

PROPOSED AMENDMENTS TO THE CITY OF SEATTLE WHISTLEBLOWER PROTECTION CODE

[proposed changes in blue and underlined]

SMC 4.20.800 Policy - Purpose. It is the purpose of this ordinance to:

- A. Encourage good faith reporting by City Employees of improper governmental action to the appropriate City or other government official and to provide a clear reporting process;
- B. Provide for a independent investigation of reports for the purpose of informing City government;
- C. Provide City Employees with protection from retaliatory action and for the independent investigation of alleged retaliation;
- D. Provide employees with non-exclusive remedies to address retaliation and for the assessment of penalties against those who retaliate against a City Employee acting in accordance with this chapter, and,
- E. Adopt a City program providing for the reporting of alleged improper governmental actions, the independent investigation of retaliation claims arising under this ordinance with the intent to exempt the City from 42.41 RCW, and to provide Cooperating Employees with non-exclusive remedies to seek recompense for acts of retaliation.

SMC 4.20.810 - Definitions

As used in Sections 4.20.800 through 4.20.860, the following terms shall have these meanings:

- A. “City Employee” or “Employees” means every individual who is, appointed to a position of employment in any City agency, an elected official, an individual who volunteers services to the City and individuals appointed to boards and commission whether paid or unpaid.
- B. “Cooperating Employee” means:
 - a. A City employee who in good faith reports alleged improper governmental action pursuant to this subchapter, or
 - b. A City employee who is perceived by the employer as reporting, whether they did or not, alleged improper governmental action, or
 - c. A City employee who in good faith provides information in connection with an inquiry or investigation of alleged improper governmental action, or
 - d. A City employee who is perceived by the employer as providing information in connection with an inquiry or investigation of alleged improper governmental action, but who, in fact, has not done so.
- C. "Executive Director" means the Executive Director of the Seattle Ethics and Elections Commission.
- D. “Good Faith” means the individual providing the information or report of improper governmental activity has a reasonable basis in fact for reporting or providing the information. An individual who knowingly provides or reports, malicious, false, or frivolous information, or information with reckless disregard for the truth, is not acting in good faith.
- E. “Gross Waste of Public Funds or Resources” means to spend or use funds or resources, or to allow the use of any funds or resources, in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation. The term “gross waste of public funds or resources” also includes the non-collection of a debt or other obligation owed the City when the non-collection is done in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation.
- F. "Improper governmental action" means any action by an employee that is undertaken in the performance of the employee's official duties, whether or not the action is within the scope of employment, and:
 - a. Violates any Federal, State or City law or rule.
 - b. Creates a substantial or specific danger or 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.
 - c. Results in a gross waste of public funds or resources; or
 - d. Prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification, unless disclosure is legally prohibited. This provision is not meant to preclude the discretion of department or agency management to adopt a particular scientific opinion or technical finding from among differing opinions or technical findings to the exclusion of other scientific opinion or technical findings.

[Note: Deletion of “constitutes an abuse of authority”]

- e. " Improper governmental action" excludes:
 - i. personnel actions, including but not limited to: employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, reprimands, violations of collective bargaining or civil service laws, or alleged violations of agreements with labor organizations under collective bargaining, or any action that may be taken under RCW Chapters 41.08, 41.12, 41.14, 41.56, 41.59, or 53.18 or RCW 54.04.170 and 54.04.180.
 - ii. A properly authorized City program, [reasonable expenditure](#) or activity that an employee dissents from the City policy or considers the expenditures unwise.
- G. "Retaliate," and its kindred nouns, "retaliation" and "retaliatory action," means to make, or use one's official authority to influence another to make, because of an activity protected under Section 4.20.810, any unwarranted adverse change in an employee's employment status or the terms and conditions of employment including, but not limited to, denial of adequate staff to perform duties; frequent staff changes; frequent and undesirable office changes or changes [in the physical location of the Cooperating Employee's workplace or a change in the basic nature of the Cooperating Employee's job, if either are in opposition to the Cooperating Employee's expressed wish; refusal to assign meaningful work; letters of reprimand or unsatisfactory performance evaluations; demotion, reduction in pay; denial of promotion;](#) transfer or reassignment; suspension or dismissal; or other disciplinary action; [a supervisor or superior behaving in or encouraging coworkers to behave in a hostile manner toward the Cooperating Employee; issuance of or attempt to enforce any nondisclosure policy or agreement in a manner inconsistent with prior practice; or any other action that is inconsistent compared to actions taken before the Cooperating Employee engaged in action protected by this chapter, or compared to other employees who have not engaged in action protected by this chapter.](#)
- H. ["Use of official authority to influence" includes threatening, taking, directing others to take, recommending, processing, or approving any retaliatory action including tolerance of a hostile work environment or any adverse action under applicable civil service law.](#)

SMC 4.20.820 - Reporting improper governmental action – Rights, Responsibilities, Limitations and Protected Conduct.

A Employee Rights.

- 1) Right to Report: Every City employee shall have the right to report in good faith information concerning an improper governmental action.
- 2) Freedom from Retaliation: Every [Cooperating City](#) employee, who acts in good faith pursuant to this subchapter shall be free from retaliation.

B Confidentiality: To the extent allowed by law:

- 1) The identity of City Employees who make a good faith report of alleged improper governmental action or who [cooperate in good faith in an inquiry or investigation initiated under this sub-chapter](#), and who request confidentiality, shall , to the extent provided by law, not be disclosed [as a cooperating employee](#) unless:
 - a) The City Employee in writing waives confidentiality and consents to disclosure, or
 - b) The City employee waives confidentiality through a claim of retaliation based on the reporting of improper governmental action.

C Limitations.

- 1. A City employee is not authorized to disclose information otherwise protected by law.
- 2. An employee's report of his or her own improper action does not result in the employee being free from discipline or termination under SMC 4.04.230 or 4.08.100 if his or her improper action would be cause for such actions.

D Protected Conduct- Reporting:

- 1. The following conduct by City employees is protected if carried out in good faith and in accordance with this subchapter:
 - a. Reporting to the Executive Director any assertion of improper government;
 - b. [Reporting any assertion of improper government action to an Employee's supervisor, manager, officer or director;](#)
 - c. Reporting sexual harassment to the employee's supervisor, EEO officer, department head, or other government official as set out in the City's adopted procedure for reporting sexual harassment complaints;
 - d. Reporting violations of the Fair Employment Practices ordinance to the Office for Civil Rights;

- e. Reporting police misconduct to the Seattle Police [Office of Professional Accountability](#);
- f. Reporting violations of the Code of Judicial Conduct to the Washington State Commission on Judicial Conduct; [NOTE: deletion of “by Municipal Court judges”]
- g. Reporting violations of criminal laws to the appropriate county prosecuting attorney;
- h. Cooperating in an investigation resulting from a report of improper governmental action or other report made in accordance with this subchapter;
- i. Testifying in any proceeding that arises in whole or in part from a report made in accordance with this subchapter
- j. Reporting to other than a City employee if:
 - i. [The City employee is, in good faith, seeking advice, counsel or opinion on their rights and responsibilities under this subchapter to determine whether to report the alleged improper governmental action](#), or
 - ii. [30 days have passed](#) since the report of alleged improper governmental action has been delivered to the Executive Director.
- k. When the City Employee believes in good faith that a crime is about to be committed, reporting to the Executive Director, any supervisor, manager or head of a department.
- l. Reporting in an emergency, where the City Employee believes in good faith that substantial damage to persons or property will result, to any person who the employee believes can prevent the damage to persons or property. No emergency under this subsection exists where prompt attention and reporting under this subchapter by the employee could have avoided the perceived need to report immediately.

SMC 4.20.830 - Referral, Retention and Investigation of Reported Governmental Misconduct by the Executive Director.

- A **Investigation:** [In order to be investigated, an assertion of improper governmental action must be reported within 18 months of the occurrence of the alleged improper governmental action. The Executive Director may enlarge this time if he or she finds that an investigation is in the best interest of the public interest to initiate an inquiry or investigation into the alleged improper governmental action.](#)
- B **Referral Required.** The Executive Director upon receiving a report alleging improper governmental action in the following circumstances shall refer the Employee as follows:
 - 1. Reports of sexual harassment to the employee's supervisor, EEO officer, department head, or other government official as set out in the City's adopted procedure for reporting sexual harassment complaints;
 - 2. Reports of violations of the Fair Employment Practices ordinance to the Office for Civil Rights;
 - 3. Reports of police misconduct to the Seattle Police Office of Professional Accountability;
 - 4. Reports of violations of the Code of Judicial Conduct to the Washington State Commission on Judicial Conduct.
- C **Discretionary Referral.** The Executive Director may retain all reports of improper governmental action not required to be referred, for either investigation or referral to the chief elected official of the branch of government implicated in the allegation, the head of the City department implicated in the allegation [or to other governmental agencies that the Executive Director believes to be better suited to investigate the allegation. In all instances, the identity of the City employee who initiated the report is to be kept confidential pursuant to SMC 4.20.810.](#)
 - 1. [When the Executive Director seeks to refer the complaint of improper governmental action the City Employee who initiated the report shall be notified before the referral is made.](#)
 - 2. [Within 30 days of a referral being made by the Executive Director to the chief elected official of the branch of government implicated in the allegation or to a City department, the official or department head shall personally or their designated representative, report to the Executive Director, and to the City Employee who initiated the complaint if the employee has waived confidentiality pursuant to SMC 4.20.810, as to actions taken by the department or agency.](#)
- D **Retention and Investigation by the Executive Director.**
 - 1. Within 30 days after receiving and retaining a report of possible improper governmental action from a City employee, the Executive Director shall [conduct a confidential preliminary inquiry](#), and communicate the results of this inquiry and action to be taken, if any, to the City Employee who initiated the report.
 - 2. If, after making a preliminary inquiry, the Executive Director has reason to believe that improper governmental action has taken place, the Executive Director may open an investigation or make a discretionary referral.

3. When the Executive Director investigates a report alleging a violation of the Elections Code, the Executive Director shall handle that allegation according to SMC 2.04.070 and the Ethics and Election Commission's Administrative Rules. If the Executive Director investigates a report alleging a violation of the Ethics Code, the Executive Director shall handle that allegation according to SMC 4.16.090 and the Ethics and Election Commission's Administrative Rules. If the Executive Director investigates a report alleging a violation of the Lobbying Code, the Executive Director shall handle that allegation according to SMC 2.06 and the Ethics and Election Commission's Administrative Rules.
 4. Investigations of improper governmental action that do not allege violations of the Ethics, Election or Lobbying Code shall be completed within a period of six (6) months. If an investigation cannot be completed within that time the Executive Director must inform the City Employee who initiated the complaint as to the reason why and estimate the completion date of the investigation.
- E Executive Director's Report: Upon completion of the preliminary inquiry or the investigation, the Executive Director shall notify the City Employee who initiated the complaint in writing of any determinations made.
- 1)
 - a) If the Executive Director determines that there is reasonable cause to believe that an improper governmental action has occurred, the Executive Director shall report the nature and details of this determination to:
 - a) the City Employee who initiated the complaint;
 - a. the City employee who are the subject of the report,
 - b. the head of the department with responsibility for the conduct, unless the department head is implicated, then to the Mayor and City Council, and,
 - c. to such other governmental officials or agencies as the Executive Director deems appropriate.
- F Response by City Officials: The head of the department with responsibility for the conduct, or their designated representative, shall report to the Executive Director what follow up action is taken in response to the report. If satisfactory action to follow up the report is not being taken within a reasonable time, the Executive Director shall report his or her determination to the Mayor and advise the City Council.
- G Closure. Notwithstanding the foregoing, the Executive Director may close an investigation at any time he or she determines that no further action is warranted and shall so notify the City Employee who initiated the complaint. Decisions of the Executive Director under this section are not appealable to the Ethics and Elections Commission.

SMC 4.20.840 - Retaliation – Complaints, Investigation and Determination

- A Timeliness: In order to seek relief, a City Employee who believes they have been the subject of retaliation due to engaging in action protected under SMC 4.20.810(C) , must file a signed written complaint within 18 months of the occurrence alleged to constitute retaliation.
- B Place of Filing: The complaint shall be filed with the Executive Director.
- C Content of Complaint: The complaint alleging retaliation must specify:
1. The protected action taken by the City Employee under SMC 4.120.810(C);”
 2. The alleged retaliatory action;
 3. The person or persons responsible for the retaliation, and
 4. The relief sought by the employee.
 5. If a Cooperating Employee claims retaliation based on a report to a supervisor, manager or department head, and the receipt of the report is denied, the complainant shall, upon request of the Executive Director, provide evidence of the report, its contents and the date on which the report was made.
- D Investigation:
1. The Executive Director shall conduct and conclude an investigation into the alleged retaliation within 90 days of receiving a City Employee's report. At the request of the Executive Director, the Commission may, for good cause shown, extend the time for completion of the review. If the Commission determines that the review must be completed in less than 90 days in order to avoid prejudice or irreparable harm to the employee or the City, the Commission shall

order the Executive Director to complete the review in a shorter period of time, and the Executive Director shall comply.

2. The investigation shall be limited to the alleged facts contained in the complaint. The results of the investigation shall be reduced to writing and shall contain a finding of whether there is reasonable cause for believing that retaliation has been or is being committed, and the facts on which the finding is based.

E Notification: Upon completion of the investigation, the Executive Director shall notify the City Employee who alleged retaliation in writing of any determinations made. If the Executive Director determines there is reasonable cause to believe retaliation has been committed, or is being committed, and that conduct protected under this sub-chapter was a contributing factor, the Executive Director shall report the nature and details of this determination to:

1. the City Employee who initiated the complaint;
2. the City employee who are the subject of the report, and
3. the head of the department with responsibility for the action, to the Mayor and to the City Attorney.

F Report of Remediation by Departments: Within 30 days of receiving a report finding reasonable cause to believe that retaliation has been or is being committed, the head official of the branch where the retaliation occurred shall submit a response to the Executive Director which details the actions taken or planned to be taken in order to resolve the matter and prevent further occurrences. This time period may be extended by 30 days by the Executive Director. If satisfactory action to follow up the report is not being taken within a reasonable time, the Executive Director shall report his or her determination regarding retaliation to the Mayor and advise the City Council.

SMC 4.20.850 Hearing and Appeals:

- A. Hearing and Appeals: If a Cooperating Employee who has filed a complaint of retaliation under this section is either dissatisfied with the Executive Director's finding after investigation or the response of the head official of the branch where the retaliation occurred, the Cooperating Employee may pursue any remedy available at law.
- B. Pursuit of administrative remedies as outlined in this sub-chapter is not a condition precedent to the filing of a civil action and nothing in this subchapter shall diminish the rights and remedies of an employee pursuant to any other State or Federal law.
- C. Administrative Hearing – To pursue an administrative hearing a Cooperating Employee must:
 - 1) Request a Hearing:
 - a. Within 60 days after receipt of the findings of the Executive Director or within 60 days of the date on which the response from the head of the branch of City government in which the retaliation occurred should have been issued, the Cooperating Employee may request an administrative hearing to establish that a retaliatory action occurred and to request for the relief defined in this section.
 - b. The request for a hearing shall be delivered to the Mayor's Office.
 - c. Within five working days of receipt of the request for hearing, the Mayor's Office shall apply to the state office of administrative hearings for an adjudicative proceeding before an administrative law judge. Except as otherwise provided in this section, the proceedings shall comply with RCW 34.05.410 through 34.05.598.
 - 2) In pursuing administrative remedies, a Cooperating Employee who has shown that they have been subjected to workplace reprisal or retaliatory action is presumed to have established a cause of action.
 - a) For the purpose of this section, "workplace reprisal or retaliatory action" has the same meaning as the term "Retaliate," defined in SMC 4.20.820 above.
 - b) The department presumed to have taken retaliatory action under subsection (1) of this section may rebut that presumption by proving by a preponderance of the evidence that there have been a series of documented personnel problems or a single, egregious event, or that the departmental conduct or actions were based on independent, separate and legitimate reasons without regard to the employee's status as a Cooperating Employee and that the action was not merely pre-textual. The Cooperating Employee shall be allowed rebuttal.
 - 3) If a determination is made that retaliatory action, as defined in SMC 4.16.820, has been taken against a Cooperating Employee, the administrative law judge may order compensatory damages, may require restoration of employment, job classification, seniority rights, back pay, benefits, and any increases in compensation that would have occurred, all with interest. In addition, the administrative law judge may order injunctive relief as may be necessary in order to prevent a recurrence of retaliatory action.

- 4) The administrative law judge may also award reasonable attorney fees and costs to the Cooperating Employee as the prevailing party or to the City as the prevailing party upon a showing that the claim for retaliation was frivolous, unfounded, without legal or factual basis or brought in bad faith.
- 5) The administrative law judge may impose a civil penalty upon the retaliator of up to five thousand (\$5,000) dollars. Any penalty assessed against an individual City employee shall not be subject to indemnification under SMC 4.64.016. The civil penalty shall be paid into the City general fund.
- 6) The final order of the administrative law judge shall include a notice to the parties of the right to obtain judicial review of the order in accordance with State law.
- 7) If, upon all the evidence, the administrative law judge finds that the respondent has not engaged in any alleged unfair practice, the administrative law judge shall state findings of fact and shall similarly issue and file an order dismissing the complaint.

D. Nothing in this section prohibits a head of the branch of City government or their designee from making any decision exercising their authority to terminate, suspend, or discipline an employee who engages in workplace reprisal or retaliatory action against a Cooperating Employee.

SMC 4.20.860 – Investigative Powers: At any stage in the investigation of an alleged improper governmental action, or an allegation of retaliation, the Executive Director may issue subpoenas, administer oaths, examine witnesses, compel the production of documents or other evidence, enlist the assistance of the City Attorney, the City Auditor, or the Chief of Police, refer the matter to the State Auditor or law enforcement authorities, and/or issue reports, each as deemed appropriate

SMC 4.20.870 - Annual Restatement. Upon entering City service and at least once each year thereafter, every City officer and employee shall receive a written summary of this chapter, the procedures for reporting improper governmental actions to auditing officials, the procedures for obtaining the protections extended, and the prohibition against retaliation in this section. The Executive Director of the Ethics and Elections Commission shall ensure that such summaries are distributed and that copies are posted where all employees will have reasonable access to them.