

**STORAGE NAME:** h1973.cp  
**DATE:** March 15, 2000

**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
CRIME & PUNISHMENT  
ANALYSIS**

**BILL #:** HB 1973 (PCB 06)

**RELATING TO:** Offenses by Public Servants

**SPONSOR(S):** Committee on Crime & Punishment and Representative Ball

**TIED BILL(S):**

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

- (1) CRIME & PUNISHMENT YEAS 6 NAYS 0
  - (2)
  - (3)
  - (4)
  - (5)
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**I. SUMMARY:**

HB 1973 adopts many of the recommendations made by the Public Corruption Study Commission as follows:

- The bill creates the offense of Official Misconduct to prohibit a public servant, with corrupt intent to obtain a benefit for any person 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 for which the public servant works and; from refraining from performing a mandatory statutory duty.
- The bill creates the offense of Criminal Misuse of Official Position to prohibit a public officer or public employee from corruptly using his or her official position or any public property to establish a business relationship between the public servant's agency and any business entity from which the public servant receives a benefit. The offense also prohibits a public officer or employee from performing his or her official duties to secure a benefit that is not generally available to the public.
- The bill makes it a third degree felony for a public servant, with the intent to obstruct a criminal investigation, to disclose active criminal investigative or intelligence information when such information is not available to the public.
- The bill makes it a second degree felony for a public servant to commit bid-tampering.
- The 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. HB 1973 also increases the penalties for the offenses of bribery and unlawful compensation for official behavior.
- The bill modifies the procedure for placing a person who has been convicted of a crime involving fraud against a governmental entity on the "convicted vendor list".

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- |                                   |   |                             |   |
|-----------------------------------|---|-----------------------------|---|
| 1. <u>Less Government</u>         | Yes <input type="checkbox"/>            | No <input type="checkbox"/> | N/A <input checked="" 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 checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input 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:

B. PRESENT SITUATION:

1. **Public Corruption Study Commission**

On September 15, 1999, Governor Bush established the Public Corruption Study Commission. The fifteen member commission was tasked to complete a comprehensive review of current laws, policies and procedures related to Florida's response to public corruption and prepare specific recommendations on how Florida might better prevent and respond to acts of public corruption. Fifteen members served on the commission including Representative Randy Ball and Senator Jim Sebesta. The commission held four meetings and issued a report on December 14, 1999. HB 1973 includes many of the recommendations of the commission.

2. **Chapter 839 - Offenses by Public Officers and Employees**

a. Former Official Misconduct Statute

Before 1978, the public misconduct statute read as follows:

- (1) "Official Misconduct" means the commission of one of the following acts by a public servant; with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another:

(a) Knowingly refraining or causing another to refrain, from performing a duty imposed upon him by law; or

(b) Knowingly falsifying, or causing another to falsify, any official records or official documents; or

(c) Knowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office.

- (2) "Corrupt" means done with knowledge that the act is wrongful and with improper motives.

In 1978, the Florida Supreme Court held that paragraph (1)(c) of the above statute violated due process because it was susceptible to arbitrary application. The court noted that the statute would allow prosecution as a third degree felony for a violation of a minor agency rule which might carry no penalty of its own. The court further held that the fact that the violation had to be committed with corrupt intent was not sufficient to cure the statute because the standard was “too vague to give men of common intelligence sufficient warning of what is corrupt” and therefore made illegal by the statute. State v. DeLeo, 356 So.2d 306 (Fla. 1978). In 1985, the court ruled that paragraph (1)(a) of the above statute was also unconstitutionally vague and susceptible to arbitrary application. State v. Jenkins, 469 So.2d 733 (Fla. 1985). The legislature subsequently deleted both paragraphs.

b. Current Official Misconduct Statute

As a result, the “official misconduct” statute currently provides that a public servant who knowingly falsifies any official record or official document with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another commits a third degree felony. Sec. 839.25, F.S.

**3. Chapter 838 - Bribery; Misuse of Public Office**

a. Bribery

Bribery is a third degree felony and is ranked a level 1 offense in the Criminal Punishment Code. “Bribery” means “corruptly to give, offer, or promise to any public servant, or, if a public servant<sup>1</sup>, corruptly<sup>2</sup> to request, solicit, accept, or agree to accept for himself or herself or another, any pecuniary or other benefit<sup>3</sup> 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 the public servant in violation of a public duty, or in the performance of a public duty.” Sec. 838.015, F.S.; Donnelly v. State, 693 So.2d 125 (Fla. 1st DCA1997).

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<sup>1</sup>The term “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 any 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, umpire, referee, consultant, administrative law judge, hearing officer, or hearing examiner, or any person acting on behalf of any of these, in performing a governmental function. The term does not include witnesses. The term includes a candidate for election or appointment to any such office, including any individual who seeks or intends to occupy any such office. It also includes any person appointed to any of the foregoing offices or employments before and after he or she qualifies. Sec. 838.014(4), F.S.

<sup>2</sup>The term “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. Sec. 838.014(6), F.S.

<sup>3</sup>The term “benefit” is defined as “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. Sec. 838.014(1), F.S.

Further, a bribery prosecution does not require any allegation or proof of any of the following:

1. The public servant ultimately sought to be unlawfully influenced was qualified to act in the desired way,
2. The public servant had assumed office,
3. The matter was properly pending before the public servant,
4. The public servant possessed jurisdiction over the matter; or
5. The public servant's official position was necessary to achieve the person's purpose.

Sec. 838.015, F.S.

b. 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:

1. for the past, present, or future performance or non performance or violation of any act; or
2. 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.

It is also a third degree felony for any public servant to request, solicit, accept or agree to accept any benefit not authorized by law:

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

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

Sec. 838.016, F.S.

c. Corruption by Threat Against Public Servant

It is unlawful to harm or threaten unlawful harm<sup>4</sup> to any public servant, to his or her immediate family, or to any other person with whose welfare the public servant is interested, with the intent or purpose:

1. 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 the public servant, in violation of a public duty or in performance of a public duty.
2. To cause or induce the public servant to use or exert any influence upon any other public servant regarding any act or omission which the person believes to be, or the public servant represents as being within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty.

Any person who unlawfully harms any public servant or any other person with whose welfare the public servant is interested commits a second degree felony. Any person who unlawfully threatens a public servant or any other person with whose welfare the public servant is interested commits a third degree felony. Sec, 838.021, F.S.

**4. Perjury in an Official Proceeding**

Section 837.02 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. This offense is ranked as a level 4 offense in the Criminal Punishment Code. If the proceeding relates to the prosecution of a capital felony, the offense is a second degree felony and is ranked as a level 8 offense in the criminal punishment code. Knowledge of the materiality of the statement is not an element of the crime and the defendant's mistaken belief that the statement was not material is not a defense.

**5. Public Entity Crime - Convicted Vendor List**

Section 287.133 provides a procedure for placing a person who has been convicted of a "public entity crime" on a convicted vendor list. The term "public entity crime" means a violation of any state or federal law with respect to the transaction of business with any public entity<sup>5</sup> or with an agency or political subdivision of any other state or with the United States, including, but not limited to, any bid or contract for goods or services, any lease for real property, or any contract for the construction or repair of a public building or public work, involving antitrust, fraud, theft, bribery, collusion, racketeering, conspiracy, or material misrepresentation. Sec. 287.133(1)(g), F.S.

If the Department of Management Services has reason to believe that a person has been convicted of a public entity crime, the department must determine whether good

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<sup>4</sup> The term "harm" is defined to mean 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. Sec. 838.014(3), F.S.

<sup>5</sup>"Public entity" is defined as "the State of Florida, any of its departments or agencies, or any political subdivision". Sec. 287.133(1)(f), F.S.

cause exists to place that person on the convicted vendor list. If good cause exists, the department must notify the person in writing of its intent to place the person on the convicted vendor list and inform the person of the right to a hearing. If the person does not request a hearing, the department may enter the name on the convicted vendor list. If the person requests a hearing, the department has the burden of proving that the person should be placed on the convicted vendor list. The statute provides a list of factors for the administrative law judge to consider in determining whether it is in the public interest to place a person on the convicted vendor list.

A person on the convicted vendor list may not submit a bid on a contract to provide any goods or services to a public entity, to repair a public building or to lease real property to a public entity and may not perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity for a period of three years. Sec. 287.133(2)(a).

6. **Bid-Tampering**: Section 839.10 provides that no state or county officer may bid for, or enter into, or be in any manner interested in any contract for public work for which the officer "may be a party to the letting." There is no state statute specifically making it a criminal offense for a public officer or employee to tamper with the bidding process.

C. EFFECT OF PROPOSED CHANGES:

1. **Office of Statewide Prosecution**: The Office of Statewide Prosecution currently has the authority to investigate and prosecute a list of specified offenses including bribery, extortion and perjury when the offense has occurred in two or more judicial circuits as part of a related transaction. HB 1973 adds to this list, giving the office the authority to investigate any violation of chapter 838.

2. **Public Entity Crime - Convicted Vendor List**

The bill eliminates the current requirement that the department investigate and determine whether good cause exists to place a person on the convicted vendor list. The bill provides that upon receipt of information regarding a finding of guilt against a person of a public entity crime, the department must determine whether a finding of guilt has been recorded with the clerk of the court and if so, the department must immediately place the name of the person on the convicted vendor list. The term "finding of guilt" includes any determination of guilt as a result of a trial or the entry of a plea of guilty or nolo contendere, regardless of whether adjudication was withheld. The term also includes a finding of guilt by a court-martial, any other state or the federal government.

The department must notify the person of his or her right to a hearing to contest the placing of the name on the convicted vendor list. If the vendor requests a hearing, the administrative law judge must determine whether there is a substantial public purpose justifying the removal of the name of the person from the list.

HB 1973 amends the definition of "public entity crime" to include a violation of any of the provisions of chapter 838.

3. **Perjury in an Official Proceeding**

The bill amends the perjury statute to make it a second degree felony for any 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 crime is ranked as a level 7 offense in the offense severity ranking chart of the Criminal Punishment Code.

**4. Chapter 838 - Bribery; Misuse of Public Office**

- a. Definition of "Public Servant": The bill defines term "public servant" in Chapter 838 as:
1. Any officer or employee of a state, county, municipal, or special district agency or entity.
  2. Any legislative or judicial officer or employee.
  3. 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.
  4. Any person who holds an office in a political party or political party committee.
  5. Any person, except a witness, who acts as a master, receiver, auditor, juror, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function.
  6. A candidate for election or appointment to any of the positions listed in this subsection, or an individual who has been elected to, but has yet to officially assume the responsibilities of, public office.
- b. Bribery: The bill increases bribery from a third degree felony to a second degree felony and increases the crime's ranking in the offense severity ranking chart from a level 1 offense to a level 7 offense.
- c. Unlawful Compensation or Reward for Official Behavior: The bill increases the crime of unlawful compensation for official behavior from a third degree felony to a second degree felony and increases the crime's ranking from a level 1 offense to a level 7 offense.
- d. Corruption by Threat Against Public Servant: The bill increases the rank of the offense of corruption by threat against a public servant from a level 3 offense to a level 7 offense.

- e. Official Misconduct: The bill creates section 838.022, titled “official misconduct”<sup>6</sup> which provides that it is unlawful for a public servant with corrupt intent to obtain a benefit<sup>7</sup> for any person or to cause harm<sup>8</sup> 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.

The bill amends the definition of the term “corruptly” or “corrupt intent” in Chapter 838 to mean “done with knowledge that the act is wrongful”. For purposes of this section, a candidate is not included within the term “public servant”.

A violation of this section is a second degree felony and is ranked as a level 7 offense in the offense severity ranking chart.

f. Criminal Misuse of Official Position

The bill creates section 838.20, 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.

Any violation of this section is a second degree felony. The offense is ranked as a level 7 offense in the offense severity ranking chart.

g. Disclosure of Confidential Criminal Justice Information

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<sup>6</sup> The bill also repeals, section 839.25, the current “official misconduct” statute.

<sup>7</sup> The bill amends the current definition of “benefit” to include “any commission, gift, gratuity, property, commercial interest, or any other thing of economic value.”

<sup>8</sup> The term “harm” is amended to mean “pecuniary or other 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.



The bill creates section 838.21 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<sup>9</sup> 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.

- h. Bid-tampering: The bill creates section 838.23 which prohibits a public servant, with corrupt intent to influence or attempt to influence the competitive bidding<sup>10</sup> process undertaken by any 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.
  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.

Also, 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.

Further, 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. It is also 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 above provisions commits a second degree felony. The offense is ranked as a level 7 offense in the offense severity ranking chart.

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<sup>9</sup> Criminal intelligence information is defined 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. Sec. 119.011(3)(a), F.S. Criminal investigative information means 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. Sec. 119.011(3)(b), F.S.

<sup>10</sup> HB 1973 defines the term "bid" to include a response to an "invitation to bid" or "request for proposal".

**D. SECTION-BY-SECTION ANALYSIS:**

Section 1: Amends s. 16.56, F.S.; granting the Office of Statewide Prosecution the authority to investigate and prosecute any violation of chapter 838.

Section 2: Amends s. 287.133; amending procedures for department upon receipt of information regarding a finding of guilt against a person of a public entity crime.

Section 3: Amends s. 837.02;

Section 4: Provides that act may be cited as the "Citizens' Right to Honest Government Act".

Section 5: Amends s. 838.014; amending definitions of "benefit", "corruptly", "harm", "public servant".

Section 6: Amends s. 838.015; increases bribery from a third degree felony to a second degree felony.

Section 7: Creates s. 838.022, 838.20 and 838.23; creating offenses of official misconduct, criminal misuse of official position, disclosure or use of confidential criminal justice information and bid tampering.

Section 8: Amends s. 837.02 relating to perjury in an official proceeding by a public servant.

Section 9: Amends s. 921.0022 to rank offenses in the offense severity ranking chart of the Criminal Punishment Code.

Section 10: Repeals s. 839.25, Fla. Stat.

Section 11: Provides effective date.

**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:

The Criminal Justice Estimating Conference has determined that SB 946, by Senator Sebesta, which is similar to this bill will have an indeterminate with minimal expected impact on the Department of Corrections.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

HB 1973 does not require local governments to expend funds or to take any action requiring the expenditure of funds. Therefore, it is exempt from the provisions of Article VII, Section 18 of the Florida Constitution.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties 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:

It is possible that the section of the bill relating to "official misconduct" may be challenged on constitutional grounds. 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 office. The word "corrupt" was defined as "done with knowledge that the act is wrongful and with improper motive". The Court found:

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." Id. at 308.

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, therefore, by the statute. The 'corruption' element, as defined, does nothing to cure the statute's susceptibility to arbitrary application." See also, State v. Jenkins, 469 So.2d 733 (Fla. 1985).

Like the official misconduct that was struck down in DeLeo, the 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 statute struck down in DeLeo. Given the greater specificity, It is probably less likely that a court will find the new language susceptible to arbitrary application.

**B. RULE-MAKING AUTHORITY:**

N/A

**C. OTHER COMMENTS:**

N/A

**VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:**

Representative Ball offered four amendments at the March 15, 2000 of the Committee on Crime & Punishment. The first amendment changed the term public "official" to the term public "officer" to make it consistent with the rest of the bill. The second amendment amends the section of the bill dealing with criminal misuse of official position to change the term "public servant" to the term "public officer or public employee" to make the term consistent with the rest of the section. The third and fourth amendments correct inconsistencies in the section of the bill dealing with the convicted vendor list to clarify that the burden will be on the vendor who has been convicted of a public entity crime to remove the vendor's name from the convicted vendor list. The amendments were adopted by the committee.

**VII. SIGNATURES:**

**COMMITTEE ON CRIME & PUNISHMENT:**

Prepared by:

Staff Director:

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Trina Kramer

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David De La Paz