

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1363 Pub. Rec./Trust Proceedings

SPONSOR(S): Judiciary Committee and Civil Justice & Property Rights Subcommittee, Fetterhoff and others

TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1304, HB 1229

FINAL HOUSE FLOOR ACTION: 92 Y's

24 N's

GOVERNOR'S ACTION: Approved

SUMMARY ANALYSIS

CS/CS/HB 1363 passed the House on March 8, 2022, as CS/CS/SB 1304.

Article I, section 24(a) of the State Constitution establishes the state's government records access policy, guaranteeing each person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. However, the Legislature may provide a public records exemption by general law if the exemption passes by a two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption ("public necessity statement"), and is no broader than necessary to meet its public purpose.

A trust is a relationship in which one party, the "settlor," gives another party, the "trustee," the right to hold title to the settlor's property or assets for the benefit of a third party, the "beneficiary." Under Florida law, families may choose to form a family trust company, licensed family trust company, or foreign licensed family trust company to provide the family services similar to those provided by a trustee or a financial institution. Although trusts are not generally subject to judicial supervision, most family trust companies, licensed family trust companies, and foreign licensed family trust companies need to access the court system at some point, as certain matters of trust administration cannot be accomplished without judicial intervention. However, information contained in the records related to trust proceedings involving these companies is not currently exempt from public disclosure. Such proceedings may expose private information about family wealth and other sensitive matters that may lead to exploitation of family members by financial predators, unwanted solicitations, and a heightened risk of kidnapping. This information may also reveal extensive private and highly personal facts, including information about family disputes.

The bill:

- Directs the clerk to keep all court records of a proceeding under ch. 736 or 738, F.S., in which a family trust company, licensed family trust company, or foreign licensed family trust company is a party separate from other court records and not open to public inspection upon written notice by a party that the public records exemption created by the bill applies.
- Specifies that, upon receipt of such written notice, court records of that case are confidential and exempt from the public record.
- Provides exceptions.
- Provides a public necessity statement.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on June 24, 2022, ch. 2022-211, L.O.F., and becomes effective on July 1, 2022.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Public Records

Article I, section 24(a) of the State Constitution establishes the state's government records access policy, guaranteeing each person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government. However, the Legislature may provide a public records exemption by general law if the exemption passes by a two-thirds vote of each chamber, states with specificity the public necessity justifying the exemption, and is no broader than necessary to meet its public purpose.¹

Additionally, s. 119.07(1), F.S., guarantees every person a right to inspect and copy any state, county, or municipal record, unless the record is exempt. Under the Open Government Sunset Review Act,² a public record exemption may be created or maintained only if it serves an identifiable public purpose and 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."³ An identifiable public purpose is served if the exemption is no broader than necessary to:

- Allow the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
- Protect sensitive personal information that, if released, would be defamatory or would jeopardize an individual's safety;⁴ or
- Protect trade or business secrets.⁵

Under s. 119.15(3), F.S., a new public records exemption or substantial amendment of an existing public records exemption is repealed on October 2 of the fifth year following enactment, unless the Legislature reenacts the exemption. However, this provision does not apply to an exemption that:

- Is required by federal law; or
- Applies solely to the State Legislature or the State Court System.⁶

Court Proceedings and Records

Independent of constitutional and statutory provisions that generally require court files to be open to the public, the courts have found that "both civil and criminal court proceedings in Florida are public events" and that courts must "adhere to the well-established common law right of access to court proceedings and records."⁷ A court may close a court file or a portion thereof on equitable grounds, but its ability to do so is limited due to the Florida Supreme Court's ruling that closure of court proceedings or records should occur only when necessary to:

- Comply with established public policy set forth in the constitution, statutes, rules, or case law;
- Protect trade secrets;
- Protect a compelling governmental interest (such as national security or confidential informant identity);
- Obtain evidence to properly determine legal issues in a case;

¹ Art. I, s. 24(c), Fla. Const.

² S. 119.15, F.S.

³ S. 119.15(6)(b), F.S.

⁴ Only the identity of an individual may be exempted under this provision.

⁵ S. 119.15(6)(b), F.S.

⁶ S. 119.15(2), F.S.

⁷ *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 116 (Fla. 1988).

- Avoid substantial injury to innocent third parties (such as to protect young witnesses from offensive testimony or children in a divorce); or
- Avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.⁸

Additionally, the legislature has exempted from the public record certain court records when disclosure of such records would implicate privacy interests, including:

- Records relating to dependency matters, termination of parental rights, and child abuse, neglect, and abandonment.⁹
- Adoption records.¹⁰
- Guardianship records.¹¹
- Social security, bank account, charge, debit, and credit card numbers.¹²
- Birth records and portions of death and fetal death records.¹³
- Estate inventories and accountings included in court records.¹⁴

Family Trust Companies

A trust is a relationship in which one party, the “settlor,” gives another party, the “trustee,” the right to hold title to the settlor’s property or assets for the benefit of a third party, the “beneficiary.” A trust is generally governed by the Florida Trust Code, set out in ch. 736, F.S., and the Florida Uniform Principal and Income Act, set out in ch. 738, F.S. However, certain types of trusts, such as family trust companies, may be governed by additional statutes.

Types of Family Trust Companies

A “family trust company” is a corporation or limited liability company (“LLC”) operating in accordance with the Florida Family Trust Company Act, set out in ch. 662, F.S., that:

- Is exclusively owned by one or more family members;¹⁵
- Is organized or qualified to do business in the state;
- Acts or proposes to act as a fiduciary to serve one or more family members;
- Does not serve as a fiduciary for a person, entity, trust, or estate that is not a family member, except that it may serve as a fiduciary for up to 35 individuals who are not family members if the individuals are current or former employees of the family trust company or one or more trusts, companies, or other entities that are family members.¹⁶

⁸ *Id.* at 118.

⁹ Ss. 39.0132(3) and 39.0132(4)(a), F.S.

¹⁰ S. 63.162, F.S.

¹¹ Ss. 744.1076 and 744.3701, F.S.

¹² S. 119.0714(1)(i)-(j), (2)(a)-(e), F.S.

¹³ Ss. 382.008(6) and 382.025(1), F.S.

¹⁴ This exemption was created because the legislature found that the public disclosure of such information “would produce undue harm to the heirs of the decedent or beneficiaries of the decedent’s estate.” S. 733.604, F.S.; ch. 2009-230, Laws of Fla.

¹⁵ “Family member” means a designated relative; a person within the fourth degree of lineal kinship to a designated relative of a family trust company, or a person within the sixth degree of lineal kinship to a designated relative of a licensed family trust company; a person within the seventh degree of collateral kinship to a designated relative of a family trust company, or a person within the ninth degree of collateral kinship to a designated relative of a licensed family trust company; the spouse or former spouse of an individual qualifying as a family member and an individual who is within the fifth degree of lineal kinship to such spouse or former spouse; a family affiliate; a trust established by a family member if the trust is funded exclusively by one or more family members; a trust established by an individual who is not a family member if all of the noncharitable qualified beneficiaries of the trust are family members; the probate estate of a family member; the probate estate of an individual who is not a family member if all of the noncharitable beneficiaries of the estate are family members; or a charitable foundation or other charitable entity in which a majority of the governing body is composed of family members. S. 662.111(11), F.S.

¹⁶ S. 662.111(12), F.S.

A “licensed family trust company” is a family trust company that has been issued a license by the Office of Financial Regulation (“OFR”) that has not been suspended or revoked.¹⁷ A “foreign licensed family trust company” is a family trust company that:

- Is licensed by a state other than Florida or the District of Columbia (“D.C.”);
- Has its principal place of business in a state other than Florida or D.C.;
- Is operated in accordance with family or private trust company laws of the state in which it is licensed or of D.C.;
- Is subject to statutory or regulatory mandated supervision by the state in which the principal place of business is located or by D.C.; and
- Is not owned by, or a subsidiary of, a corporation, LLC, or other business entity that is organized or licensed by any foreign country as defined in s. 663.01(3), F.S.¹⁸

Formation and Oversight

A family may form a family trust company, licensed family trust company, or foreign licensed family trust company to provide the family services similar to those provided by a trustee or a financial institution; such companies are often formed to manage the wealth of families with a high net worth in lieu of relying on traditional individual or institutional trustee arrangements.¹⁹ Neither a family trust company nor a foreign licensed family trust company must be a licensed family trust company, but such companies must register with OFR before beginning operations in the state.²⁰

Certain information disclosed to OFR in connection with its oversight of family trust companies, licensed family trust companies, and foreign licensed family trust companies is confidential and exempt²¹ from the public record, including:

- Personal identifying information;
- The names of shareholders or members of the company; and
- Information received by OFR from persons from another state or nation or the federal government which is otherwise confidential and exempt from public disclosure under the laws of such state or nation or under federal law.²²

Trust Proceedings

Although trusts are not generally subject to judicial supervision, most family trust companies, licensed family trust companies, and foreign licensed family trust companies will need to access the court system at some point, as certain matters of trust administration cannot be accomplished without judicial intervention.²³ However, information contained in the court records related to such trust proceedings is not currently exempt from public disclosure. Such proceedings may expose private information about family wealth and other sensitive matters that may lead to exploitation of family members by financial predators, unwanted solicitations, and a heightened risk of kidnapping.²⁴ This information may also

¹⁷ S. 662.111(16), F.S.

¹⁸ S. 662.111(15), F.S.

¹⁹ See generally ch. 662, F.S.

²⁰ Ss. 662.114 and 662.122, F.S.

²¹ There is a difference between records the Legislature designates exempt from public record requirements and those the Legislature deems confidential and exempt. A record classified as exempt from public disclosure may be disclosed under certain circumstances. See *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So.2d 48, 53 (Fla. 5th DCA 2004), review denied 892 So. 2d 1015 (Fla. 2004); *City of Rivera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994); *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991). If the Legislature designates a record as confidential and exempt from public disclosure, such record may not be released by the custodian of public records to anyone other than the persons or entities specifically designated in statute. See Op. Att’y Gen. Fla. 04-09 (2004).

²² S. 662.148(2), F.S.

²³ These matters include final settlement of trust accountings, conclusive validation of trustee fees, approval of specific trustee actions, trust instrument construction, the determination of a trust’s validity, and a trust’s modification, reformation, or termination. See chs. 736 and 738, F.S.

²⁴ *Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978) (recognizing that financial privacy is important for reasons including the irritation of solicitations and the threat of kidnapping).

reveal extensive private and highly personal information, including information about family disputes, which may appeal to the prurient interest but is of limited legitimate public interest.

Effect of The Bill

The bill provides that, in trust proceedings under ch. 736 or 738, F.S., in which a family trust company, licensed family trust company, or foreign licensed family trust company is a party, the clerk must, upon written notice by a party that the bill's public records exemption applies, keep all court records of that case separate from other court records and not open to inspection by the public. The bill also provides that, upon receipt of such written notice by the clerk, the records of that case are confidential and exempt from s. 119.07, F.S., and s. 24(a), article I of the State Constitution. The bill defines "court records" as the docket and all filings or other records of the case.

However, the bill allows such court records to be inspected, upon court order, by any person deemed by the court to have a specific interest in the trust, a transaction relating to the trust, or an asset held or previously held by the trust and where the court determines there is a compelling need for releasing the information requested. In granting a right to any person to inspect such court records, the bill provides that the court may limit access to information as the court deems necessary to protect the inspecting person's interests and place any reasonable restriction on further distribution of such information by the inspecting person. The bill also directs the clerk to make such court records available to:

- The settlor;
- A fiduciary of the trust, including a trustee or trust director;
- A beneficiary of the trust; and
- An attorney for such persons.

The bill provides a public necessity statement as required by article I, section 24(c) of the State Constitution. The public necessity statement provides that:

- Public disclosure of the court records of proceedings under ch. 736 or 738, F.S., involving family trust companies, licensed family trust companies, or foreign licensed family trust companies can result in specific harm to beneficiaries and other interested parties, as such proceedings often involve large sums of money or vulnerable people who could be targeted for exploitation or abuse.
- Public disclosure of the court records for such trust proceedings, which include sensitive financial information and information relating to the clients, family members, members, or stockholders of family trust companies, licensed family trust companies, and foreign licensed family trust companies, would vitiate other protections granted by law to such companies and their constituents.
- The need to protect the identities of beneficiaries of trusts for which a family trust company, licensed family trust company, or foreign licensed family trust company is a trustee and the sensitive financial information contained in the court records of such proceedings is sufficiently compelling to override the state's public policy of open government and that the protection of such information cannot be accomplished without the exemption.

The bill provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may protect from financial exploitation and other dangers the members of a family trust company, licensed family trust company, or foreign licensed family trust company by keeping court records for a proceeding under ch. 736 or 738, F.S., involving such a trust company out of the public record in certain circumstances, unless an exception applies.

D. FISCAL COMMENTS:

None.