

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: SB 946

SPONSOR: Senator Sebesta

SUBJECT: Offenses by public servants

DATE: January 27, 2000

REVISED: 2/8/00 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Fox</u>	<u>Bradshaw</u>	<u>EE</u>	<u>Fav/3 amendments</u>
2.	_____	_____	<u>CJ</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

Senate Bill 946 contains the criminal recommendations of the Public Corruption Study Commission. The bill modifies a number of existing criminal offenses and definitions, and creates several new criminal offenses as second and third degree felonies for: misuse of official position; disclosure or use of confidential criminal justice information; bid tampering, in connection with public contracts; and public servant perjury. The bill also modifies the procedures for placing the names of persons and affiliates on the convicted vendor list, precluding participation in certain government contracts.

This bill substantially amends ss. 16.56, 287.133, 837.02, 838.014, 838.015, 838.016, 921.0022, F.S., creates ss. 838.0105, 838.022, 838.20, 838.21, 838.22, 838.23, 838.24, F.S., and repeals ss. 838.15 and 838.16, F.S.

II. Present Situation:

The bill incorporates a number of recommendations contained in the Public Corruption Study Commission's *Report to the Governor* (December 15, 1999) [hereinafter, Commission, *Report*]. The Governor established the Commission to "assure that the State's elected and appointed officials and those employed by the state abide by the highest standards of behavior and avoid any type of official misconduct." Executive Order No. 99-237 (September 15, 1999).

The bill embodies the criminal portion of the Commission's recommendations. Other Commission recommendations include: specific revisions to Chapter 112, the Code of Ethics for Public Officers and Employees (SB 368); two public records exemptions (SB 1108; SB 1110); enhanced state contract review (SB 1100); and, expansion of the election code violations to include conspiracy to violate (SB 1106).

Section 16.56, Florida Statutes, details the offenses which the statewide prosecutor may investigate and prosecute.

Section 287.133, Florida Statutes, 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, Florida Statutes, 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, Florida Statutes, 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, Florida Statutes, provides that actions involving bribery of a public servant are a third degree felony.

Section 838.016, Florida Statutes, provides that offenses involving unlawful compensation of a public servant or corruptly rewarding a public servant for official behavior constitute a third degree felony.

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

Section 921.0022, Florida Statutes, contains Florida’s criminal punishment code and offense severity ranking chart.

III. Effect of Proposed Changes:

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

Section 2. Section 287.133, Florida Statutes, is amended to define “public entity crime” to include any violation of Chapter 838. The effect is to place the name of any person or affiliate

convicted of a public servant offense under the substantially rewritten Chapter 838 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. 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 general 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 section 838.24, Florida Statutes, 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, Florida Statutes, is created to provide a short title.

Section 5. Section 838.014, Florida Statutes, is amended to redefine the terms “benefit,” “corruptly,” “harm,” and “public servant.” The definition of “corruptly” means knowledge that an act is wrongful and done with improper intent. 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, Florida Statutes, is amended to elevate the offense of bribery from a third degree felony to a second degree felony.

Section 7. Section 838.016, Florida Statutes, 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 to a second degree felony.

Section 8. Section 838.022, Florida Statutes, is created making it a second degree felony to engage in official misconduct. Official misconduct means that a public servant acts with corrupt intent to obtain a benefit or to cause harm by:

- Falsifying any official record or document.
- Concealing, covering up, destroying, mutilating, or altering any official record or official document.
- Obstructing, delaying, or preventing the communication of information relating to the commission of a felony that involves the public servant’s agency or entity.
- Refraining from performing a *mandatory* constitutional or statutory duty.

The offense includes causing another person to commit one of these violative acts. The amendment to section 838.022 incorporates, clarifies, and expands the current prohibitions in section 839.25, Florida Statutes.

Section 838.20, Florida Statutes, 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 in which the public servant receives or has an expectation of receiving a benefit.
- Perform his or her official duties to secure a benefit that is not generally available to the public.

The purpose of this provision was to strike a balance between the reality of doing business in government and the need to prohibit the inappropriate use of the public's trust. Commission, *Report*, at p. 9.

Section 838.21, Florida Statutes, is created making it a third degree felony for a public servant to corruptly disclose certain types of confidential criminal investigative information or active criminal investigative or intelligence information as defined in Chapter 119, Florida Statutes. The Public Corruption Study Commission identified circumstances where public servants wrongfully disclosed such information, negatively compromising investigations and, in some cases, jeopardizing personal safety. Commission, *Report*, at p. 9.

Section 838.22, Florida Statutes, is created to provide an inference that the use of the terms "privatize" or "privatization" in a statute, ordinance, resolution, or contract providing for a private contractor to perform a function or service on behalf of government means that the private entity is in fact performing a government function or providing a government service. This helps to assure that these private entities will be considered "public servants" subject to penalties under Chapter 838. Commission, *Report*, at p. 9.

Section 838.23, Florida Statutes, is created as a bid-tampering statute, making it a second degree felony to engage in certain conduct that currently undermines the competitive bidding process for public contracts but for which no adequate statute currently exists. Commission, *Report*, at p. 9. Examples of prohibited conduct include: corruptly disclosing material information concerning a bid or the bidding process which is not publicly disclosed; corruptly establishing a bid specification that provides an unfair competitive advantage to any person; or, corruptly altering or amending any submitted bid or bid results to provide an unfair competitive advantage.

Section 838.24, Florida Statutes, is created as a public servant perjury statute, making it a second degree felony for a public servant to commit perjury in regard to a matter that relates to his or her public duties. Perjury by a public servant not related to his or her official duties would remain a third degree felony under section 837.02, Florida Statutes.

Section 9. Section 921.0022, Florida Statutes, is amended to include the new second degree felonies for offenses by public servants in Level 7 of the offense severity ranking chart. The new third degree felony for corruptly disclosing confidential criminal justice information is located in Level 6.

Section 10. Section 838.15, Florida Statutes, relating to commercial bribe receiving, and section 838.16, relating to commercial bribery, are repealed. Section 838.15 has been held

unconstitutional, and results in section 838.16 being unenforceable. *Roque v. State*, 664 So.2d 928 (1995).

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.

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 Chapter 838.

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:

Section 839.25, Florida Statutes, relating to official misconduct, should be repealed. The provisions of that section are transferred and expanded upon in a newly-created section 838.022, Florida Statutes, in section 8 of the bill.

There is a title defect, referencing s. 838.16, F.S. instead of s. 838.016, F.S., on page 1, line 14. Also, obsolete cross references to bribery, unlawful compensation, and commercial bribery in the Criminal Punishment Code, Offense Severity Ranking Chart should be omitted.

VII. Related Issues:

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

VIII. Amendments:

#1 by Ethics and Elections

Title amendment, to correct a statute number.

#2 by Ethics and Elections

Deletes obsolete cross-references in the Criminal Punishment Code, Offense Severity Ranking Chart.

#3 by Ethics and Elections

Repeals section 839.25, F.S., which makes it a 3rd degree felony to engage in “official misconduct.” The section has been superseded by the revision of Chapter 838 in the bill and specifically the creation of a new section on official misconduct (s. 838.022) which carries a 2nd degree felony penalty.

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