

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 946

SPONSOR:

SUBJECT:

DATE: REVISED: _____

	ANALYST		REFERENCE
1.	<u>Gomez</u>	<u>Bradshaw</u>	<u>Fav/3 amendments</u>
3.	_____	_____	<u>CJ</u>
5.	_____	_____	_____

I. Summary:

Public Corruption Study Commission. The bill modifies a number of existing criminal offenses and misuse of official position; disclosure or use of confidential criminal justice information; bid the procedures for placing the names of persons and affiliates on the convicted vendor list,

This bill substantially amends ss. 16.56, 287.133, 837.02, 838.014, 838.015, 838.016, 921.0022, ss. 838.15, 838.16, and 839.25, F.S.

Present Situation:

Commission's *Report to the Governor* (December 15, 1999) [hereinafter, Commission,]. officials and those employed by the state abide by the highest standards of behavior and avoid any

The bill embodies the criminal penalties portion of the Commission's recommendations. Other Public Officers and Employees (SB 368); two public records exemptions (SB 1108; SB 1110); include conspiracy to violate (SB 1106).

legislatively specified violations of criminal laws having occurred in or affected two or more

judicial circuits. Art. IV, s. 4(c), Fla. Const. Section 16.56, F.S., details the offenses which the statewide prosecutor may investigate and prosecute.

Section 287.133, F.S., currently requires the Department of Management Services to maintain a “convicted vendor list,” containing the name of any person or affiliate who has been convicted of a “public entity crime.” Those on the list are precluded from bidding on public contracts, performing work on a public contract (i.e. subcontractor, supplier, etc.), and transacting business with a public entity in excess of a threshold amount of \$25,000 for a period of 36 months from being placed on the list. Within 21 days of receiving notice that they are to be placed on the list, a vendor may petition for a hearing to determine whether it is in the public interest to place that person on the list.

Section 837.02, F.S., makes it a third degree felony to commit perjury in an official proceeding --- other than a proceeding relating to the prosecution of a capital felony, which is a second degree felony.

Section 838.014, F.S., defines the terms “benefit,” “corruptly,” “harm,” and “public servant” for the purpose of Florida’s criminal laws prohibiting bribery and misuse of public office.

Section 838.015, F.S., provides that actions involving bribery of a public servant are a third degree felony.

Section 838.016, F.S., provides that offenses involving unlawful compensation of a public servant or corruptly rewarding a public servant for official behavior constitutes a third degree felony.

Section 838.15, F.S., criminalizes commercial bribe receiving, defined as soliciting, accepting, or agreeing to accept a benefit with intent to violate a statutory or common law duty to which a person is subject to as: an agent or employee; a fiduciary; a lawyer or other professional advisor; an officer or director of an organization; or an arbitrator. The Florida Supreme Court held the statute unconstitutionally vague and arbitrary, in that it: failed to provide persons of common intelligence sufficient warning of what activities were prohibited; and, applied regardless of whether the proscribed behavior resulted in harm, thereby vesting too much unbridled discretion in prosecutor’s hands. *Roque v. State*, 664 So.2d 928 (1995).

Section 838.16, F.S., makes it a third degree felony to engage in commercial bribery. However, the section’s cross reference to s. 838.15, F.S., renders it unenforceable.

All felony offenders whose offenses were committed on or after October 1, 1998 are subject to the Criminal Punishment Code. The Code allows the trial judge to sentence any felony offender to the statutory maximum for the offense degree, e.g., to five years for a third-degree felony and up to 15 years for a second-degree felony. The Code provides for a mandatory minimum sentence below which the judge may not sentence an offender without providing written reasons.

s. 921.00265, F.S. The minimum sentence is calculated by computing various factors like victim injury and prior record. s. 921.0024, F.S. The Offense Severity Ranking Chart ranks most felony offenses from levels 1 to 10, and is another factor which goes into the minimum sentence calculation. A level 10 offense scores highest; level 1 and level “M” score lowest. s. 921.0022, F.S.

III. Effect of Proposed Changes:

Section 1. Section 16.56, F.S., is amended to authorize the statewide prosecutor to investigate and prosecute offenses by public servants under a substantially rewritten ch. 838, F.S.

Section 2. Section 287.133, F.S., is amended to define “public entity crime” to include any violation of ch. 838, F.S. The effect is to place the name of any person or affiliate convicted of a public servant offense under the substantially rewritten ch. 838, F.S., on the “convicted vendor list,” precluding the person or affiliate from bidding on public contracts, performing work on a public contract (i.e. subcontractor, supplier, etc.), and transacting business with a public entity in excess of a threshold amount of \$25,000 for a period of 36 months from being placed on the list. The term “finding of guilt” is defined broadly to include withholds of adjudication and pleas of *nolo contendere*. The name of a convicted vendor is *immediately* placed on the list, shifting the burden to the convicted vendor to demonstrate removal from the list is justified. The convicted vendor may request a hearing within 21 days to be removed from the list, but an administrative law judge must determine that there is a “substantial public interest” justifying the removal.

Section 3. Section 837.02, F.S., the generic perjury statute, is amended to exempt public servants who commit perjury in connection with a matter relating to their official duties. Another section of the bill creates s. 838.24, F.S., which makes such perjury by a public servant in connection with his or her official duties a second degree felony.

Section 4. Section 838.0105, F.S., is created to provide a short title; designating ch. 838, F.S., as the “Citizens’ Right to Honest Government Act.”

Section 5. Section 838.014, F.S., is amended to redefine the terms “benefit,” “corruptly,” “harm,” and “public servant.” The definition of “corruptly” means knowledge that the act is wrongful and done with improper motives. The term “public servant” is defined in a comprehensive manner to include not only public officers and employees but also specifically identified non-governmental entities performing “privatized” governmental services or functions authorized by law or contract. The bill also expands the current “public servant” definition to include persons elected to, but yet to formally assume the duties of, public office. The definition of “benefit” is revised to incorporate the current definition of “pecuniary benefit.”

Section 6. Section 838.015, F.S., is amended to elevate the offense of bribery from a third degree felony (5 year prison maximum) to a second degree felony (15 year prison maximum).

Section 7. Section 838.016, F.S., is amended to elevate offenses involving unlawful compensation of a public servant or corruptly rewarding a public servant for official behavior from a third degree felony (5 year prison maximum) to a second degree felony (15 year prison maximum).

Section 8. Section 838.022, F.S., is created making it a second degree felony to engage in official misconduct. (Current s. 839.25, F.S., contains a more narrowly defined “official misconduct offense which is punished as a third degree felony.) Official misconduct is expanded to include a public servant who acts with corrupt intent to obtain a benefit or to cause harm by:

- Falsifying any official record or document.
- document.
- commission of a felony that involves the public servant's agency or entity.
- *mandatory* constitutional or statutory duty.

Section 838.20, F.S., is created making it a second degree felony for any public servant to corruptly use his or her official position, public property, or public resource to:

- Establish any business relationship between the public servant's agency and any business public.

government and the need to prohibit the inappropriate use of the public's trust. Commission, , at p. 9.

disclose certain types of confidential criminal investigative information or active criminal Commission identified circumstances where public servants wrongfully disclosed such safety. Commission, , at p. 9.

“privatization” in a statute, ordinance, resolution, or contract providing for a private contractor to performing a government function or providing a government service. This helps to assure that Commission, , at p. 9.

engage in certain conduct that currently undermines the competitive bidding process for public *Report*
Examples of prohibited conduct include: corruptly disclosing material information concerning a specification that provides an unfair competitive advantage to any person; or, corruptly altering or

Section 838.24, F.S., is created as a public servant perjury statute, making it a second degree duties. The new provision specifies that knowledge of the materiality of the statement is not an

remain a third degree felony under s. 837.02, F.S. Also, perjury by a public servant in giving contradictory statements remains a third degree felony since the bill does not create an analogous public servant version of perjury by contradictory statements, s. 837.021, F.S.

Section 9. Section 921.0022, F.S., is amended to include the new second degree felonies for offenses by public servants in Level 7 of the offense severity ranking chart. Under the punishment code, a Level 7 offense sets the lowest permissible sentence at 21 months prison, (assuming no other offenses are committed, no prior record, and no victim injury points are scored). The new third degree felony for corruptly disclosing confidential criminal justice information is placed in Level 6. Under the punishment code, a Level 6 offense sets the lowest permissible sentence and does not require a prison sentence, (assuming no other offenses are committed, no prior record, and no victim injury points are scored).

Section 10. Section 838.15, F.S., relating to commercial bribe receiving, and s. 838.16, F.S., relating to commercial bribery, are repealed. Section 838.15, F.S., has been held unconstitutional, and results in s. 838.16, F.S., being unenforceable. *Roque v. State*, 664 So.2d 928 (1995). Section 839.25, F.S., relating to official misconduct is also repealed as it is superseded by the newly created official misconduct provision in s. 878.022, F.S.

Section 11. Provides an effective date of October 1, 2000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

1. Definition of corruptly or corrupt intent

The bill defines “corruptly” or “corrupt intent” to mean “done with knowledge that the act is wrongful and with improper motives.” This definition is the identical definition contained in the current official misconduct statute, s. 839.25, F.S. However, the phrase may give rise to an argument that the statute is unconstitutionally vague and susceptible to arbitrary application because it is not clear what constitutes “improper motives.” *See Brown v. State*, 629 So.2d 841 (Fla. 1994). Although the courts have not expressly held the definition in s. 839.25, F.S., unconstitutional, the Court in *State v. De Leo*, 356 So. 2d 306 (Fla 1978),

stated that “this standard is too vague to give men of common intelligence sufficient warning of what is corrupt and outlawed.” *Id.* at 308.

The definition of “corruptly” or “corrupt intent” could be improved to counteract any constitutional arguments by deleting the reference to “improper motives.”

2. *Refraining from performing a mandatory constitutional or statutory duty*

The bill provides that one may be convicted of official misconduct if it is shown that he or she refrained from performing a mandatory constitutional or statutory duty. A prior version of the current official misconduct statute, s. 839.25, F.S., attempted to capture this type of act by prohibiting one from “knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office.” S. 839.25(1)(c), Fla. Stat. 1977. This provision was declared unconstitutional under the due process clause because it was found to be susceptible to arbitrary application. *State v. De Leo*, 356 So. 2d 306 (Fla 1978). In a subsequent case, the court declared a related provision of s. 839.25, F.S., prohibiting one from “knowingly refraining, or causing another to refrain from performing a duty imposed upon him by law...” unconstitutional on the same grounds. *State v. Jenkins*, 469 So. 2d 733 (Fla. 1985). In that decision, Justice Overton’s concurring opinion made the following recommendation:

I strongly suggest, however, that the legislature revisit this statute and re-enact these provisions, limiting their application to identifiable public officials and to the statutorily- or constitutionally- defined duties of the particular offices.

The bill’s official misconduct provision on mandatory constitutional or statutory duties is designed to follow Justice Overton’s blueprint for crafting a constitutional statute.

V. **Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Public servants may incur legal costs to defend against criminal allegations under the new provisions of ch. 838, F.S.

C. Government Sector Impact:

The new second and third degree felony offenses have the potential to result in costs to prosecute, incarcerate, and administer the new offenders. The precise cost is indeterminate. The Criminal Justice Estimating Conference has not yet reviewed the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Committee Substitute for Senate Bill 946 is one of six bills embodying the recommendations of the Public Corruption Study Commission.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
