

3.42 WHISTLEBLOWER PROTECTION

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3.42.010 Policy - purpose. Unless prohibited by state law, county employees are encouraged to report on improper governmental action to the appropriate county or other government official. To assist such reporting and to implement chapter 42.41 RCW, this chapter provides county employees a process for reporting improper governmental action and protection from retaliatory action for reporting and cooperating in the investigation and/or prosecution of improper governmental action in good faith in accordance with this chapter. (Ord. 16580 § 1, 2009; Ord. 11687 § 3, 1995).

3.42.020 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

A. "Appropriate investigating official" means an investigating official acting within the investigating official's respective jurisdiction as identified in K.C.C. 3.42.030.D. or any assistant or representative authorized to receive documents on the investigating official's behalf, except that for the department of public safety, the only appropriate investigating official shall be the internal investigations unit or any assistant or representative authorized to receive documents on its behalf.

B. "Employee" or "county employee" means any individual who is appointed as an employee by the appointing authority of a county agency, office, department, council, board, commission or other separate unit or division of county government, however designated. The term "employee" or "county employee" also includes county elected officials and members of county boards, commissions, committees, or other multi-member bodies.

C. "Good faith" means the individual providing the information or report of improper governmental action has a reasonable basis in fact for reporting or providing the information. An individual who knowingly provides or reports, or who reasonably ought to know that the information or report is malicious, false or frivolous, or information that is provided with reckless disregard for the truth, is not acting in good faith.

D. "Gross mismanagement" means the exercise of management responsibilities in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

E. "Gross waste of public funds" means to spend or use public funds or to allow public funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.

F.1. "Improper governmental action" means any action by a county officer or employee that is undertaken in the performance of the officer's or employee's official duties, whether or not the action is within the scope of employment, and:

- a. violates any state or federal law or rule or county ordinance or rule;
- b. constitutes an abuse of authority;
- c. is gross mismanagement;
- d. creates a substantial and specific danger to the public health or safety;
- e. results in a gross waste of public funds; or

f. prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification, unless disclosure is legally prohibited. This subsection G.1.f. is not meant to preclude the discretion of agency management to adopt a particular scientific opinion or technical finding from among differing opinions or technical findings to the exclusion of other scientific opinions or technical findings.

2. "Improper governmental action" does not include violations of anti-discrimination laws, violations of collective bargaining or civil service laws, or alleged violations of agreements with labor organizations under collective bargaining. A properly authorized county program or activity does not become an "improper governmental action" because an employee or investigating official dissents from the county policy or considers the expenditures unwise.

G. "Investigating official" means any individual to whom a report may be made pursuant to K.C.C. 3.42.030.D. or any assistant or representative authorized to receive documents on the investigating official's behalf.

H. "Retaliate," "retaliation" and "retaliatory action," means to make any unwarranted adverse change in an employee's employment status or the terms and conditions of employment including, but not limited to:

1. Denial of adequate staff to perform duties;
2. Frequent staff changes;
3. Frequent and undesirable office changes;
4. Refusal to assign meaningful work;
5. Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations;
6. Demotion;
7. Reduction in pay;
8. Denial of promotion;
9. Denial of training or benefits;
10. Transfer or reassignment;
11. Suspension or dismissal;
12. Other unwarranted disciplinary action;
13. A supervisor or senior manager or official behaving in or encouraging coworkers to behave in a hostile manner toward the employee, or failing to take appropriate action to prevent coworkers from behaving in a hostile manner toward the employee.

I. "Substantial and specific danger" means a risk of serious injury, illness, peril or loss, to which the exposure of the public is a gross deviation from the standard of care or competence which a reasonable person would observe in the same situation.

J. "Written report of improper governmental action" means any writing that alleges that an improper governmental action has occurred and describes the basis for that belief. (Ord. 18618 § 95, 2017: Ord. 16580 § 2, 2009: Ord. 11687 § 2, 1995).

3.42.030 Right to report - procedures.

A. Every county employee shall have the right to report, in good faith in accordance with this ordinance, information concerning an improper governmental action.

B. In reporting improper governmental action, the employee is encouraged, but not required, to make a written report first to any investigating official as defined by K.C.C. 3.42.020.G; the employee is encouraged to consult with the office of the ombuds in order to determine to whom a written report should be made.

C.1. This section does not authorize a county employee to report information that is subject to an applicable privilege against disclosure at law (e.g., RCW 5.60.060 privileged communications) unless waived, or to make disclosure where prohibited at law.

2. An employee making a written report under this subsection is encouraged to wait at least thirty days from receipt of the written report by the investigating official before reporting the improper governmental action to a person who is not an investigating official. However, reporting to a person who is not an investigating official before this thirty-day period will not result in the loss of the protections in this chapter.

3. An employee's reporting of the employee's own improper action does not grant the employee immunity from discipline or termination insofar as the employee's improper action would be cause for discipline.

D. For purposes of this chapter, the person to whom a written report should be made is as follows:

1. Reporting sexual harassment to the employee's supervisor, department head or other government official as set out in the county's adopted procedure for reporting sexual harassment complaints;

2. Reporting violations of the fair employment practices ordinance, which is K.C.C. chapter 12.18, to the executive or the executive's designee;

3. Reporting police misconduct to the department of public safety's internal investigation unit or to the office of law enforcement oversight;

4. Reporting violations of the Code of Judicial Conduct to the Washington state Commission on Judicial Conduct;

5. Reporting improper governmental action occurring within the district court to the presiding judge of the district court;

6. Reporting improper governmental action occurring within the legislative branch to the chair of the council or to the prosecutor;

7. Reporting improper governmental action occurring within the executive branch to the executive or to the department director of the executive agency in which the alleged improper governmental action occurred or to the ombuds;

8. Reporting improper governmental action occurring within the department of judicial administration to the director/clerk of the superior court or to the ombuds;

9. Reporting improper governmental action occurring within the department of assessments to the assessor or to the ombuds;

10. Reporting improper governmental action occurring within the department of elections to the director of elections or to the ombuds;

11. Reporting improper governmental action occurring within the superior court to the presiding judge of the superior court;

12. Reporting violations of criminal laws to the sheriff or the county prosecuting attorney;

13. Reporting improper governmental action of the county prosecuting attorney to the state auditor or the attorney general;

14. Reporting improper governmental action occurring within the office of economic and financial analysis to any member of the forecast council or to the ombuds;

15. Reporting violations of K.C.C. chapter 3.04, the Employee Code of Ethics, to the ombuds; and

16. Reporting any improper governmental action for which no other appropriate recipient of a report is listed in subsection D.1. through 15. of this section to the ombuds.

E. Any one or more of the following conduct by employees is protected under this chapter:

1. Reporting improper governmental action;

2. Cooperating in an investigation by any official related to improper governmental action, including but not limited to local, state, federal, and internal investigation; and

3. Testifying in any official proceeding, hearing, or prosecution arising out of an improper governmental action.

F. A county officer or employee shall not retaliate, attempt to retaliate or threaten to retaliate against any employee because that employee has in good faith engaged in conduct protected by K.C.C. 3.42.030.E., or because the county officer or employee believes the employee has engaged or will engage in such conduct, whether or not such conduct actually occurred.

G. Any county officer or employee who engages in retaliatory action prohibited by K.C.C. 3.42.030.F. is subject to disciplinary action including, but not limited to, suspension without pay, demotion or termination. [In addition,]* any elected official who engages in retaliatory action prohibited by K.C.C. 3.42.030.F. is subject to censure by

motion of the council and also may be subject to recall from office due to misfeasance or malfeasance in office.

H. Each appointing authority shall ensure that, upon entering county service or any time there are material changes to this chapter, every county officer and employee shall receive a written summary of this chapter, the procedures for reporting improper governmental actions to investigating officials, the procedures for obtaining the protections extended, the prohibition against retaliation in this section, and identification of offices and resources available to help the employee understand the provisions of this chapter including but not limited to the ombuds's office. The ombuds's office shall assist in the development of materials. Copies of these summaries shall be conspicuously posted where all employees will have reasonable access to them. Every county officer and employee shall also receive a written summary of this chapter at least once every two years; the summary may be distributed electronically. (Ord. 18618 § 96, 2017: Ord. 16580 § 3, 2009: Ord. 16391 § 22, 2009: Ord. 11687 § 4, 1995).

***Reviser's note: Added but not underlined in Ordinance 16580 § 3 and Ordinance 18618 § 96. See K.C.C. 1.24.075.**

3.42.040 Confidentiality. To the extent allowed by the Public Disclosure Act, RCW 42.56.240 and other laws, the identity or identifying characteristics the identity of an employee reporting information about an improper governmental action or cooperating in an investigation of improper governmental action under K.C.C. 3.42.030E.1. or K.C.C. 3.42.030E.2. shall be kept confidential from all persons except for investigating officials and their staff. However, the employee may waive confidentiality in a written waiver or by making the employee's own identity known in connection with the protected conduct in the course of public testimony or by acknowledging the employee's own identity in a claim against the county for retaliation. If applicable, the complainant may state in writing whether the complainant wishes the complainant's own name not to be disclosed pursuant to the provisions of RCW 42.56.240(2), which exempts information revealing the identity of persons who are witnesses to or victims of crime or who file complaints with investigative, law enforcement or penology agencies, other than the commission, if disclosure would endanger any person's life, physical safety or property. (Ord. 18618 § 97, 2017: Ord. 16580 § 4, 2009: Ord. 11687 § 5, 1995).

3.42.050 Investigations.

A. If the official receiving a complaint under this section is not the appropriate investigating official identified in K.C.C. 3.42.030.D.1, the official receiving the complaint shall immediately forward the written report to the appropriate investigating official and notify the reporting employee of the referral.

B. If a report of improper governmental action meets the definition of a complaint under K.C.C. 3.04.055, the ombuds, upon receipt of the report, shall investigate that allegation according to the procedures in K.C.C. chapter 3.04, the Employee Code of Ethics.

C. If the ombuds is an appropriate investigating official and the report does not meet the definition of a complaint under K.C.C. chapter 3.04, the Employee Code of Ethics, the ombuds upon receipt of the report may refer the report to the department director of the agency in which the alleged improper governmental action occurred or to the chief elected official of the branch of government implicated in the allegation; if the ombuds does not refer to another official, or if the other official's response is not timely or satisfactory to the ombuds, the ombuds shall conduct an investigation in accordance with the procedures outlined in K.C.C. 3.42.057.

D. If a report of improper governmental action is filed with an appropriate investigating official who is not the ombuds, and a report is concurrently filed with the ombuds, the ombuds may defer action until the investigation is completed by the affected department, office or agency. When the ombuds chooses to conduct a concurrent investigation the ombuds shall notify the executive and the chair of the council.

E. Decisions of the ombuds under this section may not be appealed to the Board of Ethics. (Ord. 18618 § 98, 2017: Ord. 16580 § 5, 2009: Ord. 11687 § 6, 1995).

3.42.055 Investigations by investigating officials - powers - procedures - prosecutor powers.

A. The procedures in this section shall apply to any investigating official except the ombuds or the judicial branch. Investigations by the ombuds shall be conducted in accordance with K.C.C. 3.42.057.

B. When an appropriate investigating official who is not the ombuds receives a report of improper governmental action, the ombuds shall respond to the reporting employee in writing within thirty days of when the report was received with either a final report or a preliminary report, with a copy of the response to the ombuds. If responding with a preliminary report, the official shall include a summary of the status of the investigation and information obtained thus far, and identifying matters for further research or inquiry. If the identity of the reporting employee is not known, the response shall be sent to the ombuds.

C. The investigating official shall complete the investigation and issue a final report no later than one year from when the report of improper governmental action was received. If the final report concludes that there was improper governmental action, it shall include an action plan for addressing the improper governmental action and provide reasonable timelines for completing corrective actions.

D. The investigating official shall send a copy of the final report to the reporting employee and the ombuds.

E. When conducting an investigation of improper governmental action occurring within the legislative branch, the prosecutor may at any stage, issue subpoenas, administer oaths, examine witnesses, and compel the production of documents or other evidence; refer the matter to the state auditor, law enforcement authorities or other governmental agency; and issue reports; or any combination thereof, each as deemed appropriate.

F. If the investigating official determines that that the employee reporting improper governmental action has been retaliated against or is at great risk of retaliation, the investigating official may seek temporary preventive action, including but not limited to the transfer of the reporting employee to another department at the request of the reporting employee or authorizing leave with pay for the reporting employee. If the investigating official deems it necessary, the investigating official's recommendation may be made to the executive. Such a temporary preventative action may continue until the conclusion of any investigation and a permanent resolution of the matter.

G. To the extent allowed by law, investigating officials are encouraged to enter into cooperative agreements or arrangements for receiving and processing complaints with other agencies or entities that are investigating related complaints, so that duplication of functions shall be minimized and multiple redundant investigations avoided. (Ord. 18618 § 99, 2017: Ord. 16580 § 6, 2009).

3.42.057 Investigations by ombuds - powers - procedures - fines.

A. The procedures in this section apply to the ombuds when the ombuds is investigating a report of an improper governmental action that is not investigated according to the rules applicable to K.C.C. chapter 3.04, the Employee Code of Ethics.

B. In determining whether to conduct an investigation, the ombuds may consider factors including, but not limited to, the nature and quality of the evidence and the existence of relevant laws and rules; whether the alleged improper governmental action was isolated or systematic; the history of previous assertions regarding the same subject or subject matter; whether other avenues are available for addressing the matter; whether the matter has already been investigated or is in litigation; the seriousness or significance of the asserted improper governmental action; and the cost and benefit of the investigation. The ombuds has the sole discretion to determine the priority and weight given to these or any other relevant factors and to decide whether a matter is to be investigated.

C. If the ombuds elects not to investigate the matter, the ombuds shall, before making a final decision to close the investigation, send a notice to the person who made the report explaining the factors considered and the analysis applied, summarizing allegation deficiencies if any, and providing a reasonable opportunity to reply. The notification may be by electronic means.

D. If the ombuds determines that that the employee reporting improper governmental action has been retaliated against or is at great risk of retaliation, the ombuds may recommend to the head of the department that temporary preventive action be taken, including but not limited to transferring the reporting employee at the reporting employee's request to another department or authorizing leave with pay for the reporting employee. If the ombuds deems it necessary, the ombuds's recommendation may be made to the executive instead. Such temporary preventative action may continue until the conclusion of any investigation and a permanent resolution of the matter.

E. If the ombuds elects to conduct an investigation and it appears to the ombuds that the investigation will take longer than thirty days to complete, the ombuds shall, within thirty days after receiving the report of alleged improper governmental action, provide the complainant with a preliminary written report that summarizes the procedural status of the investigation, the information obtained thus far, any preliminary findings as the ombuds deems appropriate, and identifying matters for further research or inquiry. The ombuds shall also notify the subject or subjects of the investigation and the agency head of the need for continued investigation.

F. When conducting an investigation, the ombuds may at any stage issue subpoenas, administer oaths, examine witnesses, and compel the production of documents or other evidence; refer the matter to the state auditor, law enforcement authorities or other governmental agency; and issue reports; or any combination thereof, each as deemed appropriate.

G. Upon completion of an investigation, the ombuds shall make a final written report that summarizes the results of the investigation, including findings with regard to each assertion of improper governmental action and recommended actions. The ombuds shall complete the investigation and issue a final report within one year of receipt of the report of improper governmental action.

1. If the ombuds determines that no improper governmental action has occurred, the ombuds shall send the report to the complainant, the subject or subjects of the investigation and the agency head.

2. If the ombuds determines that an improper governmental action has occurred:

- a. The ombuds shall give the subject of the report an opportunity to respond before issuing a final report.

b. The ombuds shall send the report to: the complainant; the head of the department with responsibility for the action or if a department head is implicated, to the executive and county council; and such other governmental officials or agencies as the ombuds deems appropriate. The ombuds shall also send a copy of the written report to the executive or the county council if requested to do so by the complainant, if the ombuds has not already done so.

c. The department with responsibility for the improper governmental action shall report back to the ombuds and complainant with an action plan for addressing the improper governmental action and provide reasonable timelines for completing its corrective actions. The department's response should be made within fourteen days of receipt of the ombuds's report. If the ombuds deems that satisfactory action within a reasonable timeframe has not been achieved, the ombuds shall report the ombuds's determination to the executive and the county council.

d. The ombuds may impose a fine of not greater than ten thousand dollars on the department within which the improper governmental action occurred. A fine should be imposed for improper governmental actions that are exceptionally egregious or for which corrective actions have been highly unsatisfactory. The department shall be given a reasonable opportunity to be heard before imposition of any fine. Proceeds collected from any fine shall be deposited into an account to be used for the purpose of educating employees about this chapter or may be applied by the department toward the cost of administrative leave paid to the employee reporting the improper governmental action where the reason for the administrative leave is related to the employee's reporting.

H. At any stage in the investigation, the ombuds may, with the agreement of the parties, recommend, arrange for, convene, or conduct voluntary mediation between the employee and either the subject of the investigation or agency head, or both, with cost sharing, if any, to be determined by the parties.

1. If the parties reach agreement as a result of mediation, the ombuds may close the investigation.

2. The response times from subsection E. of this section shall be tolled for the duration of the mediation process.

3. Mediation and other informal resolution processes are voluntary. No employer or employee shall be pressured into participating in such processes, and no negative inferences shall be drawn if any party declines to participate in such processes. If a party agrees to participate in voluntary mediation or other informal resolution process, that party is under no obligation to accept the resolution recommended by the mediator, the ombuds, or any other person participating in this process, and no negative inferences shall be drawn as a result of a refusal to accept such recommendations.

I. The ombuds may close an investigation at any time the ombuds determines that no further action is warranted and shall so notify the complainant, the subject or subjects of the investigation and the agency head. The ombuds shall also issue any reports as required by this section.

J. Decisions of the ombuds under this section may not be appealed to the board of ethics. (Ord. 18618 § 100, 2017: Ord. 16580 § 7, 2009).

3.42.060 Reporting and adjudicating retaliation - ombuds, prosecutor powers and procedures.

A. In order to seek relief, an employee who believes the employee has been retaliated against in violation of K.C.C. 3.42.030.E. must file a signed written complaint within six months of when the alleged retaliation occurred or the employee reasonably

should have known of the occurrence. The complaint shall be filed with the ombuds and must specify the alleged retaliatory action and the relief requested.

B. The ombuds shall conduct an investigation of the alleged retaliatory action except that complaints involving the judicial branch shall be forwarded to the appropriate investigating official for that branch for investigation and complaints involving councilmembers shall be forwarded to and investigated by the prosecutor.

C. When conducting an investigation, the ombuds or prosecutor may at any stage, issue subpoenas, administer oaths, examine witnesses, and compel the production of documents or other evidence; refer the matter to the state auditor, law enforcement authorities or other governmental agency; and issue reports; or any combination thereof, each as deemed appropriate.

D. If it appears to the ombuds or prosecutor after conducting an investigation that no retaliation has occurred, the ombuds or prosecutor shall so notify the complainant summarizing the ombuds's or prosecutor's findings and providing a reasonable opportunity for the complainant to reply before making a final determination.

E. The ombuds or prosecutor shall, within forty-five days after receiving the report of alleged retaliatory action, provide the complainant with a written report that summarizes the results of the investigation, including findings with regard to each assertion of retaliation and recommended actions. The ombuds or prosecutor shall also send a copy of the written report to any governmental officials or agencies as the ombuds or prosecutor deems appropriate. If the ombuds or prosecutor finds that additional time is needed to complete the report, the ombuds or prosecutor shall notify the complainant in writing before the expiration of the forty-five day response period, and shall specify the reasons that additional time is required. The effect of the notice is to extend for forty-five days the time period in which a response must be made. Only two such extensions may be made.

F. The following apply to investigations by the ombuds under this section.

1. If it appears to the ombuds at any stage in the process that the complainant is at great risk of retaliation, the ombuds may recommend to the head of the department that temporary preventive action be taken, including but not limited to transferring the individual to another department or authorizing leave with pay. If the ombuds deems it necessary, the ombuds recommendation may be made to the executive instead. Such temporary preventative action may continue until the conclusion of any investigation and a permanent resolution of the matter;

2. If the ombuds determines that no retaliatory action has occurred, the ombuds shall send the report to the complainant, the subject or subjects of the investigation and the agency head; and

3. If the ombuds determines that retaliatory action has occurred:

a. The ombuds shall give the subject of the investigation an opportunity to respond before issuing a final report;

b. The ombuds shall send the report to: the complainant; the head of the department with responsibility for the action or if a department head is implicated, to the executive and county council, and to such other governmental officials or agencies as the ombuds deems appropriate. The ombuds shall also send a copy of the written report to the executive or the county council if requested to do so by the complainant, if the ombuds has not already done so;

c. The department with responsibility for the retaliatory action shall report back to the ombuds and complainant with an action plan for addressing the retaliatory action and provide reasonable timelines for when the corrective actions will occur. The department's response should be made within fourteen days of receipt of the ombuds report;

d. If the ombuds deems that the responsible department has not taken satisfactory action within a reasonable timeframe, the ombuds shall report the ombuds's determination to the executive and the county council; and

e. The ombuds may impose a fine on the department within which the retaliatory action occurred; the ombuds shall not impose a fine greater than ten thousand dollars. A fine should be imposed for retaliatory actions where the department's response to the retaliatory actions was grossly inadequate. The department shall be given a reasonable opportunity to be heard before imposition of any fine. Proceeds collected from any fine shall be deposited into an account to be used for the purpose of educating employees about this chapter or applied by the department toward administrative leave paid to the complainant where the reason for the administrative leave is related to the retaliation claim.

G. At any stage in the investigation, the ombuds or prosecutor may, with the agreement of the parties, recommend, arrange for, convene or conduct voluntary mediation between the employee and the subject of the investigation and/or agency head.

1. If the employer and employee reach agreement as a result of a mediation, the investigation shall be closed and the employee shall not be entitled to seek a hearing under subsection I. of this section.

2. If the employer and employee fail to reach agreement, the response times from subsection C. of this section shall be tolled for the duration of the mediation process.

3. Mediation and other informal resolution processes are voluntary. No employer or employee shall be pressured into participating in such processes, and no negative inferences shall be drawn if any party declines to participate in such processes. If a party agrees to participate in voluntary mediation or other informal resolution process, that party is under no obligation to accept the resolution recommended by the mediator, the ombuds, or any other person participating in this process, and no negative inferences shall be drawn as a result of a refusal to accept such recommendations.

H. The ombuds or prosecutor may close an investigation at any time the ombuds or prosecutor determines that no further action is warranted and shall so notify the complainant, the subject or subjects of the investigation and the agency head. The ombuds or prosecutor shall also issue any reports as required by this section.

I. Decisions of the ombuds under this section may not be appealed to the board of ethics.

J. 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 within the later of: one year of when the alleged retaliation occurred or the employee reasonably should have known of the occurrence; or ninety days from receipt of the department's response under K.C.C. 3.42.060E.2.b. The employee shall notify the ombuds of the request. Within five working days of receipt of the request for hearing, the county shall apply to the state office of administrative hearings for a hearing to be conducted as provided in RCW 42.41.040(4) through (9).

K. An employee shall not have the right to seek a hearing under this section if the complaint of retaliation is pursued under and falls within the subject matter jurisdiction of a collective bargaining agreement grievance procedure ending in binding arbitration or the career service grievance procedure ending in a hearing before the personnel board.

L. To the extent allowed by law, investigating officials are encouraged to enter into cooperative agreements or arrangements for receiving and processing complaints with other agencies or entities that are investigating related complaints, so that duplication of functions shall be minimized and multiple redundant investigations avoided. (Ord. 18618 § 101, 2017: Ord. 16580 § 8, 2009: Ord. 11687 § 7, 1995).