

**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.)

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Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

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**BILL:** CS/CS/SB 1094

**INTRODUCER:** Governmental Oversight and Accountability Committee, Banking and Insurance Committee and Senator Flores

**SUBJECT:** Public Records/Limited Purpose International Trust Company

**DATE:** February 18, 2016

**REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson</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>RC</u>	_____

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 1094 provides exemptions from the public records inspection and disclosure requirements of Art. I, s. 24(a) of the State Constitution and s. 119.07(1), F.S., for documents held by the Office of Financial Regulation (OFR) relating to certain entities seeking a moratorium under the provisions of s. 633.041.<sup>1</sup> For purposes of this analysis, the substance of CS/HB 1383 will be considered the appropriate provisions of the substantive bill linked to this public records exemption bill.

CS/CS/SB 1094 makes confidential and exempt from public records disclosure the following information held the OFR:

- All internal corporate documents of an organization or entity applying for a moratorium under s. 663.041 (prohibition on the enforcement of ch. 633, F.S., as it relates to international trust company representative offices);
- All internal corporate documents of an international trust entity submitted pursuant to s. 663.041, (prohibition on the enforcement of the provisions of ch. 633, F.S., as it relates to international trust companies);

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<sup>1</sup>At the time this analysis is published, SB 1106 did not contain any language regarding a moratorium or s. 633.041. However, its House companion, CS/HB 1383, does contain a provision creating s. 633.041, which prohibits the OFR from enforcing the provisions of ch. 633, F.S., for certain international trust company representative offices and an international trust companies.

- The names of officers, directors, shareholders of an international trust entity, if the names are confidential pursuant to the laws of the “home” country of the international trust entity;
- Regulatory documentation from the regulatory body which provides licensing, charters, or oversight of the international trust entity;
- Working papers of the OFR generated while processing an application under s. 663.041.
- Information received by the OFR from another state, nation, or the federal government that is otherwise confidential or exempt pursuant to the laws of that state or nation, or pursuant to federal law.

The bill allows the OFR to disclose the otherwise confidential and exempt information in specified circumstances. The bill also provides that the names of certain officers and legal entities are not confidential and exempt from public disclosure.

The bill provides a statement of public necessity.

The public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

Since this bill creates a new public records exemption, a two-thirds vote from each chamber is necessary for passage.

The bill will take effect on the same date that SB 1106, or similar legislation, is adopted during the same legislative session, or extension, and becomes a law.

## II. Present Situation:

### Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.<sup>2</sup> This applies to the official business of any public body, officer or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.<sup>3</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>4</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>5</sup> The Public Records Act states that

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<sup>2</sup> FLA. CONST., art. I, s. 24(a).

<sup>3</sup> FLA. CONST., art. I, s. 24(a).

<sup>4</sup> The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So.2d 255 (Fla. 1995). The Legislature’s records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislatures are primarily located in s. 11.0431(2)-(3), F.S.

<sup>5</sup> Public records laws are found throughout the Florida Statutes.

it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.<sup>6</sup>

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.<sup>7</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>8</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>9</sup>

The Legislature may create an exemption to public records requirements.<sup>10</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>11</sup> In addition, an exemption must explicitly lay out the public necessity justifying the exemption, and the exemption must be no broader than necessary to accomplish the stated purpose of the exemption.<sup>12</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>13</sup>

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>14</sup> Records designated as ‘confidential and exempt’ may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as ‘exempt’ may be released at the discretion of the records custodian.<sup>15</sup>

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<sup>6</sup> Section 119.01(1), F.S.

<sup>7</sup> Section 119.011(12), F.S., defines “public record” 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.” Section 119.011(2), F.S., defines “agency” 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.”

<sup>8</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>9</sup> Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>10</sup> FLA. CONST., art. I, s. 24(c).

<sup>11</sup> FLA. CONST., art. I, s. 24(c).

<sup>12</sup> FLA. CONST., art. I, s. 24(c).

<sup>13</sup> *Halifax Hosp. Medical Center v. New-Journal Corp.*, 724 So2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id.* at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So.2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id.* at 196.

<sup>14</sup> If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So.2d 48 (Fla. 5th DCA 2004).

<sup>15</sup> A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So.2d 687 (Fla. 5th DCA 1991).

## Open Government Sunset Review Act

In addition to the constitutional requirements relating to the enactment of a public records exemption, the Legislature may subject the new or broadened exemption to the Open Government Sunset Review Act (OGSR).

The OGSR prescribes a legislative review process for newly created or substantially amended public records.<sup>16</sup> The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an exemption from repeal, the Legislature must reenact the exemption.<sup>17</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

Under the OGSR the purpose and necessity of reenacting the exemption are reviewed. The Legislature must consider the following questions during its review of an exemption:<sup>18</sup>

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

If the Legislature expands an exemption, then a public necessity statement and a two-thirds vote for passage are required.<sup>19</sup> If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are not required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless otherwise provided for by law.<sup>20</sup>

## International Financial Services Market

CS/HB 1383, the companion bill to SB 1106, creates s. 663.041. This new section prohibits the OFR from enforcing the provisions of ch. 633, F.S., on certain international trust company representative offices (ITCROs) and certain international trust companies. For the moratorium to apply to a particular ITCRO or international trust company (company), the company must provide to the OFR:

- Proof that the company has been organized and doing business in Florida since October 1, 2013;

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<sup>16</sup> Section 119.15, F.S. According to s. 119.15(4)(b), F.S., a substantially amended exemption is one that is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to s. 119.15(2), F.S. The OGSR process is currently being followed; however, the Legislature is not required to continue to do so. The Florida Supreme Court has found that one legislature cannot bind a future legislature. *Scott v. Williams*, 107 So.3d 379 (Fla. 2013).

<sup>17</sup> Section 119.15(3), F.S.

<sup>18</sup> Section 119.15(6)(a), F.S.

<sup>19</sup> FLA. CONST., art. I, s. 24(c).

<sup>20</sup> Section 119.15(7), F.S.

- The name(s) under which the company does business in Florida, the address of the company's registered agents, and the locations from which the company does business;
- Declarations under penalties of perjury that the company has not been subject to a consumer complaint to the OFR; has not been convicted of a felony or required to pay a fine or other penalty within the last five years; and does not provide banking or fiduciary trust services, promote or sell investments, or accept custody of assets.

In order to qualify for the moratorium, the ITCRO must meet the following standards:

- Has been organized or qualified to do business in Florida since October 1, 2013;
- Has not been the subject of a consumer complaint;
- Has not been convicted of a felony or ordered to pay a fine or penalty in the preceding five years; or  
Does not provide banking or fiduciary trust services, promote or sell investment, or accept assets.

### III. Effect of Proposed Changes:

The bill makes certain information held by the Office of Financial Regulation (OFR) confidential and exempt from the public disclosure requirements of Art. I, s. 24(a) of the State Constitution and s. 119.07(1), F.S. For purposes of this analysis, the substance of CS/HB 1383 will be considered the appropriate provisions of the substantive bill linked to this public records exemption bill.

#### Scope of the Exemption

The bill creates a definition for “internal corporate information or documents” to mean the articles of organization, bylaws and other organizational documents of the entity, organization, or international trust entity applying for a moratorium. This definition includes documents that are not publically disclosed by the entity, organization or international trust entity, however, the standard for such lack of disclosure is not articulated. The definition also states that such documents may be confidential under the laws of the country where the international trust entity is organized or does business. There is no conflict of laws provision governing which law will prevail if an international trust entity is located in several countries.

The bill uses a cross-reference to s. 663.01(8), F.S.,<sup>21</sup> to define “international trust entity.” With the use of this definition it appears that an international trust company (as used in s. 663.041 in CS/HB 1383) and international representative office (as used in ch. 633, F.S.) are the same.

The bill defines “working papers” to include records of the procedures followed, tests performed, the information obtained, and the conclusions reached in processing an applications under the moratorium provisions of s. 663.041 (in CS/HB 1383).

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<sup>21</sup> Section 663.01(8), F.S., provides: “International representative office” means an office of an international banking corporation organized and licensed under the laws of a foreign country that is established or maintained in this state for the purpose of engaging in the activities described in s. 663.062, or any affiliate, subsidiary, or other person that engages in such activities, on behalf of such international banking corporation, from an office located in this state.

The bill makes the following records confidential and exempt from public disclosure requirements:

- All internal corporate documents of an organization or entity applying for a moratorium under s. 663.041 (prohibition on the enforcement of ch. 633, F.S., as it relates to international trust company representative offices);
- All internal corporate documents of an international trust entity submitted pursuant to s. 663.041 (prohibition on the enforcement of the provisions of ch. 633, F.S., as it relates to international trust companies);
- The names of officers, directors, shareholders of an international trust entity, if the names are confidential pursuant to the laws of the “home” country of the international trust entity;
- Regulatory documentation from the regulatory body which provides licensing, charters, or oversight of the international trust entity;
- Working papers of the OFR in processing the application under s. 663.041.

The bill authorizes the OFR to release confidential and exempt information in the following circumstances:

- To the authorized representative(s) of the organization or entity applying for a moratorium; The authorized representative(s) will be identified in a resolution or by written consent of the board of directors or managers of the entity or organization;
- To a fidelity insurance company or liability insurer, upon the written consent of the board of directors or managers;
- To an independent auditor;
- To a liquidator, receiver, or conservator, if one is appointed;
- To another governmental entity in furtherance of the entity’s official duties and responsibilities;
- Pursuant to a legislative subpoena. The legislative body must maintain the confidential status of such records or information except when the subpoena involves the investigation of charges against a public official subject to impeachment or removal; and,
- Pursuant to federal law.

The bill also provides that some information is not confidential and exempt from s. 119.07(1), F.S., and Article I, s. 24(a) of the Florida Constitution. The following information will be public record regardless of whether this information would be confidential or exempt under other portions of this bill or under the laws of any foreign or domestic sovereign:

- The name of the organization or entity applying for the moratorium;
- The name of the international trust entity for which the organization or entity provides services; or
- The name and business address of the directors, managers, officers or registered agent of the organization or entity applying for a moratorium.

### **Repeal Date Pursuant to the Open Government Sunset Review Act**

The public records exemption is subject to the Open Government Sunset Review Act in accordance with s. 119.15, F.S. It shall stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.

### **Statement of Public Necessity and Legislative Findings**

The bill states that the OFR will collect the names of the officers and directors of an international trust entity and will determine whether the organization or entity has met the requirements of the moratorium. The bill appears to state that this will entail the OFR collecting proof of corporate standing of the international trust entity and confirming that the organization or entity is not controlled by a foreign government or by the regulatory arm of a foreign government. This may require submission of names, documents, and regulatory records which are not public in such a foreign country. The public necessity statement goes on to state that the documents which are not normally made public in such a foreign country, or which are confidential under the laws of the foreign government “should not lose their confidential status solely because the [OFR] reviews them in processing an application for the moratorium.”

### **Effective Date**

The public records exemption in this bill takes effect on the same date that SB 1106 or similar legislation takes effect, if such legislation is adopted in the same legislative session or an extension thereof.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

The mandate restrictions do not apply because the bill does not require counties and municipalities to spend funds, reduce counties’ or municipalities’ ability to raise revenue, or reduce the percentage of a state tax shares with counties and municipalities.

### **B. Public Records/Open Meetings Issues:**

#### **Vote Requirement**

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 or expanded public record or public meeting exemption. This bill creates a public record exemption; thus, it requires a two-thirds vote for final passage.

#### **Public Necessity Statement**

Article I, s. 24(c) of the State Constitution requires a public necessity statement for a newly created or expanded public record or public meeting exemption, and the exemption “shall state with specificity the public necessity justifying the exemption and shall not be broader than necessary to accomplish the stated purpose of the law.” The Florida Supreme Court stated that a public records exemption meets constitutional requirements when the exemption “is supported by a thoroughly articulated public policy.”<sup>22</sup> The public necessity statement for this bill may not meet this standard, in that the public

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<sup>22</sup> *Bryan v. State*, 753 So. 2d 1244, 1250 (Fla. 2000).

policy reason for making documents confidential and exempt is not thoroughly articulated.

The exemption and public necessity statement may be too broad, since some terms are not clearly defined. The definition of “internal corporate information or documents” is subjective for each business entity. Neither the bill nor CS/HB 1383 explain what is an entity or organization. An overly broad public records exemption may be susceptible to a constitutional challenge. The lack of clear definitions was one of the reasons the Florida Supreme Court found that a public meetings exemption was overly broad and struck down the exemption.<sup>23</sup>

The public necessity statement also appears to be limited to documents or information that is ‘confidential and exempt’ or simply ‘exempt’ in the country of origin of the managing entity. This means that the exemption itself could be limited to such restrictions. The exemption, however, is broader, in that all internal corporate documents (under (2)(a)), and regulatory records (under (2)(c)) are confidential and exempt from public disclosure. If a corporate document or regulatory record is public in the country of origin of the managing entity, or in the State of Florida in the hands of another agency, then the reason for making the public information confidential and exempt when held by the OFR in this bill is unclear.

Currently, the bill does not appear to meet constitutional requirements for a public records exemption.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article II, s. 3 of the Florida Constitution provides that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.” The Florida Supreme Court has interpreted this constitutional provision to mean:

[t]he Legislature may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.<sup>24</sup>

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<sup>23</sup> *Halifax Hosp. Medical Center v. News-Journal Corp.*, 742 So. 2d 567, 569-570 (Fla. 1999).

<sup>24</sup> *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968). (internal citations omitted).



Furthermore, the Florida Supreme Court found that the Legislature unlawfully delegates its authority to the Executive Branch:

When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say What the law shall be.<sup>25</sup>

In a case dealing with a public records exemption and unlawful delegation, the Florida Supreme Court found that the Legislature unlawfully delegated its authority when the Legislature made releasing records a discretionary act based on the consent of the Department of Banking and Finance.<sup>26</sup> The Florida Supreme Court stated:

As the statute is written, it makes a vast volume of private records, necessarily subject to governmental inspection confidential, but then gives the Comptroller unrestricted and unlimited power to exempt particular records and items of information from the operation of that provision of the statute making them confidential.

In other words, the Department is given power from day to day to say what is the law as to the confidential nature of any records of banks which the Department has the right to inspect or include in the reports of bank examinations.

The Constitution does not permit this delegation of legislative power.<sup>27</sup>

The bill provides that the public records exemption is subject to the laws of other countries as well as the business practices business entities of other countries. This may be ‘vague’ or contain ‘uncertain terms’ and the OFR may be unable to determine what the law is. The bill could also be construed as giving the OFR the ‘unrestricted and unlimited power’ to decide what records are public and which ones are not. If so, then this bill may susceptible to an unlawful delegation of duty if challenged in a court.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

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<sup>25</sup> *Id.* (emphasis in the original, internal citations omitted)

<sup>26</sup> *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla. 1976).

<sup>27</sup> *Id.* at 55.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

The bill creates a definition for “internal corporate information or documents” but refers only to “internal corporate documents.” The Legislature may wish to consider modifying the defined term as “internal corporate documents.”

The bill makes references to “entity,” “organizations or entities” and “entity or organizations” in different places in the bill. It is not clear if all of these references should include both organizations and entities throughout the bill or if this issue will be resolved once the underlying bill or the companion bill are amended. If the intent is to include both entities and organizations in this bill, then the title of the bill may need to be amended to include international trust organizations.

The bill also uses the word “confidential” in reference to how foreign governments or businesses treat their records. “Confidential” as used in Florida Statutes and case law has a specific meaning which may not be consistent with the meaning given to the term in other jurisdictions.

It is possible that all of the confidential and exempt information that is contemplated in (2)(d) will encompass most of the information exempted in (2)(a) and (b); if so (2)(a) and (b) could be unnecessary.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill creates section 663.097 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 February 16, 2016:**

The CS/CS does the following:

- Creates definitions for “internal corporate information or documents” and revises the definition of “working papers;”
- Includes provisions related to a moratorium or application for a moratorium.
- Makes the following information or documents held by the OFR confidential and exempt from public disclosure:

- Internal corporate information or documents;
- Regulatory documents sent to or received by the OFR;
- Working papers;
- Amends the public necessity statement.

The CS/CS deletes the following provisions that were previously in the CS:

- References to international trust company representative offices;
- The definition of and references to “reports or investigations;”
- The public records exemption for personal identifying information appearing in records relating to an application, or a new or renewal registration of a limited purpose international trust company representative office;
- The public records exemption for personal identifying information appearing in reports, investigations, and records relating to an investigation of a limited purpose international trust company representative office;
- The public records exemption for the names of existing or prospective clients of an affiliated international trust company;
- The criminal penalty for violating the public records exemption; and
- Provisions related to releasing information to law enforcement agencies or prosecutorial entities.

**CS by Banking and Insurance Committee on January 26, 2016:**

The CS references the linked bill, SB 1106.

**B. Amendments:**

None.