

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB RCEC 16-05 Public Corruption

**SPONSOR(S):** Rules, Calendar & Ethics Committee

**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 582

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rules, Calendar & Ethics Committee	19 Y, 0 N	Aziz	Birtman

### SUMMARY ANALYSIS

Chapter 838, F.S., establishes a number of criminal offenses related to public officials or employees and the performance of their official duties, including bribery, unlawful compensation for official behavior, official misconduct, and bid tampering. In order to be convicted of an offense under ch. 838, F.S., one must act “corruptly” or “with corrupt intent,” which is defined as “acting knowingly and dishonestly for a wrongful purpose.”

The offenses defined in ch. 838, F.S., only apply to the following persons and those who solicit such persons:

- Any officer or employee of a state, county, municipal, or special district agency or entity;
- Any legislative or judicial officer or employee;
- Any person, except a witness, who acts as a general or special magistrate, receiver, auditor, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
- 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.

The bill expands the applicability of offenses in ch. 838, F.S., to officers and employees of a public entity created or authorized by law. Also, the bill makes public contractors eligible for prosecution of official misconduct. The bill defines public contractors as any person, or any officer or employee of a person, who has entered into a contract with a governmental entity. Additionally, the bill widens the scope of bid tampering to include public servants and public contractors who have contracted with a governmental entity to assist in a competitive procurement.

The bill also revises the level of intent for offenses under ch. 838, F.S., from “corruptly” or “with corrupt intent” to “knowingly and intentionally.”

Furthermore, the bill provides that public servants and public contractors may be reimbursed in the same manner as provided by common law for any attorney’s fees incurred defending public corruption charges.

The bill does not appear to have a fiscal impact on local governments. The bill may have an indeterminate prison bed impact on the Department of Corrections.

The bill is effective October 1, 2016.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

Public corruption is a breach of trust by a government official often with the aid of a private sector accomplice.<sup>1</sup> From 2003-2013, Florida was ranked third in the country for federal public corruption convictions at the local, state, and federal level.<sup>2</sup> In 2012, Integrity Florida<sup>3</sup> ranked the state as number one in government corruption.<sup>4</sup>

Florida law provides for two methods to fight public corruption in the state. The Code of Ethics applies administrative and civil penalties to government actors. Chapter 838, F.S., provides criminal penalties to both the public servant and those who solicit a public servant. Civil violations under the Code of Ethics require a lesser standard of proof than any criminal penalties under ch. 838, F.S.

#### Chapter 838, F.S., Bribery; Misuse of Public Office

Chapter 838, F.S., establishes a number of criminal offenses related to public officials or employees and the performance of their official duties, including bribery,<sup>5</sup> unlawful compensation for official behavior,<sup>6</sup> official misconduct,<sup>7</sup> and bid tampering.<sup>8</sup> An offense under ch. 838, F.S., requires that a person act “corruptly” or “with corrupt intent”, which is defined as “acting knowingly and dishonestly for a wrongful purpose.”<sup>9</sup> A person convicted of an offense defined in ch. 838, F.S., is:

- Convicted of a second degree<sup>10</sup> or third degree<sup>11</sup> felony, depending on the offense;
- May be ordered to pay restitution; and
- Must perform 250 hours of community service.<sup>12</sup>

The offenses in ch. 838, F.S., apply to both public servants and the private party soliciting the public servant. Chapter 838, F.S., defines public servant as:

- Any officer or employee of a state, county, municipal, or special district agency or entity;
- Any legislative or judicial officer or employee;
- Any person, except a witness, who acts as a general or special magistrate, receiver, auditor, arbitrator, umpire, referee, consultant, or hearing officer while performing a governmental function; or
- 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.<sup>13</sup>

#### Bribery

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<sup>1</sup> FBI, *Public Corruption: Why It's Our #1 Criminal Priority*, [https://www.fbi.gov/news/stories/2010/march/corruption\\_032610](https://www.fbi.gov/news/stories/2010/march/corruption_032610) (last visited Jan. 7, 2016).

<sup>2</sup> Alan Stonecipher and Ben Wilcox, *Florida's Path to Ethics Reform*, Integrity Florida, available at <http://www.integrityflorida.org/wp-content/uploads/2016/01/Floridas-Path-to-Ethics-Reform-final.pdf>.

<sup>3</sup> Founded in 2012, Integrity Florida is a nonpartisan, nonprofit research institute and government watchdog whose mission is to promote integrity in government and expose public corruption. *About Integrity Florida*, <http://www.integrityflorida.org/about-us/> (last visited Jan. 7, 2016).

<sup>4</sup> William March, *Study ranks Florida No. 1 in government corruption*, THE TAMPA TRIBUNE (May 31, 2012) <http://www.tbo.com/ap/politics/study-ranks-florida-no--in-government-corruption-409916>.

<sup>5</sup> s. 838.015, F.S.

<sup>6</sup> s. 838.016, F.S.

<sup>7</sup> s. 838.022, F.S.

<sup>8</sup> s. 838.22, F.S.

<sup>9</sup> s. 833.014(4), F.S.

<sup>10</sup> A second degree felony is punishable by up to 15 years imprisonment and a \$10,000 fine. Sections 775.082 and 775.083, F.S.

<sup>11</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>12</sup> s. 838.23, F.S.

<sup>13</sup> s. 838.014(6), F.S.

Section 838.015, F.S., states it is a second degree felony for anyone to corruptly 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 not authorized by law 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.

#### *Unlawful Compensation or Reward for Official Behavior*

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

- For the past, present, or future performance, nonperformance or violation of any act or omission; or
  - For the past, present, or future exertion of any influence upon or with 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 performance of a public duty.

#### *Official Misconduct*

Section 838.022(1), F.S., 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:

- Falsify, or cause another person to falsify, any official record or official document;
- Conceal, cover up, destroy, mutilate, or alter any official record or official document or cause another person to perform such an act; or
- 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.

An official record or official document includes only public records.<sup>14</sup> Any person who violates this section commits a felony of the third degree.

#### *Bid Tampering*

Section 838.22(1), F.S., provides that it is a second degree felony for a public servant, with corrupt intent to influence or attempt to influence the competitive bidding process undertaken by any state, county, municipal, or special district agency, or any other public entity, for the procurement of commodities or services, to:

- Disclose material information concerning a bid or other aspects of the competitive bidding process when such information is not publicly disclosed; or
- Alter or amend a submitted bid, documents or other materials supporting a submitted bid, or bid results for the purpose of intentionally providing a competitive advantage to any person who submits a bid.

Additionally, s. 838.22(2), F.S., provides that it is a second degree felony 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. Any person who knowingly agrees, conspires, combines, or confederates, directly or indirectly, with a public servant to tamper bids through these actions commits a second degree felony.<sup>15</sup>

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<sup>14</sup> s. 838.022(2)(b), F.S.

<sup>15</sup> s. 838.22(3), F.S.

## **2010 Statewide Grand Jury Recommendations**

In 2010, upon the petition of then Governor Charlie Crist, a state-wide grand jury was impaneled to examine criminal activity of public officials who abused their office and whether prosecutors have sufficient resources to combat corruption.<sup>16</sup> The grand jury identified deficiencies in current laws and made detailed recommendations to improve anti-corruption initiatives. Their recommendations included expanding the definition of “public servant” under ch. 838, F.S., and removing the requirement of “corrupt intent” from offenses in ch. 838, F.S. and replacing it with “knowingly or intentionally.”

### **Definition of Public Servant**

The Statewide Grand Jury found that “many of our governmental duties have been shifted to private or semi-private entities and actors who do not fall within the existing narrow definition and thus escape prosecution under anti-corruption laws.”<sup>17</sup> The grand jury listed examples of when non-governmental entities, performing governmental functions, acted corruptly but evaded charges due to them not fitting within the definition of public servant in ch. 838, F.S., such as a private, nonprofit corporation that was accepting cash to falsify community service hours of probationers.<sup>18</sup>

### **Effect of the Bill — Definition of Public Servant**

The bill expands the population of persons subject to criminal sanction under ch. 838, F.S., by amending the definition of public servant, creating a new definition of public contractor applicable to official misconduct, and including public contractors who contract with a governmental entity to assist in competitive procurement in bid tampering offenses. The bill redefines the term “public servant” as any officer or employee of a governmental entity, including any executive, legislative, or judicial branch. The bill creates a new definition for governmental entity, which is defined as:

- An agency or entity of the state,
- A county,
- A municipality,
- A special district, or
- Any other public entity created or authorized by law.

Thus, the bill makes the criminal offenses of bribery, unlawful compensation, official misconduct, and other offenses in ch. 838, F.S., applicable to officers or employees of public entities created or authorized by law, which includes but is not limited to officers and employees of Citizens Property Insurance Corporation,<sup>19</sup> Prison Rehabilitative Industries and Diversified Enterprises, Inc.,<sup>20</sup> and Enterprise Florida, Inc.<sup>21</sup>

Additionally, the bill expands who may be prosecuted for official misconduct. The bill creates a new definition of public contractor, which is defined as any person, officer, or employee of a person, who has entered into a contract with a governmental entity. The term “person” in the definition of public contractor means individuals, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations.<sup>22</sup> Under the amended offense of official misconduct, it is unlawful for a public servant or a public contractor to falsify, or cause another person to falsify any official record or official document or to conceal, cover up, destroy, mutilate, or alter any official record or official document, except as authorized by law or contract.

The bill expands the offense of bid tampering to public contractors who have contracted with a governmental entity to assist in a competitive procurement. If a public contractor who has contracted

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<sup>16</sup> Nineteenth Statewide Grand Jury, A Study of Public Corruption in Florida and Recommended Solutions, Case No. SC 09-1910, December 17, 2010. Available online at: [http://myfloridalegal.com/webfiles.nsf/WF/JFAO-8CLT9A/\\$file/19thSWGJInterimReport.pdf](http://myfloridalegal.com/webfiles.nsf/WF/JFAO-8CLT9A/$file/19thSWGJInterimReport.pdf) (last visited on Jan. 7, 2016).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> s. 627.351(6), F.S.

<sup>20</sup> s. 946.5025, F.S.

<sup>21</sup> s. 288.901, F.S.

<sup>22</sup> s. 1.01(3), F.S.

with a governmental entity to assist in competitive procurement attempts to influence a competitive solicitation by making a disclosure, except as authorized by law, of material information concerning a vendor's response when such information is not public disclosed, then that public contractor commits a second degree felony. The same prohibition applies to public contractors who alter or amend any evaluation results relating to the competitive solicitation for the purpose of intentionally providing a competitive advantage to any person who submits a bid.

The bill reenacts several sections of law to incorporate amendments by the bill to the definition of public servant.

### **Mens Rea**

Mens rea is "the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime."<sup>23</sup> At common law, all crimes consisted of both an act or omission coupled with a requisite guilty knowledge or mens rea.<sup>24</sup> The general rule was that a scienter<sup>25</sup> or mens rea was a necessary element in the indictment and proof of every crime.<sup>26</sup> Subsequently, this rule is generally followed in regard to statutory crimes.<sup>27</sup> Standard criminal mens rea requirements include intentionally, knowingly, recklessly, or negligently.<sup>28</sup>

The Statewide Grand Jury recommended removing the additional element of "corruptly" or "with corrupt intent" from the offenses of bribery, unlawful compensation, official misconduct and bid tampering.<sup>29</sup> The grand jury found the scienter of "acting knowingly and dishonestly for a wrongful purpose"<sup>30</sup> limits the "effectiveness of Florida's criminal anti-corruption laws by placing an extra burden beyond the requirement of criminal intent that is standard in criminal offenses."<sup>31</sup> Often, by requiring "corrupt intent," the prosecution must provide testimony from one of the actors involved in order to prove they acted with a wrongful purpose. The grand jury suggested the standard criminal burden of intentionally or knowingly be used in place of corrupt intent.

### **Effect of the Bill — Mens Rea**

The bill repeals the element of corrupt intent from the offenses of bribery, unlawful compensation for official behavior, official misconduct, and bid tampering. The bill replaces the corrupt element with the standard element of "knowingly and intentionally." Under the bill, a prosecutor will no longer have to show a defendant acted dishonestly for a wrongful purpose by accepting a bribe but rather that the defendant knowingly and intentionally accepted the bribe.

### **Attorney's Fees**

Under common law, a public officer who successfully defends charges of misconduct while in office is entitled to be reimbursed for his or her attorney's fees accrued defending said charges.<sup>32</sup> The reimbursement applies regardless if the official is defending their conduct in either civil or criminal proceedings.<sup>33</sup> However, in order to be entitled to attorney's fees, the litigation must arise out of or in connection with the performance of their official duties and serve a public purpose.<sup>34</sup> Inherent in the requirement of a "public purpose" is that the public officer was not advancing their own private pecuniary interests.<sup>35</sup> Thus, in order to be reimbursed, the public officer must successfully defend themselves against charges and demonstrate their actions were for a public purpose.

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<sup>23</sup> BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>24</sup> *State v. Giorgetti*, 868 So. 2d 512, 515 (Fla. 2004).

<sup>25</sup> Black's Law Dictionary defines scienter as "a degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly, esp. as a ground for civil damages or criminal punishment." BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>26</sup> *Chicone v. State*, 684 So. 2d 736, 741 (Fla. 1996).

<sup>27</sup> *Id.*

<sup>28</sup> § 2.02. General Requirements of Culpability., Model Penal Code § 2.02.

<sup>29</sup> Nineteenth Statewide Grand Jury, *supra* note 26.

<sup>30</sup> s. 838.014(4), F.S.

<sup>31</sup> Nineteenth Statewide Grand Jury, *supra* note 26.

<sup>32</sup> *Thornber v. City of Ft. Walton Beach*, 568 So. 2d 914, 916 (Fla. 1990).

<sup>33</sup> *Chavez v. City of Tampa*, 560 So. 2d 1214, 1217 (Fla. 2d DCA 1990).

<sup>34</sup> *Thornber*, 568 So. 2d at 916.

<sup>35</sup> *Chavez*, 560 So. 2d at 1217.

### **Effect of the Bill — Attorney's Fees**

The bill provides public servants and public contractors may recover attorney fees in the same manner as provided by general law for public officers and employees with respect to the enforcement of public corruption offenses in ch. 838, F.S.

#### **B. SECTION DIRECTORY:**

Section 1. Amends s. 838.014, F.S., relating to definitions.

Section 2. Amends s. 838.015, F.S., relating to bribery.

Section 3. Amends s. 838.016, F.S., relating to unlawful compensation or reward for official behavior.

Section 4. Amends s. 838.022, F.S., relating to official misconduct.

Section 5. Amends s. 838.22, F.S., relating to bid tampering.

Section 6. Creating s. 838.24, F.S., relating to attorney fees.

Section 7. Reenacts s. 112.534, F.S., relating to failure to comply; official misconduct.

Section 8. Reenacts s. 117.01, F.S., relating to appointment, application, suspension, revocation, application fee, bond, and oath.

Section 9. Reenacts s. 817.568, F.S., relating to criminal use of personal identification information.

Section 10 -11. Reenacts s. 921.0022, F.S., relating to the Criminal Punishment Code; offense severity ranking chart.

Section 12. Provides an effective date of October 1, 2016.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill does not appear to have any impact on state revenues.

##### **2. Expenditures:**

The bill expands those who are eligible for prosecution for felony offenses in ch. 838, F.S., and thus the bill may have an indeterminate prison bed impact on the Department of Corrections.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

##### **1. Revenues:**

The bill does not appear to have any impact on local government revenues.

##### **2. Expenditures:**

The bill does not appear to have any impact on local government expenditures.

#### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**