

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2005

Chapter 361, Laws of 1999

56th Legislature
1999 Regular Session

WHISTLEBLOWERS--INVESTIGATION

EFFECTIVE DATE: 7/25/99

Passed by the House April 24, 1999
Yeas 96 Nays 0

JOHN E. PENNINGTON, JR.
Speaker of the House of Representatives

FRANK CHOPP
Speaker of the House of Representatives

Passed by the Senate April 23, 1999
Yeas 45 Nays 0

BRAD OWEN
President of the Senate

Approved May 17, 1999

GARY LOCKE
Governor of the State of Washington

CERTIFICATE

We, Dean R. Foster and Timothy A. Martin, Co-Chief Clerks of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2005** as passed by the House of Representatives and the Senate on the dates hereon set forth.

DEAN R. FOSTER

Chief Clerk

TIMOTHY A. MARTIN

Chief Clerk

FILED

May 17, 1999 - 3:27 p.m.

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 2005

AS AMENDED BY THE SENATE

Passed Legislature - 1999 Regular Session

State of Washington 56th Legislature 1999 Regular Session

By House Committee on State Government (originally sponsored by Representatives Wolfe, D. Sommers, D. Schmidt, Romero, Carlson, Delvin, Santos, O'Brien, Miloscia, Lovick, Dickerson, Kenney, Ogden, Fisher, Cody, Parlette, Campbell, Lambert, Pennington, Dunshee, Koster, Hankins, Clements, Cairnes, Keiser, Conway and Veloria; by request of State Auditor)

Read first time 03/02/1999.

1 AN ACT Relating to whistleblowers; amending RCW 42.40.020,
2 42.40.040, and 43.09.410; and adding new sections to chapter 42.40 RCW.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 42.40.020 and 1995 c 403 s 509 are each amended to
5 read as follows:

6 As used in this chapter, the terms defined in this section shall
7 have the meanings indicated unless the context clearly requires
8 otherwise.

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

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

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

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

1 (5)(a) "Improper governmental action" means any action by an
2 employee(~~(~~
3 ~~(i) Which is~~) undertaken in the performance of the employee's
4 official duties(~~(, whether or not the action is within the scope of the~~
5 ~~employee's employment; and~~)):
6 ~~((ii))~~ (i) Which is ((in violation of any state law or rule, is
7 an abuse of authority,) gross waste of public funds or resources as
8 defined in this section;
9 (ii) Which is in violation of federal or state law or rule, if the
10 violation is not merely technical or of a minimum nature; or
11 (iii) Which is of substantial and specific danger to the public
12 health or safety(, or is a gross waste of public funds)).
13 (b) "Improper governmental action" does not include personnel
14 actions, for which other remedies exist, including but not limited to
15 employee grievances, complaints, appointments, promotions, transfers,
16 assignments, reassignments, reinstatements, restorations,
17 reemployments, performance evaluations, reductions in pay, dismissals,
18 suspensions, demotions, violations of the state civil service law,
19 alleged labor agreement violations, reprimands, claims of
20 discriminatory treatment, or any action which may be taken under
21 chapter 41.06 RCW, or other disciplinary action except as provided in
22 RCW 42.40.030.
23 ~~((4))~~ (6) "Substantial and specific danger" means a risk of
24 serious injury, illness, peril, or loss, to which the exposure of the
25 public is a gross deviation from the standard of care or competence
26 which a reasonable person would observe in the same situation.
27 (7) "Use of official authority or influence" includes taking,
28 directing others to take, recommending, processing, or approving any
29 personnel action such as an appointment, promotion, transfer,
30 assignment, reassignment, reinstatement, restoration, reemployment,
31 performance evaluation, or any adverse action under chapter 41.06 RCW,
32 or other disciplinary action.
33 ~~((5))~~ (8) "Whistleblower" means an employee who in good faith
34 reports alleged improper governmental action to the auditor, initiating
35 an investigation under RCW 42.40.040. For purposes of the provisions
36 of this chapter and chapter 49.60 RCW relating to reprisals and
37 retaliatory action, the term "whistleblower" also means: (a) An
38 employee who in good faith provides information to the auditor in
39 connection with an investigation under RCW 42.40.040 and an employee

1 who is believed to have reported ((alleged)) asserted improper
2 governmental action to the auditor or to have provided information to
3 the auditor in connection with an investigation under RCW 42.40.040 but
4 who, in fact, has not reported such action or provided such
5 information; or (b) an employee who in good faith identifies rules
6 warranting review or provides information to the rules review
7 committee, and an employee who is believed to have identified rules
8 warranting review or provided information to the rules review committee
9 but who, in fact, has not done so.

10 NEW SECTION. **Sec. 2.** An employee must make a reasonable attempt
11 to ascertain the correctness of the information furnished and may be
12 subject to disciplinary actions, including, but not limited to,
13 suspension or termination, for knowingly furnishing false information
14 as determined by the employee's appointing authority.

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

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

20 (b) The auditor has the authority to determine whether to
21 investigate any assertions received. In determining whether to conduct
22 either a preliminary or further investigation, the auditor shall
23 consider factors including, but not limited to: The nature and quality
24 of evidence and the existence of relevant laws and rules; whether the
25 action was isolated or systematic; the history of previous assertions
26 regarding the same subject or subjects or subject matter; whether other
27 avenues are available for addressing the matter; whether the matter has
28 already been investigated or is in litigation; the seriousness or
29 significance of the asserted improper governmental action; and the cost
30 and benefit of the investigation. The auditor has the sole discretion
31 to determine the priority and weight given to these and other relevant
32 factors and to decide whether a matter is to be investigated. The
33 auditor shall document the factors considered and the analysis applied.

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

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

5 (3) Upon receiving specific information that an employee has
6 engaged in improper governmental action, the auditor shall, within five
7 working days of receipt of the information, mail written
8 acknowledgement to the whistleblower at the address provided stating
9 whether a preliminary investigation will be conducted. For a period
10 not to exceed thirty working days from receipt of the assertion, the
11 auditor shall conduct such preliminary investigation of the matter as
12 the auditor deems appropriate. (~~In conducting the investigation, the~~
13 identity of the whistleblower shall be kept confidential.

14 ~~(2))~~ (4) In addition to the authority under subsection (~~(1)~~) (3)
15 of this section, the auditor may, on its own initiative, investigate
16 incidents of improper state governmental action.

17 ~~((3))~~ (5)(a) If it appears to the auditor, upon completion of the
18 preliminary investigation, that the matter is so unsubstantiated that
19 no further investigation, prosecution, or administrative action is
20 warranted, the auditor shall so notify the whistleblower.

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

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

29 ~~((If it appears to the auditor that the matter does not meet~~
30 ~~the definition of an "improper governmental action" under RCW~~
31 ~~42.40.020(3), or is other than a gross waste of public funds, the~~
32 ~~auditor may forward a summary of the allegations to the appropriate~~
33 ~~agency for investigation and require a response by memorandum no later~~
34 ~~than thirty days after the allegations are received from the auditor.~~
35 ~~The response shall contain a summary of the investigation with regard~~
36 ~~to each allegation and any determination of corrective action taken.~~
37 ~~The auditor will keep the identity of the whistleblower confidential.~~
38 ~~Upon receipt of the results of the investigation from the appropriate~~
39 ~~agency, the auditor will notify the whistleblower as prescribed under~~

1 ~~(a), (b), and (c) of this subsection))~~ With the agency's consent, the
2 auditor may forward the assertions to an appropriate agency to
3 investigate and report back to the auditor no later than sixty working
4 days after the assertions are received from the auditor. The auditor
5 is entitled to all investigative records resulting from such a
6 referral. All procedural and confidentiality provisions of this
7 chapter apply to investigations conducted under this subsection. The
8 auditor shall document the reasons the assertions were referred.

9 ~~((4))~~ (6) During the preliminary investigation, the auditor shall
10 provide written notification of the nature of the assertions to the
11 subject or subjects of the investigation and the agency head. The
12 notification shall include the relevant facts and laws known at the
13 time and the procedure for the subject or subjects of the investigation
14 and the agency head to respond to the assertions and information
15 obtained during the investigation. This notification does not limit
16 the auditor from considering additional facts or laws which become
17 known during further investigation.

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

24 (b) If the preliminary investigation resulted from an anonymous
25 assertion, a decision to conduct further investigation shall be subject
26 to review by a three-person panel convened as necessary by the auditor
27 prior to the commencement of any additional investigation. The panel
28 shall include a state auditor representative knowledgeable of the
29 subject agency operations, a citizen volunteer, and a representative of
30 the attorney general's office. This group shall be briefed on the
31 preliminary investigation and shall recommend whether the auditor
32 should proceed with further investigation.

33 (c) If further investigation is to occur, the auditor shall provide
34 written notification of the nature of the assertions to the subject or
35 subjects of the investigation and the agency head. The notification
36 shall include the relevant facts known at the time and the procedure to
37 be used by the subject or subjects of the investigation and the agency
38 head to respond to the assertions and information obtained during the
39 investigation.

1 (8) Within sixty working days after the (~~(thirty-day)~~) preliminary
2 investigation period in subsection (~~((+1))~~) (3) of this section, the
3 auditor shall complete the investigation and report its findings to the
4 whistleblower unless written justification for the delay is furnished
5 to the whistleblower, agency head, and subject or subjects of the
6 investigation. In all such cases, the report of the auditor's
7 investigation and findings shall be sent to the whistleblower within
8 one year after the information was filed under subsection (~~((+1))~~) (3)
9 of this section.

10 (~~((+5))~~) (9)(a) At any stage of an investigation under this section
11 the auditor may require by subpoena the attendance and testimony of
12 witnesses and the production of documentary or other evidence relating
13 to the investigation at any designated place in the state. The auditor
14 may issue subpoenas, administer oaths, examine witnesses, and receive
15 evidence. In the case of contumacy or failure to obey a subpoena, the
16 superior court for the county in which the person to whom the subpoena
17 is addressed resides or is served may issue an order requiring the
18 person to appear at any designated place to testify or to produce
19 documentary or other evidence. Any failure to obey the order of the
20 court may be punished by the court as a contempt thereof.

21 (b) The auditor may order the taking of depositions at any stage of
22 a proceeding or investigation under this chapter. Depositions shall be
23 taken before an individual designated by the auditor and having the
24 power to administer oaths. Testimony shall be reduced to writing by or
25 under the direction of the individual taking the deposition and shall
26 be subscribed by the deponent.

27 (~~((+6))~~) (c) Agencies shall cooperate fully in the investigation and
28 shall take appropriate action to preclude the destruction of any
29 evidence during the course of the investigation.

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

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

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

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

5 (b) The auditor has no enforcement power except that in any case in
6 which the auditor submits ~~((a))~~ an investigative report ~~((of alleged~~
7 ~~improper activity))~~ containing reasonable cause determinations to the
8 ~~((head of an))~~ agency, the ~~((attorney general, or any other individual~~
9 ~~to which a report has been made under this section, the individual~~
10 ~~shall report to the auditor with respect to any action taken by the~~
11 ~~individual regarding the activity, the first report being transmitted~~
12 ~~no later than thirty days after the date of the auditor's report and~~
13 ~~monthly thereafter until final action is taken))~~ agency shall send its
14 plan for resolution to the auditor within fifteen working days of
15 having received the report. The agency is encouraged to consult with
16 the subject or subjects of the investigation in establishing the
17 resolution plan. The auditor may require periodic reports of agency
18 action until all resolution has occurred. If the auditor determines
19 that appropriate action ~~((is))~~ has not ~~((being))~~ been taken ~~((within a~~
20 ~~reasonable time))~~, the auditor shall report the determination to the
21 governor and to the legislature and may include this determination in
22 the agency audit under chapter 43.09 RCW.

23 ~~((+7))~~ (11) Once the auditor concludes that appropriate action has
24 been taken to resolve the matter, the auditor shall so notify the
25 whistleblower, the agency head, and the subject or subjects of the
26 investigation. If the resolution takes more than one year, the auditor
27 shall provide annual notification of its status to the whistleblower,
28 agency head, and subject or subjects of the investigation.

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

32 NEW SECTION. Sec. 4. The auditor has the authority to contract
33 for any assistance necessary to carry out the provisions of this
34 chapter.

35 NEW SECTION. Sec. 5. The cost of administering this chapter is
36 funded through the auditing services revolving account created in RCW
37 43.09.410.

1 NEW SECTION. **Sec. 6.** A whistleblower wishing to provide
2 information under this chapter regarding asserted improper governmental
3 action against the state auditor or an employee of that office shall
4 provide the information to the attorney general who shall act in place
5 of the auditor in investigating and reporting the matter.

6 NEW SECTION. **Sec. 7.** Chapter . . . , Laws of 1999 (this act) does
7 not affect the jurisdiction of the legislative ethics board, the
8 executive ethics board, or the commission on judicial conduct, as set
9 forth in chapter 42.52 RCW. The senate, the house of representatives,
10 and the supreme court shall adopt policies regarding the applicability
11 of chapter 42.40 RCW to the senate, house of representatives, and
12 judicial branch.

13 NEW SECTION. **Sec. 8.** The office of financial management shall
14 contract for a performance audit of the state employee whistleblower
15 program on a cycle to be determined by the office of financial
16 management. The audit shall be done in accordance with generally
17 accepted government auditing standards beginning with the fiscal year
18 ending June 30, 2001. The audit shall determine at a minimum: Whether
19 the program is acquiring, protecting, and using its resources such as
20 personnel, property, and space economically and efficiently; the causes
21 of inefficiencies or uneconomical practices; and whether the program
22 has complied with laws and rules on matters of economy and efficiency.
23 The audit shall also at a minimum determine the extent to which the
24 desired results or benefits established by the legislature are being
25 achieved, the effectiveness of the program, and whether the auditor has
26 complied with significant laws and rules applicable to the program.

27 The cost of the audit is a cost of operating the program and shall
28 be funded by the auditing services revolving account created by RCW
29 43.09.410.

30 **Sec. 9.** RCW 43.09.410 and 1995 c 301 s 25 are each amended to read
31 as follows:

32 An auditing services revolving account is hereby created in the
33 state treasury for the purpose of a centralized funding, accounting,
34 and distribution of the actual costs of the audits provided to state
35 agencies by the state auditor and audits of the state employee
36 whistleblower program under section 8 of this act.

1 NEW SECTION. **Sec. 10.** Sections 2 and 4 through 8 of this act are
2 each added to chapter 42.40 RCW.

 Passed the House April 24, 1999.

 Passed the Senate April 23, 1999.

 Approved by the Governor May 17, 1999.

 Filed in Office of Secretary of State May 17, 1999.