
MEMORANDUM

TO: COMMISSIONERS
FROM: KATE FLACK
SUBJECT: WHISTLEBLOWER PROTECTION CODE
DATE: NOVEMBER 3, 2010

Follow-up to the Commission's October 6th, 2010 Meeting:

The Commission's October discussion regarding amendments to the City's Whistleblower Protection Code raised the following issues for staff follow-up:¹

1. Could the City amend the current ordinance to preclude the disclosure of a whistleblower's identity in all circumstances?

No, the City cannot amend SMC 4.20.800 *et seq* in a manner that would provide an employee a complete shield. The largest impediment is the Public Disclosure Act (PDA).

The PDA applies to all governmental records not specifically exempted within the PDA or where disclosure of records is specifically prohibited under another State statute. Some departments within State government have statutory authority to prohibit disclosure and ensure whistleblower confidentiality.²

To ensure the confidentiality of a City whistleblower and preclude disclosure under the PDA, the State legislature would need to amend one of two existing State laws, and in one instance, further action by the City Council would be needed. Here are possible scenarios:

- i) The PDA is amended by the State legislature to exempt from disclosure the identity of persons reporting in good faith under RCW 42.41 – Local governmental whistleblower code and all local programs developed and codified pursuant to 42.41.050.³ If this were to occur, no further action by the City Council would be needed.

¹ See attached, Section I - Proposed Amendments to the City of Seattle Whistleblower Protection Code

² See, e.g., RCW 43.70.075 (person's identity remains confidential when reporting improper care by a health care professional); RCW 49.17.110 (person's identity remains confidential when reporting a violation of any Labor and Industries safety or health standard).

³ RCW 42.41.050 "Any local government that has adopted a program for reporting alleged improper governmental actions and adjudicating retaliation resulting from such reporting shall be exempt for this chapter if the program meets the intent of this chapter.

- ii) The Local Government Whistleblower Protection statute⁴ could be amended to read identically to the State Whistleblower Protection Act at RCW 42.40.040(2), which provides:

“ ... The identity or identifying characteristics of a whistleblower is confidential at all times unless the whistleblower consents to disclosure by written waiver or by acknowledging his or her identity in a claim against the state for retaliation. In addition, the identity or identifying characteristics of any person who in good faith provides information in an investigation under this section is confidential at all times, unless the person consents ...or by acknowledging his or her identity as a witness ...”

If “ii” above were the course taken, the City Council could then amend the City Whistleblower Protection Code adopting the language of the local model law⁵ as the City ordinance.

2. Can a municipality adopt a law that allows a whistleblower to report information which may be confidential or privileged (either under state or common law) without putting the reporting person in jeopardy?

No. The City Council cannot pass a law shielding a whistleblower who uses privileged information when making a good faith report of improper governmental action, whether the privilege is created by common law or statute.

3. How can we distinguish “reporting to the public” from conversations that a whistleblower may wish to have regarding whether to report or what to report, to whom and when?

Currently if a whistleblower “reports” to a member of the public before making a report to the appropriate City official, the whistleblower is denied the protections of the whistleblower Protection Code.

Because it is reasonably foreseeable that a whistleblower would seek advice from a variety of people before deciding whether to initiate a whistleblower report, staff propose an amendment which would allow an employee the freedom to have these discussions. No other jurisdiction was found that takes this approach.

⁴ RCW 42.41.030(7) reads: “The identity of the reporting employee shall be kept confidential to the extent possible under law, unless the employee authorizes the disclosure of his or her identity.”

⁵ Ibid.