



Mercer Island Ethics Code Revisions

Second Reading – June 1, 2021

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Overview

Based on City Council feedback, proposed edits to the draft ordinance for second reading fall into the following categories:

- **Definitions**
- **Prohibited conduct**
- **Signed acknowledgment**
- **Advisory opinions**
- **Complaint, hearing, and enforcement procedures**
- **Fees and costs**

Definitions

Proposed Revisions

- Definitions section has been expanded to define several terms that appear in the prohibited conduct section of the code.
- Additional defined terms include “beneficial interest,” “confidential information,” “conflict of interest,” “contract,” “contracting party,” “financial gain or loss,” and “remote interest.”
- Language exempting “broadly held interests” from the definition of conflict of interest has been replaced with language similar to that in Kirkland’s code clarifying that financial interests shared with more than 10 percent of the city’s population do not amount to a conflict.

Prohibited Conduct

Proposed Revisions

- **Conflict of interest and confidential information provisions have been shortened/streamlined to reflect that definitions are now housed in the definitions section.**
- **Additional language from the state provision on beneficial interests in contracts (RCW 42.23.030) has been added to clarify that officials may not vote on contracts in which they are beneficially interested, even if one of the state law exemptions allowing the awarding of the contract applies.**

Signed Acknowledgment

Proposed Revisions

- The signed acknowledgment provision has been revised to require that officials acknowledge receipt of both the Code of Ethics and state law (ch. 42.23 RCW).
- This provision has also been modified to require that currently-serving officials sign the acknowledgment at the time the Code is adopted and upon any material changes to the Code.

Advisory Opinions

Proposed Revisions

- The advisory opinion section has been revised to clarify that opinions will be issued at the City's expense.
- This section has also been revised to give the ethics officer discretion over whether to issue an advisory opinion, based on several nonexclusive factors.
- Language has been added to clarify that the advisory opinion process is not intended to substitute for officials' own understanding and exercise of reasonable judgment with respect to prohibited conduct.
- These changes are intended to address concerns about overuse of the advisory opinion process and related expense to the City.

Complaint, Hearing, and Enforcement Procedures

Proposed Revisions

- The confidentiality provision has been revised to clarify that the City (as opposed to the complainant or the official complained against) will maintain confidentiality as to complaints until a sufficiency determination is made, to the extent allowed by state law.
- Language has been added to clarify that complaints dismissed at the sufficiency stage are considered dismissed with prejudice and will not be reconsidered unless additional facts are presented.
- The hearing provisions have been revised to confirm the official may submit a written answer to the complaint, and both parties may appear at the hearing in person and/or through counsel.

Proposed Revisions (Cont.)

- The evidentiary provisions have been modified to clarify that the parties may present witnesses and evidence on matters relevant to the issues raised in the complaint.
- Language has been added to clarify that if the hearing examiner finds no violation, the complaint must be dismissed with prejudice and no further action taken.
- Regarding authorized remedial actions or sanctions, the “dismissal” option has been replaced with a “no sanctions or penalties” option.
- A new provision has been added requiring the city clerk to deliver copies of the hearing examiner’s final decision to the parties and City Council within 15 days.
- The timeline for the City Council’s final action has been shortened to 30 days after receipt of the final decision, or the next regularly scheduled City Council meeting following that 30-day period.

Note on Sufficiency Standard

- The standard for sufficiency remains the same as in the first reading version: “A complaint shall be sufficient if it precisely alleges and reasonably describes acts that constitute a prima facie showing of a violation of MICC 2.60.030, including chapter 42.23 RCW.”
- Pacifica considered several options for defining “prima facie,” but ultimately recommends keeping prima facie as an established term.
- The sufficiency standard is directed at the ethics officer, who will apply the established term “prima facie” as used under Washington law. *See Matter of Detention of M.W.*, 185 Wn.2d 633, 657, 374 P.3d 1123 (2016); *McCoy v. Courtney*, 25 Wn.2d 956, 962, 172 P.2d 596 (1946); BLACK’S LAW DICTIONARY (11th ed. 2019).
- Inserting additional language to describe this standard could introduce ambiguity.

Fees and Costs

Proposed Revisions

- The fees and costs provision has been revised to clarify that the hearing examiner will determine the amount of any reasonable fees awarded to an official who qualifies for such an award.

Note on Fees and Costs Recovery

- The fees and costs provision applies only to the official complained against and only where the complaint is dismissed by the hearing examiner (i.e. no violation); it does not allow for the complaining party to recover costs and fees.
- Pacifica reviewed the codes of 35 other jurisdictions across the state (26 cities, 9 counties) and found no other code allowing the complainant to recover fees.
- We recommend against any change on this point; allowing complaining party fee recovery is inconsistent with the principles behind indemnity/defense of officials.

Timeline for Resolution of Complaints Found Sufficient by Ethics Officer

Start to Finish: 142 Days

**Filing → 30 days → sufficiency → 7 days → notice to parties → at least
30 days → hearing → 30 days → final decision → 15 days → clerk
delivers decision to parties and council → 30 days or next regularly
scheduled meeting after 30 days → final City Council action**