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DATE: February 22, 2001

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIME PREVENTION, CORRECTIONS & SAFETY
ANALYSIS**

BILL #: CS/HB 3

RELATING TO: Citizens' Right to Honest Government Act

SPONSOR(S): Committee on Crime Prevention, Corrections & Safety and Representative(s) Ball

TIED BILL(S): None

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

- (1) STATE ADMINISTRATION YEAS 4 NAYS 0
- (2) CRIME PREVENTION, CORRECTIONS & SAFETY YEAS 8 NAYS 0
- (3) FISCAL POLICY & RESOURCES
- (4) COUNCIL FOR SMARTER GOVERNMENT
- (5)

I. SUMMARY:

On September 15, 1999, Governor Bush established the Public Corruption Study Commission. The members were asked to complete a comprehensive review of current laws, policies, and procedures related to Florida's response to public corruption and prepare specific recommendations. This committee substitute includes many of the recommendations of the commission. This committee substitute:

- Creates the offense of "official misconduct" in Chapter 838, F.S., to prohibit 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.
- Creates the offense of "criminal misuse of official position" to prohibit a public officer or public employee from corruptly using their official position or any public property to establish a business relationship between the their 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.
- Creates the offense of "disclosure or use of confidential criminal justice information" to prohibit a public servant, with the intent to obstruct a criminal investigation, from disclosing active criminal investigative or intelligence information when such information is not available to the public; punishable as a third degree felony.
- Creates the second degree felony offense of "bid tampering".
- 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. It also increases the penalties for bribery and unlawful compensation for official behavior.

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 committee substitute creates new criminal penalties and increases the penalties for certain existing crimes.

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.

2. Chapter 839 - Offenses by Public Officers and Employees

a. Former Official Misconduct Statute

Before 1978, the public misconduct statute, Chapter 839, F.S., 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;
- (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 although the violation had to be committed with corrupt intent, that 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, 308 (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, or causes another to falsify, 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. s. 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 servant¹, corruptly² to request, solicit, accept, or agree to accept for himself or herself or another, any pecuniary or other benefit³ 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." s. 838.015, F.S.; *Donnelly v. State*, 693 So.2d 125 (Fla. 1st DCA 1997). 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, or might by law be brought before the public servant;
4. The public servant possessed jurisdiction over the matter; or

¹ 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 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, 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." 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." s. 838.014(4), F.S.

² 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." s. 838.014(6), F.S.

³ 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." s. 838.014(1), F.S.

5. The public servant's official position was necessary to achieve the person's purpose.
See s. 838.015, F.S.

b. Unlawful Compensation or Reward for Official Behavior

Section 838.016, F.S., states that 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 nonperformance 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. s. 838.016, F.S.

4. Perjury in an Official Proceeding

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. 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. Second Degree and Third Degree Felonies

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; a third degree felony is punishable by a term of imprisonment not to exceed 5 years, and a maximum fine of \$5,000.

C. EFFECT OF PROPOSED CHANGES:

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. s. 16.56,

F.S. This committee substitute gives the office the authority to investigate any violation of chapter 838, F.S.

Perjury in an Official Proceeding: This committee substitute amends s. 837.02, F.S., to add to the offense of 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. This crime is a second degree felony and ranked as a level 7 offense in the offense severity ranking chart of the Criminal Punishment Code, chapter 775, F.S., and s. 921.0022, F.S.

Chapter 838 - Bribery; Misuse of Public Office:

Definition of "Benefit": This committee substitute deletes the definition of "pecuniary benefit" and adds that language to the definition of "benefit" in s. 838.014, F.S.: "including any commission, gift, gratuity, property, commercial interest, or any other thing of economic value."

Definition of "Corruptly" or "with corrupt intent": This committee substitute amends the definition of "corruptly" in s. 838.014, F.S., to state that "corruptly" or "with corrupt intent" means "done with knowledge that the act is wrongful."

Definition of "Harm": This committee substitute amends the definition of "harm" in s. 838.014, F.S., to include "pecuniary" in the description of the type of loss involved.

Definition of "Public Servant": This committee substitute amends the definition of "public servant" in s. 838.014, F.S.⁴, 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, . . . employee of a *nongovernmental entity* that is authorized by law or contract to perform a governmental function or provide a governmental service" to the definition of public servant appears to include private entities and employees traditionally not considered to be public servants. Furthermore, what activities may be considered government functions or services is subject to significantly varied opinions.

Bribery: This committee substitute amends s. 838.015, F.S., to increase the penalty for bribery from a third degree felony to a second degree felony, and amends s. 921.0022, F.S., to increase the crime's ranking in the offense severity ranking chart from a level 1 offense to a level 7 offense.

⁴ Currently the statute defines "public servant" 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, 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." 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." S. 838.014(4), F.S.

Unlawful Compensation or Reward for Official Behavior: This committee substitute amends s. 838.016, F.S., to increase the penalty for unlawful compensation for official behavior from a third degree felony to a second degree felony, and amends s. 921.0022, F.S., to increase the crime's ranking from a level 1 offense to a level 7 offense.

Official Misconduct: This committee substitute creates s. 838.022, titled "official misconduct", which provides that it is unlawful for a public servant with corrupt intent⁵ to obtain a benefit⁶ for any person or to cause harm⁷ 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 committee substitute provides that a violation of s. 838.022 is a second degree felony, and amends s. 921.0022, F.S., to assign the crime to a level 7 offense in the offense severity ranking chart.

This committee substitute 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".

The committee substitute also repeals the current official misconduct statute, section 839.25, F.S.

Criminal Misuse of Official Position: This committee substitute creates s. 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.

CS/HB 3 provides that any violation of s. 838.20 is a second degree felony. This committee substitute amends s. 921.0022, F.S., to assign the offense to a level 7 offense in the offense severity ranking chart.

⁵ This committee substitute defines "with corrupt intent" to mean "done with knowledge that the act is wrongful."

⁶ This committee substitute amends the current definition of "benefit" to include "any commission, gift, gratuity, property, commercial interest, or any other thing of economic value."

⁷ This community substitute amends the term "harm" to include "pecuniary or other loss."

Disclosure of Confidential Criminal Justice Information: This committee substitute creates s. 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 information⁸ 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.

Bid-tampering: This committee substitute creates s. 838.22, which prohibits a public servant, with corrupt intent to influence or attempt to influence the competitive bidding⁹ 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; 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 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.

Further, under this section, 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 provisions of s. 838.22 commits a second degree felony. This committee substitute amends s. 921.0022, F.S., stating that the offense is ranked as a level 7 offense in the offense severity ranking chart.

Status of Confidential Informants: This committee substitute creates s. 838.23, which provides that persons who provide information regarding suspected criminal violations by public servants, pursuant to s. 838.014, will be considered a confidential informant or source under s. 119.07(3)(c), F.S.¹⁰ Any information revealing the identity of the confidential informant or source is exempt from public records disclosure.

⁸ 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." s. 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." s. 119.011(3)(b), F.S.

⁹ This committee substitute defines the term "bid" to include a response to an "invitation to bid" or "request for proposal".

¹⁰ 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."

Attorney's Fees: This committee substitute creates s. 838.24, 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.

This committee substitute repeals ss. 838.15 and 838.16, F.S., on commercial bribery. 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 that the crime was "simply too open-ended to limit prosecutorial discretion in any reasonable way." *Id.* The court held that the statute "invites arbitrary application of the law." *Id.* Section 838.16, F.S., provides the penalties for violation of s. 838.15, F.S.

This committee substitute amends ss. 112.3173(2)(e), and 121.091, F.S., to conform with the above repeals.

This committee substitute provides an effective date of October 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Provides that the act may be cited as the "Citizens' Right to Honest Government Act."

Section 2: Amends s. 16.56, F.S.; granting the Office of Statewide Prosecution the authority to investigate and prosecute any violation of chapter 838.

Section 3: Amends s. 838.014, F.S.; amending definitions of "benefit", "corruptly", "harm", "public servant."

Section 4: Amends s. 838.015, F.S.; increasing the penalty for bribery from a third degree felony to a second degree felony.

Section 5: Amends s. 838.016, F.S.; increasing the penalty for unlawful compensation or reward for official behavior from a third degree felony to a second degree felony.

Section 6: Creates ss. 838.022, 838.20, 838.21 and 838.24; providing for offenses of official misconduct, criminal misuse of official position, disclosure or use of confidential criminal justice information and bid tampering. Creates ss. 838.22 and 838.23; providing for the status of confidential informants and attorney's fees.

Section 7: Amends s. 837.02, F.S.; providing for the offense of perjury in an official proceeding by a public servant in regard to any material matter that relates to his or her duties or actions as a public servant, punishable as a felony of the second degree.

Section 8: Amends s. 921.0022, F.S.; ranking offenses in the offense severity ranking chart of the Criminal Punishment Code.

Section 9: Repeals ss. 838.15 and 838.16, F.S., on commercial bribery.

Section 10: Amends ss. 112.3173(2)(e) and 121.091(5)(f), F.S., to conform language.

Section 11: Provides effective date of October 1, 2001.

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:

On February 22, 2001, the Criminal Justice Impact Conference determined that HB 3 will 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 committee substitute 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 committee substitute 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 committee substitute does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The section of the committee substitute 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.

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. The 'corruption' element, as defined, does nothing to cure the statute's susceptibility to arbitrary application." *Id.*; See also *State v. Jenkins*, 469 So.2d 733 (Fla. 1985). (holding that s. 839.25(1)(a), F.S., was unconstitutional because it was vague and subject to arbitrary and capricious application).

Like the official misconduct that was struck down in *DeLeo*, this committee substitute 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. *Bill Analysis for HB 1973 (PCB 06)*, Committee on Crime & Punishment (March 15, 2000).

B. RULE-MAKING AUTHORITY:

None

C. OTHER COMMENTS:

Last year, the Committee on Crime and Punishment drafted a proposed committee bill, PCB 06, incorporating many of the Public Corruption Study Commission's recommendations. The PCB was sponsored by the Committee on Crime and Punishment and Representative Ball, and numbered HB 1973. Senator Sebesta introduced a similar bill, SB 946. HB 1973 died on the calendar; SB 946 died in returning messages.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 25, 2001, the Committee on State Administration adopted three amendments. The bill, as amended, was reported favorably. The first amendment clarifies which public servants are affected in the criminal misuse of official position offense. The second amendment adds the term "reasonable" to the provision awarding of attorney's fees and clarifies language. The third amendment is a technical amendment that deletes references to non-existing statutory cites.

On February 22, 2001, the Committee on Crime Prevention, Corrections and Safety adopted two amendments. The first amendment, sponsored by Rep. Stansel clarified that an employee of a nongovernmental entity is only a "public servant" to the extent that the individual's conduct relates to the performance of the governmental function or provision of the governmental service. The second amendment repeals the current official misconduct statute, section 839.25 which is being replaced in the

STORAGE NAME: h0003s1.cpcs.doc

DATE: February 22, 2001

PAGE: 11

bill with the newly created section 838.022. The bill with the five amendments was made a committee substitute.

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:

Jennifer D. Krell

Staff Director:

J. Marleen Ahearn

AS REVISED BY THE COMMITTEE ON CRIME PREVENTION, CORRECTIONS & SAFETY:

Prepared by:

Trina Kramer

Staff Director:

David De La Paz
