

November 30, 2023

Mr. Roger Millar

Secretary

Washington State Department of Transportation

310 Maple Park Ave SE

Olympia, WA 98504

RE: Whistleblower Complaint Regarding Fuel Cost Estimates

Dear Secretary Millar,

I am writing to you on behalf of my client, Scott Smith, regarding his whistleblower complaint, which was filed against your agency for retaliation against him regarding his refusal to violate Washington state law by omitting the impact of Washington state's cap-and-trade program on fuel price estimates starting in January of this year. You will recall that during this time, the Governor was repeatedly claiming there was no impact on fuel prices from this program and was instead blaming the fuel industry for the increased costs. When my client refused to change his estimate to provide false or misleading information, he was forced out of state service.

Please be advised that we are filing the attached notice of claim form with the appropriate agency for the $750,000.00 in damages suffered by my client because of this matter. In addition, please allow this communication to serve as a document preservation letter and a public records request to your agency, as well as the Office of the Governor, the Office of Financial Management, and the State Auditor.

**FACTS**

The following is a recitation of the facts pertinent to this matter. My client worked for several years at the Washington State Department of Transportation (“WSDOT”) as a Transportation Planner 5, but functioned as the sole fuel consumption, price, and revenue/estimator within State Government. He had extensive experience in this professional arena. He has thirty-five (35) years of experience as a revenue estimator. Among other jobs, he previously served as Chief Economist at the New Mexico Department of Transportation (“NMDOT”) for over twelve (12) years and Chief Economist for the standing committee of the New Mexico legislature.

Earlier this year, my client began to review the inputs to the fuel price estimates as a part of his duties as staff to the transportation revenue forecast council, as he’d done for years as part of his service to the state. The numbers in early January had come under some scrutiny as the cap-and-trade programs that had been championed by Governor Inslee were beginning to be implemented. These policies had been hotly debated and one of the main concerns about them was that they would significantly increase the cost of fuel.

On January 18, 2023, at around 10:10 a.m., my client met with Mr. Nguyen Dang (a temporary supervisor) who informed him that management “would prefer” that he not include the cap-and-trade surcharges in his quarterly fuel price forecast. By “management”, my client understood that Mr. Nguyen was referring to Ms. Amber Coulson, WSDOT’s Financial and Planning Manager, and Mr. Eric Hansen of the Governor’s Office of Financial Management.

My client told him that under no circumstances would he “jimmy the numbers.” In my client’s own words in his whistleblower complaint to the state auditor:

*“The fact that carbon taxes raise the cost of gasoline is a matter of 6th grade math. The incidence (who the cost ultimately falls on) is usually assumed to be 100 percent on the consumer. This is the logic employed by the U.S. Energy Information Administration. Further, S&P displays a line-item cost per gallon in their Oil Price Information Report, a summary of wholesale fuel prices by location.”*

At a subsequent meeting, the issue of providing inaccurate numbers for the financial report was again raised with my client. My client stated that it was impossible to do this as this surcharge is embedded in the history of prices. He also told Mr. Dang to “tell Amber that this was whistleblower stuff.” In an additional attempt to conceal management’s efforts to “jimmy the numbers”, my client and three other staff members were instructed to not include carbon tax issues in any email so that the agency could avoid public record requests.

After these exchanges, WSDOT began a course of systematically forcing my client from state service in retaliation for his refusal to provide false or misleading information about the source of fuel cost increases. He began to be required to “clear” the release of information with Mr. Hansen prior to being released to the rest of the Transportation Revenue Forecast Council, which was contrary to prior practice. WSDOT further took the step of attempting to change and backdate his employee evaluation, which prior to this incident, had been uniformly positive with no indication of negative performance reviews. His supervisor changed and my client’s duties were dramatically scaled down or eliminated.

My client requested that he be allowed to telecommute from an out-of-state duty station; he was refused on the specious grounds that physical meetings were necessary with his new supervisor, which was his personal preference. WSDOT was unique in its restrictions on my client in this respect, since almost all division staff has been working remotely since the onset of the COVID-19 pandemic. Following the WSDOT’s announcement that my client’s position would be eliminated, paired with the refusal of his new supervisor to approve a leave request so he could visit his elderly mother out of state over the holiday, my client was forced into early retirement.

**ANALYSIS**

My client was forced out of state service for having the courage to tell the truth. As staff to the Transportation Revenue Forecast Council, his independent, non-political judgement was essential in fulfilling its crucial statutory mission to provide accurate and reliable data so that the state and industry can rely upon its conclusions. By pressuring him to alter his conclusions and then taking retaliatory measures when he refused to acquiesce, the state engaged in improper government action by engaging in an effort to “prevent the dissemination of scientific opinion or alter technical findings without scientifically valid justification” - among other violations of law.

The potential causes of action that we will be pursuing include wrongful termination, retaliation, age discrimination, and violations of the Public Records Act. He will also be seeking $750,000.00 in compensatory damages for loss of income, benefits, and potential retirement savings for being wrongfully forced out of state service.

**DOCUMENT PRESERVATION DEMAND**

As noted above, I represent Scott Smith in the above-referenced matter. We are investigating the dispute, will likely be commencing an action concerning this dispute soon, and your board will be named as a defendant. It seems unlikely that we will resolve this dispute and anticipate that litigation will commence shortly. The purpose of this letter is to notify you of your obligation to take reasonable steps to preserve and retain all hard copies and electronically stored information ("ESI"), as defined by Rule 34 of the Federal Rules of Civil Procedure, relevant to this Action.

To fulfill your preservation obligation, you must take reasonable steps to preserve all hard copy documents and ESI relevant to this Action, including, but not limited to:

1. Suspending your document and data destruction and backup tape recycling policies.
2. Retaining software, hardware, or other information required to access or view the ESI, such as:

(i) identification codes;

(ii) passwords;

(iii) decryption applications;

(iv) decompression software;

(v) reconstruction software;

(vi) network access codes;

(vii) manuals; and

(viii) user instructions

1. Taking special action for:

(i) archived or deleted ESI, and

(ii) ESI stored in a database; and

(iii) computer logs; and

(iv) metadata, including the date ESI was created, the date ESI was last modified, and the name of the individual who created the ESI.

1. Taking any other reasonable steps necessary to prevent the destruction, loss, override, or modification of relevant data, either intentionally or inadvertently, such as through modification of your document retention policy and systems.
2. All ESI must be preserved, intact, and without modification.

This above list is not exhaustive, and you must preserve all information that is potentially relevant to this Action.

We believe that, among other information, the following information is relevant to the case and must be preserved:

1. Any documents, information, or data regarding the underlying facts outlined in this letter, any documents, information, or data regarding the allegations in the whistleblower complaint that is the subject of this letter, any investigative file, any emails to or from any employee of the Washington State Department of Transportation, the Office of the Governor, the State Auditor, and the Office of Financial Management regarding the whistleblower complaint that is the subject of this letter and/or any of the facts outlined in this letter.

In addition, you must take reasonable steps to preserve all hard copy documents and ESI relevant to this Action that are not just in your possession or custody, but in your control.

As with documents in your possession or custody, all ESI in a nonparty's possession or custody must be preserved, intact, and without modification.

Potentially relevant ESI may include:

1. active, archived, and deleted copies of ESI, such as emails, voicemails, text messages, instant messages (“IMs”), ephemeral messages, calendars, diaries, word processing files, spreadsheets, PDFs, JPEGs, PowerPoint presentations, recordings of videoconferences or conference calls, database files, temporary internet files, cookies, .ZIP files, Internet of Things (“IoT”) generated data, stored correspondence from workplace collaboration tools (“WCTs”), among others.
2. the ESI's metadata, including the date it was created, the date it was last modified, and the name of the individual who created it, as well as whether it was stored online, offline, in a cloud-based server or in other electronic storage, or on any computers, handheld devices, tablets, cell phones, or other devices over which you have in your possession, custody, or control.

Your failure to preserve relevant data may constitute spoliation of evidence, which may subject you to sanctions. We trust that you will preserve for the duration of this Action all relevant hard copy documents and ESI. In the event of a dispute arising out of your failure to preserve documents, we will rely on this letter in court as evidence of our request and notice of your preservation obligations.

**PUBLIC RECORDS REQUEST**

Please also consider this letter as a public records request to your agency as well as the Office of the Governor, the Office of Financial Management, and the State Auditor pursuant to Washington state law for the following:

1. Any documents, information, or data regarding the underlying facts outlined in this letter, any documents, information, or data regarding the allegations in the whistleblower complaint that is the subject of this letter, any investigative file, any emails to or from any employee of the Washington State Department of Transportation, the Office of the Governor, the State Auditor, and the Office of Financial Management regarding the whistleblower complaint that is the subject of this letter and/or any of the facts outlined in this letter.

Please produce any responsive records in electronic format via email to jackson@citizenactiondefense.org or through a file-sharing service. If you do not have a cloud-based sharing method and the responsive records are too large to send via email, please let us know and our office will coordinate with you to utilize a file-sharing service. If records responsive to these requests may be produced in installments, please do so as soon as they are available. If there are any fees associated with searching for and copying the requested records, please inform us if those costs exceed $100.00 prior to producing those documents to our office.

If you deny any part of this request or redact any information from responsive records, please provide a log in compliance with applicable law that describes the reason for the denial and cite each specific exemption that justifies the refusal to release the record, in whole or in part.

Thank you for your time and attention to this matter. Please feel free to contact me should you have any questions or wish to discuss further.

Sincerely,

Jackson Maynard

Executive Director and Counsel

Citizen Action Defense Fund

111 21st Ave SW

Olympia, WA 98501

(850) 519-3495

cc: Office of the Governor

Office of Financial Management

The State Auditor