

2 SHB 2005 - S AMD - 420  
3 By Senators Gardner and McCaslin

4 ADOPTED 4/16/99

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) "Agency" means any state board, commission, bureau, committee,  
13 department, institution, division, or tribunal in the legislative,  
14 executive, or judicial branch of state government. "Agency" includes  
15 all elective offices, the state legislature, those institutions of  
16 higher education created and supported by the state government, and  
17 those courts that are part of state government.

18 (2) "Auditor" means the office of the state auditor.

19 ~~((+2))~~ (3) "Employee" means any individual employed or holding  
20 office in any department or agency of state government.

21 ~~((+3))~~ (4) "Good faith" means a reasonable basis in fact for the  
22 communication. "Good faith" is lacking when the employee knows or  
23 reasonably ought to know that the report is malicious, false, or  
24 frivolous.

25 (5) "Gross waste of funds" means to spend or use funds or to allow  
26 funds to be used without valuable result in a manner grossly deviating  
27 from the standard of care or competence that a reasonable person would  
28 observe in the same situation.

29 (6)(a) "Improper governmental action" means any action by an  
30 employee(~~(+~~

31 ~~(i) Which is~~) undertaken in the performance of the employee's  
32 official duties(~~(, whether or not the action is within the scope of the~~  
33 ~~employee's employment; and~~)).

34 ~~((+ii))~~ (i) Which is ((in violation of any state law or rule, is  
35 an abuse of authority,)) mismanagement or gross waste of public funds  
36 or resources as defined in this section;

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

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

5 (b) "Improper governmental action" does not include personnel  
6 actions, for which other remedies exist, including but not limited to  
7 employee grievances, complaints, appointments, promotions, transfers,  
8 assignments, reassignments, reinstatements, restorations,  
9 reemployments, performance evaluations, reductions in pay, dismissals,  
10 suspensions, demotions, violations of the state civil service law,  
11 alleged labor agreement violations, reprimands, claims of  
12 discriminatory treatment, or any action which may be taken under  
13 chapter 41.06 RCW, or other disciplinary action except as provided in  
14 RCW 42.40.030.

15 ~~((4))~~ (7) "Mismanagement" means the exercise of an executive  
16 function in a manner grossly deviating from the standard of care or  
17 competence that a reasonable person would observe in the same  
18 situation.

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

23 (9) "Use of official authority or influence" includes taking,  
24 directing others to take, recommending, processing, or approving any  
25 personnel action such as an appointment, promotion, transfer,  
26 assignment, reassignment, reinstatement, restoration, reemployment,  
27 performance evaluation, or any adverse action under chapter 41.06 RCW,  
28 or other disciplinary action.

29 ~~((5))~~ (10) "Whistleblower" means an employee who in good faith  
30 reports alleged improper governmental action to the auditor, initiating  
31 an investigation under RCW 42.40.040. For purposes of the provisions  
32 of this chapter and chapter 49.60 RCW relating to reprisals and  
33 retaliatory action, the term "whistleblower" also means: (a) An  
34 employee who in good faith provides information to the auditor in  
35 connection with an investigation under RCW 42.40.040 and an employee  
36 who is believed to have reported (~~alleged~~) asserted improper  
37 governmental action to the auditor or to have provided information to  
38 the auditor in connection with an investigation under RCW 42.40.040 but  
39 who, in fact, has not reported such action or provided such

1 information; or (b) an employee who in good faith identifies rules  
2 warranting review or provides information to the rules review  
3 committee, and an employee who is believed to have identified rules  
4 warranting review or provided information to the rules review committee  
5 but who, in fact, has not done so.

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

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

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

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

30 (c) The auditor also has the authority to investigate assertions as  
31 part of an audit conducted under chapter 43.09 RCW. The auditor shall  
32 document the reasons for handling the matter as part of such an audit.

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

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

10       ~~(2))~~ (4) In addition to the authority under subsection (~~(1)~~) (3)  
11 of this section, the auditor may, on its own initiative, investigate  
12 incidents of improper state governmental action.

13       (~~(3)~~) (5)(a) If it appears to the auditor, upon completion of the  
14 preliminary investigation, that the matter is so unsubstantiated that  
15 no further investigation, prosecution, or administrative action is  
16 warranted, the auditor shall so notify the whistleblower.

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

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

25       (d) (~~If it appears to the auditor that the matter does not meet~~  
26 ~~the definition of an "improper governmental action" under RCW~~  
27 ~~42.40.020(3), or is other than a gross waste of public funds, the~~  
28 ~~auditor may forward a summary of the allegations to the appropriate~~  
29 ~~agency for investigation and require a response by memorandum no later~~  
30 ~~than thirty days after the allegations are received from the auditor.~~  
31 ~~The response shall contain a summary of the investigation with regard~~  
32 ~~to each allegation and any determination of corrective action taken.~~  
33 ~~The auditor will keep the identity of the whistleblower confidential.~~  
34 ~~Upon receipt of the results of the investigation from the appropriate~~  
35 ~~agency, the auditor will notify the whistleblower as prescribed under~~  
36 ~~(a), (b), and (c) of this subsection)~~ With the agency's consent, the  
37 auditor may forward the assertions to an appropriate agency to  
38 investigate and report back to the auditor no later than sixty working  
39 days after the assertions are received from the auditor. The auditor

1 is entitled to all investigative records resulting from such a  
2 referral. All procedural and confidentiality provisions of this  
3 chapter apply to investigations conducted under this subsection. The  
4 auditor shall document the reasons the assertions were referred.

5 ~~((4))~~ (6) During the preliminary investigation, the auditor shall  
6 provide written notification of the nature of the assertions to the  
7 subject or subjects of the investigation and the agency head. The  
8 notification shall include the relevant facts and laws known at the  
9 time and the procedure for the subject or subjects of the investigation  
10 and the agency head to respond to the assertions and information  
11 obtained during the investigation. This notification does not limit  
12 the auditor from considering additional facts or laws which become  
13 known during further investigation.

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

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

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

36 (8) Within sixty working days after the ~~((thirty-day))~~ preliminary  
37 investigation period in subsection ~~((1))~~ (3) of this section, the  
38 auditor shall complete the investigation and report its findings to the  
39 whistleblower unless written justification for the delay is furnished

1 to the whistleblower, agency head, and subject or subjects of the  
2 investigation. In all such cases, the report of the auditor's  
3 investigation and findings shall be sent to the whistleblower within  
4 one year after the information was filed under subsection ~~((+1+))~~ (3)  
5 of this section.

6 ~~((+5+))~~ (9)(a) At any stage of an investigation under this section  
7 the auditor may require by subpoena the attendance and testimony of  
8 witnesses and the production of documentary or other evidence relating  
9 to the investigation at any designated place in the state. The auditor  
10 may issue subpoenas, administer oaths, examine witnesses, and receive  
11 evidence. In the case of contumacy or failure to obey a subpoena, the  
12 superior court for the county in which the person to whom the subpoena  
13 is addressed resides or is served may issue an order requiring the  
14 person to appear at any designated place to testify or to produce  
15 documentary or other evidence. Any failure to obey the order of the  
16 court may be punished by the court as a contempt thereof.

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

23 ~~((+6+))~~ (c) Agencies shall cooperate fully in the investigation and  
24 shall take appropriate action to preclude the destruction of any  
25 evidence during the course of the investigation.

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

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

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

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

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

19 ((+7)) (11) Once the auditor concludes that appropriate action has  
20 been taken to resolve the matter, the auditor shall so notify the  
21 whistleblower, the agency head, and the subject or subjects of the  
22 investigation. If the resolution takes more than one year, the auditor  
23 shall provide annual notification of its status to the whistleblower,  
24 agency head, and subject or subjects of the investigation.

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

28 **Sec. 4.** RCW 42.40.050 and 1992 c 118 s 3 are each amended to read  
29 as follows:

30 (1) Any person who is a whistleblower, as defined in RCW 42.40.020,  
31 and who as a result of being a whistleblower has been subjected to  
32 workplace reprisal or retaliatory action has the remedies provided  
33 under chapter 49.60 RCW. For the purpose of this section "reprisal or  
34 retaliatory action" means but is not limited to:

- 35 ((+1)) (a) Denial of adequate staff to perform duties;  
36 ((+2)) (b) Frequent staff changes;  
37 ((+3)) (c) Frequent and undesirable office changes;  
38 ((+4)) (d) Refusal to assign meaningful work;

1       (~~(5)~~) (e) Unwarranted and unsubstantiated letters of reprimand or  
2 unsatisfactory performance evaluations;  
3       (~~(6)~~) (f) Demotion;  
4       (~~(7)~~) (g) Reduction in pay;  
5       (~~(8)~~) (h) Denial of promotion;  
6       (~~(9)~~) (i) Suspension;  
7       (~~(10)~~) (j) Dismissal;  
8       (~~(11)~~) (k) Denial of employment; (~~and~~  
9       ~~(12)~~) (l) A supervisor or superior encouraging coworkers to behave  
10 in a hostile manner toward the whistleblower;  
11       (m) Actions which violate RCW 42.40.030; and  
12       (n) Disclosure of a whistleblower's name unless the whistleblower  
13 has consented to disclosure as provided in RCW 42.40.040(2).

14       (2) Nothing in this section prohibits an agency from making any  
15 decision exercising its authority to terminate, suspend, or discipline  
16 an employee who engages in workplace reprisal or retaliatory action  
17 against a whistleblower. However, the agency also shall implement any  
18 order under chapter 49.60 RCW (other than an order of suspension if the  
19 agency has terminated the retaliator).

20       NEW SECTION. Sec. 5. The auditor has the authority to contract  
21 for any assistance necessary to carry out the provisions of this  
22 chapter.

23       NEW SECTION. Sec. 6. The cost of administering this chapter is  
24 funded through the auditing services revolving account created in RCW  
25 43.09.410.

26       NEW SECTION. Sec. 7. A whistleblower wishing to provide  
27 information under this chapter regarding asserted improper governmental  
28 action against the state auditor or an employee of that office shall  
29 provide the information to the attorney general who shall act in place  
30 of the auditor in investigating and reporting the matter.

31       NEW SECTION. Sec. 8. Chapter . . . , Laws of 1999 (this act) does  
32 not affect the jurisdiction of the legislative ethics board, the  
33 executive ethics board, or the commission on judicial conduct, as set  
34 forth in chapter 42.52 RCW.



1 NEW SECTION. **Sec. 9.** The office of financial management shall  
 2 contract for a performance audit of the state employee whistleblower  
 3 program on a cycle to be determined by the office of financial  
 4 management. The audit shall be done in accordance with generally  
 5 accepted government auditing standards beginning with the fiscal year  
 6 ending June 30, 2001. The audit shall determine at a minimum: Whether  
 7 the program is acquiring, protecting, and using its resources such as  
 8 personnel, property, and space economically and efficiently; the causes  
 9 of inefficiencies or uneconomical practices; and whether the program  
 10 has complied with laws and rules on matters of economy and efficiency.  
 11 The audit shall also at a minimum determine the extent to which the  
 12 desired results or benefits established by the legislature are being  
 13 achieved, the effectiveness of the program, and whether the auditor has  
 14 complied with significant laws and rules applicable to the program.

15 The cost of the audit is a cost of operating the program and shall  
 16 be funded by the auditing services revolving account created by RCW  
 17 43.09.410.

18 **Sec. 10.** RCW 43.09.410 and 1995 c 301 s 25 are each amended to  
 19 read as follows:

20 An auditing services revolving account is hereby created in the  
 21 state treasury for the purpose of a centralized funding, accounting,  
 22 and distribution of the actual costs of the audits provided to state  
 23 agencies by the state auditor and audits of the state employee  
 24 whistleblower program under section 9 of this act.

25 NEW SECTION. **Sec. 11.** Sections 2 and 5 through 9 of this act are  
 26 each added to chapter 42.40 RCW."

27 **SHB 2005 - S AMD - 420**  
 28 By Senators Gardner and McCaslin

29 ADOPTED 4/16/99

30 On page 1, line 1 of the title, after "whistleblowers;" strike the  
 31 remainder of the title and insert "amending RCW 42.40.020, 42.40.040,  
 32 42.40.050, and 43.09.410; and adding new sections to chapter 42.40  
 33 RCW."

--- END ---