



King County

King County Ombudsman's Office

FINDINGS AND CONCLUSION

Whistleblower Complaint No. 2007-01714
Respondent: King County Medical Examiner's Office
January 29, 2010

ALLEGATION

On August 23, 2007, the King County Ombudsman's Office received a complaint alleging improper governmental action at the King County Medical Examiner's Office (KCMEO). The complaint was made pursuant to the King County Whistleblower Protection Code, section 3.42.020(c).

The complaint filed by former KCMEO employee Robinette Struckel¹, was 16 pages in length and alleged several violations in the KCMEO between 2001 and 2007. Following an initial review of the complaint, the Ombudsman's Office initiated an investigation into the following allegations:

- Inappropriate semen collection practices.
- Improper disposal of human brain tissue following autopsies.
- Improper treatment of fetal remains following an autopsy.
- Storage of skeletal remains in a room with substandard ventilation.
- Improper changes to the investigative database.
- Storage of tissue samples in a broken freezer.
- Illegal disposal of brain formalin.

INVESTIGATIVE AUTHORITY

The King County Ombudsman's Office was created by the voters of King County in the County Home Rule Charter of 1968 and operates as an independent office within the legislative branch of King County government. The Office is authorized to investigate the administrative conduct of King County agencies in response to complaints received from the public, or on its own initiative.² The Office promotes public confidence in King County government by responding to issues in an impartial, efficient and timely manner.

¹ Ms. Struckel was a county employee at the time she submitted this complaint and later resigned from her position at KCMEO.

² King County Code (KCC) section 2.52. In addition, the Ombudsman's Office investigates alleged violations of the King County Employee Code of Ethics (KCC 3.04) and the Lobbyist Disclosure code (KCC 1.07), and reports of improper governmental action under the Whistleblower Protection Code (KCC 3.42).

OMBUDSMAN INVESTIGATION

The initial complaint from Ms. Struckel was received by the Ombudsman's Office on August 23, 2007.

On August 30, 2007, the Ombudsman's Office formally transmitted the whistleblower complaint to the Director of Public Health Seattle and King County (DPH) pursuant to KCC 3.42.050(a).

On November 29, 2007, the Ombudsman's Office received a copy of DPH's response to the complaint.

On December 12, 2007, the Ombudsman's Office received a copy of consultant Karen Sutherland's investigation that was commissioned by DPH following transmittal of the complaint by the Ombudsman's Office. Ms. Sutherland's investigation reviewed all of the allegations described in the complaint.

The Ombudsman's Office conducted a preliminary review of all of the allegations in Ms. Struckel's complaint as well as DPH's response to the complaint. While some of the allegations raised unresolved issues, many of the issues have been resolved by the agency. The Ombudsman's Office accordingly investigated the following allegations:

- Inappropriate semen collection practices.
- Improper disposal of human brain tissue following autopsies.
- Improper treatment of fetal remains following an autopsy.
- Storage of skeletal remains in a room with substandard ventilation.
- Improper changes to the investigative database.
- Storage of tissue samples in a broken freezer.
- Illegal disposal of brain formalin.

Deputy Ombudsman Chuck Sloane led the Ombudsman's Office investigation, with oversight from King County Ombudsman Amy Calderwood and Senior Deputy Ombudsman Jon Stier.

WHISTLEBLOWER PROTECTION CODE

The Whistleblower Protection Code (KCC 3.42.020(c)) is an avenue for King County employees to report improper governmental action and retaliation.

The relevant substantive section of the Whistleblower Code at the time this complaint was filed³; stated:

³ On June 29, 2009, the King County Council revised chapter 3.42 of the county code (Ordinance 16580). This report relies upon and refers to the language in chapter 3.42 of the county code at the time the complaint was received.

“Improper governmental action” means any action by a county officer or employee that is undertaken in the performance of the officer's or employee's official duties, whether or not the action is within the scope of employment, and:

1. Violates any state or federal law or rule or county ordinance or rule, or
2. Constitutes an abuse of authority, or
3. Creates a substantial and specific danger to the public health or safety, or
4. Results in a gross waste of public funds.⁴

Section 3.42.020(c) also provides that “a properly authorized county program or activity does not become an ‘improper governmental action’ because an employee or investigating official dissents from the county policy or considers the expenditures unwise.”

King County Code section 3.42.050(a) recognizes the role of the Ombudsman as an appropriate investigating official for alleged improper governmental actions occurring within an executive branch agency such as DPH. Procedurally, the Code provides that:

The ombudsman may refer the report to the department director of the agency in which the alleged improper governmental action occurred or to the chief elected official of the branch of government implicated in the allegation, who shall ensure that the appropriate officer or agency responds to the complainant in writing within thirty (30) days of the receipt of the report, with a copy of the response to the ombudsman. If the ombudsman does not refer to another official, or if the other official's response is not timely or satisfactory to the ombudsman, the ombudsman may conduct an investigation.

SUMMARY OF FACTS AND FINDINGS

Allegation 1: *Inappropriate semen collection practices at KCMEO.*

KCMEO occasionally tests for the presence of semen in criminal cases. A control sample of semen is used to ensure the chemical stain the agency uses to prepare the semen for analysis is functioning properly. To obtain the control samples of semen, Dr. Richard Harruff, the Chief Medical Examiner for KCMEO would make a general announcement to KCMEO employees for samples and offer \$20.00 of his own money to anyone who was willing to donate. Dr. Harruff explained in Ms. Sutherland's investigation that this method of obtaining samples was significantly less expensive than ordering them through a medical supply company.

⁴ KCC 3.42.020(c).

The collection of semen samples from employees was voluntary and the process was designed so that samples could be submitted anonymously. KCMEO discontinued this practice of semen collection in November 2007, when it began purchasing semen samples from a medical supply company.

Finding 1: The Ombudsman’s Office understands how the semen procurement practice appeared to be inappropriate and could have been misinterpreted. However, the only portion of the county’s improper governmental action definition that could reasonably relate to this allegation is “abuse of authority.” The Ombudsman’s Office found no evidence that Dr. Harruff pressured employees to participate in this practice, retaliated against employees who declined to participate, or otherwise abused his position. Dr. Harruff’s actions did not constitute an improper governmental action under KCC 3.42.020(c).

Allegation 2: *KCMEO improperly disposed of human brain tissue following autopsies from 2001 to 2007.*

KCMEO conducts a neuropathology conference approximately once a week in which tissue samples are taken from a brain for analysis. During the period cited in this allegation (2001-2007), after a sample was taken the rest of the brain was placed in a biohazard bag and picked up by a contractor⁵ for off-site incineration. This brain disposal method met the criteria for appropriate disposal of biomedical waste described by the Harborview Medical Center where KCMEO was located at the time. Additionally, KCMEO’s practice of retaining some brain tissue for analysis was legal according to Washington State law.⁶

KCMEO changed its brain tissue retention policy in 2005. KCMEO’s current policy directs employees to retain all brain tissue indefinitely and notify the family of the deceased that the agency is saving the brain tissue. If any plan emerges to dispose of brain tissue the current policy directs KCMEO employees to inform the decedent’s family before tissue disposal occurs.

Finding 2: The only portion of the county’s improper governmental action definition that could reasonably relate to this allegation is subsection 1: “violates any state or federal law or rule or county ordinance or rule.” However, the Ombudsman’s Office found no evidence to support the claim that this process violated any existing law, rule or ordinance. Therefore, this action does not constitute an improper governmental action under KCC 3.42.020(c).

⁵ The Stericycle Corporation.

⁶ RCW 68.50.106 states that a medical examiner may “retain or dispose of any specimens or organs of the deceased which in his or her discretion are desirable or needful for anatomic, bacteriological, chemical, or toxicological examination.”

Allegation 3: *KCMEO improperly placed a deceased fetus in its deceased mother's visceral bag⁷ following an autopsy in September 2005.*

Following the autopsy cited in this complaint, KCMEO officials consulted with the decedent's funeral home to determine how to prepare the remains. KCMEO prepared the body in accordance with the funeral home's request and placed the fetus with organs that had been removed from the mother during the autopsy. In October 2005, KCMEO created a new policy to clarify the protocol for handling pregnant decedents and their fetuses. The new policy states:

If the decedent is an adult female carrying a fetus, the fetus is to be wrapped in its own separate baby body bag and labeled with the same case number as that of the mother. This body bag is then taped onto the top of the mother's body bag. The fetus should also be written onto the disposition form before release.⁸

Finding 3: The only portion of the county's improper governmental action definition that could reasonably relate to this allegation is subsection 1: "violates any state or federal law or rule or county ordinance or rule." However, the Ombudsman's Office found no evidence to support the claim that this process violated any existing law, rule or ordinance. Therefore, this action does not constitute an improper governmental action under KCC 3.42.020(c).

Allegation 4: *KCMEO stored human skeletal remains in a room with inadequate ventilation.*

During the time period cited in this complaint, KCMEO leased examination space from the Harborview Medical Center (HMC). KCMEO used one of the rooms at HMC to boil skeletal remains and dry decedents' clothing. The ventilation system in this room was functional but performed at a less than optimal level. KCMEO reported the ventilation issues to HMC, which made multiple attempts to improve the system. The complaint alleged that the smell from the remains was significantly worse when the ventilation system was not working properly. While these ventilation issues were likely uncomfortable for KCMEO employees there is no legal requirement for ventilation in this situation. The more pressing safety issue in this area was staff exposure to blood and other potentially infectious materials. To address this concern, KCMEO employees were instructed to take universal precautions⁹ in this area pursuant to WAC 296-823-110.

⁷ Visceral bags are plastic bags that KCMEO uses to store a decedent's dissected organs following an autopsy.

⁸ KCMEO Policy Manual (page 26).

⁹ "Universal Precautions" are an approach to infection control. According to this concept all human blood and certain human body fluids are treated as if known to be infectious for bloodborne pathogens. WAC 296-823-200.

In May 2009, KCMEO moved into a new building. The room currently devoted to boiling down and laying out skeletal remains and clothing has a more effective ventilation system than that used at HMC.

Finding 4: The only portion of the county's improper governmental action definition that could reasonably relate to this allegation is subsection 1: "violates any state or federal law or rule or county ordinance or rule." However, the Ombudsman's Office found no evidence to support the claim that this process violated any existing law, rule or ordinance. Therefore, this action does not constitute an improper governmental action under KCC 3.42.020(c).

Allegation 5: *KCMEO made two improper changes to the investigative database.*

KCMEO uses VertiQ, a case management system designed for coroners and medical examiners. The VertiQ system records the details of autopsy cases, including: investigative reports, toxicology findings, evidence and property. The VertiQ system uses a drop-down box that requires KCMEO employees to choose the name of the staff person who collected the evidence for each case. The drop-down box included the names of current KCMEO staff and also the names of people who were no longer KCMEO employees.

The complaint alleged that in one case a KCMEO employee misidentified the investigator in a VertiQ file. In reviewing this case, it appears that a KCMEO employee incorrectly selected the last name "Mahmood" from the drop-down box rather than the correct name "Myrabo." The similarity of these names lends credence to KCMEO's assertion in Ms. Sutherland's report that this was a clerical mistake.

The complaint also alleged that in a second case, a KCMEO employee improperly modified autopsy information after the fact. In reviewing this case it appears that the KCMEO employee cited did modify the format of a VertiQ file so that a decedent's possessions could be separated for release and/or disposal. This activity was within the employee's job responsibilities.

Finding 5: These actions do not constitute an improper governmental action under KCC 3.42.020(c).

Allegation 6: *KCMEO stored tissue samples in a broken freezer.*

According to Ms. Sutherland's report, the freezer in question was above 32 degrees Fahrenheit on at least three occasions between January and July in 2007. But the complainant did not provide evidence of, and neither Ms. Sutherland nor the Ombudsman's Office found, any instances in which tissue samples were degraded from thawing. Additionally, there is no evidence to support the claim that this practice compromised an autopsy investigation.

In May 2009, KCMEO moved into a new building with new refrigerators and freezers.

Finding 6: These actions do not constitute an improper governmental action under KCC 3.42.020(c).

Allegation 7: *KCMEO dumped brain formalin down the drain in the autopsy suite at the Harborview Medical Center in violation of state law.*

Formalin is a formaldehyde-based solution¹⁰ that KCMEO uses to preserve human body tissue for autopsy. Basic formalin generally has a formaldehyde concentration of 3.7%. Brain formalin has a higher concentration of formaldehyde (7.4%) than basic formalin. Formaldehyde is a solid waste¹¹ and a dangerous waste¹². The disposal of formaldehyde solutions in King County is regulated by the King County Code, state law, and federal law.

Based on information obtained in the course of our investigation it appears that the following two methods of brain formalin disposal were used at KCMEO between 2001 and 2007:

Method One: This method was described by Gareth Johnson, a manager in DPH in a letter to the Ombudsman's Office. This method involved placing a brain in an eight liter bucket, then floating the brain in brain formalin to preserve it. Once the formalin had preserved the brain the excess formalin was poured off into a container properly designated for dangerous waste disposal. At this point, some excess formalin still remained within the folds of the brain. To remove this formalin, the eight liter bucket holding the brain was filled with water. The water was allowed to run until it overflowed the bucket, displacing the formalin, and the mixture was then allowed to run down the drain.

According to representatives from the Washington State Department of Ecology and the King County Industrial Waste Program¹³, Method One is an acceptable way to dispose of formalin solutions. Employee accounts presented in the Sutherland investigation indicate that the disposal process described as Method One was used by five of the seven KCMEO staff members primarily responsible for brain formalin disposal between 2001 and 2007.

¹⁰ Formalin is a mixture of formaldehyde, monobasic chemical, dibasic chemical and water.

¹¹ WAC 173-303-016.

¹² WAC 173-303-100.

¹³ The King County Industrial Waste Program regulates and provides guidance on waste water discharge in King County.

Method Two: This method was described by Ms. Struckel in the Sutherland investigation. It involved placing a brain in an eight liter bucket and then floating the brain in brain formalin to preserve it. To dispose of the formalin, water was added directly to the eight liter bucket holding the brain and all of the formalin. The water was allowed to run until it overflowed the bucket, displacing the formalin, and the mixture was allowed to run down the drain.

The reliance upon dilution described in Method Two is an unacceptable method of disposal according to the King County Code, Washington state law, and King County Industrial Waste Directory guidelines.

The King County Code section relevant to this matter is KCC 28.84.060(d)(3), which states:

No industrial user shall ever increase the use of process water, or in any way attempt to dilute a discharge, as a partial or complete substitute for adequate treatment to achieve compliance with an applicable pretreatment standard or requirement unless expressly authorized by an applicable pretreatment standard or requirement. The director may impose mass limitations or flow restrictions on users he or she believes may be using dilution to meet applicable pretreatment standards or requirements.

In addition, WAC 173-303 defines acceptable methods of treatment and disposal of dangerous wastes like brain formalin and states in relevant part:

A person may offer a designated dangerous waste only to a TSD facility.

WAC 173-303-141(1).

Any action taken to evade the intent of this regulation by dividing or diluting wastes to change their designation shall be prohibited, except for the purposes of treating, neutralizing, or detoxifying such wastes.

WAC 173-303-150(1).

In addition to the county code and state law, the King County Industrial Waste Program (KCIWP) is "designed to prevent businesses from discharging substances that can degrade the wastewater treatment process, harm workers or facilities, or impact surface water quality."¹⁴

¹⁴ King County Industrial Waste Program fact sheet, accessed online at <http://www.kingcounty.gov/environment/wastewater/IndustrialWaste.aspx>.

The KCIWP provides a guide for hazardous waste generators (“the Yellow Book”) in King County which states in relevant part:

If the solution contains formaldehyde in concentrations less than 0.1 percent, you can pour waste solution into the sanitary sewer (but not down the storm drain or into a septic system). If the concentration of formaldehyde is greater than 0.1 percent, you cannot put the untreated solution down the drain.^[15]

According to the Sutherland investigation and additional interviews conducted by the Ombudsman’s Office, the disposal process described as Method Two was used by two of the seven KCMEO staff members primarily responsible for brain formalin disposal between 2001 and 2007, one of whom is the complainant in this case. In addition to these two employees, the Ombudsman’s Office also interviewed a former KCMEO employee whom the complainant believed had information regarding the agency’s brain formalin disposal method. That person stated that in his work as a Medical Investigator with KCMEO from 1999 to 2003, he assisted the autopsy technicians when they were understaffed. He said he exclusively used and observed others using Method Two to dispose of brain formalin.

Information obtained in the course of this investigation also raised questions regarding KCMEO’s compliance with state requirements for personnel training¹⁶ and general inspection¹⁷ during the period of time cited in the complaint (2001-2007). During this period, KCMEO had no written policy or procedure for brain formalin disposal and instead relied solely upon employee-to-employee training to ensure that staff members understood the appropriate disposal method.

In addition, according to several KCMEO employees, the 55 gallon drum that was used for formalin disposal during this period was not easily accessible due to its location. The drum was located outside of the autopsy suite where the brains and other body tissues were treated for preservation, across the hallway in a separate room.

Since 2007, KCMEO has made significant changes to its formalin disposal process, including:

- Developing a written procedure for brain formalin disposal;
- Conducting staff trainings on formalin disposal; and
- Introducing the use of a formaldehyde neutralizing agent called Neutralex that deactivates formaldehyde and renders it safe for direct disposal to the sewer system.

¹⁵ King County Hazardous Waste Directory at page 24.

¹⁶ WAC 173-303-330(1).

¹⁷ WAC 173-303-320(1).

Finding 7: In light of the testimony provided in the course of this investigation and statements made by current and former KCMEO employees in previous investigations, it is more likely than not that at least three KCMEO employees improperly released untreated formalin to the wastewater sewer system using Method Two.

These actions violated both the King County Code¹⁸ and Washington state law¹⁹ and therefore constituted improper governmental action in that the actions of county employees in the performance of their official duties violated a state law and county ordinance. KCC 3.42.020(c)(1).

We note that a majority of the KCMEO employees who were responsible for brain formalin disposal from 2001 to 2007 have reported that they disposed of this waste appropriately. However, the employees who were acting in error did so for an extended period which indicates insufficient oversight. The agency's lack of written instructions and/or formalized training for brain formalin disposal allowed for staff uncertainty regarding this aspect of their work. In addition, the lack of documented correction or discipline related to this matter, after the agency realized that this process had been used, indicates that the process was either tacitly approved by KCMEO administration during this period or that there was ineffective supervision within the workgroup regarding this issue.

OMBUDSMAN'S CONCLUSION

We do not find improper governmental action concerning six of the complainant's allegations. Regarding the seventh allegation, we find that at least three KCMEO employees disposed of brain formalin in violation of the law, which constitutes an improper governmental action under KCC 3.42.020(c)(1) (2007). We acknowledge KCMEO has significantly improved its disposal process since 2007 and that these improvements have addressed many of the issues raised by this complaint.

Distribution per KCC 3.42.050(c):

cc: David Fleming, M.D., Director of the Department of Public Health
Robinette Struckell

¹⁸ KCC 28.84.060(d)(3).

¹⁹ WAC 173-303-141(1); 173-303-150(1).

Appendix A, Whistleblower Complaint No. 2007-01714

The following process was reportedly used in December 2007, by Richard Harruff, M.D., the Chief Medical Examiner at KCMEO, to test the amount of formaldehyde that is released into the sewer when Method One is used:

1. An autopsy specimen (brain) was fixed in formalin
2. The 20% formalin solution was removed from the brain, leaving the brain with a small residual quantity of formalin in the 8L (2 gallon) bucket used for fixing the brain
3. The 8L bucket, still containing the fixed brain was completely filled with water to the point just before it flowed over the top of the container
4. The water solution was tested with the Merck "Formaldehyde Test" provided by the Harborview Medical Center Histology Laboratory, following the testing directions on the back of the package label. (Merckoquant 1.10036.0001)
5. Following the completion of the test, the residual formaldehyde from the fixed brain, diluted by the water necessary to fill the 8L bucket was calculated at .05%

DANIEL T. SATTERBERG
PROSECUTING ATTORNEY



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January 8, 2010

Ms. Amy Calderwood
King County Ombudsman's Office
401 Fifth Avenue, Room 135
Seattle, WA 98104

Re: Whistleblower Complaint No. 2007-01714

Dear Ms. Calderwood:

Public Health –Seattle & King County (PHSKC) has conducted a further review of your revised proposed findings and conclusions regarding this complaint, dated December 18, 2009. Again, we appreciate this opportunity to respond and are appreciative of the extension to January 8, 2010 to submit our response.

A. Finding 1

Thank you for the clarifications in this section, which help to address PHSKC's comments regarding the previous draft report. At the same time, PHSKC respectfully renews its request that the Ombudsman remove subjective language extraneous to her finding. The first sentence of this finding, which states that your office "understands how the semen procurement practice may have appeared to be inappropriate and could have been misinterpreted," is not pertinent. While the Ombudsman may question the propriety of this practice, the relevant inquiry is limited to whether it was an "improper governmental action." The Ombudsman properly concluded that it was not. PHSKC would appreciate the Ombudsman limiting its finding to that point.

B. Finding 7

1. Governing authority and jurisdiction to determine alleged violations of WAC 173-303

PHSKC also appreciates the number of specific citations to WAC 173-303 in response to its request for clarification. The Ombudsman cites these provisions to address whether the MEO violated state law in disposing of formalin over the period 2001-2007. In its revised report, the Ombudsman also appears to have found new violations of WAC 173-303 concerning the adequacy of MEO personnel training.

Review of these regulations -- and how they may apply to alleged MEO actions over the past decade -- is an immensely challenging task. Determining whether certain regulations apply is difficult due to the sheer number of regulations and their complexity. Further complicating a meaningful review is the fact that applicable laws, regulations and rules are frequently amended, and may be materially different now than they were during 2001 to 2003. Indeed, some apparently did not even exist in the earlier years. See PHSKC response dated October 30, 2009,

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at 1-2 (referencing materials cited in Sutherland Report and Ombudsman draft findings, including LWMG Final Report and waste management plans, dated 2006 and 2007).

Given these difficulties, PHSKC sought the advice of a specialist in this area, Ryan Kellogg, in preparing this response. Mr. Kellogg works for King County as a Supervisor in the Local Hazardous Waste Management Program (LHWMP), PHSKC, and has extensive experience in hazardous waste programs. See attached Statement of Ryan Kellogg (Kellogg Statement). He raises a number of points PHSKC asks the Ombudsman to consider.

The first concerns the Ombudsman's reliance on the King County Hazardous Waste Directory, also called the "Yellow Book," as authority in this case. See 12/18/09 draft findings at 7-8. The Directory is a guideline. See Kellogg statement at pages 1-2 and Exhibit 1. It does not rise to the level of a state or local law, regulation or rule. As such, it is not designed for determining the violation of ordinances, rules or regulations. *Id.* It therefore should not be the standard by which the Ombudsman determines whether PHSKC engaged in "improper governmental action" by violating a state or federal law, or county ordinance or rule.

The second question involves the Ombudsman's reliance on the King County Industrial Waste Program and its personnel to support the draft findings. See 12/18/09 draft findings at 7. This program -- and related KCC Chapters 28.81 -.84¹ -- govern water pollution abatement. Kellogg Statement, at 2. The Industrial Waste Program and KCC Chapters 28.81 - .84 are separate and distinct from the hazardous waste regulations (WAC 173-303), which are cited by the Ombudsman as governing this case. Kellogg Statement, at 2. Because of these differences, neither the Industrial Waste Program nor its personnel are authoritative sources for alleged violations of the dangerous waste regulations contained in WAC 173-303. See Kellogg Statement at 3.

PHSKC's third and primary concern is an outgrowth of the first two. It relates to whether the Ombudsman has jurisdiction to determine violations of the hazardous waste regulations (WAC 173-303). Based on the opinion of Mr. Kellogg, his discussions with a state Department of Ecology (DOE) representative, and the regulations themselves, PHSKC respectfully asks the Ombudsman to find that it lacks jurisdiction to determine violations of state laws and agency regulations in this area.

RCW Chapter 70.105 governs hazardous waste management. The purpose of this statute is to provide a comprehensive framework for regulating management of hazardous wastes. See RCW 70.105.007. DOE has broad regulatory authority in this area (*id.*), and violations of the dangerous waste regulations are governed by the penalty provisions of RCW Chapter 70.105 and

¹ The Ombudsman cites KCC 28.84.060(d)(3) as a local ordinance violated in this case. See 12/18/09 draft findings at 8, note 16.

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WAC 173-303-950. DOE issues orders determining violations,² and such orders are appealable to the pollution control hearings board.³

This elaborate regulatory framework, combined with DOE's broad enforcement authority, indicates that DOE has exclusive jurisdiction to determine violations of hazardous waste regulations. *See also* Kellogg Statement, at 3 (regulations do not delegate implementation or regulatory enforcement authority beyond DOE to any other state agency or local jurisdiction).

This conclusion is further supported by Michelle Underwood, Regulatory Assistance Unit Supervisor for DOE's Hazardous Waste and Toxics Reduction Program. In discussions with Mr. Kellogg, Ms. Underwood stated that only the DOE can determine violations of WAC 173-303, and that DOE would be unlikely to make a regulatory finding under the facts of this case. *See* Kellogg Statement, page 3, para. 8. Ms. Underwood further states that citation to WAC 173-303-150(1) for the proposition that "Method Two" violates state law⁴ is incorrect. *See* Kellogg Statement, page 3, para. 8.

2. "Good faith" requirement for whistleblower complaints.

Aside from jurisdictional deficiencies, PHSKC has serious concerns over whether the complainant and another primary witness made their complaints in good faith.

Whistleblower complaints must be made in "good faith." This requirement is very prominent in the whistleblower ordinance. *See, e.g.,* KCC 3.42.010; 3.42.030(A) and (C). Additionally, the ordinance expressly excludes "personnel actions" from the definition of "improper governmental actions." KCC 3.42.020(C).

Even assuming that complainant's allegations technically fall outside this exclusion, they clearly arose from employment disputes and are closely-related to personnel actions affecting her job. The complainant waited for months -- and in some cases years -- before raising her allegations. This seriously prejudiced the MEO's ability to defend against them.⁵ When she first complained in the summer of 2007, she acted only after becoming dissatisfied with her employment situation and decisions of MEO personnel. It is therefore reasonable to conclude that her employment difficulties motivated her complaints. One cannot help but question why she waited years to

² *See* RCW 70.105.095; WAC 173-303-845.

³ *See* WAC 173-303-845. The right of appeal applies to any "person" adversely affected by a department order, and "person" is defined to include local governmental entities. *See* WAC 173-303-040. Ombudsman determinations, however, carry no right of appeal. *See* KCC 3.42.050(E).

⁴ *See* 12/18/09 draft findings at page 8, note 17, and page 9.

⁵ The state whistleblower provision contains a one-year limitation period for raising complaints. *See* RCW 42.40.040(1)(a). The Ombudsman has correctly noted that the King County whistleblower ordinance is silent on this issue. The reason for the limitation period, however, is to ensure that documentary evidence remains available to conduct a full and fair investigation, and that the recollections of affected parties are not diminished by the passage of time. Both concerns are implicated in this case. PHSKC respectfully asks the Ombudsman to apply the one year limitation period by analogy and reject all claims of improper governmental conduct occurring more than one year before complainant raised her allegations.

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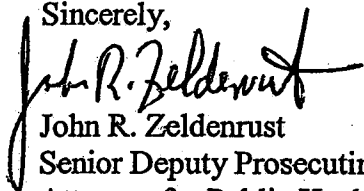
raise her allegations when the wrongfulness of the actions alleged would in many cases have been readily-apparent at the time they occurred.

PHSKC has similar concerns over the allegations of the Medical Investigator referenced in the Ombudsman's 12/18/09 draft report at page 8. The Ombudsman relied on statements from this individual, who the MEO believes is Don Halberg, about events occurring six to eight years ago in an area outside his normal job duties. After leaving the MEO in 2003, Mr. Halberg filed a lawsuit against King County in federal court. In his 75-page complaint, he claimed retaliation for "having brought to the attention of his supervisors numerous matters concerning illegal activities and policy violations occurring at KCMEO." PHSKC's review of this complaint reveals no allegations of improper formalin disposal.⁶ His lawsuit lacked merit and was later dismissed. In light of these facts, PHSKC reasonably questions Mr. Halberg's motives and the good faith basis for his allegations. It is unclear whether he offered any documentary evidence to support his claims. If he did so, PHSKC would appreciate an opportunity to review the information.

C. Conclusion

PHSKC appreciates the Ombudsman's obvious intent to conduct a thorough and fair investigation of complainant's allegations, as well as fully consider the department's response. For the reasons stated above, PHSKC respectfully requests that the Ombudsman re-evaluate her draft findings and (1) modify draft finding 1 by removing the first sentence, and (2) change draft finding 7 to reflect no finding of improper governmental action due to lack of jurisdiction, and/or the absence of timely, credible evidence of improper governmental action.

Sincerely,



John R. Zeldenrust
Senior Deputy Prosecuting Attorney
Attorney for Public Health - Seattle & King County

cc:

David Fleming, M.D.
Ben Leifer

⁶ See Donald Halberg v. King County Medical Examiner's Office, Case No. CV03-3580-CMP (filed in U.S. District Court for the Western District of Washington on November 19, 2003). Due to its volume, PHSKC has not included Mr. Halberg's as an attachment to this response. PHSKC will provide a complete copy of this document to the Ombudsman on request.



King County

OMBUDSMAN

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January 29, 2010

Dr. David Fleming, Director & Health Officer
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Re: Whistleblower Complaint No: 2007-01714

Dear Dr. Fleming:

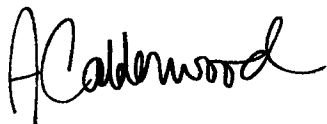
Thank you for the letter of January 8, 2010, sent by counsel for Public Health—Seattle & King County in response to my office's second draft findings transmitted to you on December 18, 2009. I appreciate the department's time and attention to this complaint throughout this investigation. Several points made in the January 8 letter merit a final reply.

- The letter requests that we limit our finding regarding the semen procurement practice to the conclusion that improper governmental action did not occur, and that we not question the propriety of the practice. It is sometimes appropriate for our office to comment on the circumstances surrounding our findings. Here, in order to promote public confidence in King County government it is important to signal in our public findings that our office understands the practice at issue appeared to be inappropriate and could be misinterpreted.
- The letter asserts that applicable laws and rules may be materially different now than they were during the relevant timeframe. But the department has not contested that the Method Two formalin disposal practice violated the King County Code. Moreover, the state anti-dilution rule (WAC 173-303-150(1)) has not been amended since 1995.

- The letter questions whether our office has jurisdiction to find violations of the hazardous waste regulations. Our jurisdiction extends to finding whether improper governmental action, defined in relevant part as a violation of laws or rules, occurred. KCC 3.42.020(c) (2007). We do not assert jurisdiction to issue hazardous waste permits or to take other regulatory and enforcement actions that are solely within the Department of Ecology's ("Ecology") authority.
- The letter states that an Ecology employee said our citation to WAC 173-303-150(1) was incorrect. Following receipt of the January 8 letter, we contacted that employee, who clarified that the citation is not incorrect. Rather, the employee said that where a business may have violated more than one rule Ecology in its discretion usually bases an enforcement action on only one rule. The employee said that Ecology could choose to cite another rule in the event it was to pursue formal enforcement in a case like this one. The employee did not say that the Method Two formalin disposal practice complies with WAC 173-303-150(1).

Thank you again for your attention to these matters. I hope that Ms. Struckel's complaint, and our investigation, have contributed to Public Health—Seattle & King County's continuing managerial and quality improvement efforts at the Medical Examiner's Office. Please feel free to call me if you would like to discuss this matter further.

Sincerely,



Amy Calderwood
King County Ombudsman

cc:

Ben Leifer, Chief Administrative Officer, PHSKC
John R. Zeldenrust, Senior Deputy Prosecuting Attorney