
HOUSE BILL 2633

State of Washington 59th Legislature 2006 Regular Session

By Representatives Haigh, Wallace, Santos, Tom and Nixon

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1 AN ACT Relating to whistleblower investigations; and amending RCW
2 42.40.040 and 42.41.030.

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

4 **Sec. 1.** RCW 42.40.040 and 1999 c 361 s 3 are each amended to read
5 as follows:

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

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

1 to determine the priority and weight given to these and other relevant
2 factors and to decide whether a matter is to be investigated. The
3 auditor shall document the factors considered and the analysis applied.

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

8 (d) In addition to investigating employee assertions of improper
9 governmental action, the auditor has the authority to investigate
10 assertions of improper action made by a state contractor or an employee
11 of a state contractor.

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

16 (3) Upon receiving specific information that an employee has
17 engaged in improper governmental action, the auditor shall, within five
18 working days of receipt of the information, mail written
19 acknowledgement to the whistleblower at the address provided stating
20 whether a preliminary investigation will be conducted. For a period
21 not to exceed thirty working days from receipt of the assertion, the
22 auditor shall conduct such preliminary investigation of the matter as
23 the auditor deems appropriate.

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

27 (5)(a) If it appears to the auditor, upon completion of the
28 preliminary investigation, that the matter is so unsubstantiated that
29 no further investigation, prosecution, or administrative action is
30 warranted, the auditor shall so notify the whistleblower.

31 (b) The written notification shall contain a summary of the
32 information received and of the results of the preliminary
33 investigation with regard to each assertion of improper governmental
34 action.

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

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

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

1 head to respond to the assertions and information obtained during the
2 investigation.

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

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

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

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

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

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

1 (i) The subject or subjects of the investigation and the head of
2 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 an investigative report containing reasonable
7 cause determinations to the agency, the agency shall send its plan for
8 resolution to the auditor within fifteen working days of having
9 received the report. The agency is encouraged to consult with the
10 subject or subjects of the investigation in establishing the resolution
11 plan. The auditor may require periodic reports of agency action until
12 all resolution has occurred. If the auditor determines that
13 appropriate action has not been taken, the auditor shall report the
14 determination to the governor and to the legislature and may include
15 this determination in the agency audit under chapter 43.09 RCW.

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

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

25 **Sec. 2.** RCW 42.41.030 and 1995 c 213 s 1 are each amended to read
26 as follows:

27 (1) Every local government employee has the right to report to the
28 appropriate person or persons information concerning an alleged
29 improper governmental action.

30 (2) The governing body or chief administrative officer of each
31 local government shall adopt a policy on the appropriate procedures to
32 follow for reporting such information and shall provide information to
33 their employees on the policy. Local governments are encouraged to
34 consult with their employees on the policy.

35 (3) The policy shall describe the appropriate person or persons
36 within the local government to whom to report information and a list of

1 appropriate person or persons outside the local government to whom to
2 report. The list shall include the county prosecuting attorney.

3 (4) The policy shall authorize the state auditor to investigate
4 assertions of improper action made by a local government contractor or
5 an employee of a local government contractor.

6 (5) Each local government shall permanently post a summary of the
7 procedures for reporting information on an alleged improper
8 governmental action and the procedures for protection against
9 retaliatory actions described in RCW 42.41.040 in a place where all
10 employees will have reasonable access to it. A copy of the summary
11 shall be made available to any employee upon request.

12 ((+5)) (6) A local government may require as part of its policy
13 that, except in the case of an emergency, before an employee provides
14 information of an improper governmental action to a person or an entity
15 who is not a public official or a person listed pursuant to subsection
16 (3) of this section, the employee shall submit a written report to the
17 local government. Where a local government has adopted such a policy
18 under this section, an employee who fails to make a good faith attempt
19 to follow the policy shall not receive the protections of this chapter.

20 ((+6)) (7) If a local government has failed to adopt a policy as
21 required by subsection (2) of this section, an employee may report
22 alleged improper government action directly to the county prosecuting
23 attorney or, if the prosecuting attorney or an employee of the
24 prosecuting attorney participated in the alleged improper government
25 action, to the state auditor. The cost incurred by the state auditor
26 in such investigations shall be paid by the local government through
27 the municipal revolving account authorized in RCW 43.09.282.

28 ((+7)) (8) The identity of a reporting employee shall be kept
29 confidential to the extent possible under law, unless the employee
30 authorizes the disclosure of his or her identity in writing.

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