysis the First District relied upon to divine the trade secret exception gives untenable weight to the division of statutory revision’s decision on where to place Chapter 94-100. The First District’s decision misapplies and conflicts with *Enslein v. Gere*, 497 So. 2d 705 (Fla. 4th DCA 1986), which

decided that placement decisions of the codifiers cannot affect the substance of a law.

**I. THE *SEPRO* DECISION CONFLICTS WITH THE DECISION OF OTHER DISTRICT COURTS OF APPEAL.**

**A. *SePro* Conflicts with *Tribune Company v. Public Records*, P.C.S.O. #79-35504, 493 So. 2d 480 (Fla. 2<sup>nd</sup> DCA 1986)**

The *SePro* decision recognizes that the case's outcome hinges on whether the court chooses a narrow or broad view of section 815.045. The court below chose what it repeatedly called "the broader view." Appx. at 3. That decision conflicts directly with *The Tribune Company v. Public Records*, P.C.S.O. #79-35504 *Miller/Jent*, 493 So. 2d 480 (Fla. 2<sup>nd</sup> DCA 1986), *rev. den. sub nom. Gillum v. Tribune Co.*, 503 So. 2d 327 (1987).

In *Tribune Company* the court faced a choice between a narrow or broad view of the meaning of "appeal" in a public records exception for active criminal investigations including information directly related to "appeals." *Tribune Company* at 482. Like the court below, the Second District Court of Appeal construed a claimed public records exception. Unlike the court below, the Second District decided that an exemption to the Public Records Act must be construed narrowly.

The Public Records Act is to be liberally construed in favor of "open government to the extent possible in order to preserve our basic freedom,

without undermining significant governmental functions such as crime detection and prosecution . . . .” *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4<sup>th</sup> DCA 1985). ***Exemptions from disclosure are to be construed narrowly and limited to their stated purposes.*** *Miami Herald Publishing Co. v. City of North Miami*, 452 So. 2d 572, 573 (Fla. 3d DCA 1984); *Cf. State v. Nourse*, 340 So. 2d 966, 969 (Fla. 3d DCA 1976) (“unless the right to the exception is clearly apparent in the statute, no benefits thereunder will be permitted”). “[W]hen in doubt the courts should find in favor of disclosure rather than secrecy.” *Bludworth* at 780, n.1.

*Tribune Company* at 483 (emphasis supplied).

The decision in *SePro* conflicts directly with the decision of *Tribune Company* by construing section 815.045 broadly and not narrowly, and by finding in favor of secrecy rather than disclosure. The decision conflicts with many other decisions requiring narrow construction of exemptions to Florida’s Public Records Act and a construction in favor of disclosure.<sup>1</sup>

**B. *SePro* Conflicts with *Enslein v. Gere*, 497 So. 2d 705 (Fla. 4th DCA 1986)**

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<sup>1</sup> See e.g. *Halifax Hospital v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999), (Constitution imposes “exacting” standard of specific public necessity and limited breadth.); *Wait v. Fla. Power & Light Co.*, 372 So. 2d 420, 422 (Fla. 1979) (“[T]he Public Records Act exempts only those records that are provided by statutory law to be confidential or which are expressly exempted by general or special law.”); *City of Riviera Beach v. Barfield*, 642 So. 2d 1135, 1136 (Fla. 4th DCA 1994) (Courts must construe Florida’s Public Records Act “liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly and limited to their designated purpose.”); *Bludworth v. Palm Beach Newspapers, Inc.*, 476 So. 2d 775, 779 (Fla. 4<sup>th</sup> DCA 1985), *rev. denied* 488 So. 2d 67 (Fla. 1986).

The *SePro* decision cites *Enslein v. Gere*, 497 So. 2d 705 (Fla. 4th DCA 1986), generally for the proposition that the codifiers of statutory revision may move statutes about so long as the movement does not affect the construction or meaning of the law. But the decision misapplies *Enslein* and construes section 815.045 in direct conflict with the general principle and the specific decision of *Enslein*. *SePro* relied upon the placement of the statute to determine its meaning. *Enslein* refused to let the placement of a statute affect the meaning of the law.

The dispute in *Enslein* was over the right of grandparents to recover attorneys fees in a case in which they obtained an order granting them visitation rights. In 1985, when the grandparents began their action, the statute creating the right to visitation was lodged in Chapter 61 of the Florida Statutes.<sup>2</sup> In 1986, when the court heard the motion for fees, the law had been moved to Chapter 752 of the Florida Statutes.<sup>3</sup> Other provisions of Chapter 61 provided for attorneys fees. Chapter 752 did not provide for attorneys fees. The court decided that the move from Chapter 61 to Chapter 752 could not affect the right to attorneys fees created when the Legislature amended Chapter 61 to create grandparent rights.

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<sup>2</sup> § 61.1201, Fla. Stat. (1984).

<sup>3</sup> § 752.01, Fla. Stat. (1985)

*SePro* decided just the opposite, holding that where the codifiers originally placed section 815.045 determined the substantive meaning of the law. The decision recognized that section 815.045 was unclear at best and described it as reading “more like a statement of legislative intent than a conventionally phrased provision of positive law . . . .” Appx. at 3. Contrary to *Enslein’s* holding that statutory revision’s placement of a statute cannot determine its meaning, the court decided that “[t]he 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, Laws of Florida (1994) [amending Chapter 815], enacted applies to more than computer data, programs or supporting documentation.” Appx. at 3.

The decision lets the substance of the law turn upon placement of the statute. The decision therefore conflicts with *Enslein*. It conflicts similarly with *Shuman v. State*, 358 So. 2d 1333 (Fla. 1978) (statutory revision division has no authority to effect a substantive change).

**II. THIS COURT SHOULD GRANT REVIEW BECAUSE SEPRO VIOLATES THE OPEN GOVERNMENT IMPERATIVE OF FLORIDA’S CONSTITUTION AND LAWS, AND HAS PROFOUND POLICY IMPLICATIONS.**

The public’s right to know about and monitor its government is a fundamental

constitutional right. Article I, Section 24 of the Florida Constitution articulates the overriding public policy:

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. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The *SePro* decision manufactures a huge new exception to the public's constitutional right to inspect public records making many agency records unavailable to the public unless judicially determined not to be a trade secret . Until this decision issued there was no broad trade secret exemption to the Public Records Act. Trade secret exemptions were legislatively created and narrowly tailored to specific types of records in specific contexts. For example, since Section 1, Chapter 94-100 (§815.045) became law, the Legislature has enacted at least twelve public record exemptions that are either limited to specific trade secrets in certain contexts, or include specific types of trade secrets with other documents exempted.<sup>4</sup> The *SePro*

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<sup>4</sup> See Ch. 2002-68, Laws of Fla.; Ch. 2002-396, Laws of Fla.; Ch. 2001-69, Laws of Fla.; Ch. 2001-151, Laws of Fla.; Ch. 2001-181, Laws of Fla.; Ch. 2001-35, Laws of Fla.; Ch. 2001-161, Laws of Fla.; Ch. 2001-136, Laws of Fla.; Ch. 2000-311, Laws of Fla.; Ch. 2000-293, Laws of Fla.; Ch. 1998-256, Laws of Fla.; Ch. 1997-196,

decision renders these laws meaningless, effectively revoking what the Legislature plainly intended to be limited exemptions. All these laws would be purposeless if, as the First District held, section 815.045 creates a *general* trade secrets exemption from the Public Records Act. Courts should never presume that the Legislature intended to enact purposeless legislation. *See Sharer v. Hotel Corp. of America*, 144 So. 2d 813, 817 (Fla. 1962).

The First District's decision also renders section 815.045 constitutionally suspect. For section 815.045 to be a valid public records exemption, it must itself have a statement of public necessity. Art. I, §24, Fla. Const.; *Halifax Hosp. Med. Ctr. v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). The legislative history reveals no statement of public necessity for section 815.045. The reason is that section 815.045 was never intended to be codified. ***That section was itself simply the statement of public necessity for the exemption created in section 815.04(3)(a). Ch. 94-100, Laws of Fla.!***

### CONCLUSION

Based on the foregoing, the Petitioner respectfully submits the Court should accept jurisdiction of this cause.

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Laws of Fla.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been forwarded by U.S. Mail this \_\_\_\_\_ day of April, 2003, to: **Douglas Moody, Jr.**, Myers & Fuller, 402 Office Plaza Drive, Tallahassee, Florida 32301 (counsel for SePro), **Susan L. Kelsey** and **Karen D. Walker**, Holland and Knight, P. O. Drawer 810, Tallahassee, Florida 32302-0810 (counsel for Griffin) and **Teri L. Donaldson**, General Counsel, **Stacey D. Cowley**, Senior Assistant General Counsel, Florida Department of Environmental Protection, 3900 Commonwealth Blvd., MS 35,

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John D.C. Newton, II  
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that Petitioner's Jurisdictional Brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P., in that this Brief uses Times New Roman 14-point font.

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