

STORAGE NAME: h0147a.sa.doc
DATE: January 8, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: HB 147
RELATING TO: Citizens' Right to Honest Government
SPONSOR(S): Representative(s) Ball & others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) STATE ADMINISTRATION YEAS 5 NAYS 0
- (2) JUDICIAL OVERSIGHT
- (3) CRIME PREVENTION, CORRECTIONS & SAFETY
- (4) COUNCIL FOR SMARTER GOVERNMENT
- (5)

I. SUMMARY:

Governor Bush established the Public Corruption Study Commission in 1999 in order to complete a comprehensive review of current laws, policies and procedures relating to Florida's response to public corruption. This bill includes many of the recommendations of the commission.

This bill repeals the current statute on "official misconduct" and creates a new "official misconduct" offense classified as a second degree felony. The new offense prohibits a public servant, with corrupt intent to obtain a benefit or to cause harm to another from falsifying, concealing, or destroying a public record; from obstructing the communication of information relating to the commission of a felony that directly involves the public agency employing the public servant; and from refraining from performing a mandatory statutory duty. In addition, this bill creates the second degree felonies of "criminal misuse of official position" and "bid tampering", and the third degree felony of "disclosure or use of confidential criminal justice information."

This bill further provides that any person who provides information regarding suspected criminal violations committed by a public servant must be considered a confidential informant. Additionally, this bill provides that if a public servant is arrested or prosecuted for an alleged violation created under this bill, the public servant may petition the employing public agency to award reasonable attorney's fees.

This bill also explicitly provides that the Office of Statewide Prosecution and the statewide grand jury may investigate and prosecute any offenses created under this bill. Additionally, this bill increases the penalty for a public servant who commits perjury in an official proceeding in regard to any material matter that relates to his or her duties as a public servant. The bill also increases the penalties for bribery and unlawful compensation for official behavior.

Lastly, this bill repeals the sections of law which provide for the crimes of commercial bribe receiving and commercial bribery, and amends the definitions of *benefit*, *corrupt*, *harm*, and *public servant*.

Please see the "Fiscal Analysis and Economic Impact Statement" for fiscal comments on the bill.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill creates new criminal penalties and increases the penalties for certain existing crimes.

B. PRESENT SITUATION:

Public Corruption Study Commission

Governor Bush signed Executive Order 99-237 on September 15, 1999, establishing the Public Corruption Study Commission (the commission). The fifteen-member commission was to complete a comprehensive review of current laws, policies and procedures relating to Florida's response to public corruption, and to prepare specific recommendations on how Florida might better prevent and respond to acts of public corruption.¹

The Committee on Crime and Punishment drafted a proposed committee bill during both the 2000 and 2001 legislative sessions both of which incorporated many of the commission's recommendations. Both bills failed to pass the legislature.

Bribery; Misuse of Public Office

Chapter 838, F.S., pertains to bribery and the misuse of public office. This chapter defines the following terms relating to the misuse of a public office by a public servant: benefit,² pecuniary benefit,³ harm,⁴ public servant,⁵ government,⁶ and corruptly.⁷

¹ In sum, the commission's final report recommended revisions to Chapter 838, F.S., relating to criminal violations by public servants; amending Florida's public records exemptions relating to offenses involving public servants; continuing funding to Florida's state or local law enforcement agencies for the investigation of public corruption; enhancing the role of the State Comptroller in the state contracting process; amending Chapter 287, F.S., to include a "convicted vendor list"; revising Chapter 112, F.S., requiring mandatory training of elected public officials; strengthening the Code of Ethics for public officers and employees; and elevating many criminal violations by public servants to second-degree felonies. Florida Public Corrupt Study Commission, Executive Summary of Commission's Recommendations, December 14, 1999.

² "'Benefit' means gain or advantage, or anything regarded by the person to be benefited as a gain or advantage, including the doing of an act beneficial to any person in whose welfare he or she is interested." Section 838.014(1), F.S.

³ "'Pecuniary benefit' is benefit in the form of any commission, gift, gratuity, property, commercial interest, or any other thing of economic value." Section 838.014(2), F.S.

⁴ "'Harm' means loss, disadvantage, or injury to the person affected, including loss, disadvantage, or injury to any other person in whose welfare he or she is interested." Section 838.014(3), F.S.

⁵ "'Public servant' means any public officer, agent, or employee of government, whether elected or appointed, including, but not limited to, any executive, legislative, or judicial officer; any person who holds an office or position in a political party or political party committee, whether elected or appointed; and any person participating as a special master, receiver, auditor, juror, arbitrator,

Section 838.015, F.S., relates specifically to bribery.⁸ Any individual who is prosecuted under this section is guilty of a felony of the third degree, which is punishable as provided for in ss. 775.082, 775.083, or s. 775.084, F.S.⁹ This chapter also provides for the crimes of commercial bribe receiving¹⁰ and commercial bribery¹¹; both crimes are also classified as third degree felonies.

Section 838.016, F.S., pertains to unlawful compensation or reward for official behavior. It is a third degree felony for any person corruptly to give or offer to any public servant any benefit not authorized by law; or for any public servant to request, solicit, accept or agree to accept any benefit not authorized by law

- for the past, present, or future performance or nonperformance or violation of any act; or
- for the past present, or future exertion of any influence upon any other public servant regarding any act or omission

which the person believes to have been or the public servant represents to have been either within the official discretion of the public servant, in violation of a public duty, or in the performance of a public duty.¹²

Perjury in an Official Proceeding

Chapter 837, F.S., pertains to perjury. Section 837.02, F.S., provides that it is a third degree felony for a person to make a false statement which he or she does not believe to be true, under oath in an official proceeding in regard to any material matter. If the proceeding relates to the prosecution of a capital felony, the offense is a second degree felony.¹³

umpire, referee, consultant, administrative law judge, hearing officer, or hearing examiner, or person acting on behalf of any of these, in performing a governmental function; but the term does not include witnesses. Such term shall include a candidate for election or appointment to any such office, including any individual who seeks or intends to occupy any such office. It shall include any person appointed to any of the foregoing offices or employments before and after he or she qualifies.” Section 838.014(4), F.S.

⁶ “‘Government’ includes the state government and any city or county government or any branch, political subdivision, or agency of the state, county, or city government.” Section 838.014(5), F.S.

⁷ “‘Corruptly’ means done with a wrongful intent and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.” Section 838.014(6), F.S.

⁸ “‘Bribery’ means corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or herself or another, any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in violation of a public duty, or in performance of a public duty.” Section 838.015(1), F.S.

⁹ Under ss. 775.082 and 775.083, F.S., a third degree felony is punishable by a term of imprisonment not to exceed 5 years, and a maximum fine of \$5,000. Section 775.084, F.S., deals with habitual felony offenders. If a habitual felony offender is convicted of a third degree felony, such offender may be sentenced for a term not exceeding 10 years.

¹⁰ “A person commits the crime of commercial bribe receiving if the person solicits, accepts, or agrees to accept a benefit with intent to violate a statutory or common-law duty to which that person is subject as: an agent or employee of another; a trustee, guardian, or other fiduciary; a lawyer, physician, accountant, appraiser, or other professional adviser; an officer, director, partner, manager, or other participant in the direction of the affairs of an organization; or an arbitrator or other purportedly disinterested adjudicator or referee.” Section 838.15, F.S.

¹¹ “A person commits the crime of commercial bribery if, knowing that another is subject to a duty described in s. 838.15(1) and with intent to influence the other person to violate that duty, the person confers, offers to confer, or agrees to confer a benefit on the other.” Section 838.16, F.S.

¹² Section 838.016, F.S.

¹³ Under ss. 775.082 and 775.083, F.S., a second degree felony is punishable by a term of imprisonment not to exceed 15 years, and a maximum fine of \$10,000.

Offenses by Public Officers and Employees

Chapter 839, F.S., pertains to official misconduct. "Official misconduct" means the commission of the following act by a public servant, with corrupt intent to obtain a benefit for himself or herself or another or to cause unlawful harm to another: knowingly falsifying, or causing another to falsify, any official record or official document. "Corrupt" is defined as "done with knowledge that the act is wrongful and with improper motives."¹⁴

Office of Statewide Prosecution and the Statewide Grand Jury

Section 16.56, F.S., creates the Office of Statewide Prosecution. This office is permitted to investigate and prosecute offenses, including bribery. This section of statute does not specifically state that the Office of Statewide Prosecution may investigate and prosecute offenses in violation of Chapter 838, F.S., pertaining to bribery and misuse of public office, yet by referencing the general term "bribery" it can be reasonably inferred that violations of Chapter 838, F.S., would fall within the prosecutorial responsibilities of the Office of Statewide Prosecution.

Section 905.34, F.S., pertains to the powers and duties of the statewide grand jury. This section of statute limits the jurisdiction of the statewide grand jury to particular offenses. The jurisdiction of the statewide grand jury includes those offenses classified as bribery. This section of statute does not specifically state that the jurisdiction of the statewide grand jury includes those offenses in violation of Chapter 838, F.S., yet it can be reasonably inferred that such violations would fall within the jurisdiction of the statewide grand jury.

Criminal Punishment Code; Offense Severity Ranking Chart

Chapter 921, F.S., deals with the sentencing of criminals. Section 921.0022, F.S., contains the offense severity ranking chart, which must be used with the Criminal Punishment Code worksheet to compute a sentence score for each felony offender whose offense was committed on or after October 1, 1998.¹⁵ The offense severity ranking chart has 10 offense levels, ranked from least severe, which are level 1 offenses, to most severe, which are level 10 offenses, and each felony offense is assigned to a level according to the severity of the offense. The offenses of bribery, public servants receiving unlawful compensation, commercial bribe receiving, and commercial bribery are classified as level 3 offenses in the Criminal Punishment Code.

C. EFFECT OF PROPOSED CHANGES:

This bill creates the "Citizens' Right to Honest Government Act."

Bribery; Misuse of Public Office

This bill makes various changes to Chapter 838, F.S., pertaining to bribery and the misuse of public office. This bill amends the following definitions in s. 838.014, F.S.:

- *Benefit* – This bill deletes the definition of "pecuniary benefit" and adds that language to the definition of "benefit." Thus, a "benefit" is to include "any commission, gift, gratuity, property, commercial interest, or any other thing of economic value."

¹⁴ Section 839.25, F.S.

¹⁵ Section 921.0022(1), F.S.

- *Corruptly or with corrupt intent* – This bill amends the definition of “corruptly” to state: “Corruptly or with corrupt intent means done with knowledge that the act is wrongful.” This amended definition changes the current definition by removing the phrase “for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.”
- *Harm* – This bill amends the definition of “harm” to include “pecuniary” in the description of the type of loss involved.
- *Public Servant* – This bill amends the definition of “public servant” to include:

Any officer, director, partner, manager, representative, or employee of a *nongovernmental entity* that is authorized by law or contract to perform a governmental function or provide a governmental service on behalf of a state, county, municipal, or special district agency or entity to the extent that the individual’s conduct relates to the performance of the governmental function or provision of the governmental service. (emphasis added)

The addition of “any officer, director, . . . or employee of a *nongovernmental entity*” to the definition of public servant appears to include private entities and employees traditionally not considered to be public servants. In addition, what activities may be considered government functions or services is potentially subject to varied opinions.

Current law provides that the penalty for bribery is a third degree felony. Current law also provides that any individual who receives unlawful compensation or reward for official behavior commits a third degree felony. This bill increases such penalties to second degree felonies, and changes the rankings of these crimes in the offense severity ranking chart¹⁶ from level 1 offenses to level 7 offenses.

Current law also provides for the crimes of commercial bribe receiving and commercial bribery. This bill repeals the sections that establish these crimes.¹⁷

Perjury in an Official Proceeding

Current law provides for particular felonies for any individual who makes a false statement under oath in an official proceeding. This bill adds an additional offense to be classified as perjury: a public servant who commits perjury in an official proceeding on a material matter that relates to his or her duties or actions as a public servant. The bill provides that this crime is a second degree felony and ranked as a level 7 offense in the offense severity ranking chart.

Offenses by Public Officers and Employees

This bill repeals the current provision provided for in Chapter 839, F.S., pertaining to official misconduct and creates a new section of law pertaining to official misconduct. Additionally, this bill

¹⁶ Section 921.0022, F.S., contains the offense severity ranking chart, which must be used with the Criminal Punishment Code worksheet to compute a sentence score for each felony offender whose offense was committed on or after October 1, 1998. The offense severity ranking chart has 10 offense levels, ranked from least severe, which are level 1 offenses, to most severe, which are level 10 offenses, and each felony offense is assigned to a level according to the severity of the offense.

¹⁷ Section 838.15, F.S., creating the crime of commercial bribery and providing definitions, was found “invalid” under *Roque v. State*, 664 So. 2d 928, 930 (Fla. 1995). The Florida Supreme Court stated: “We have declared similar statutes invalid on various grounds . . . Some were impermissibly vague or were subject to arbitrary application. The present statute suffers from similar ills.” *Id.* at 929.

creates additional areas of law relating to criminal misuse of official position; disclosure or use of confidential criminal justice information; bid tampering; status of confidential informants and confidential sources; and attorney's fees.

Official Misconduct - This bill creates s. 838.022, F.S., titled "official misconduct", which provides that it is unlawful for a public servant with corrupt intent to obtain a benefit for any person or to cause harm to another, to

1. Falsify, or cause another person to falsify, any official record or official document.
2. Conceal, cover up, destroy, mutilate, or alter any official record or official document. The terms official record and official document includes only public records.
3. Obstruct, delay, or prevent the communication of information relating to the commission of a felony that directly involves or affects the public agency or public entity served by the public servant; or
4. Refrain from performing a mandatory statutory duty or cause another person to refrain from performing such duty.

This bill provides that a violation of this section is a second degree felony and classifies the crime as a level 7 offense in the offense severity ranking chart. In addition, this section provides that an official record or official document includes only public records. Moreover, for purposes of this section, this bill provides that a candidate is not included within the term "public servant."

Criminal Misuse of Official Position - This bill creates s. 838.20, F.S., which provides that it is unlawful for any public official or public employee to corruptly use or attempt to use his or her official position or any public property or public resource that is within his or her trust to

1. Establish any business relationship between the public servant's own agency and any business entity in which the public servant receives or has an expectation of receiving a benefit; or
2. Perform his or her official duties to secure for himself or herself a benefit that is not generally available to the public.

This bill provides that any violation of s. 838.20 is a second degree felony and classifies the crime as a level 7 offense in the offense severity ranking chart.

Disclosure of Confidential Criminal Justice Information - This bill creates s. 838.21, F.S., which provides that it is a third degree felony for a public servant with intent to obstruct, impede, or prevent a criminal investigation or a criminal prosecution, to disclose active criminal investigative or intelligence information,¹⁸ or to disclose or use information regarding either the efforts to secure or the issuance of a warrant or subpoena when such information is not available to the general public and is gained by reason of the public servant's official position. This bill classifies this crime as a level 6 offense in the offense severity ranking chart.

¹⁸ Section 119.011, F.S., defines criminal intelligence information as "information with respect to an identifiable person or group of persons collected by a criminal justice agency in an effort to anticipate, prevent, or monitor possible criminal activity." This section defines criminal investigative information as "information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including, but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance."

Bid-tampering - This bill creates s. 838.22, F.S., which prohibits a public servant, with corrupt intent to influence or attempt to influence the competitive bidding¹⁹ process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services, from

1. Disclosing material information concerning a bid or other aspects of the competitive bidding process when such information is not publicly disclosed;
2. Establishing a bid specification, contract specification, request for proposal, invitation to bid, or other material aspect of the competitive bidding process that provides an unfair competitive advantage to any person who submits a bid; or
3. Altering or amending a submitted bid, documents, or other materials supporting a submitted bid, or bid results for the purpose of providing an unfair competitive advantage to any person who submits a bid.

Section 838.22, F.S., also states that it is unlawful for a public servant, with corrupt intent to obtain a benefit for any person or to cause unlawful harm to another, to circumvent a competitive bidding process required by law or rule by using a sole-source contract for commodities or services. Furthermore, it is unlawful for any person to knowingly agree, conspire, combine, or confederate, directly or indirectly, with a public servant to violate either of the above provisions. Lastly, it is unlawful for any person to knowingly enter into a contract for commodities or services which was secured by a public servant acting in violation of either of the above provisions.

Any person who violates any of the provisions of s. 838.22, F.S., commits a second degree felony. This bill classifies this crime as a level 7 offense in the offense severity ranking chart.

Status of Confidential Informants and Confidential Sources - This bill creates s. 838.23, F.S., which provides that persons who provide information regarding suspected criminal violations by public servants will be considered a confidential informant or source under s. 119.07(3)(c), F.S.²⁰ Therefore, any information revealing the identity of the confidential informant or source is exempt from public records disclosure.

Attorney's Fees - This bill creates s. 838.24, F.S., which provides that if a public servant is arrested or prosecuted for an alleged violation of Chapter 838, F.S., and the charges are dismissed or the public servant is acquitted, the public servant may petition the employing agency to award attorney's fees for the costs of the public servant's defense. The employing agency is authorized to award the attorney's fees only if the agency finds that the public servant's actions were connected to the performance of his or her official duties and served a public purpose.

Office of Statewide Prosecution and the Statewide Grand Jury

Currently, ss. 16.56 and 905.34, F.S., pertain to the powers and duties of the Office of Statewide Prosecution and the statewide grand jury, respectively. Although it can be reasonably inferred that any violations of Chapter 838, F.S., relating to bribery and the misuse of public office, would fall under the investigative and prosecutorial responsibilities of these entities, current law does not explicitly state that either the Office of Statewide Prosecution or the statewide grand jury can investigate any violations of Chapter 838, F.S. This bill expands the jurisdiction of both the Office of

¹⁹ This bill defines the term "bid" to include a response to an "invitation to bid" or "request for proposal".

²⁰ Section 119.07(3)(c), F.S., states that "[a]ny information revealing undercover personnel of any criminal justice agency is exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution."

Statewide Prosecution and the statewide grand jury to specifically include any violations of Chapter 838, F.S.

This bill amends ss. 112.3173, 112.534, 117.01, and 121.091, F.S., to conform with the repeals provided for in the bill.

This bill provides for an effective date of October 2, 2002.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

See Fiscal Comments.

D. FISCAL COMMENTS:

HB 3 was filed during the 2001 legislative session, and contained substantively similar provisions as those in HB 147. On February 22, 2001, the Criminal Justice Impact Conference determined that HB 3 would have an indeterminate but minimal prison bed impact on the Department of Corrections.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The section of the bill relating to “official misconduct” may raise constitutional concerns. In *State v. DeLeo*, 356 So.2d 306 (Fla. 1978), the Florida Supreme Court declared a portion of the official misconduct statute unconstitutional. At that time, the statute prohibited a public servant, acting with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another, from knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his or her office. The word “corrupt” was defined as “done with knowledge that the act is wrongful and with improper motive”. The Court found, as follows:

The crime defined by the statute, knowing violations of any statute, rule or regulation for an improper motive, is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its ‘catch-all’ nature.²¹

The Court also stated that the “corrupt” standard contained in the statute “is too vague to give men of common intelligence sufficient warning of what is corrupt and outlawed . . . The ‘corruption’ element, as defined, does nothing to cure the statute’s susceptibility to arbitrary application.”²²

Like the official misconduct that was struck down in *DeLeo*, this bill defines “corrupt” as “done with knowledge that the act is wrongful” but removes the language involving “improper motive”. However, the acts that are prohibited in the bill are defined with greater specificity than in the statute struck down in *DeLeo*. Given the greater specificity, it may be less likely that a court will find the new language susceptible to arbitrary application.²³

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The Committee on Crime and Punishment drafted a proposed committee bill during both the 2000 and 2001 legislative sessions both of which incorporated many of the commission’s recommendations. Both bills failed to pass the legislature.

²¹ *State v. DeLeo*, 356 So.2d 306, 308, (Fla. 1978).

²² *Id.*

²³ Bill Analysis for HB 3, as revised by the Council for Smarter Government, April 13, 2001.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Staff Director:

Lauren Cyran, M.S.

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