

**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/SB 1094

INTRODUCER: Banking and Insurance Committee and Senator Flores

SUBJECT: Public Records/Limited Purpose International Trust Company

DATE: February 8, 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>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

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

COMMITTEE SUBSTITUTE - Technical Changes

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**I. Summary:**

CS/SB 1094 makes certain information held by the Office of Financial Regulation (OFR) relating to the regulation of limited purpose International Trust Company Representative Offices (ITCROs) confidential and exempt from the public records inspection and access requirements of Art. I, s. 24(a) of the State Constitution and s. 119.07(1), F.S. The confidential and exempt records include:

- 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.
- Personal identifying information appearing in reports, investigations, and records relating to an investigation of a limited purpose international trust company representative office.
- Names of existing or prospective clients of an affiliated international trust company.
- 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.

Under the bill, the willful disclosure of information made confidential and exempt by this public records exemption is a third degree felony.

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The public records exemption is subject to the Open Government Sunset Review Act and will stand repealed on October 2, 2021, unless reviewed and saved from repeal through reenactment by the Legislature.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>1</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>2</sup>

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.<sup>3</sup> Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.<sup>4</sup> The Public Records Act states that

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>5</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>6</sup> The Florida Supreme Court has interpreted public records as being “any material prepared in connection with official

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<sup>1</sup> FLA. CONST., art. I, s. 24(a).

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

<sup>3</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>4</sup> Public records laws are found throughout the Florida Statutes.

<sup>5</sup> s. 119.01(1), F.S.

<sup>6</sup> s. 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.”

agency business which is intended to perpetuate, communicate or formalize knowledge of some type.”<sup>7</sup> A violation of the Public Records Act may result in civil or criminal liability.<sup>8</sup>

The Legislature may create an exemption to public records requirements.<sup>9</sup> An exemption must pass by a two-thirds vote of the House and the Senate.<sup>10</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>11</sup> A statutory exemption which does not meet these criteria may be unconstitutional and may not be judicially saved.<sup>12</sup>

When creating a public records exemption, the Legislature may provide that a record is ‘confidential and exempt’ or ‘exempt.’<sup>13</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>14</sup>

### **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>15</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>16</sup> In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

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<sup>7</sup> *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc.*, 379 So.2d 633, 640 (Fla. 1980).

<sup>8</sup> s. 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

<sup>9</sup> FLA. CONST., art. I, s. 24(c).

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

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

<sup>12</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>13</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>14</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).

<sup>15</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>16</sup> s. 119.15(3), F.S.

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>17</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>18</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>19</sup>

### **International Financial Services Market**

SB 1106, the substantive bill linked to this public records exemption bill, creates a Limited Purpose ITCRO that will be subject to registration, clarifies that the administrative and compliance services do not involve discretionary investment or distribution of funds and clarifies such services do not constitute the activities of a financial institution and should be exempt from licensure and capital requirements that apply to financial institutions.

Providing fiduciary (trustee) services required for the implementation of estate, tax, and asset protection planning is a longstanding niche market within the international financial services market. These services traditionally have comprised the administration (documentation preparation, accounting, compliance, and accounting) for a trust and its underlying investments. Services, such as banking, asset management, and tax advice, are provided by third parties.<sup>20</sup> Proponents of the bill provided the following example:

A family from Latin America purchasing a residence in Florida has a banking relationship with a Florida-based bank and is advised by Florida counsel. To avoid exposure to U.S. estate tax, the family will be advised to own the property through a non-U.S. company, as the shares in the non-U.S. company are not subject to U.S. estate tax. To provide for the family's long-term planning (local and foreign tax laws and political and security risks), the family may be advised to place the shares in the company's foreign trust.<sup>21</sup>

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<sup>17</sup> s. 119.15(6)(a), F.S.

<sup>18</sup> FLA. CONST., art. I, s. 24(c).

<sup>19</sup> s. 119.15(7), F.S.

<sup>20</sup> Memorandum from McDonald Hopkins LLC, *International Trust Company Representative Offices*, (Mar. 8, 2015) (on file with Senate Committee on Banking and Insurance).

<sup>21</sup> *Id.*

According to advocates of the bill, in the above example, responsibility for the administration of the trust and the underlying company is given to a trust company, which provides this service for an agreed fee. The trust company generally will be part of an organization that provides this service in multiple jurisdictions. The trust company, which acts as a trustee, is licensed and regulated in the jurisdiction in which it is domiciled. The trust company does not promote, sell, or accept any financial investments, money, or provide depository or custodial accounts.

The Florida-based marketing office for the aforementioned fiduciary services provided by a foreign trust company is an international trust company representative office (ITCRO). The advocates of the bill state that the primary function of the ITCRO of the foreign trust company and the organization of which it is a member is to market the trust company's services to lawyers, accountants, and financial advisors—not the general public.<sup>22</sup> Because many of the families who establish foreign trusts travel to Miami, the ITCROs provide a convenient way for these families to monitor the services of the international trust company without having to travel to the jurisdiction where the trust company has its operations. Thus, advocates of the bill assert that ITCROs represent an important part of Miami's role as the financial capital of the Americas and contribute in an important way to the state's economy.<sup>23</sup>

### III. Effect of Proposed Changes:

The bill makes certain information held by the Office of Financial Regulation (OFR) relating to the regulation of limited purpose International Trust Company Representative Offices (ITCROs) confidential and exempt from the public records inspection and access requirements of Art. I, s. 24(a) of the State Constitution and s. 119.07(1), F.S.

#### Scope of the Exemption

The records included in this public records exemption are:

- 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.
- Personal identifying information appearing in reports, investigations, and records relating to an investigation of a limited purpose international trust company representative office.
- Names of existing or prospective clients of an affiliated international trust company. The purpose of this exemption is to shield the identities of high worth individuals who could be targets of criminal predators seeking access to their assets.
- 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 authorizes the release of information subject to the public records exemption in the following circumstances:

- To the authorized representative(s) of the limited purpose ITCRO that is the subject of a report or investigation. Such persons shall be identified in a resolution or by written consent

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

of the board of directors (if a corporation) or managers (if a limited liability company) of the limited purpose ITCRO.

- If the board of directors or managers of a limited purpose ITCRO consent in writing, to a fidelity insurance company or liability insurer. The OFR objects to the limited purpose ITCRO having authority to determine whether a record may be released.<sup>24</sup>
- If the board of directors or managers of a limited purpose ITCRO consent in writing, to an independent auditor. The OFR objects to the limited purpose ITCRO having authority to determine whether a record may be released.<sup>25</sup>
- To a liquidator, receiver, or conservator for a limited purpose ITCRO if a liquidator, receiver, or conservator is appointed; however, the identities of current or prospective clients must be redacted. The OFR believes that the requirement to redact such names would inhibit the ability of the liquidator, receiver, or conservator to fulfill its duties if it cannot identify the individuals and entities the limited purpose ITCRO has dealt with.<sup>26</sup> In addition, OFR notes that the substantive bill does not contain procedures for receivership, conservatorship or liquidation of a limited purpose ITCRO.<sup>27</sup>
- To any other state, federal, or foreign agency responsible for the regulation or supervision of limited purpose ITCROs or an affiliated international trust company.
- To a law enforcement agency in the furtherance of the agency'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.

The public records exemption does not apply to the name of the limited purpose ITCRO; the name of any affiliated international trust company; and the names and addresses of the directors, managers, officers, or registered agent of the limited purpose ITCRO or any affiliated international trust company. The public records exemption also does not prevent or apply to the publication of a report required by federal law.

### **Penalty for Willful Disclosure**

Under the bill, the willful disclosure of information made confidential and exempt by this public records exemption is a third degree felony.

### **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.

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<sup>24</sup> Office of Financial Regulation, 2016 Agency Legislative Bill Analysis SB 1094 (Jan. 19, 2016)(on file with the Senate Committee on Banking and Insurance).

<sup>25</sup> See Office of Financial Regulation, *supra* note 20.

<sup>26</sup> See Office of Financial Regulation, *supra* note 20.

<sup>27</sup> Office of Financial Regulation, 2016 Agency Legislative Bill Analysis SB 1094 (Jan. 19, 2016)(on file with the Senate Committee on Banking and Insurance).

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

The bill states that the Legislature finds it a public necessity to hold exempt from public records requirements the information that is subject to this public records exemption. Specifically, the bill states that disclosure of the financial information and lists of names of clients or prospective clients would jeopardize the personal and financial safety of such persons because families with high net worth are targeted by criminal predators seeking access to their assets. The exposure of their identities and financial information could expose such persons to increased threats of extortion, kidnapping and other crimes, especially because many of the clients and prospective clients of affiliated international trust companies reside in or frequently travel to countries in which kidnapping and extortion are significant risks and public corruption impedes the rule of law.

The Legislature also finds that it is a public necessity to exempt from public records requirements information received by the OFR from a person from another state or nation or the Federal Government with is otherwise confidential or exempt pursuant to the laws of that state or nation or federal law. The Legislature finds that maintaining such confidentiality is necessary to protect the sensitive nature of the information and to facilitate the sharing of such information for the OFR's effective and efficient performance of its duties.

### **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:**

None.

### **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. This bill creates a new public record exemption and includes a public necessity statement that supports the exemption. The exemption may not be broader than necessary to accomplish the stated purpose of the law.

The bill provides a statement of public necessity for the current and prospective clients of the limited purpose ITCRO. No findings, however, are provided to support the public necessity statement for exempting personal identifying information appearing in an application or a new or renewal registration of a limited purpose ITCRO. Similarly, no findings are provided to support holding confidential and exempt from public disclosure the personal identifying information appearing in records relating to an OFR report or investigation of a limited purpose ITCRO. The findings provided for holding confidential and exempt the names and personal identifying information of clients and prospective clients support their nondisclosure if contained in the foregoing applications, registrations, records, reports, or investigations.

Finally, the bill provides that certain information is “confidential and exempt” but the public necessity statement provides that the relevant information is “exempt.”

The bill does not appear to meet constitutional requirements for a public records exemption.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

As previously noted, the bill creates a public records exemption for receivership, conservatorship or liquidation of a limited purpose ITCRO, but the substantive bill (SB 1106) does not include provisions for such a process. It is unclear why this provision has been included in the public records bill.

The bill provides that any personal identifying information contained in certain named records is confidential and exempt (lines 32-41), which would include the names of employees of a limited purpose ITCRO. At the same time, the bill provides that the information that is required by federal law may not be restricted and the names and address of officers and registered against of the limited purpose ITCRO are public (lines 95-101). If information is public through federal



law, or otherwise made public by the exemption itself, the rationale for making such information confidential and exempt from public disclosure is unclear.

It is not clear why the bill makes a distinction between a “law enforcement agency” and an “appropriate law enforcement agency” (lines 80-84), or why the two provisions permitting OIR to release confidential and exempt information to a law enforcement agency are separated.

**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 Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Banking and Insurance Committee on January 26, 2016:**  
The CS references the linked bill, SB 1106.

- B. **Amendments:**

None.