MEMORANDUM

TO: COMMISSIONERS

FROM: KATE FLACK

SUBJECT: PROPOSED AMENDMENT OF SMC 4.20.800-860; THE WHISTLEBLOWER PROTECTION CODE

DATE: 9/29/2010

SUMMARY: Staff is proposing for discussion and action by the Commission, several amendments to the City's Whistleblower Protection Code. Staff's proposals are based on our experience working with City employees who contemplate or initiate whistleblower reports and review of other jurisdictions' laws. To simplify the process and to align the ordinance with best practices the proposed amendments will primarily cover;

- Clarifying the rights, responsibilities and limitations for City employees who consider initiating a report of improper governmental actions and utilizing the Whistleblower Protection ordinance;
- Simplifying the process City employees use to initiate and report improper governmental actions and clarify the process through which the appropriate investigative body receives the report;
- Providing clarity for employees, the City and the public regarding the process and procedure used to determine whether retaliation has occurred.

This memo is intended to introduce the topic and address some of the issues. Other memos on the code will follow in the coming months.

BACKGROUND: In 1990, the City of Seattle passed a Whistleblower Protection Ordinance, the purpose of which was to encouraging City employees "to report on improper governmental action" and to provide "protection from interference and retaliatory action…"[1] In 1992 the State Legislature passed RCW 40.41, the Local Whistleblower Protection Code. The statute required local governments to adopt a whistleblower policy, develop procedures to handle both whistleblower reports of improper governmental activity and to address whistleblower claims of retaliation. If a municipality failed to comply with this State mandate, RCW 40.41 would automatically cover the municipality and its employees.[2] In 1994 the City Council aligned the City ordinance with the State statute.

The City Council has made no changes to the Whistleblower Protection Code since 1994.

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[1] SMC 4.20.800; ordinance 115464 (1990).

[2] The State passed RCW 42.40, in1992. This statute covers State employees who chose to initiate inquiry into suspected improper governmental conduct. This statute prohibits retaliation and provides State employees with a process to address claims of retaliation.

Proposed Amendments: 4.20.810, 4.20.820

SMC 4.20.800 Policy -- Purpose

The City's Whistleblower Protection Code has from its inception emphasized the concept that institutional reform through employee reports of improper governmental actions will lead to a better performing government and that employees who step forward to initiate inquiry into governmental performance should be encouraged and protected. Amendments to SMC 4.20.800 will clarify this City value.

SMC 4.20.810 Reporting improper governmental action --

City employees number approximately 11,000 and encompass divergent languages, cultures and educational levels. To encourage employees to thoughtfully consider initiating a report of improper governmental conduct the ordinance must be clear, understandable and accessible by City employees.

Amendments to this section are intended to clarify and make more accessible the basic rights, responsibilities and limitations that may affect an employee's decision to initiate a report under the Whistleblower Code, and to address issues staff have experienced in working with the ordinance.

Confidentiality:

This proposed amendment clarifies the whistleblower's right to remain confidential and its limitation. This would bring the City ordinance squarely in line with the Public Records Act and State law while retaining flexibility to allow for the rare circumstance when identification of a whistleblower may serve the ends of justice.

Currently the identity of a State employee is clearly protected under the State Whistleblower statute [3] which states the identity of a whistleblower is "confidential at all times unless the whistleblower consents [to disclosure]." This mandate precludes nonconsensual disclosure of the whistleblower's identity under the Public Records Act. The Public Records Act does not require disclosure where "… a duty to disclose or withhold is contained in any other law." [4]

Recognizing that a situation may arise in a civil suit or criminal prosecution where, in the interest of justice, disclosure of a whistleblower's identity may be necessary, the amendment creates a mechanism for disclosure. Under the amendment, a party could seek an Order of Disclosure from a court of general jurisdiction and have a motion granted upon a showing that disclosure was in the interest of justice. At the same time, this procedure protects the City's interest in encouraging employee reports.

Responsibility for Submitting a Report:

Currently there is no clear requirement that an employee who seeks the protection of the ordinance do so in a formal manner. Reports made to the several "auditing officials" are not required to be consistently dated and signed. Determination of the date on which a whistleblower initiated an inquiry

[3] RCW 42.40.040(2)
[4] RCW 42.56.510

into governmental actions can be critical to a determination of whether the report was the precipitating action for retaliatory behavior. Consistent certainty is needed and gained through this proposed amendment.

Privilege:

The proposed amendment places the responsibility of determining what information is subject to privilege or when disclosure is prohibited by law on the party who receives the report. The proposed amendment mimics the recent amendment to RCW 42.40.030.[5]

Reporting to the Executive Director:

The purpose of the amendment is to make reporting as simple as possible for all employees. This mimics the State statute which provides that an employee may report to the State Auditor as well as other defined "public officials."[6]

In addition, when a report is made to an official other than the Executive Director, the amendment requires the official to provide the Executive Director with notice of the report. This will prevent duplication of reports and duplicate inquiries.

The amendment mimics again, the State statute which requires that the State Auditor receive notice of reports made to other "public officials."[7]

Reporting to the Public:

The current ordinance – SMC 4.20.800 – affirmatively grants employees the "right to report in good faith in accordance with the subchapter," to a member of the public. Currently, one reference exists regarding this right and that reference is buried in an exception.

Reporting to the public is arguably well within the policy and purpose of the whistleblower ordinance. However, it can conflict with the overall policy of encouraging employees to report improper conduct so that the conduct can be addressed and problems cured by the City. Bringing both concepts in line requires a clear statement.

Amending the ordinance as proposed would provide a clear procedure for employees to follow. The procedure allows the employee to voice concerns in and through a public forum and allows the City a thirty day time period in which to inquire and address the improper governmental conduct.[8]

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[5] RCW 42.40.030 Amended 2008, c 266 sec 3
[6] RCW 42.40.040(1)(a)
[7] ibid
[8] Wisconsin treats public reports in a similar manner. An employee is required to first report to their supervisor or ask the "division of equal rights" where they should report. The employee must then make the report to the identified department prior to making the matter public. Wis. Laws; Chpt 230 -, Subchapter III – Employee Protections, 230.81(1).

Prohibited Behavior:

Proposed changes reflect both the State Employee WB Protection law[9] and the Local Government WB law[10],[11] prohibitions against threatening employees or retaliating against those thought to be the WB.

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[9] RCW 42.40.030(1)
[10] RCW 42.41.045(1)
[11] Regarding the addition of prohibiting retaliation against an employee who is perceived to have been involved in reporting or cooperating; See, RCW 42.40.020(10)(a)(ii); KCC 3.42.030 F.