

# CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS

## Policy Session Worksheet

**Presentation Date:** Nov. 29, 2016 **Approx Start Time:** 1:30pm **Approx Length:** 30 mins

**Presentation Title:** Whistleblower and Fraud Hotline Policy Update

**Department:** County Counsel

**Presenters:** Christina Thacker

**Other Invitees:** Evelyn Minor-Lawrence, DES Director

Julia Getchell, DES Assistant Director

Shari Anderson, Treasurer

Brian Nava, Treasurer's Office, Internal Auditor

### WHAT ACTION ARE YOU REQUESTING FROM THE BOARD?

Approval of changes to the existing Fraud Hotline Policy, to include provisions required by state law, and make it an Employment Policy and Practice.

**EXECUTIVE SUMMARY:** The Board approved the creation of the Fraud Hotline Policy in 2006, as a means for employees to report suspected fraudulent activity in the County. In 2016, the Oregon legislature passed HB 4067, requiring public entities to implement a policy regarding employees who invoke their rights under that bill and under ORS 659A.203 (Oregon's whistleblower statute). This revised policy continues the Fraud Hotline Policy and includes the required language of HB 4067.

The revised policy differs from the original policy in two significant ways:

- (1) it removes procedural aspects from the policy, which will be captured in an operations document, created by the Internal Audit function within the County and
- (2) it adds the language required by HB 4067, which informs employees of their rights under HB 4067 and ORS 659A.203.

The revised policy continues the expectation that employees have a responsibility to report suspicious activity that could be fraudulent or wasteful (among other types of activities). The revised policy also makes clear that employees are also expected to disclose suspected violations of the law or gross misuse of public funds (among other types of activities), as well as that employees have rights and remedies available under Oregon law (e.g., that they will not face disciplinary action for disclosing their belief that the law has been violated, as long as their belief is held in good faith, is objectively reasonable, and is based on personal knowledge).

FINANCIAL IMPLICATIONS (current year and ongoing): n/a

STRATEGIC PLAN ALIGNMENT:

- How does this item align with your Department's Strategic Business Plan goals?

This revised policy supports County Counsel's goal of partnering with other departments to provide legal advice and support regarding changes in legal requirements (here with the Department of Employee Services and the Treasurer's Office).

- How does this item align with the County's Performance Clackamas goals?

This revised policy supports the County's strategic priority of building trust through good government—both internally and externally.

LEGAL/POLICY REQUIREMENTS:

These revisions are prompted by the Oregon legislature's passage of HB 4067 in 2016.

PUBLIC/GOVERNMENTAL PARTICIPATION: n/a

OPTIONS: n/a

**RECOMMENDATION:** Adopt the revised policy as presented. If the recommendation is not implemented, the County will not be in compliance with HB 4067.

ATTACHMENTS: Revised "Whistleblower and Fraud Hotline Policy"

SUBMITTED BY:

Division Director/Head Approval \_\_\_\_\_ n/a

Department Director/Head Approval \_\_\_\_\_ SM/ct

County Administrator Approval \_\_\_\_\_

For information on this issue or copies of attachments, please contact Christina Thacker 503.655.8363.

## **“WHISTLEBLOWER AND FRAUD HOTLINE POLICY”**

### **DISCLOSURE OF IMPROPER GOVERNMENTAL CONDUCT AND REPORTING OF WASTEFUL CONDUCT**

#### **I. POLICY STATEMENT**

The Board of County Commissioners, County Administrator, elected officials and management representatives of Clackamas County are committed to the highest standards of legal and ethical behavior. All County employees, elected officials, authorized representatives, and volunteers are expected to act lawfully, ethically, and responsibly in performing their duties for the County. In accordance with this policy, all of these individuals are expected to share any good faith and objectively reasonable belief that conduct by other County employees, elected officials, authorized representatives, or volunteers constitutes Improper Governmental Conduct<sup>1</sup> or Wasteful Conduct if they have personal Knowledge of such conduct.

#### **II. PURPOSE**

This policy is created to foster a culture of ethical and responsible conduct, as well as a culture of compliance with federal, state, and local laws, rules, and regulations. In addition, this policy informs employees of the County’s commitment to protect employees from unlawful retaliation against any employee who discloses a good faith and objectively reasonable belief that another County employee, elected official, authorized representative, or volunteer has engaged in Improper Governmental Conduct.

An additional purpose of this policy is to inform employees of the County’s expectations, as well as of their rights and remedies under Oregon law. This policy applies to Improper Governmental Conduct and to the broader categories of Fraud, Waste, and Abuse. Fraud, Waste, and Abuse (together “Wasteful Conduct”) include concerns of: accounting, auditing, or internal financial control issues; Financial Statement Fraud; Corruption; embezzlement; falsification of records; Misappropriation of Assets; theft; sabotage; vandalism; and misuse of County assets or services.

The County’s Fraud Hotline—EthicsPoint—provides a confidential method to make a Disclosure of Improper Governmental Conduct or a report of Wasteful Conduct. Disclosures of Improper Governmental Conduct may, in certain situations, include conduct that is also considered Wasteful Conduct and vice versa; however, the protections afforded to disclosures and reports differ according to these categories.

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<sup>1</sup> Terms with initial capital letters are defined in this policy.

### III. SCOPE

This policy applies to all employees.

### IV. DEFINITIONS

For the purposes of this policy the following definitions apply:

- A. “*Abuse*” means the intentional, wrongful, or improper use or destruction of County resources or seriously improper practice that does not involve prosecutable Fraud. Abuse can include the excessive or improper use of one’s position in a manner other than its rightful or legal use. Examples include:
- Failure to report damage to County equipment or property
  - Using one’s position in one County department to gain an advantage over another County resident when conducting personal business in another County department
  - Serious abuse of County time, such as significant unauthorized time away from work or significant use of County time for personal business
  - Abusing the system of travel reimbursement
  - Receiving favors for awarding contracts to certain vendors
- B. “*Abuse of Authority*” means to deliberately exceed (or make improper use of) delegated or inherent authority in connection with the administration of a public program or a public contract;
- C. “*Disciplinary Action*” means any adverse employment action, including dismissal, demotion, transfer, reassignment, supervisory reprimand, warning of possible dismissal or withholding of work, whether or not the action affects employee compensation, and discrimination.
- D. “*Disclosure*” means a formal or informal internal or external communication that the individual in good faith reasonably believes evidences Improper Governmental Conduct.
- E. “*Fraud*” means a dishonest and deliberate course of action that results in the obtaining of money, property, or an advantage to which the person committing the action would not normally be entitled. Fraud includes the intentional misleading or deceitful conduct that deprives the County of its resources or rights. There are three categories of Fraud:
1. *Financial Statement Fraud*: means intentional misstatements, omissions, or disclosures in financial statements designed to deceive financial statement users. Fraudulent financial reporting often involves management override of controls that otherwise may appear to be operating effectively. Examples include:
    - overstating revenues, understating liabilities, or expenses manipulation
    - falsification or alteration of accounting records or supporting documents from which financial statements are prepared
    - misrepresentation of (or an intentional omission from) the financial statements of events, transactions, or other significant information, including the costs of goods or services provided or received
    - intentional misapplication of accounting principles relating to amounts, classification, or manner of presentation

2. *Misappropriation of Assets*: means theft of the County's assets that causes financial statements not to be presented in conformity with generally accepted accounting principles, including false or misleading records or documents, possibly created by circumventing controls. Examples include:
  - embezzling funds
  - soliciting or accepting a bribe or a kickback
  - theft of assets
  - falsifying financial records to cover up theft
  - submitting false claims for reimbursement
  - theft or misuse of County money, equipment supplies, or materials
  - causing the County to pay for goods and services that have not been received
  - use of County equipment or property for personal gain
  - skimming revenues
  - falsifying payroll records
3. *Corruption*: means a person wrongfully using their influence in a County business transaction to procure some benefit for themselves or another person, contrary to their duty to the County or the rights of another. Examples include:
  - accepting kickbacks
  - engaging in conflicts of interest
  - bid rigging
  - economic extortion
  - illegal gratuities

- F. "*Gross Waste of Funds*" means an expenditure that is significantly out of proportion to the benefit expected to accrue to the County and is more than a debatable expenditure.
- G. "*Information*" means public and private records, documents, and electronically stored data.
- H. "*Improper Governmental Conduct*" means conduct or actions of County employees, elected officials, authorized representatives, or volunteers that may constitute:
  1. Violation of any federal, state or local law, rule, or regulation;<sup>2</sup>
  2. Mismanagement;
  3. Gross misuse or Gross Waste of public resources or funds;
  4. Abuse of Authority in connection with the administration of a public program or the execution of a public contract; or
  5. Creation of a Substantial and Specific Danger to public health or safety resulting from County action.
- I. "*Knowledge*" means actual knowledge, that is, actual facts and Information acquired by a person.
- J. "*Mismanagement*" means serious County misconduct having the effect of actually or potentially undermining the County's ability to fulfill its public mission.

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<sup>2</sup> This includes a good faith and objectively reasonable belief of a violation of federal, state, or local anti-discrimination, labor, and employment laws, rules, or regulations.

- K. “*Reckless Disregard for its Truth or Falsity*” means a conscious disregard of a substantial and justifiable risk that the Information disclosed is false.
- L. “*Substantial and Specific Danger*” means a specified 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 that a reasonable person would observe in the same situation.
- M. “*Waste*” means the needless, careless, or extravagant expenditure of County funds, incurring of unnecessary expenses, or Mismanagement of County resources or property. Waste does not necessarily involve private use or personal gain, but almost always signifies poor management decisions, practices, or controls.

Examples include:

- purchase of unneeded supplies or equipment
- purchase of goods at inflated prices
- failure to reuse or recycle major resources or reduce waste generation

- N. “*Wasteful Conduct*” means Fraud, Waste, or Abuse.

## V. OPTIONS AND EXPECTATIONS REGARDING REPORTS AND DISCLOSURES

- A. Options: In addition to or instead of the options included in Section VI.A., below, an employee may Disclose any objectively reasonable belief, held in good faith, of Improper Governmental Conduct by any of the following options:

1. utilizing the County’s Fraud Hotline (administered by EthicsPoint);
2. notifying the Department of Employee Services Director;
3. notifying the County Administrator;
4. notifying the Oregon Government Ethics Commission (if the conduct may also be a violation of the State Code of Ethics (ORS Chapter 244); or
5. any other appropriate state or federal agency.<sup>3</sup>

- B. Expectations: All County employees are expected to act lawfully, responsibly, and ethically in performing work for the County. All County employees are also expected to report Improper Governmental Conduct and Wasteful Conduct if they have personal Knowledge of such conduct. Suspected Improper Governmental Conduct or Wasteful Conduct by an employee that is identified by a supervisor or manager may be addressed through the regular investigative process that may lead to employee discipline.

## VI. EMPLOYEE RIGHTS AND REMEDIES

- A. No Disciplinary Action Regarding Disclosure: No County employee will be subjected to or threatened with Disciplinary Action for making a Disclosure of

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<sup>3</sup> These options are not intended to replace other opportunities for employees to bring other complaints or grievances pertaining to their employment. Specifically, County employees maintain their rights pursuant to an applicable collective bargaining agreement, other applicable County policies, as well as any rights they may have pursuant to federal and state laws.

Information that the employee, in good faith, objectively and reasonably believes is evidence of Improper Governmental Conduct.<sup>4</sup>

- B. No Disciplinary Action Regarding Legislative Request: Subject to statutory requirements, in response to an official request (either specifically or generally with any member of the Legislative Assembly, legislative committee staff acting under direction of a member of the Legislative Assembly, any member of the elected governing body of a political subdivision in Oregon or any elected auditor of a city, county, or metropolitan service district), any County employee may discuss the activities of:

1. The state or any agency or political subdivision in the state; or
2. Any person authorized to act on behalf of the state or any agency or political subdivision in the state.

No County employee will be subjected to or threatened with Disciplinary Action for such discussion. Employees must, however, inform their supervisor or appointing authority of any official requests for Information made to the County, as well as the substance of testimony made (or to be made) by the employee to legislators or members of the elected governing body of a political subdivision on behalf of the County.

- C. No Disciplinary Action Regarding Disclosure of Warrant for Arrest: No County employee will be subjected to or threatened with Disciplinary Action for making a Disclosure of Information the employee in good faith, objectively and reasonably believes is evidence that a person who is receiving services, benefits, or assistance from the State of Oregon, or an agency or subdivision there, is subject to a felony or misdemeanor warrant for arrest issued by the state of Oregon, any other state, the federal government, or any territory, commonwealth governmental instrumentality of the United States, subject to ORS 659A.212(2) (which requires an employee to promptly disclose such to their immediate supervisor).
- D. No Prior Notice: No County employee is required to give notice to the County prior to making a Disclosure under A. or C. or prior to engaging in a discussion under B.
- E. No Interference: No County employee will be discouraged, restrained, dissuaded, coerced, prevented, or otherwise interfered with when making Disclosures under Section A. or C., or engaging in discussions of matters protected under B.
- F. Affirmative Defense: Any County employee who makes a Disclosure of Information that the employee, in good faith, objectively and reasonably believes is a violation of federal, state, or local law, rule, or regulation by a County employee, elected official, authorized representative, or volunteer, will have an affirmative defense to a civil or criminal charge related to the Disclosure by the employee of lawfully accessed Information related to the violation, including Information that is exempt from Disclosure as provided in Oregon's Public Records Exemptions (ORS 192.501 to 192.505) or by County policy, if the Information is provided to:
1. A state or federal regulatory agency;

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<sup>4</sup> A County employee who is an attorney may report their Knowledge of a violation of federal, state, or local law, rule, or regulation by the County to the Attorney General, subject to the rules of professional conduct established pursuant to ORS 9.490. Additionally, the affirmative defense described herein may not be asserted by an employee who is an attorney, or by an employee who is not an attorney but who is employed, retained, supervised, or directed by an attorney, if the information disclosed pursuant to Section V.A. is related to the representation of a client.

2. A law enforcement agency;
3. A manager employed by the County; or
4. An attorney licensed to practice law in the state of Oregon if a confidential communication is made in connection with the alleged violation and in furtherance of the rendition of legal services to the employee that are subject to the attorney-client privilege under Oregon law.

An employee may not assert this affirmative defense if the lawfully accessed Information is disclosed or redisclosed by the employee or at the employee's direction to someone other than those listed above.<sup>5</sup>

This affirmative defense is available to an employee who discloses Information related to an alleged violation by a co-worker or supervisor if the Disclosure relates to the course and scope of employment of the co-worker or supervisor.

- G. Remedies: In addition to the affirmative defense and protections above, employees have additional remedies under Oregon law, in ORS 659A.

## VII. RESPONSE TO REPORTS AND DISCLOSURES

- A. The Internal Audit division acts as the hotline administrator for Ethicspoint and oversees the response to concerns of Improper Governmental Conduct and Wasteful Conduct, with the following exception: concerns regarding the treatment of employees that potentially violate any federal, state or local law, rule, regulation, or County policy related to anti-discrimination and/or labor and employment law matters, will be addressed by the Department of Employee Services. Internal Audit will maintain operational safeguards and records regarding Improper Governmental Conduct and Wasteful Conduct. The Department of Employee Services will maintain operational safeguards and records regarding the above-described labor and employment law-related reports.
- B. Except where the Disclosure or report pertains to potential criminal activity or potential violation of ORS chapter 244 regarding ethical conduct, the name of any individual raising allegations of Improper Governmental Conduct will be kept confidential unless waived by the individual. The County will take all reasonable steps to maintain confidentiality of the reporting individual.
- C. All responses, including any investigations, conducted due a Disclosure or report under to this policy will be done in a timely, impartial, and fair manner. An employee who is the subject of an investigation may have additional rights afforded pursuant to County policies, a collective bargaining agreement, and/or state or federal law.
- D. All County employees, elected officials, authorized representatives, and volunteers are expected to cooperate in any investigation performed pursuant to this policy.
- E. If an investigation concludes that Improper Governmental Conduct or Wasteful Conduct occurred, it will be shared by Internal Audit or the Director of Employee Services with the director of the department investigated, if that Director is not

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<sup>5</sup> There are additional limitations to this affirmative defense under Oregon law. See HB 4067 (2016).



culpable or involved in the investigated conduct.<sup>6</sup> The non-culpable County authority receiving the investigation findings will take necessary and appropriate action in response to the findings.

## **VIII. PROTECTION AGAINST RETALIATION**

- A. County employees, elected officials, authorized representatives, and volunteers are prohibited from retaliating against a County employee because he or she has reported Improper Governmental Conduct in accordance with this policy. This prohibition includes the imposition of Disciplinary Action.
- B. Employees may be subjected to discipline if the Information disclosed by the employee is known by the employee to be false, if the employee discloses the Information with Reckless Disregard for its Truth or Falsity, or if the Information disclosed relates to the employee's own Improper Governmental Conduct or Wasteful Conduct.
- C. An employee who believes he or she has been retaliated against for disclosing Improper Governmental Conduct must advise their supervisor, manager, the Department of Employee Services Director, or the County Administrator immediately. The County representative receiving a report of retaliation must notify the Department of Employee Services Director and take appropriate action to investigate and address complaints of retaliation. A County employee who has been found to have retaliated against an employee for reporting Improper Governmental Conduct in accordance with this policy, will be subject to discipline, up to and including termination.

Resources: HB4067 (2016); ORS 659A.203; ORS 659A.221.

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<sup>6</sup> In the event that the allegations involve culpable conduct of a department director, the investigation conclusions will be presented to the County Administrator. In the event that the allegations involve culpable conduct of the County Administrator, the findings will be presented to the Chair of the Board of County Commissioners.