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**MEMORANDUM**

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**TO:** COMMISSIONERS  
**FROM:** KATE FLACK  
**SUBJECT:** PROPOSED AMENDMENT TO SMC 4.20.800 ET SEQ - WHISTLEBLOWER PROTECTION CODE  
**DATE:** APRIL 27, 2011

**SUMMARY**

In the fall of 2010, Commissioners and Commission staff began discussing amendments to the City's Whistleblower Protection Code, SMC 4.20.800.

This memo summarizes the proposed changes. Attached you will find a copy of the current Whistleblower Protection Code and a discussion draft of the Proposed Amendments to the Whistleblower Protection Code.

**REVIEW and CURRENT TOPICS FOR DISCUSSION**

[Proposed Amendments- see attached – in **blue text**]

**Purpose:**

- ❖ Specifically exempts the City from the State Local Whistleblower statute, RCW 42.41.

**Employee Rights:**

- ❖ Adds Whistleblower protections for those who are perceived to report or perceived to have cooperated, as well as those who actually report or cooperate.
- ❖ Protects the identity of an employee who cooperates in the investigation. Both of these proposed concepts are ubiquitous in laws and regulations protecting whistleblowers.

❖ **Confidentiality**

Confidentiality remains for the reporting employee and is clear in its extension to a City employee who cooperates in the investigation but is not the reporting employee. Waiver provisions stay the same as our current ordinance.

The State statute grants confidentiality to both sets of employees unless waived.<sup>1</sup>

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<sup>1</sup> RCW 42.40.040(2); ...”the identity or identifying characteristics of a whistleblower is confidential at all times unless the whistleblower consents to disclosure by written waiver or be 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 to

## **Employee Reporting**

- ❖ Allows an employee to report to the Executive Director at any time and for any reason.
- ❖ Extends protections to those who report to supervisors.
- ❖ The State code allows reporting to the employee’s agency director and “an appropriate number of individuals designated to receive whistleblower reports by the head of each agency.”<sup>2</sup>

“Most misconduct is reported to leadership in close proximity. When reporting misconduct, more than half of employees (>50%) report their observation to a supervisor. Another one out of five (21%) reports is made to higher management, but nearly four in ten (37%) government employees consider the highest executive to be the head of the location where the employee works.”<sup>3</sup>

The proposal allows an employee to report outside the City under limited circumstances, as previously discussed.

### **Definitions:**

Several additions have been made. With the exception of “City Employee” all mimic or copy definitions used in either or both the State Employee Whistleblower Code or King County Whistleblower Protection law.

- ❖ “City Employee” or “Employee” – Defined as in Ethics Code.
- ❖ “Cooperating Employee” comports with the Washington State Whistleblower statute.<sup>4</sup>
- ❖ “Good Faith” – defined as in State County Code with a clause deleted.<sup>5</sup>

The following proposed amendments bring our ordinance in line with State and County laws and extend possible liability to others who approve or execute waste of public funds or actions taken against a Cooperating Employee

- ❖ “Gross Waste of Public Funds or Resources” reads as State and County codes with the addition of “resources” and “non-collection of debt.” Deletes requirement that funds were used “without valuable result.”<sup>6</sup>
- ❖ “Retaliate” is defined in a manner that combines the State Employee Whistleblower statute, the State ‘Local Whistleblower Code’ and with the existing City ordinance.<sup>7</sup>

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disclosure by written waiver or by acknowledging his or her identity as a witness who provides information in an investigation.”

<sup>2</sup> RCW 42.40.040(1)(a); RCW 42.40.020(7)

<sup>3</sup> Ethics Resource Center, *National Governmental Ethics Survey: An Inside View of the Public Sector*, 2007.

<sup>4</sup> RCW 42.40.020(10)

<sup>5</sup> RCW 42.40.020(3); KCC 3.42.020; Proposal deletes, “An individual who knowingly provides or reports, or who reasonably ought to know he or she is providing or reporting malicious, false, or frivolous information, ..”

<sup>6</sup> RCW 42.40.020(5); KCC 3.42.020(E).

- ❖ “Use of Official authority to influence,” adopts the concept found in the State Employee Whistleblower statute.<sup>8</sup>

**Investigations:**

- ❖ Time limitation:

As previously discussed, SMC 4.20.830 currently allows an employee to report an improper governmental action at anytime, regardless of when the conduct occurred. The proposed amendment requires City employees to report improper governmental actions within 18 months of its occurrence.<sup>9</sup>

A caveat to the above is proposed to allow the Executive Director to extend the time if an investigation was determined to be in the public interest. [It should be noted that the amendment covers only *reports leading to an investigation by SEEC staff* and does not affect any other department, agency or commission to which a Whistleblower may report.]<sup>10</sup>

- ❖ Discretionary Referral:

The Executive Director currently has discretion under SMC 4.20.830 to refer Whistleblower reports *that do not involve the Ethics or Elections Codes* to “the chief elected official of the branch of government implicated in the allegation.”<sup>11</sup>

The proposed amendment is similar to the State Employee Whistleblower Code which allows the State Auditor to refer reports to state agencies while keeping the identity of the Whistleblower confidential. The State statute requires the receiving agency to report back within sixty (60) days.<sup>12</sup> Given the relative size of the City organization, versus that of the State, we propose a 30 day window for departmental reports.

- ❖ Timeline for Investigations

The proposed amendment articulates a clear timeline for the handling of reports by the Executive Director. The amendment does not affect the timeline of other agencies receiving a report or a referral. This timeline is shorter than the State statute, which requires a full report within a year.<sup>13</sup>

- Within thirty days of receiving the initial Whistleblower report, an inquiry must be made;

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<sup>7</sup> RCW 42.40.050; KCC 3.42.020(H)(13)

<sup>8</sup> RCW 42.40.020(9)

<sup>9</sup> The State of Washington requires that all reports be made within a year of the improper governmental action.

<sup>10</sup> E.g. the Seattle Office for Civil Rights, SPD Office of Public Accountability (OPA); King County Prosecuting Attorney, and the Washington State Commission on Judicial Conduct.

<sup>11</sup> SMC 4.20.830

<sup>12</sup> RCW 42.40.040(5)(d).

<sup>13</sup> RCW 40.42.040 - all Whistleblower complaints acknowledged within 15 days of receipt; preliminary inquiry finished within 60 days; final investigation completed within an additional 60 days

- If the Executive Director finds reasonable cause that an investigation is warranted, an investigation will be conducted;
- Investigations under the Whistleblower Code shall be completed within six (6) months of the original Whistleblower report.

### **Retaliation – Complaints, Investigation and Determination**

The myriad approaches to handling reports of retaliation, investigations of allegations and forums for adjudication, as well as the determination of remedies makes determining a “best practice” difficult at best. Much is determined by the purpose and scope of the Whistleblower program and the policy choices made by those who govern. As a leading voice in legal scholarship surrounding state, national and international whistleblower policy stated:

“As a group, Whistleblower statutes address a range of policy decisions in structuring protection. . . . Experience with federal whistleblower provisions has shown that the resolution of these issues regarding reprisal are perhaps most important to the success or failure of whistleblower protections.”<sup>14</sup>

“Remedies often determine the substantive rights granted. Inadequate remedies reduce the significance of substantive protections.”<sup>15</sup>

The proposed amendments adopt a public accountability approach over one that emphasizes institutional control.

- **Timeliness**: Expands the time in which an employee can file a retaliation claim.
- **Place of Filing**: Vests the investigation with the SEEC to insure independence.
- **Contents of Complaint**: Similar to present ordinance though does add that a report of improper governmental action made to a supervisor will, in some circumstances, need corroboration. The approach is in contrast to jurisdictions, such as San Francisco, which allows reporting to a supervisor but requires it be a “*written complaint*” filed with “*the complainant’s department*.”
- **Investigation**: Requires a decision within 90 days.
- **Findings/Conclusion**: Retaliation is established when there is evidence that 1) a protected report or action was taken by a Cooperating Employee; 2) a retaliatory act occurred, and, 3) there is reasonable cause to believe that a Cooperating Employee’s protected conduct was a contributing factor to the retaliatory action. (This proposal follows Washington State. Employee retaliation claims are investigated by the State Human Right Commission [HRC] and are classified by state statute as an unfair practice.<sup>16</sup> An “unfair practice” is “founded” on a finding of “reasonable cause.”<sup>17 18</sup>

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<sup>14</sup> See, “State Whistleblower Statutes and the Future of Whistleblower Protections,” 51 Admin L. Rev 581 at 605-606; 1999; authored by R.G. Vaughn, Professor of Law, A. Allen King Scholar, American University

<sup>15</sup> Id., at pg 611.

<sup>16</sup> KCC 3.42.060

<sup>17</sup> RCW 49.60.240(3); “If the finding is made that there is reasonable cause for believing that an unfair practice has been or is being committed, the commission’s staff shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion.”

<sup>18</sup> The King County Ombudsman, who investigates employee retaliation claims, has no defined standard upon which a finding must be based.

- **Reporting:** If retaliation is found, a report is sent by the Executive Director to the City department in which the retaliation occurred. The City official must make a decision on remediation and report back to the Executive Director. If the department's remediation is satisfactory, the SEEC's obligations under the ordinance come to an end. If the department's reaction is not satisfactory, the Executive Director will alert both the Council, the Mayor and if it concerns the courts, the Chief Municipal Court Judge. This in all instances ends SEE participation.

If retaliation is not found, a report is sent to the Cooperating Employee with the reasons why the allegation is not considered by the Executive Director to fall within the definition of retaliation.

### **Retaliation – Administrative and Civil Remedies Available**

The proposed amendment allows a Cooperating Employee to pursue remedial action in both the administrative and civil arenas.<sup>19</sup>

The proposal is made assuming that, for many City employees, administrative procedures are generally faster, less time consuming and less expensive for the parties. The proposal is also premised on the idea that administrative courts may best be able to determine remedies that are sought on one legal theory and easily assessed; requests for back pay, benefits, reinstatement, etc. The proposal also allows the administrative court to order sanctions against those individuals responsible for the retaliation.

Pursuing a remedy in civil court may be appropriate for cases involving termination, loss of opportunity, emotional or medical damages, interference with future employment, slander or other causes of action under common law, discrimination law, employment law, etc, with the more formalized rules surrounding discovery, evidence and procedure.

- **Administrative hearing:**

The proposal extends to 60 days the time in which an employee may request an administrative hearing on a claim of retaliation.

A Cooperating Employee, is presumed to have shown retaliation if they can show that an act defined in the ordinance as retaliation occurred. Like the Washington State statute, the burden then shifts to the City to show by a preponderance of the evidence that the action was taken after a series of documented personnel problems or a single egregious event, or that the departmental action or actions were taken based on independent, separate and legitimate reasons without regard to the protected conduct and the actions were not merely pre-textual.<sup>20</sup>

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<sup>19</sup> RCW 49.60.020 – ... “nor shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights. “

<sup>20</sup> RCW 42.40.050(2) in part; See also, 43 P.S. § 1421 (2007), at 43 P.S. § 1421.124(c), “ DEFENSE.-- It shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action by the employer occurred for separate and legitimate reasons, which are not merely pre-textual.”

A \$5,000 fine against individuals involved in the retaliation and the inability to seek indemnification is also proposed.

Our proposal differs from King County which has adopted the course under the Local Whistleblower Law, RCW 42.41.040,<sup>21</sup> which mirrors our current ordinance. A King County Superior Court judge ruled recently that a whistleblower alleging retaliation had to first exhaust his administrative remedies, and that at the conclusion of the administrative process, the administrative law judge's opinion could be overturned only on a finding that it was arbitrary and capricious. The whistleblower has appealed that decision.

**NEXT STEPS:**

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<sup>21</sup>KCC 3.42.060 in part: "If an employee who has filed a complaint of retaliation under this section is dissatisfied with the progress of the investigation or the response and desires a hearing under RCW 42.41.040, the employee shall deliver a request for hearing to the head of the branch within which retaliation is alleged to have occurred..."