

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 1269 Pub. Rec./Family Trust Companies/OFR

**SPONSOR(S):** Government Operations Subcommittee; Insurance & Banking Subcommittee; McBurney

**TIED BILLS:** CS/HB 1267 **IDEN./SIM. BILLS:** SB 1320

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Bauer	Cooper
2) Government Operations Subcommittee	13 Y, 0 N, As CS	Williamson	Williamson
3) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

This bill creates a public records exemption for certain information held by the Office of Financial Regulation (OFR) relating to family trust companies, licensed family trust companies, and foreign licensed family trust companies, which is the subject of a pending bill, CS/HB 1267. CS/HB 1267 authorizes families to form and operate any of these three family trust companies, subject to varying regulatory requirements. In general, a FTC is an entity which provides trust services similar to those that can be provided by an individual or financial institution. This includes serving as a trustee of trusts held for the benefit of the family members, as well as providing other fiduciary, investment advisory, wealth management, and administrative services to the family. A Florida FTC must be owned exclusively by family members and may not provide fiduciary services to the public.

The bill treats the following as confidential and exempt from public disclosure: records relating to a registration, an application, annual certification, or examination of any FTC type; reports of examinations, operations, or conditions (including working papers), which the bill defines; names of shareholders or members of any FTC type; and information received by the OFR from a person from another state or nation or the federal government which is otherwise confidential or exempt pursuant to the laws of that state, nation, or federal government. The bill authorizes release of confidential and exempt information to specified persons, and provides a criminal penalty for willful disclosure of such information.

The bill provides for repeal of the exemption on October 2, 2019, unless reviewed and saved from repeal by the Legislature pursuant to the Open Government Sunset Review Act. As this bill creates a new public records exemption, the bill also provides a statement of public necessity as required by the State Constitution.

The bill provides an effective date that is contingent upon the passage of HB 1267 or similar legislation.

**Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created public record or public meeting exemption. The bill creates a new exemption; thus, it appears to require a two-thirds vote for final passage.**

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Public Records Laws**

The State of Florida has a long history of providing public access to governmental records and meetings. The Florida Legislature enacted the first public records law in 1892.<sup>1</sup> One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.<sup>2</sup> Article I, s. 24, of the State Constitution, provides that:

(a) 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.

In addition to the State Constitution, the Public Records Act,<sup>3</sup> which pre-dates the State Constitution's public records provisions, specifies conditions under which public access must be provided to records of an agency.<sup>4</sup> Section 119.07(1)(a), F.S., states:

Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

Unless specifically exempted, all agency records are available for public inspection. The term "public record" is broadly defined to mean:

[A]ll 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.<sup>5</sup>

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.<sup>6</sup> All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.<sup>7</sup>

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<sup>1</sup> Section 1390, 1391 F.S. (Rev. 1892).

<sup>2</sup> Fla. Const. art. I, s. 24.

<sup>3</sup> Chapter 119, F.S.

<sup>4</sup> The word "agency" is defined in s. 119.011(2), F.S., to mean "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 Florida Constitution also establishes a right of access to 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 those records exempted by law or the State Constitution. *See supra* fn. 3.

<sup>5</sup> Section 119.011(12), F.S.

<sup>6</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).

<sup>7</sup> *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).

There is a difference between records that the Legislature has made exempt from public inspection and those that are *confidential* and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.<sup>8</sup> If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.<sup>9</sup>

Only the Legislature is authorized to create exemptions to open government requirements.<sup>10</sup> Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption. Further, the exemption must be no broader than necessary to accomplish the stated purpose of the law.<sup>11</sup> A bill enacting an exemption<sup>12</sup> may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.<sup>13</sup>

### **Open Government Sunset Review Act**

The Open Government Sunset Review Act (Act)<sup>14</sup> provides for the systematic review, through a 5-year cycle ending October 2 of the fifth year following enactment, of an exemption from the Public Records Act or the Public Meetings Law.

The Act states that an exemption may be created, revised, or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.<sup>15</sup> An identifiable public purpose is served if the exemption meets one of three specified criteria and if 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. An exemption meets the three statutory criteria if it:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protects sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety; however, only the identity of an individual under this provision.
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.<sup>16</sup>

While the standards in the Open Government Sunset Review Act may appear to limit the Legislature in the exemption review process, those aspects of the act are only statutory, as opposed to constitutional. Accordingly, the standards do not limit the Legislature because one session of the Legislature cannot bind another.<sup>17</sup> The Legislature is only limited in its review process by constitutional requirements.

### **CS/HB 1267 (2014) – Family Trust Companies**

The Office of Financial Regulation (OFR) administers the Florida Financial Institutions Codes (chs. 655-667, F.S., “the Codes”), which includes the regulation of trust companies. Trust companies are for-profit business organizations that are authorized to engage in trust business and to act as a fiduciary for

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<sup>8</sup> Florida Attorney General Opinion 85-62.

<sup>9</sup> *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991).

<sup>10</sup> *Supra* fn. 1.

<sup>11</sup> *Memorial Hospital-West Volusia v. News-Journal Corporation*, 784 So. 2d 438 (Fla. 2001); *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999).

<sup>12</sup> Under s. 119.15, F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

<sup>13</sup> *Supra* fn. 1.

<sup>14</sup> Section 119.15, F.S.

<sup>15</sup> Section 119.15(6)(b), F.S.

<sup>16</sup> *Id.*

<sup>17</sup> *Straughn v. Camp*, 293 So. 2d 689, 694 (Fla. 1974).

the general public. Section 655.057, F.S., exempts certain records relating to the OFR's investigations and examinations of trust companies (and other financial institutions) from public records disclosure.

A small number of states allow families to form and operate *private or family trust companies (FTCs)*, which provide trust services similar to those that can be provided by an individual trustee or a financial institution, but are owned exclusively by family members and may not provide fiduciary services to the public. These private, family trust companies are generally formed to manage the wealth of high net-worth families in lieu of traditional individual or institutional trustee arrangements, for a variety of personal, investment, regulatory, and tax reasons. Currently, there are no Florida statutes authorizing the formation of family trust companies, licensed trust companies, and foreign-licensed trust companies.

CS/HB 1267 creates ch. 662, F.S., to authorize families to form and operate any of these three family trust companies in this state, subject to varying regulatory requirements, including a license or registration with the OFR, maintenance of minimum owners' equity for FTCs with a principal place of business in Florida, and certain reporting requirements. The bill prohibits all three FTC types from advertising and conducting trust business with the public. CS/HB 1267 authorizes the OFR to investigate applications for licensure or registration, require annual certifications and other regulatory filings from licensees and registrants, and to conduct periodic examinations of all three family trust company types.

### **Effect of the Bill**

The bill, which is linked to the passage of CS/HB 1267, creates s. 662.148, F.S., a public records exemption for:

- Records relating to a registration, an application, or annual certification of any FTC types;
- Records relating to an examination of any FTC type;
- Reports of examinations, operations, or conditions of any FTC type, including working papers (which the bill defines);
- Any portion of a list of names on the shareholders or members of any FTC type;
- Information received by the OFR from a person from another state or nation or the federal government which is otherwise confidential or exempt pursuant to the laws of that state, nation, or federal government; and
- An emergency cease and desist order issued under s. 662.143, F.S., until the emergency order is made permanent, unless the OFR finds that such confidentiality will result in substantial risk of financial loss to the public.

The bill defines the terms "reports of examinations, operations, or conditions" and "working papers."

The bill authorizes release of the confidential and exempt information:

- To the authorized representative of the family trust company, licensed family trust company, or foreign licensed family trust company under examination.
- To a fidelity insurance company, upon written consent of the board of directors or its managers.
- To an independent auditor, upon written consent of the board of directors or its managers.
- To a liquidator, receiver, or conservator for the trust company in the event of the appointment of a liquidator, receiver, or conservator.
- To any other state, federal, or foreign agency responsible for the regulation or supervision of the trust company.
- To a law enforcement agency in the furtherance of its official duties and responsibilities.
- To the appropriate law enforcement or prosecutorial agency for the purpose of reporting any suspected criminal activity.
- Pursuant to a legislative subpoena.

The bill provides that it does not prevent or restrict the publication of certain information.

Further, the bill provides that it is a third-degree felony for willful disclosure of such confidential and exempt information.

The bill provides that the section is subject to the Open Government Sunset Review Act and stands repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature. It also provides a statement of public necessity as required by the State Constitution.

**B. SECTION DIRECTORY:**

**Section 1** creates s. 662.148, F.S., to provide an exemption from public records requirements for certain information held by the OFR relating to a family trust company, licensed family trust company, or foreign licensed family trust company; to provide for the authorized release of certain information by the office; to permit the publication of certain information; to provide a penalty; to provide for future legislative review and repeal of the exemption.

**Sections 2** provides a statement of public necessity as required by the State Constitution.

**Section 3** provides a contingent effective date.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See FISCAL COMMENTS section.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill may provide protection for high net worth families' assets, as well as the methodologies and practices of their family-owned businesses, which could otherwise be subject to security risks and criminal activity.

**D. FISCAL COMMENTS:**

The bill could create a minimal fiscal impact on OFR, because OFR staff would be responsible for complying with public records requests and may require training related to the creation of the public records exemption. In addition, OFR could incur costs associated with redacting the confidential and exempt information prior to releasing a record. The costs, however, would be absorbed, as they are part of the day-to-day responsibilities of OFR.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Vote Requirement and Public Necessity Statement for Public Records Bills

In order to pass a newly-created or expanded public records or public meetings exemption, s. 24(c), Art. I of the State Constitution requires 1) a two-thirds vote of each house of the legislature and 2) a public necessity statement. The bill contains a public necessity statement and will require a two-thirds vote for passage.

Subject Requirement

Section 24(c), Art. I of the State Constitution requires the Legislature to create public-records or public-meetings exemptions in legislation separate from substantive law changes.

B. RULE-MAKING AUTHORITY:

None provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

Insurance & Banking Subcommittee

On March 19, 2014, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment retained the provisions of the bill and made the following changes:

- Corrected a cross-reference;
- Moved the exceptions to confidentiality to section 1 of the bill, which creates the public records exemption;
- Corrected drafting errors regarding confidentiality between this bill and the substantive bill (HB 1267); and
- Provided definitions of “reports of examinations, operations, or conditions” and “working papers.”

Government Operations Subcommittee

On March 31, 2014, the Government Operations Subcommittee adopted an amendment and reported the bill favorably with committee substitute. The amendment:

- Reorganized the public record exemption.
- Removed a substantive provision from the bill.
- Co-located all of the provisions granting access to the confidential and exempt information.

This analysis is drafted to the committee substitute as passed by the Government Operations Subcommittee.