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**SUBSTITUTE SENATE BILL 5294**

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**State of Washington 65th Legislature 2017 Regular Session**

**By** Senate Law & Justice (originally sponsored by Senators Padden and O'Ban)

AN ACT Relating to addressing the department of corrections early release error; amending RCW 72.09.010, 43.06.010, 42.40.040, 49.60.210, and 42.40.110; adding new sections to chapter 72.09 RCW; adding a new chapter to Title 43 RCW; creating new sections; and providing an expiration date.

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

NEW SECTION. **Sec.**  The legislature finds that serious and specific public allegations have been made against the department of corrections regarding the department's early release error of over three thousand two hundred prisoners during a thirteen-year period from 2002 to 2015. The senate engaged in an exhaustive investigation that involved review of over one hundred thousand pages of documents, three dozen witnesses interviews, six hearings in which thirteen witnesses testified under oath, and the release of a report. The report outlined a systematic failure of management by members of the executive branch over a multiyear period and made a number of recommendations to address the underlying causes of the problem. The purpose of this act is to implement the following twelve legislative recommendations:

(1) Establish a corrections ombuds independent of the department of corrections and the governor's office.

(2) Investigate the advance corrections/STRONG-R initiative/project.

(3) Clarify the statutory obligation of the governor to oversee agencies.

(4) Clarify through policy how personal relationships within the executive branch should be managed to avoid conflicts of interest.

(5) Simplify Washington's sentencing code in a manner that does not reduce punishment or compromise public safety.

(6) Study the staffing of the information technology and records departments of the department of corrections.

(7) Require a department of corrections-wide hand count in the event of any future computer error that results in early prisoner releases.

(8) Require an annual report to the legislature and plan to address the department of corrections' information technology maintenance backlog.

(9) Enhance protections for department of corrections "whistleblowers."

(10) Review whether additional actions may be possible against former department of corrections secretary Bernie Warner.

(11) Designate public safety as the department of corrections' highest statutory duty.

(12) Restructure information technology governance at the department of corrections.

**PART 1**

**CREATING THE DEPARTMENT OF CORRECTIONS OMBUDS**

NEW SECTION. **Sec.**  Subject to the availability of amounts appropriated for this specific purpose, the legislature hereby authorizes the creation of the office of the corrections ombuds for the purpose of providing information to inmates, family members, representatives of inmates, department employees, and others regarding the rights of inmates; providing technical assistance to support inmate self-advocacy, alternative dispute resolution, and individual representation; identifying systemic issues, reporting to the legislature, and advocating for systemic reform; and monitoring and promoting compliance with statutes, rules, and policies pertaining to conditions of correctional facilities and the rights of inmates.

NEW SECTION. **Sec.**  (1) Subject to confirmation by the senate, the governor shall appoint an ombuds who must be a person of recognized judgment, independence, objectivity, and integrity, and must be qualified by training or experience, or both,

in providing information to inmates, family members, representatives of inmates, department employees, and others regarding the rights of inmates; providing technical assistance to support inmate self-advocacy, alternative dispute resolution, and individual representation; identifying systemic issues, reporting to the legislature, and advocating for systemic reform; and monitoring and promoting compliance with statutes, rules, and policies pertaining to conditions of correctional facilities and the rights of inmates. Prior to the appointment, the governor shall consult with and may receive recommendations from the ombuds advisory council regarding the selection of the ombuds.

(2) The person appointed ombuds shall hold office for a term of three years and continue to hold office until reappointed or until his or her successor is appointed. The governor may remove the ombuds only for neglect of duty, misconduct, or inability to perform duties. Any vacancy shall be filled by similar appointment for the remainder of the unexpired term.

NEW SECTION. **Sec.**  The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Abuse" means any act or failure to act by a department employee, subcontractor, or volunteer which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to an inmate.

(2) "Corrections ombuds" or "ombuds" means the corrections ombuds, staff of the corrections ombuds, and volunteers with the office of the corrections ombuds.

(3) "Council" means the ombuds advisory council established in section 5(1) of this act.

(4) "Department" means the department of corrections.

(5) "Inmate" means a person committed to the custody of the department, including, but not limited to, persons residing in a correctional institution or facility; persons released from such facility on furlough, work release, or community custody; and persons received from another state, another state agency, a county, or the federal government.

(6) "Neglect" means a negligent act or omission by any department employee, subcontractor, or volunteer which caused, or may have caused, injury or death to an inmate.

(7) "Office" means the office of the corrections ombuds.

(8) "Organization" means the private nonprofit organization that operates the office of the corrections ombuds.

NEW SECTION. **Sec.**  (1) No later than August 1, 2017, the governor shall convene an ombuds advisory council with several purposes in support of the ombuds function. The council shall participate in a priority setting process for the purpose of developing priority recommendations to the ombuds, review data collected by the ombuds, review reports issued by the ombuds prior to their release, and make recommendations to the ombuds regarding the accomplishment of its purposes. The council also has authority to issue its own reports and recommendations. The council must biannually review ombuds performance, reporting to the governor and the legislature regarding its findings. The council must provide the legislature with recommendations regarding the ombuds budget and changes in the law that would enhance ombuds effectiveness.

(2) The council initially consists of one democrat and one republican member of the legislature. The chairs of the senate committee on law and justice and the house of representatives committee on public safety shall make recommendations to the president of the senate and the speaker of the house of representatives, who shall make the final appointments. These appointed members shall select the following additional members:

(a) One former inmate who has successfully reintegrated into the community and is no longer in the custody of the department;

(b) Two family members of a current inmate;

(c) One expert with significant criminal justice or correctional experience who is not an employee or contractor with the state of Washington;

(d) A community member with extensive knowledge and experience in issues related to racial, ethnic, or religious diversity within the correctional system;

(e) A community member with extensive knowledge and experience in the accommodation needs of individuals with disabilities; and

(f) A community member with dispute resolution training who has experience working in the criminal justice or corrections field.

(3) The council also includes:

(a) The department staff serving as the internal ombuds, if any; and

(b) A bargaining unit representative, as selected by the membership of the bargaining unit.

(4) After the full membership is attained, the council shall develop a process for replacing members in case of resignation or expiration of terms.

(5) Councilmembers serve a term of three years, except that the council shall create and implement a system of staggered terms, and no member may serve more than two consecutive terms. The council shall convene at least quarterly. Councilmembers will serve without compensation, except that funds appropriated for the implementation of this act may be used to reimburse members who are not employees of Washington state for expenses necessary to the performance of their duties.

NEW SECTION. **Sec.**  (1) The state auditor shall designate, by a competitive bidding process, the nonprofit organization that will contract to operate the office of the corrections ombuds. The selection process must include direct stakeholder participation in the development of the request for proposals, evaluation of bids, and final selection. The state auditor shall select an organization that possesses, directly or through subcontracts, significant legal expertise, competence with mediation and alternative dispute resolution, and experience working within criminal justice and correctional environments addressing issues relating to chemical dependency treatment, disability and disability-related accommodation, respect for racial, ethnic, and religious diversity, and other civil rights and conditions issues. The selected organization must have experience and the capacity to effectively communicate regarding criminal justice issues with policymakers, stakeholders, and the general public, and must be prepared and able to provide all program and staff support necessary, directly or through subcontracts, to carry out all duties of the office.

(2) The contracting organization and its subcontractors, if any, are not state agencies or departments, but instead are private, independent entities operating under contract with the state.

(3) The state auditor or state may not revoke the designation of the organization contracted to provide the services of the office of the corrections ombuds except upon a showing of neglect of duty, misconduct, or inability to perform duties. Prior to revoking the designation, the state must provide notice and an opportunity for the organization, the ombuds, and the public to comment upon the proposed revocation, and must provide the organization an opportunity to appeal the decision to a court.

NEW SECTION. **Sec.**  (1) The ombuds shall:

(a) Establish priorities for use of the limited resources appropriated to implement this act;

(b) Maintain a statewide toll-free telephone number, a collect telephone number, a web site, and a mailing address for the receipt of complaints and inquiries;

(c) Provide information, as appropriate, to inmates, family members, representatives of inmates, department employees, and others regarding the rights of inmates;

(d) Provide technical assistance to support inmate participation in self-advocacy, utilizing existing kite, grievance, and appeal procedures;

(e) Monitor department compliance with applicable federal, state, and local laws, rules, regulations, and policies with a view toward protecting the rights of inmates;

(f) Monitor and participate in legislative and policy developments affecting correctional facilities and advocate for systemic reform aimed toward protecting the rights of inmates;

(g) Establish a statewide uniform reporting system to collect and analyze data related to complaints regarding the department;

(h) Establish procedures to receive, investigate, and resolve complaints;

(i) Submit annually to the council, by November 1st of each year, a report analyzing the work of the office, including any recommendations; and

(j) Adopt and comply with rules, policies, and procedures necessary to implement this chapter.

(2)(a) The ombuds may initiate and attempt to resolve an investigation upon his or her own initiative, or upon receipt of a complaint from an inmate, a family member, a representative of an inmate, a department employee, or others, regarding:

(i) Abuse or neglect;

(ii) Department decisions or actions;

(iii) Inactions or omissions;

(iv) Policies, rules, or procedures; or

(v) Alleged violations of law.

(b) The ombuds may decline to investigate any complaint as provided by the rules adopted under this chapter.

(c) The ombuds may not investigate any complaints relating to an inmate's underlying criminal conviction.

(d) The ombuds may not investigate a complaint from a department employee that relates to the employee's employment relationship with the department.

(e) The ombuds may refer complainants and others to appropriate resources, agencies, or departments.

(f) The ombuds may not levy any fees for the submission or investigation of complaints.

(g) At the conclusion of an investigation of a complaint, the ombuds must render a public decision on the merits of each complaint, except that the documents supporting the decision are subject to the confidentiality provisions of section 9 of this act. The ombuds must communicate the decision to the inmate, if any, and to the department. The ombuds must state their recommendations and reasoning if, in the ombuds' opinion, the department or any employee thereof should:

(i) Consider the matter further;

(ii) Modify or cancel any action;

(iii) Alter a rule, practice, or ruling;

(iv) Explain in detail the administrative action in question;

(v) Rectify an omission; or

(vi) Take any other action.

(h) If the ombuds so requests, the department must, within the time specified, inform the ombuds about any action taken on the recommendations or the reasons for not complying with the recommendations.

(i) After the conclusion of an investigation, if the ombuds believes that additional action is warranted, the ombuds may:

(i) Report a finding of abuse, neglect, or other rights violation to the appropriate committees of the legislature.

(ii) Take any additional action that the ombuds considers appropriate.

(j) Before announcing a conclusion or recommendation that expressly, or by implication, criticizes a person or the department, the ombuds must attempt to notify the person or the department. The ombuds may request to be notified by the department, within a specified time, of any action taken on any recommendation presented. The ombuds must notify the inmate, if any, of the actions taken by the department in response to the ombuds' recommendations.

(3) This chapter does not require inmates to file a complaint with the ombuds in order to exhaust available administrative remedies for purposes of the prison litigation reform act of 1995, P.L. 104-134.

NEW SECTION. **Sec.**  (1) The ombuds must have reasonable access to correctional facilities at all times necessary to conduct a full investigation of an incident of abuse or neglect. This authority includes the opportunity to interview any inmate, department employee, or other person, including the person thought to be the victim of such abuse, who might be reasonably believed to have knowledge of the incident under investigation. Such access must be afforded, upon request by the ombuds, when:

(a) An incident is reported or a complaint is made to the office;

(b) The ombuds determines there is reasonable suspicion that an incident has or may have occurred; or

(c) The ombuds determines that there is or may be imminent danger of serious abuse or neglect of an inmate.

(2) The ombuds must have reasonable access to department facilities, including all areas which are used by inmates, all areas which are accessible to inmates, and to programs for inmates at reasonable times, which at a minimum must include normal working hours and visiting hours. This access is for the purpose of:

(a) Providing information about individual rights and the services available from the office, including the name, address, and telephone number of the office;

(b) Monitoring compliance with respect to the rights and safety of inmates; and

(c) Inspecting, viewing, photographing, and video recording all areas of the facility which are used by inmates or are accessible to inmates.

(3) Reasonable access to inmates includes the opportunity to meet and communicate privately and confidentially with individuals regularly, both formally and informally, by telephone, mail, and in person.

(4) The ombuds has the right to access, inspect, and obtain copies of all relevant information, records, or documents in the possession or control of the department that the ombuds considers necessary in an investigation of a complaint filed under this chapter, and the department must assist the ombuds in obtaining the necessary releases for those documents which are specifically restricted or privileged for use by the ombuds.

(a) When conducting an investigation of potential abuse or neglect, the ombuds must have access to relevant records not later than ten business days after the ombuds makes a written request for such records.

(b) The ombuds must have immediate access, not later than seventy-two hours after the ombuds makes such a request, to relevant records, without consent from another party, if the ombuds determines there is reasonable suspicion that the health or safety of an inmate is in serious and immediate jeopardy, or in any case of death of an inmate while in department custody.

(5) A state or local government agency or entity that has records that are relevant to a complaint or an investigation conducted by the ombuds must provide the ombuds with access to such records.

NEW SECTION. **Sec.**  (1) Correspondence and communication with the office is confidential and must be protected as privileged correspondence in the same manner as legal correspondence or communication.

(2) The office shall establish confidentiality rules and procedures for all information maintained by the office.

(3) The office shall preserve the confidentiality of information obtained while providing services, including general information, technical assistance, and investigations, to individuals, including inmates, family members and representatives of inmates, department employees, and others. Confidential information may not be disclosed unless the individual gives informed consent, the disclosure is impliedly authorized in order to carry out ombuds services, or the disclosure is authorized by subsection (4) of this section.

(4) To the extent the ombuds reasonably believes necessary, the ombuds:

(a) Must reveal information obtained in the course of providing ombuds services to prevent reasonably certain death or substantial bodily harm; and

(b) May reveal information obtained in the course of providing ombuds services to prevent the commission of a crime.

(5) If the ombuds receives personally identifying information about individual corrections staff during the course of an investigation that the ombuds determines is unrelated or unnecessary to the subject of the investigation or recommendation for action, the ombuds will not further disclose such information. If the ombuds determines that such disclosure is necessary to an investigation or recommendation, the ombuds will contact the staff member as well as the bargaining unit representative before any disclosure.

NEW SECTION. **Sec.**  (1) A civil action may not be brought against any employee of the office for good faith performance of responsibilities under this chapter.

(2) No discriminatory, disciplinary, or retaliatory action may be taken against a department employee, subcontractor, or volunteer, an inmate, or a family member or representative of an inmate for any communication made, or information given or disclosed, to aid the office in carrying out its responsibilities, unless the communication or information is made, given, or disclosed maliciously or without good faith.

(3) The department may not hinder the lawful actions of the ombuds or employees of the office, or willfully refuse to comply with lawful demands of the office.

(4) This section is not intended to infringe on the rights of an employer to supervise, discipline, or terminate an employee for other reasons.

**PART 2**

**DEPARTMENT OF CORRECTIONS**

**Sec.**  RCW 72.09.010 and 1995 1st sp.s. c 19 s 2 are each amended to read as follows:

It is the intent of the legislature to establish a comprehensive system of corrections for convicted law violators within the state of Washington to accomplish the following objectives.

(1) The ((~~system should~~)) highest duty of the department and the secretary is to ensure the public safety. The system should be designed and managed to provide the maximum feasible safety for the persons and property of the general public, the staff, and the inmates.

(2) The system should punish the offender for violating the laws of the state of Washington. This punishment should generally be limited to the denial of liberty of the offender.

(3) The system should positively impact offenders by stressing personal responsibility and accountability and by discouraging recidivism.

(4) The system should treat all offenders fairly and equitably without regard to race, religion, sex, national origin, residence, or social condition.

(5) The system, as much as possible, should reflect the values of the community including:

(a) Avoiding idleness. Idleness is not only wasteful but destructive to the individual and to the community.

(b) Adoption of the work ethic. It is the community expectation that all individuals should work and through their efforts benefit both themselves and the community.

(c) Providing opportunities for self improvement. All individuals should have opportunities to grow and expand their skills and abilities so as to fulfill their role in the community.

(d) Linking the receipt or denial of privileges to responsible behavior and accomplishments. The individual who works to improve himself or herself and the community should be rewarded for these efforts. As a corollary, there should be no rewards for no effort.

(e) Sharing in the obligations of the community. All citizens, the public and inmates alike, have a personal and fiscal obligation in the corrections system. All communities must share in the responsibility of the corrections system.

(6) The system should provide for prudent management of resources. The avoidance of unnecessary or inefficient public expenditures on the part of offenders and the department is essential. Offenders must be accountable to the department, and the department to the public and the legislature. The human and fiscal resources of the community are limited. The management and use of these resources can be enhanced by wise investment, productive programs, the reduction of duplication and waste, and the joining together of all involved parties in a common endeavor. Since most offenders return to the community, it is wise for the state and the communities to make an investment in effective rehabilitation programs for offenders and the wise use of resources.

(7) The system should provide for restitution. Those who have damaged others, persons or property, have a responsibility to make restitution for these damages.

(8) The system should be accountable to the citizens of the state. In return, the individual citizens and local units of government must meet their responsibilities to make the corrections system effective.

(9) The system should meet those national standards which the state determines to be appropriate.

NEW SECTION. **Sec.**  A new section is added to chapter 72.09 RCW to read as follows:

To ensure public safety and the administration of justice, if the department has actual knowledge or reason to believe that a computer calculation error is or has caused an error in the calculation of the release date for any prisoner, the department shall immediately manually calculate the release date of that prisoner as well as the release dates of any similarly sentenced prisoners.

NEW SECTION. **Sec.**  A new section is added to chapter 72.09 RCW to read as follows:

On December 1st of each year, and in compliance with RCW 43.01.036, the department must submit a report to the governor and relevant policy and fiscal committees of the legislature that details any information technology backlog at the department along with specific requirements and plans to address such backlog.

**PART 3**

**JOINT LEGISLATIVE AUDIT AND REVIEW COMMITTEE**

NEW SECTION. **Sec.**  (1) Pursuant to chapter 43.09 RCW, the joint legislative audit and review committee must conduct an immediate performance audit of the information technology and records departments at the department of corrections, including:

(a) The administrative structure of the departments, including whether the departments should be restructured to more quickly respond to legislative directives and emergent issues;

(b) The sufficiency and quality of staffing at each of the departments; and

(c) An evaluation of the advance corrections project.

(2) The joint legislative audit and review committee shall report its findings to the governor and relevant policy and fiscal committees of the legislature by December 1, 2018.

**PART 4**

**GOVERNOR**

**Sec.**  RCW 43.06.010 and 2014 c 202 s 305 are each amended to read as follows:

In addition to those prescribed by the Constitution, the governor may exercise the powers and perform the duties prescribed in this and the following sections:

(1) The governor shall supervise the conduct of all executive and ministerial offices, ensure that all offices are performing their duties as prescribed by law, and ensure that all personal and professional conflicts of interest are avoided;

(2) The governor shall see that all offices are filled, including as provided in RCW 42.12.070, and the duties thereof performed, or in default thereof, apply such remedy as the law allows; and if the remedy is imperfect, acquaint the legislature therewith at its next session;

(3) The governor shall make the appointments and supply the vacancies mentioned in this title;

(4) The governor is the sole official organ of communication between the government of this state and the government of any other state or territory, or of the United States;

(5) Whenever any suit or legal proceeding is pending against this state, or which may affect the title of this state to any property, or which may result in any claim against the state, the governor may direct the attorney general to appear on behalf of the state, and report the same to the governor, or to any grand jury designated by the governor, or to the legislature when next in session;

(6) The governor may require the attorney general or any prosecuting attorney to inquire into the affairs or management of any corporation existing under the laws of this state, or doing business in this state, and report the same to the governor, or to any grand jury designated by the governor, or to the legislature when next in session;

(7) The governor may require the attorney general to aid any prosecuting attorney in the discharge of the prosecutor's duties;

(8) The governor may offer rewards, not exceeding one thousand dollars in each case, payable out of the state treasury, for information leading to the apprehension of any person convicted of a felony who has escaped from a state correctional institution or for information leading to the arrest of any person who has committed or is charged with the commission of a felony;

(9) The governor shall perform such duties respecting fugitives from justice as are prescribed by law;

(10) The governor shall issue and transmit election proclamations as prescribed by law;

(11) The governor may require any officer or board to make, upon demand, special reports to the governor, in writing;

(12) The governor may, after finding that a public disorder, disaster, energy emergency, or riot exists within this state or any part thereof which affects life, health, property, or the public peace, proclaim a state of emergency in the area affected, and the powers granted the governor during a state of emergency shall be effective only within the area described in the proclamation;

(13) The governor may, after finding that there exists within this state an imminent danger of infestation of plant pests as defined in RCW 17.24.007 or plant diseases which seriously endangers the agricultural or horticultural industries of the state of Washington, or which seriously threatens life, health, or economic well-being, order emergency measures to prevent or abate the infestation or disease situation, which measures, after thorough evaluation of all other alternatives, may include the aerial application of pesticides;

(14) The governor, after finding that a prohibited level 1 or level 2 species as defined in chapter 77.135 RCW has been detected and after finding that the detected species seriously endangers or threatens the environment, economy, human health, or well-being of the state of Washington, may order emergency measures to prevent or abate the prohibited species, which measures, after thorough evaluation of all other alternatives, may include the surface or aerial application of pesticides;

(15) On all compacts forwarded to the governor pursuant to RCW 9.46.360(6), the governor is authorized and empowered to execute on behalf of the state compacts with federally recognized Indian tribes in the state of Washington pursuant to the federal Indian Gaming Regulatory Act, 25 U.S.C. Sec. 2701 et seq., for conducting class III gaming, as defined in the Act, on Indian lands.

**PART 5**

**SENTENCING REFORM**

NEW SECTION. **Sec.**  (1) A joint legislative task force to simplify criminal sentencing is established.

(2) The task force is composed of members as provided in this subsection.

(a) The president of the senate shall appoint one member from each of the two largest caucuses of the senate.

(b) The speaker of the house of representatives shall appoint one member from each of the two largest caucuses of the house of representatives.

(c) The president of the senate and the speaker of the house of representatives jointly shall appoint members representing the:

(i) Washington association of sheriffs and police chiefs;

(ii) Washington state patrol;

(iii) Caseload forecast council;

(iv) Washington association of prosecuting attorneys;

(v) Washington association of criminal defense attorneys or the Washington defender association;

(vi) Washington state association of counties;

(vii) Office of the attorney general;

(viii) American civil liberties union of Washington;

(ix) Sentencing guidelines commission;

(x) Department of corrections;

(xi) Superior court judges' association; and

(xii) Administrative office for the courts.

(3) The task force shall:

(a) Review and make recommendations regarding how the sentencing reform act of 1981 can be simplified; and

(b) Limit its review and recommendations to technical, nonsubstantive changes. The task force recommendations must be limited to those that will not reduce punishment or risk public safety.

(4) The legislative membership shall convene the initial meeting of the task force no later than September 2018.

(5) The task force shall submit a report, which may include findings, recommendations, and proposed legislation, to the appropriate committees of the legislature by December 1, 2019.

(6) Staff support for the task force must be provided by the senate committee services and the house office of program research.

(7) Legislative members of the task force are reimbursed for travel expenses in accordance with RCW 44.04.120. Nonlegislative members are not entitled to be reimbursed for travel expenses if they are elected officials or are participating on behalf of an employer, governmental entity, or other organization. Any reimbursement for other nonlegislative members is subject to chapter 43.03 RCW.

(8) The expenses of the task force shall be paid jointly by the senate and the house of representatives. Task force expenditures are subject to approval by the senate facilities and operations committee and the house executive rules committee, or their successor committees.

(9) This section expires July 1, 2020.

**PART 6**

**GENERAL PROVISIONS**

**Sec.**  RCW 42.40.040 and 2008 c 266 s 4 are each amended to read as follows:

(1)(a) In order to be investigated, an assertion of improper governmental action must be provided to the auditor or other public official within one year after the occurrence of the asserted improper governmental action. The public official, as defined in RCW 42.40.020, receiving an assertion of improper governmental action must report the assertion to the auditor within fifteen calendar days of receipt of the assertion. The auditor retains sole authority to investigate an assertion of improper governmental action including those made to a public official. A failure of the public official to report the assertion to the auditor within fifteen days does not impair the rights of the whistleblower.

(b) Except as provided under RCW 42.40.910 for legislative and judicial branches of government, the auditor has the authority to determine whether to investigate any assertions received. In determining whether to conduct either a preliminary or further investigation, the auditor shall consider factors including, but not limited to: The nature and quality of evidence and the existence of relevant laws and rules; whether the action was isolated or systematic; the history of previous assertions regarding the same subject or subjects 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 auditor has the sole discretion to determine the priority and weight given to these and other relevant factors and to decide whether a matter is to be investigated. The auditor shall document the factors considered and the analysis applied.

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

(2) Subject to subsection (5)(c) of this section, the identity or identifying characteristics of a whistleblower is confidential at all times unless the whistleblower consents to disclosure by written waiver or by acknowledging his or her identity in a claim against the state for retaliation. In addition, the identity or identifying characteristics of any person who in good faith provides information in an investigation under this section is confidential at all times, unless the person consents to disclosure by written waiver or by acknowledging his or her identity as a witness who provides information in an investigation.

(3) Upon receiving specific information that an employee has engaged in improper governmental action, the auditor shall, within fifteen working days of receipt of the information, mail written acknowledgment to the whistleblower at the address provided stating whether a preliminary investigation will be conducted. For a period not to exceed sixty working days from receipt of the assertion, the auditor shall conduct such preliminary investigation of the matter as the auditor deems appropriate.

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

(5)(a) If it appears to the auditor, upon completion of the ((~~preliminary~~)) investigation, that the matter is so unsubstantiated that no further investigation, prosecution, or administrative action is warranted, the auditor shall so notify the whistleblower summarizing where the allegations are deficient, and provide a reasonable opportunity to reply. Such notification may be by electronic means.

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

(c) In any case to which this section applies, the identity or identifying characteristics of the whistleblower shall be kept confidential unless the auditor determines that the information has been provided other than in good faith. If the auditor makes such a determination, the auditor shall provide reasonable advance notice to the employee.

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

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

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

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

~~(c) If further investigation is to occur, the auditor shall provide written notification of the nature of the assertions to the subject or subjects of the investigation and the agency head. The notification shall include the relevant facts known at the time and the procedure to be used by the subject or subjects of the investigation and the agency head to respond to the assertions and information obtained during the investigation~~)) that an investigation has been initiated. The auditor shall also notify the whistleblower, the subject or subjects of the investigation, and the agency head no later than ninety days after initiating the investigation regarding the one hundred twenty-day statutory deadline for conclusion of the investigation provided in subsection (7) of this section and provide notice that the investigation will be completed within thirty days.

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

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

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

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

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

(9)(a) If the auditor determines there is reasonable cause to believe an employee has engaged in improper governmental action, the auditor shall report, to the extent allowable under existing public disclosure laws, the nature and details of the activity to:

(i) The subject or subjects of the investigation and the head of the employing agency;

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

(iii) Electronically to the governor, secretary of the senate, and chief clerk of the house of representatives; and

(iv) Except for information whose release is specifically prohibited by statute or executive order, the public through the public file of whistleblower reports maintained by the auditor.

(b) The auditor has no enforcement power except that in any case in which the auditor submits an investigative report containing reasonable cause determinations to the agency, the agency shall send its plan for resolution to the auditor within fifteen working days of having received the report. The agency is encouraged to consult with the subject or subjects of the investigation in establishing the resolution plan. The auditor may require periodic reports of agency action until all resolution has occurred. If the auditor determines that appropriate action has not been taken, the auditor shall report the determination to the governor and to the legislature and may include this determination in the agency audit under chapter 43.09 RCW.

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

(11) Failure to cooperate with such audit or investigation, or retaliation against anyone who assists the auditor by engaging in activity protected by this chapter shall be reported as a separate finding with recommendations for corrective action in the associated report whenever it occurs.

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

**Sec.**  RCW 49.60.210 and 2011 1st sp.s. c 42 s 25 are each amended to read as follows:

(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(2)(a) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.

(b) A settlement of any cause of action brought by an employee under this subsection may not contain a provision prohibiting the employee from future work in state government.

(3) It is an unfair practice for any employer, employment agency, labor union, government agency, government manager, or government supervisor to discharge, expel, discriminate, or otherwise retaliate against an individual assisting with an office of fraud and accountability investigation under RCW 74.04.012, unless the individual has willfully disregarded the truth in providing information to the office.

**Sec.**  RCW 42.40.110 and 1999 c 361 s 8 are each amended to read as follows:

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

(b) The cost of the audit is a cost of operating the program and shall be funded by the auditing services revolving account created by RCW 43.09.410.

(2) In the contract for the next regularly scheduled performance audit following the effective date of this section, the office of financial management must require the audit to review the legislative report from the senate law and justice committee and any other pertinent documentation regarding the department of corrections early release error, with particular focus on the inability of department of corrections employees to use the state employee whistleblower program to address concerns with mismanagement of that department. The audit must provide recommendations on this matter in its evaluation of the effectiveness of the program.

NEW SECTION. **Sec.**  Sections 1 through 10 of this act constitute a new chapter in Title 43 RCW.

**--- END ---**