

2 SHB 2005 - S AMD - 472  
3 By Senator Gardner

4 ADOPTED 4/23/99

5 Strike everything after the enacting clause and insert the  
6 following:

7 "Sec. 1. RCW 42.40.020 and 1995 c 403 s 509 are each amended to  
8 read as follows:

9 As used in this chapter, the terms defined in this section shall  
10 have the meanings indicated unless the context clearly requires  
11 otherwise.

12 (1) "Auditor" means the office of the state auditor.

13 (2) "Employee" means any individual employed or holding office in  
14 any department or agency of state government.

15 (3) "Good faith" means a reasonable basis in fact for the  
16 communication. "Good faith" is lacking when the employee knows or  
17 reasonably ought to know that the report is malicious, false, or  
18 frivolous.

19 (4) "Gross waste of funds" means to spend or use funds or to allow  
20 funds to be used without valuable result in a manner grossly deviating  
21 from the standard of care or competence that a reasonable person would  
22 observe in the same situation.

23 (5)(a) "Improper governmental action" means any action by an  
24 employee(~~(~~

25 ~~(i) Which is~~) undertaken in the performance of the employee's  
26 official duties(~~(, whether or not the action is within the scope of the~~  
27 ~~employee's employment; and~~)):

28 (~~(ii)~~) (i) Which is ((in violation of any state law or rule, is  
29 an abuse of authority,) gross waste of public funds or resources as  
30 defined in this section;

31 (ii) Which is in violation of federal or state law or rule, if the  
32 violation is not merely technical or of a minimum nature; or

33 (iii) Which is of substantial and specific danger to the public  
34 health or safety(~~(, or is a gross waste of public funds)~~).

35 (b) "Improper governmental action" does not include personnel  
36 actions, for which other remedies exist, including but not limited to

1 employee grievances, complaints, appointments, promotions, transfers,  
2 assignments, reassignments, reinstatements, restorations,  
3 reemployments, performance evaluations, reductions in pay, dismissals,  
4 suspensions, demotions, violations of the state civil service law,  
5 alleged labor agreement violations, reprimands, claims of  
6 discriminatory treatment, or any action which may be taken under  
7 chapter 41.06 RCW, or other disciplinary action except as provided in  
8 RCW 42.40.030.

9 ~~((4))~~ (6) "Substantial and specific danger" means a risk of  
10 serious injury, illness, peril, or loss, to which the exposure of the  
11 public is a gross deviation from the standard of care or competence  
12 which a reasonable person would observe in the same situation.

13 (7) "Use of official authority or influence" includes taking,  
14 directing others to take, recommending, processing, or approving any  
15 personnel action such as an appointment, promotion, transfer,  
16 assignment, reassignment, reinstatement, restoration, reemployment,  
17 performance evaluation, or any adverse action under chapter 41.06 RCW,  
18 or other disciplinary action.

19 ~~((5))~~ (8) "Whistleblower" means an employee who in good faith  
20 reports alleged improper governmental action to the auditor, initiating  
21 an investigation under RCW 42.40.040. For purposes of the provisions  
22 of this chapter and chapter 49.60 RCW relating to reprisals and  
23 retaliatory action, the term "whistleblower" also means: (a) An  
24 employee who in good faith provides information to the auditor in  
25 connection with an investigation under RCW 42.40.040 and an employee  
26 who is believed to have reported ~~((alleged))~~ asserted improper  
27 governmental action to the auditor or to have provided information to  
28 the auditor in connection with an investigation under RCW 42.40.040 but  
29 who, in fact, has not reported such action or provided such  
30 information; or (b) an employee who in good faith identifies rules  
31 warranting review or provides information to the rules review  
32 committee, and an employee who is believed to have identified rules  
33 warranting review or provided information to the rules review committee  
34 but who, in fact, has not done so.

35 NEW SECTION. **Sec. 2.** An employee must make a reasonable attempt  
36 to ascertain the correctness of the information furnished and may be  
37 subject to disciplinary actions, including, but not limited to,

1 suspension or termination, for knowingly furnishing false information  
2 as determined by the employee's appointing authority.

3 **Sec. 3.** RCW 42.40.040 and 1992 c 118 s 2 are each amended to read  
4 as follows:

5 (1)(a) In order to be investigated, an assertion of improper  
6 governmental action must be provided to the auditor within one year  
7 after the occurrence of the asserted improper governmental action.

8 (b) The auditor has the authority to determine whether to  
9 investigate any assertions received. In determining whether to conduct  
10 either a preliminary or further investigation, the auditor shall  
11 consider factors including, but not limited to: The nature and quality  
12 of evidence and the existence of relevant laws and rules; whether the  
13 action was isolated or systematic; the history of previous assertions  
14 regarding the same subject or subjects or subject matter; whether other  
15 avenues are available for addressing the matter; whether the matter has  
16 already been investigated or is in litigation; the seriousness or  
17 significance of the asserted improper governmental action; and the cost  
18 and benefit of the investigation. The auditor has the sole discretion  
19 to determine the priority and weight given to these and other relevant  
20 factors and to decide whether a matter is to be investigated. The  
21 auditor shall document the factors considered and the analysis applied.

22 (c) The auditor also has the authority to investigate assertions of  
23 improper governmental actions as part of an audit conducted under  
24 chapter 43.09 RCW. The auditor shall document the reasons for handling  
25 the matter as part of such an audit.

26 (2) Subject to subsection (5)(c) of this section, the identity of  
27 a whistleblower is confidential at all times unless the whistleblower  
28 consents to disclosure by written waiver or by acknowledging his or her  
29 identity in a claim against the state for retaliation.

30 (3) Upon receiving specific information that an employee has  
31 engaged in improper governmental action, the auditor shall, within five  
32 working days of receipt of the information, mail written  
33 acknowledgement to the whistleblower at the address provided stating  
34 whether a preliminary investigation will be conducted. For a period  
35 not to exceed thirty working days from receipt of the assertion, the  
36 auditor shall conduct such preliminary investigation of the matter as  
37 the auditor deems appropriate. (~~In conducting the investigation, the~~  
38 identity of the whistleblower shall be kept confidential.

1       ~~(2))~~ (4) In addition to the authority under subsection ~~((1))~~ (3)  
2 of this section, the auditor may, on its own initiative, investigate  
3 incidents of improper state governmental action.

4       ~~((3))~~ (5)(a) If it appears to the auditor, upon completion of the  
5 preliminary investigation, that the matter is so unsubstantiated that  
6 no further investigation, prosecution, or administrative action is  
7 warranted, the auditor shall so notify the whistleblower.

8       (b) The written notification shall ~~((be by memorandum containing))~~  
9 contain a summary of the information received~~((, a summary))~~ and of the  
10 results of the preliminary investigation with regard to each  
11 ~~((allegation))~~ assertion of improper governmental action~~((, and any~~  
12 ~~determination made by the auditor under (c) of this subsection))~~.

13       (c) In any case to which this section applies, the identity of the  
14 whistleblower shall be kept confidential unless the auditor determines  
15 that the information has been provided other than in good faith.

16       (d) ~~((If it appears to the auditor that the matter does not meet~~  
17 ~~the definition of an "improper governmental action" under RCW~~  
18 ~~42.40.020(3), or is other than a gross waste of public funds, the~~  
19 ~~auditor may forward a summary of the allegations to the appropriate~~  
20 ~~agency for investigation and require a response by memorandum no later~~  
21 ~~than thirty days after the allegations are received from the auditor.~~  
22 ~~The response shall contain a summary of the investigation with regard~~  
23 ~~to each allegation and any determination of corrective action taken.~~  
24 ~~The auditor will keep the identity of the whistleblower confidential.~~  
25 ~~Upon receipt of the results of the investigation from the appropriate~~  
26 ~~agency, the auditor will notify the whistleblower as prescribed under~~  
27 ~~(a), (b), and (c) of this subsection))~~ With the agency's consent, the  
28 auditor may forward the assertions to an appropriate agency to  
29 investigate and report back to the auditor no later than sixty working  
30 days after the assertions are received from the auditor. The auditor  
31 is entitled to all investigative records resulting from such a  
32 referral. All procedural and confidentiality provisions of this  
33 chapter apply to investigations conducted under this subsection. The  
34 auditor shall document the reasons the assertions were referred.

35       ~~((4))~~ (6) During the preliminary investigation, the auditor shall  
36 provide written notification of the nature of the assertions to the  
37 subject or subjects of the investigation and the agency head. The  
38 notification shall include the relevant facts and laws known at the  
39 time and the procedure for the subject or subjects of the investigation

1 and the agency head to respond to the assertions and information  
2 obtained during the investigation. This notification does not limit  
3 the auditor from considering additional facts or laws which become  
4 known during further investigation.

5 (7)(a) If it appears to the auditor after completion of the  
6 preliminary investigation that further investigation, prosecution, or  
7 administrative action is warranted, the auditor shall so notify the  
8 whistleblower, the subject or subjects of the investigation, and the  
9 agency head and either conduct a further investigation(~~(8)~~) or issue a  
10 report under subsection (~~(6)~~) (10) of this section.

11 (b) If the preliminary investigation resulted from an anonymous  
12 assertion, a decision to conduct further investigation shall be subject  
13 to review by a three-person panel convened as necessary by the auditor  
14 prior to the commencement of any additional investigation. The panel  
15 shall include a state auditor representative knowledgeable of the  
16 subject agency operations, a citizen volunteer, and a representative of  
17 the attorney general's office. This group shall be briefed on the  
18 preliminary investigation and shall recommend whether the auditor  
19 should proceed with further investigation.

20 (c) If further investigation is to occur, the auditor shall provide  
21 written notification of the nature of the assertions to the subject or  
22 subjects of the investigation and the agency head. The notification  
23 shall include the relevant facts known at the time and the procedure to  
24 be used by the subject or subjects of the investigation and the agency  
25 head to respond to the assertions and information obtained during the  
26 investigation.

27 (8) Within sixty working days after the (~~(thirty-day)~~) preliminary  
28 investigation period in subsection (~~(1)~~) (3) of this section, the  
29 auditor shall complete the investigation and report its findings to the  
30 whistleblower unless written justification for the delay is furnished  
31 to the whistleblower, agency head, and subject or subjects of the  
32 investigation. In all such cases, the report of the auditor's  
33 investigation and findings shall be sent to the whistleblower within  
34 one year after the information was filed under subsection (~~(1)~~) (3)  
35 of this section.

36 (~~(5)~~) (9)(a) At any stage of an investigation under this section  
37 the auditor may require by subpoena the attendance and testimony of  
38 witnesses and the production of documentary or other evidence relating  
39 to the investigation at any designated place in the state. The auditor

1 may issue subpoenas, administer oaths, examine witnesses, and receive  
2 evidence. In the case of contumacy or failure to obey a subpoena, the  
3 superior court for the county in which the person to whom the subpoena  
4 is addressed resides or is served may issue an order requiring the  
5 person to appear at any designated place to testify or to produce  
6 documentary or other evidence. Any failure to obey the order of the  
7 court may be punished by the court as a contempt thereof.

8 (b) The auditor may order the taking of depositions at any stage of  
9 a proceeding or investigation under this chapter. Depositions shall be  
10 taken before an individual designated by the auditor and having the  
11 power to administer oaths. Testimony shall be reduced to writing by or  
12 under the direction of the individual taking the deposition and shall  
13 be subscribed by the deponent.

14 ~~((6))~~ (c) Agencies shall cooperate fully in the investigation and  
15 shall take appropriate action to preclude the destruction of any  
16 evidence during the course of the investigation.

17 (d) During the investigation the auditor shall interview each  
18 subject of the investigation. If it is determined there is reasonable  
19 cause to believe improper governmental action has occurred, the subject  
20 or subjects and the agency head shall be given fifteen working days to  
21 respond to the assertions prior to the issuance of the final report.

22 (10)(a) If the auditor determines ~~((that))~~ there is reasonable  
23 cause to believe ~~((that))~~ an employee has engaged in ~~((any))~~ improper  
24 ~~((activity))~~ governmental action, the auditor shall report the nature  
25 and details of the activity to:

26 (i) The ~~((employee))~~ subject or subjects of the investigation and  
27 the head of the employing agency; and

28 (ii) If appropriate, the attorney general or such other authority  
29 as the auditor determines appropriate.

30 (b) The auditor has no enforcement power except that in any case in  
31 which the auditor submits ~~((a))~~ an investigative report ~~((of alleged~~  
32 ~~improper activity))~~ containing reasonable cause determinations to the  
33 ~~((head of an))~~ agency, the ~~((attorney general, or any other individual~~  
34 ~~to which a report has been made under this section, the individual~~  
35 ~~shall report to the auditor with respect to any action taken by the~~  
36 ~~individual regarding the activity, the first report being transmitted~~  
37 ~~no later than thirty days after the date of the auditor's report and~~  
38 ~~monthly thereafter until final action is taken))~~ agency shall send its  
39 plan for resolution to the auditor within fifteen working days of

1 having received the report. The agency is encouraged to consult with  
2 the subject or subjects of the investigation in establishing the  
3 resolution plan. The auditor may require periodic reports of agency  
4 action until all resolution has occurred. If the auditor determines  
5 that appropriate action (~~(is)~~) has not (~~(being)~~) been taken (~~(within a~~  
6 ~~reasonable time)~~), the auditor shall report the determination to the  
7 governor and to the legislature and may include this determination in  
8 the agency audit under chapter 43.09 RCW.

9 (~~(7)~~) (11) Once the auditor concludes that appropriate action has  
10 been taken to resolve the matter, the auditor shall so notify the  
11 whistleblower, the agency head, and the subject or subjects of the  
12 investigation. If the resolution takes more than one year, the auditor  
13 shall provide annual notification of its status to the whistleblower,  
14 agency head, and subject or subjects of the investigation.

15 (12) This section does not limit any authority conferred upon the  
16 attorney general or any other agency of government to investigate any  
17 matter.

18 NEW SECTION. Sec. 4. The auditor has the authority to contract  
19 for any assistance necessary to carry out the provisions of this  
20 chapter.

21 NEW SECTION. Sec. 5. The cost of administering this chapter is  
22 funded through the auditing services revolving account created in RCW  
23 43.09.410.

24 NEW SECTION. Sec. 6. A whistleblower wishing to provide  
25 information under this chapter regarding asserted improper governmental  
26 action against the state auditor or an employee of that office shall  
27 provide the information to the attorney general who shall act in place  
28 of the auditor in investigating and reporting the matter.

29 NEW SECTION. Sec. 7. Chapter . . . , Laws of 1999 (this act) does  
30 not affect the jurisdiction of the legislative ethics board, the  
31 executive ethics board, or the commission on judicial conduct, as set  
32 forth in chapter 42.52 RCW. The senate, the house of representatives,  
33 and the supreme court shall adopt policies regarding the applicability  
34 of chapter 42.40 RCW to the senate, house of representatives, and  
35 judicial branch.

