



City of Mercer Island

Proposed Ethics Code Revisions

First Reading – May 4, 2021

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Overview

Six main categories of proposed revisions:

- **Policy/intent statement**
- **Prohibited conduct**
- **Advisory opinions**
- **Complaint, hearing, and enforcement procedures**
- **Fees and costs**
- **Confidentiality**

Policy/Intent Statement

Legal/Jurisdictional Points

- In general, preambles and policy statements are generally not independently enforceable, but can inform application and interpretation of other sections.
- Most jurisdictions' ethics codes do not contain the type of aspirational/policy language included in Mercer Island's Code of Ethics Statement.
- Exceptions are Bellevue (code lists several "ethical standards" with which officials are "encouraged" to comply) and Bainbridge Island (code contains a separate "code of conduct" not subject to the types of sanctions available for "code of ethics" violations).

Proposed Revisions

- Incorporate aspirational/value statements within policy statement, with clarification that these are “encouraged” behaviors and an interpretive aid informing the application of the remainder of the Code, but not independently actionable provisions.
- In procedures section (discussed later in presentation), require ethics officer and hearing examiner to consider policy statement in rendering sufficiency determinations and final decisions.
- Clarify that Code is intended to supplement existing law, including chapter 42.23 RCW (state ethics code for municipalities).

Prohibited Conduct

Legal/Jurisdictional Points

- Current Code’s substantive provisions generally are consistent with state ethics code, other jurisdictions’ approaches, and legal authority on conflicts.
- Kirkland’s code includes an “appearance of conflict” provision requiring disclosure (but not recusal) when circumstances not rising to the level of a conflict nevertheless could appear to impair an official’s judgment.
- State law prohibits beneficial interest in contracts, and several jurisdictions expressly adopt that prohibition.
- The state gift prohibition statute broadly prohibits gifts without specifying exceptions, and some jurisdictions adopt that approach. Of the jurisdictions that specify carve-outs to gift prohibitions, several include an exception for gifts from friends/family.

Proposed Revisions

- Add “appearance of conflict” provision requiring disclosure when certain relationships or activities could appear to impair an official’s judgment.
- Add “interest in contracts” provision and incorporate state-law exceptions to same.
- Incorporate state-law remote interests provision, under which certain limited interests are deemed not to constitute beneficial interests in contracts so long as disclosure and other requirements are met.
- Add friend/family exception to gift prohibition.
- Clarify executive session/privileged materials are confidential.

Advisory Opinions

Legal/Jurisdictional Points

- Most jurisdictions provide for advisory opinions by their ethics officers or ethics boards.
- None of the jurisdictions we studied provide the additional informal opinion process like that in Mercer Island's current Code.
- Jurisdictions differ on whether officials may rely on advisory opinions.
- Advisory opinions of less value on state law.

Proposed Revisions

- Amend Code to remove informal city attorney opinion process.
- Under this revision, advisory opinions would be rendered solely by the ethics officer.
- This change would streamline, simplify, and ensure neutrality of the advisory opinion procedure.

Complaint, Hearing, and Enforcement Procedures

Legal/Jurisdictional Points

- Several jurisdictions use the same sufficiency standard as Mercer Island, but others apply a higher “prima facie” standard for complaints.
- The vast majority of jurisdictions delegate the investigation and determination of ethics violations to ethics officers, ethics boards, and/or hearing examiners.
- The vast majority of jurisdictions allow further council action only if the ethics officer, ethics board, or hearing examiner determines the ethics code was violated. If the ethics officer, ethics board, or hearing examiner finds no violation, the complaint must be dismissed.
- Several jurisdictions provide that the official, the complainant, or both may seek a writ of review (type of appeal) from a state superior court following a final determination on an ethics violation.

Proposed Revisions

- Amend sufficiency standard to require slightly higher bar, with purpose to discourage unfounded complaints.
- Require ethics officer and hearing examiner to consider policy section of Code in making sufficiency determinations and final decisions on violations.
- Specify rights of accused officials at hearings, including right to legal counsel.
- Amend subpoena procedure to allow either party to request issuance of subpoena on showing of reasonable necessity, and to clarify that issuance is discretionary with hearing examiner.

Proposed Revisions (cont.)

- **Require that hearing examiner dismiss complaints if he or she determines no violations were proven.**
- **Authorize hearing examiner to recommend particular sanctions if he or she determines violations were proven.**
- **Authorize City Council to take several actions in disposition of a complaint following hearing examiner's finding of a violation, with deference to hearing examiner's recommended sanctions.**
- **Provide for appeal procedure in state superior court following final City Council action.**

Fees and Costs

Legal/Jurisdictional Points

- Under state law, a municipal official may request, and the municipality may authorize, indemnity/defense of claims brought against the official arising from performance of official duties. RCW 4.96.041. Similar provisions apply with respect to recall sufficiency proceedings. RCW 35.21.203.
- It is common for municipal codes to provide generally for indemnity/defense of public officials against whom claims are brought. Mercer Island does so at chapter 3.04 MICC.
- Most indemnity/defense provisions do not expressly reference ethics claims, but at least one jurisdiction (Bellevue) expressly provides for indemnity/defense of such claims; courts have also ordered such defenses.

Proposed Revisions

- Amend Code to allow for recovery of reasonable attorney fees incurred by an official where the ethics complaint is dismissed by the hearing examiner.
- This change would remove the current \$5,000 cap on such fees.
- Under this change, fees would be recoverable only where the hearing examiner finds no violation of the Code was proven.

Confidentiality

Legal/Jurisdictional Points

- As a general matter, records of the ethics officer and/or hearing examiner are public records subject to disclosure under the Public Records Act.
- Exemptions may protect information in specific circumstances, including unsubstantiated allegations or matters implicating privacy interests.
- Some jurisdictions provide for confidentiality of ethics complaints until initial review is complete, and others address confidentiality in setting forth public records requirements.
- Confidentiality provisions can help discourage frivolous complaints.

Proposed Revisions

- **Add confidentiality provisions applicable to initial sufficiency determination proceedings and unsubstantiated allegations, to extent permitted under Public Records Act.**
- **Add third-party notice provision that requires City to give notice of any public records request, and complaining party and/or official complained against to obtain court order precluding disclosure.**



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