
Analysis of House Bill 7071

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Since its origin, Chapter 838 of the Florida Statutes has attempted to tackle the ongoing problem of corruption in the public office. Specifically, Chapter 838 deals in preventing misuse of the public office towards gaining access to public office or influencing political decisions. In his article discussing the relationship between bribery and politics, Harvard Law professor Daniel Hays Lowenstein stated:

“It has often been said that social scientists give too little attention to official bribery and corruption. Whatever may be the sins of omission of the social scientists in this regard, they pale beside those of the legal scholars, who have ignored the subject almost entirely. This neglect cannot be excused on the ground that acts of bribery or prosecutions for bribery are rare. They are not.”¹

Lowenstein goes on to explain that while the rules and regulations surrounding bribery are, in light of their original purpose, fixed and clear, the boundaries surrounding corruption in the public sector do not encompass all improper conduct.² The implementation of House Bill 7071 passed on January 27, 2016, aims to correct this exact problem.³

Up until the proposition of HB 7071, no clear-cut definitions existed to determine exactly what conduct Chapter 838 was attempting to deter. For example, a “public figure” may not seem to be such an ambiguous term, but when ambiguities are thrown into the definitions of terms already open to wide varieties of interpretation, the law was becoming increasingly ineffective. The law as previously constructed stated:

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.⁴

As it stands, Chapter 838 establishes that it is a criminal offense for any of the above-named parties to be solicited, particularly when such solicitation deals in “bribery, unlawful compensation for official behavior, official misconduct, and bid tampering.”⁵

Special Agent Patrick Bohrer with the FBI explains that corruption of public officials is a pressing issue in the United States today, namely because corrupt public officials can detriment national safety, public trust, and confidence in the U.S. government as a whole.⁶ Agent Bohrer has also explained that corruption can be found in almost every level of government throughout the country, tracing some instances from state and federal legislatures all the way down to members of school boards.⁷

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I. PUBLIC SERVANTS

HB 7071 aims to correct the problem of corruption throughout the United States, first and foremost by expanding the scope of the law and whom it is aimed towards. As stated above, Chapter 838 of the Florida Statutes previously applied to officers or employees of state county, municipal, or special agencies; legislative and judicial employees; and a variety of other specifically designated positions. HB 7071 goes a step further, expanding the reach of Chapter 838 to include officer and employees of a public entity created or authorized by the bill, as well as making public contractors eligible for prosecution for misconduct outlined by the bill and Chapter 838.⁸

Beginning with altering the definitions for those most directly affected by the law, HB 7071 entirely removes part of the definition of “governmental entity” relating to exactly what corrupt intent means.⁹ Instead, HB 7071 provides specific, direct definitions:

Governmental Entity: an agency or entity of the state, a county, municipality, or special district or any other public entity created or authorized by law

Public Contractor: any person, as defined above, who has entered into a contract with a governmental entity; or any officer or employee of a person, as defined above, who has entered into a contract with a governmental entity

*This definition only applies to Chapter 838 Sections 022 and 22, relating to ****

Public Servant: any officer or employee of a governmental entity, including:

- a. Any executive, legislative, or judicial branch officer or employee
- b. Any person, except a witness, who acts in outlined positions while performing a governmental function
- c. A candidate for election or appointment to an officer position.¹⁰

The intent of expanding the scope of Chapter 838 lies in opening eligibility for prosecution for more employees of the public, which in turn aims to reduce corruption as a whole. In addition to expanding this scope, HB 7071 further widens to scope of prosecution for bid tampering, including public servants and public contractors on its list of those eligible for prosecution for misconduct. By doing so, bid tampering is prohibited to more individuals, hopefully eliminating bid tampering from the public sector altogether.¹¹

After HB 7071 expands the scope of which individuals the law should target, lawmakers delve into alterations of each crime or act of misconduct that Chapter 838 aims to eliminate, beginning with bribery.

II. BRIBERY

Under the law as previously stated, bribery was defined as corruptly giving, offering, or promising to any public servant any benefit that is unauthorized by law with the intent or purpose to influence the performance of omission of a certain action.¹² The previous definition also applied in the converse, prohibited public servants from bribing others to achieve any means to an end.¹³

Primarily, HB 7071 takes issue with the term “corruptly” as applied in Chapter 838.015. In its original construction, Chapter 838 defines “corruptly” as “acting knowingly and dishonestly for a wrongful purpose.”¹⁴ This type of definition leaves a great amount of room for interpretation, and when dealing in criminal law the level of intent can be vital to determining precisely what crime¹⁵ was committed. The purpose of establishing a state of mind for every crime committed stands to assist with indictment and proof of every crime. The grand jury assigned to analyze HB 7071 felt that the language of “corruptly” was not as effective as “knowing and intentional”, and placed additional and unnecessary burdens on prosecutors to establish whether or not the accused committed the crime. HB 7071 aims to correct that ambiguity, beginning with changing the language outlining crimes from “corruptly” to “knowingly and intentionally”. By changing the language of the statute, prosecution of public servants will have a more defined outline – were they doing something wrong and did they know that what they were doing was wrong? Language of the law will now read:

“Bribery means to knowingly and intentionally give, offer, or promise to any public servant, or, if a public servant, to knowingly and intentionally 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.”¹⁶

III. UNLAWFUL COMPENSATION OR REWARD FOR OFFICIAL BEHAVIOR

Under its previous construction, Chapter 838 of the Florida Statutes established that 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.¹⁷ Application of 838.016 applied to past, present, and future performance, nonperformance, or violations of acts or omissions, as well as past, present, and future influence upon public servants.¹⁸

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Again, under HB 7071, the law will now change “corruptly” in all of its applications to “knowingly and intentionally”. By doing so, the intent becomes clearly inherent in the act itself. HB 7071’s language will allow Chapter 838.016 to read as:

It is unlawful for any person to knowingly and intentionally give, offer, or promise to any public servant, or, if a public servant, to knowingly and intentionally request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty.¹⁹

Once similarity that was original within Chapter 838.016 that the bill retains is that this section is not applicable to “preclude a public servant from accepting rewards for services performed in apprehending any criminal.” In other words, the language is simply changed from “nothing herein shall be construed to” to “this section does not.”²⁰ This minor change acts to make the language of 838.016 more concrete, and establish that reward money for apprehending criminals is not considered part of the prohibition of unlawful compensation outlined by the Florida Statutes.

IV. OFFICIAL MISCONDUCT

Section 838.022(1) of the Florida Statutes previously established 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.²¹

Under this construction, an official record or official document includes only public records, and violation of this law is a third-degree felony. HB 7071 first expands the scope of which individuals are subject to prosecution for violating Chapter 838, included public contractors. As stated previously, the law also changes the criminal intent necessary for a Chapter 838 violation from “corrupt intent” to knowing and intentional. Additionally, “public servant” under this construction does not include candidates who are otherwise not public servants.²²

V. BID TAMPERING

“Bid”, for the purposes of Chapter 838, “includes a response to an ‘invitation to bid,’ ‘invitation to negotiate,’ ‘request for a quote,’ or ‘request for proposals.’”²³ As was previously written in Chapter 838, public servants could not, with corrupt intent, attempt to influence the bidding process.²⁴ The law further outlined all specific entities in which public servants were prohibited from tampering.

HB 7071 both shortens and lengthens the specifics of Chapter 838.22. Regarding intent, once again “corrupt” is altered to read “knowingly or intentionally”; indicating that there must be a desire or will to tamper with bids in question. HB 7071 expands the scope to include prohibition of contractors working with public entities in tampering with bids. Finally, outlined governmental groups in the previous reading of Chapter 838 stated “undertaken by any state, county, municipal, or special district agency, or any other public entity.”²⁵ Effectively shortening and clarifying whom this section affects, HB 7071 simply states, “undertaken by any governmental entity.” The directness of this statement, tied together with the rest of HB 7071, can be viewed as the lawmakers attempt to state exactly which persons the law affects – anyone within a government agency.

HB 7071 also proposes to change which information about bids can be disclosed, now including responses to bids and evaluation results, indicated higher regulations of the bidding process in the public sphere.²⁶ The remainder of the changes to 838.22 primarily involve adding those contracting with public servants to each subsection of the law, to ensure no confusion in that contractors are equally liable as the public servants themselves.²⁷

VI. EFFECTS

The first effect the bill set out was to take away the excess burden placed on prosecutors in proving intent. Under the new language of “knowingly and intentionally”, all the prosecution must prove is that the defendant knowingly and intentionally accepted the bribe, rather than prove the defendant did so with dishonest intent.²⁸

No fiscal ramifications are predicted for state governments, local governments, or the private sector.²⁹

Finally, the bill includes a list of 1st, 2nd, and 3rd degree felonies affected by the re-write of Chapter 838. The statutes are attached as a supplement to this document.

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VII. CONCLUSION

HB 7071 will have numerous effects on Chapter 838 of the Florida Statutes. While some of the said effects may seem minor, such as changing the requisite intent of a crime, in the long run HB 7071 aims to eliminate corruption from state and local government, creating a more honest, trustworthy Florida under its statutes.³⁰

¹ Daniel Hayes Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784 (1985).

² Daniel Hayes Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784 (1985).

³ Florida H. 7071, 118th Sess. (2016).

⁴ s. 838.014(6), F.S.

⁵ s. 838.22, F.S.

⁶ FBI, *Public Corruption: Why It's Our #1 Criminal Priority*, https://www.fbi.gov/news/stories/2010/march/corruption_032610

⁷ FBI, *Public Corruption: Why It's Our #1 Criminal Priority*, https://www.fbi.gov/news/stories/2010/march/corruption_032610

⁸ Florida H. 7071, 118th Sess. (2016).

⁹ Florida H. 7071, 118th Sess. (2016).

¹⁰ Florida H. 7071, 118th Sess. (2016).

¹¹ Florida H. 7071, 118th Sess. (2016).

¹² s. 838.015, F.S.

¹³ s. 838.015, F.S.

¹⁴ s. 838.014(4), F.S.

¹⁵ *Chicone v. State*, 684 So.2d 736 (Fla. 1996).

¹⁶ Florida H. 7071, 118th Sess. (2016).

¹⁷ s. 838.016, F.S.

¹⁸ s. 838.016, F.S.

¹⁹ Florida H. 7071, 118th Sess. (2016).

²⁰ s. 838.016, F.S.; Florida H. 7071, 118th Sess. (2016).

²¹ s. 838.022(1), F.S.

²² Indicating that unless a candidate for a public servant position is already involved otherwise in public servitude, he or she is not subjected to prosecution. Section 838.022(1), F.S.

²³ s. 838.014(2), F.S.

²⁴ s. 838.022(1), F.S.

²⁵ s. 838.022(1), F.S.

²⁶ Florida H. 7071, 118th Sess. (2016).

²⁷ Florida H. 7071, 118th Sess. (2016).

²⁸ Nineteenth Statewide Grand Jury, *supra* note 26.

²⁹ Per the conclusions of the Statewide Grand Jury designated to analyze House Bill 7071.

³⁰ House Bill 7071 includes a list of Florida criminal statutes, which have been attached to this document as a supplement.

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Legal Background

Admitted to Practice Law:

State of Florida, 1998

Commonwealth of Massachusetts, 1998

Supreme Court of the United States

United States Court of Appeals for the Eleventh Circuit

United States Court of Appeals for the First Circuit

United States District Court for the Northern District of Florida

United States District Court for the Middle District of Florida

United States District Court for the Southern District of Florida

United States District Court for the Massachusetts District

United States District Court for the Western District of Texas

United States District Court for the Eastern District of Kentucky (Pro Hac Vice)

United States District Court for the Southern District of Mississippi (Pro Hac Vice)

United States District Court for the Southern District of West Virginia (Pro Hac Vice)

United States District Court for the Eastern District of Washington (Pro Hac Vice)

Published Works:

Strategies for Defending Identity Theft Cases, Aspatore, 2012

Former Related Experience:

Prosecutor with the Office of the Miami-Dade State Attorney's Office

Trial Experience:

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Legal Background

Areas of Practice:

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Bar Admissions:

State of Florida

United States Court of Appeals for the Eleventh Circuit

United States District Court for the Northern District of Florida

United States District Court for the Middle District of Florida

United States District Court for the Southern District of Florida

Published Works:

Strategies For Defending Identity Theft Cases, Aspatore, 2012

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Areas of Practice:

State Appeals

Federal Appeals

State Post-Conviction Motions and Hearings

Federal Post-Conviction Motions and Hearings

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Bar Admissions:

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