

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/CS/SB 1320

INTRODUCER: Governmental Oversight and Accountability Committee; Banking and Insurance Committee and Senator Richter

SUBJECT: Public Records/Office of Financial Regulation

DATE: April 17, 2014

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|------------------|----------------|-----------|------------------|
| 1. | <u>Billmeier</u> | <u>Knudson</u> | <u>BI</u> | <u>Fav/CS</u> |
| 2. | <u>Kim</u> | <u>McVaney</u> | <u>GO</u> | <u>Fav/CS</u> |
| 3. | <u>Billmeier</u> | <u>Phelps</u> | <u>RC</u> | <u>Favorable</u> |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1320 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. Linked bill CS/SB 1238 authorizes families to form and operate any of these three family trust companies, subject to regulatory requirements. A family trust company 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 family trust company must be owned exclusively by family members and may not provide fiduciary services to the public.

This bill provides that the following records relating to family trust companies, licensed family trust companies, and foreign licensed family trust companies held by the OFR are confidential and exempt from public disclosure:

- Personal identifying information appearing in records relating to a registration, an application, or an annual certification.
- Personal identifying information appearing in records relating to an examination.
- Personal identifying information appearing in reports of examinations, operations, or conditions.
- Any portion of a list of names of the shareholders or members.

- Information received from a person from another state or nation or the federal government which is otherwise confidential.
- An emergency cease and desist order until it is made permanent or unless the public is at substantial risk of financial loss.

This bill creates a third degree felony for willfully disclosing information made confidential and exempt by this bill.

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 that the act shall take effect on the same date that CS/SB 1238 or similar legislation is adopted.

II. Present Situation:

Article I, s. 24(a) of the Florida Constitution provides:

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.

Chapter 119, Florida Statutes, specifies conditions under which public access must be provided to records of an agency. 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:

all 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.¹

¹ Section 119.011(12), F.S.

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.² All such materials are open for public inspection unless made exempt.³

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.⁴ If a record is simply made exempt from disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.⁵

Exemptions must be created by general law, and such law must specifically state the public necessity justifying the exemption.⁶ The exemption must be no broader than necessary to accomplish the stated purpose of the law.⁷ A bill enacting an exemption may not contain other substantive provisions.⁸

Open Government Sunset Review Act

The Open Government Sunset Review Act⁹ provides for the systematic review ending October 2 of the fifth year following enactment of an exemption from the Public Records Act or the Public Meetings Law. 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.¹⁰

Family Trust Companies

CS/SB 1238 authorizes families to form and operate family trust companies, licensed family trust companies, and foreign licensed family trust companies (hereafter referred to collectively as “trust companies”). At least 14 other states currently have statutes governing the organization and operation of family trust companies. Florida law does not expressly authorize families to establish their own family trust companies. In general, a family trust company is an entity which provides trust services similar to those that can be provided by an individual or financial institution such as a bank or public trust company. 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.¹¹

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

³ *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

⁴ Florida Attorney General Opinion 85-62.

⁵ *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5thDCA 1991), *review denied*, 589 So.2d 289 (Fla. 1991).

⁶ See Fla. Const., art. I, s. 24(c).

⁷ See Fla. Const., art. I, s. 24(c).

⁸ See Fla. Const., art. I, s. 24(c).

⁹ See s. 119.15, F.S.

¹⁰ See s. 119.15(6)(b), F.S.

¹¹ See White Paper for SB 1238 by Senator Richter Relating to Family Trust Companies provided by the Real Property, Probate, and Trust Law Section of the Florida Bar (on file with the Senate Committee on Banking and Insurance).

III. Effect of Proposed Changes:

Section 1 of this bill, which is linked to the passage of CS/SB 1238 or similar legislation, provides that the following information in records relating to trust companies held by the OFR are confidential and exempt from public disclosure:

- Personal identifying information appearing in records relating to a registration, an application, or an annual certification.
- Personal identifying information appearing in records relating to an examination.
- Personal identifying information appearing in reports of examinations, operations, or conditions of trust companies. This encompasses all documents submitted to or prepared by the OFR.
- Personal identifying information appearing in working papers held by the OFR, including tests, investigations and audits.
- Any portion of a list of names of the shareholders or members.
- Information received 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 or nation or pursuant to federal law.
- Emergency cease and desist orders. However, an emergency cease and desist order may be made public if it is made permanent or if continued confidentially will place the public at substantial risk of financial loss.

This bill provides that the OFR may disclose confidential and exempt information to the following:

- An authorized representative of a trust company during an examination.
- A fidelity insurance company, upon written consent of a trust company.
- An independent auditor, upon written consent of a trust company.
- A liquidator, receiver, or conservator for a trust company. However, any information which discloses the identity of a bondholder, customer, family member, member, or stockholder must be redacted by the OFR before being released.
- Any other state, federal, or foreign agency responsible for the regulation or supervision of a trust company.
- A law enforcement agency in the furtherance of the agency's official duties or for the purpose of reporting suspected criminal activity.
- A prosecutorial agency for the purpose of reporting suspected criminal activity.
- A legislative body or committee pursuant to a legislative subpoena. The legislative body or committee must maintain the confidentiality of the records it receives, except in cases involving a public official who is subject to impeachment or removal.

This bill does not prevent or restrict the publication of a report required by federal law, nor does this bill prevent or restrict the publication of a trust company's name, or the name and address of its registered agent.

This bill provides that a person who willfully discloses confidential and exempt information commits a third degree felony punishable by up to five years in prison, a \$5,000.00 fine and subject to habitual offender laws.¹²

This bill provides that the public records exemption created by it is subject to the Open Government Sunset Review Act and is repealed on October 2, 2019, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2 of this bill provides the public necessity statement. The public necessity statement outlines two reasons for this public records exemption. First, family members, shareholders, and qualified participants of trust companies are targets of crime and making their identities public jeopardizes their financial and personal safety. Second, public disclosure of examinations, reports and emergency cease and desist orders could damage a family's reputation.

Section 3 of this bill provides that this bill is effective on the same date that CS/SB 1238, or similar legislation becomes effective.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the Florida Constitution requires a bill creating a new public records exemption to pass by a two-thirds vote of the members present and voting in each house of the Legislature. This bill requires a two-thirds vote.

Article I, s. 24(c) of the Florida Constitution requires a bill creating a new public records exemption to contain a public necessity statement justifying the exemption. This bill contains a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

¹² The bill provides that a person who willfully discloses confidential and exempt information will be punishable pursuant to ss. 775.082, 775.083 or 775.084, F.S.

B. Private Sector Impact:

This bill would protect some information relating to practices of family-owned businesses of high net worth families.

C. Government Sector Impact:

The OFR does not anticipate that answering public records requests will adversely impact its resources.¹³

The Department of Corrections estimates the addition of a new felony crime will have insignificant impact.¹⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

This bill also provides that records may be released to a liquidator, receiver, or conservator, however, this bill requires the OFR to redact information which discloses the identity of a bondholder, customer, family member, member or stockholder before releasing the information to the liquidator, receiver or conservator. The OFR stated that redacting the identifying information of these parties would be burdensome. More importantly, by removing information about a bondholder, customer, family member, member or stockholder from OFR's records, a receiver, liquidator or conservator would not be able to effectively perform his or her duties.¹⁵

VIII. Statutes Affected:

This bill creates section 662.148 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)**CS/CS by Governmental Oversight and Accountability on April 10, 2014:**

This CS/CS makes the following changes:

- Consolidates definitions, public records exemptions and exceptions into a single section of law.
- Provides that personal identifying information are confidential and exempt in reports or records relating to registrations, applications, annual certifications, examinations, operations, conditions of trust companies.

¹³ Office of Financial Regulation, SB 1320 Legislative Bill Analysis (March 14, 2014) at p. 5 (on file with the Senate Committee on Banking and Insurance).

¹⁴ Department of Corrections, SB 1320 Legislative Bill Analysis, (March 5, 2014) at p. 2 (on file with the Senate Committee on Banking and Insurance).

¹⁵ Office of Financial Regulation, SB 1320 Legislative Bill Analysis (March 14, 2014) at p. 5 (on file with the Senate Committee on Banking and Insurance).

- Adds a provision which makes permanent emergency cease and desist orders public record.
- Conforms the public necessity statement to the changes made in the CS/CS.

CS by Banking and Insurance on March 25, 2014:

The committee substitute removes provisions relating to the confidentiality of information in administrative and court proceedings.

B. Amendments:

None.