

FIRST REGULAR SESSION

# HOUSE BILL NO. 493

## 93RD GENERAL ASSEMBLY

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INTRODUCED BY REPRESENTATIVES BOWMAN (Sponsor), VILLA, DAUS, WAGNER, OXFORD, SCHNEIDER, GEORGE, KRATKY, HUBBARD, LOW (39), HARRIS (23), JOHNSON (90), SATER, JOHNSON (61), WRIGHT-JONES, RUCKER, MEADOWS, CASEY, BOYKINS, SANDERS BROOKS, HOSKINS, ZWEIFEL, BLAND, WALSH, SELBY, LOWE (44), STORCH, HUGHES, DARROUGH AND BEARDEN (Co-sponsors).

Read 1<sup>st</sup> time February 9, 2005 and copies ordered printed.

STEPHEN S. DAVIS, Chief Clerk

1308L.011

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### AN ACT

To repeal section 105.055, RSMo, and to enact in lieu thereof twelve new sections relating to state employee disclosures.

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*Be it enacted by the General Assembly of the state of Missouri, as follows:*

Section A. Section 105.055, RSMo, is repealed and twelve new sections enacted in lieu thereof, to be known as sections 105.1300, 105.1303, 105.1306, 105.1309, 105.1312, 105.1315, 105.1318, 105.1321, 105.1324, 105.1327, 105.1330, and 105.1333, to read as follows:

**105.1300. As used in sections 105.1300 to 105.1330 the following terms shall mean:**

- (1) "Auditor", the office of the state auditor;**
- (2) "Employee", any individual employed or holding office in any department or agency of state government;**
- (3) "Good faith", a reasonable basis in fact for the communication. Good faith is lacking when the employee knows or reasonably should know that the report is malicious, false, or frivolous;**
- (4) "Gross waste of funds", to spend or use funds or to allow funds to be used without valuable result in a manner grossly deviating from the standard of care or competence that a reasonable person would observe in the same situation;**
- (5) "Improper governmental action", any action by an employee undertaken in the performance of the employee's official duties:**

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

13 (a) Which is a gross waste of public funds or resources as defined in this section;  
14 (b) Which is in violation of federal or state law or rule, if the violation is not merely  
15 technical or of a minimum nature; or

16 (c) Which is of substantial and specific danger to the public health or safety;

17

18 "Improper governmental action" shall not mean personnel actions, for which other  
19 remedies exist, including but not limited to employee grievances, complaints, appointments,  
20 promotions, transfers, assignments, reassignments, reinstatements, restorations,  
21 reemployments, performance evaluations, reductions in pay, dismissals, suspensions,  
22 demotions, alleged labor agreement violations, reprimands, claims of discriminatory  
23 treatment, violations of chapter 36, RSMo, or any action which may be taken under  
24 chapter 36, RSMo, or other disciplinary action except as provided in section 105.1303;

25 (6) "Substantial and specific danger", a risk of serious injury, illness, peril, or loss,  
26 to which the exposure of the public is a gross deviation from the standard of care or  
27 competence which a reasonable person would observe in the same situation;

28 (7) "Use of official authority or influence", taking, directing others to take,  
29 recommending, processing, or approving any personnel action such as an appointment,  
30 promotion, transfer, assignment, reassignment, reinstatement, restoration, reemployment,  
31 performance evaluation, or any adverse action under chapter 36, RSMo, or other  
32 disciplinary action;

33 (8) "Whistleblower", an employee who in good faith reports alleged improper  
34 governmental action to the auditor, initiating an investigation under section 105.1309.

105.1303. 1. An employee shall not directly or indirectly use or attempt to use the  
2 employee's official authority or influence for the purpose of intimidating, threatening,  
3 coercing, commanding, influencing, or attempting to intimidate, threaten, coerce,  
4 command, or influence any individual for the purpose of interfering with the right of the  
5 individual to:

6 (1) Disclose to the auditor, or the auditor's representative, information concerning  
7 improper governmental action; or

8 (2) Identify rules warranting review or provide information to the rules review  
9 committee.

10 2. Nothing in this section shall authorize an individual to disclose information  
11 otherwise prohibited by law.

105.1306. An employee shall make a reasonable attempt to ascertain the correctness  
2 of the information furnished and may be subject to disciplinary actions, including, but not

3 limited to, suspension or termination, for knowingly furnishing false information as  
4 determined by the employee's appointing authority.

5 **105.1309. 1. (1) In order to be investigated, an assertion of improper governmental**  
6 **action shall be provided to the auditor within one year after the occurrence of the asserted**  
7 **improper governmental action.**

8 (2) The auditor shall have the authority to determine whether to investigate any  
9 assertions received. In determining whether to conduct either a preliminary or further  
10 investigation, the auditor shall consider factors including, but not limited to:

11 (a) The nature and quality of evidence and the existence of relevant laws and rules;

12 (b) Whether the action was isolated or systematic;

13 (c) The history of previous assertions regarding the same subject or subjects or  
14 subject matter;

15 (d) Whether other avenues are available for addressing the matter;

16 (e) Whether the matter has already been investigated or is in litigation;

17 (f) The seriousness or significance of the asserted improper governmental action;

18 **and**

19 (g) The cost and benefit of the investigation.

20 The auditor has the sole discretion to determine the priority and weight given to these and  
21 other relevant factors and to decide whether a matter is to be investigated. The auditor  
22 shall document the factors considered and the analysis applied.

23 (3) The auditor also has the authority to investigate assertions of improper  
24 governmental actions as part of an audit conducted under chapter 29, RSMo. The auditor  
25 shall document the reasons for handling the matter as part of such an audit.

26 2. Subject to subdivision (3) of subsection 5 of this section, the identity of a  
27 whistleblower is confidential at all times unless the whistleblower consents to disclosure by  
28 written waiver or by acknowledging his or her identity in a claim against the state for  
29 retaliation.

30 3. Upon receiving specific information that an employee has engaged in improper  
31 governmental action, the auditor shall, within five working days of receipt of the  
32 information, mail written acknowledgement to the whistleblower at the address provided  
33 stating whether a preliminary investigation will be conducted. For a period not to exceed  
34 thirty working days from receipt of the assertion, the auditor shall conduct such  
preliminary investigation of the matter as the auditor deems appropriate.

4. In addition to the authority under subsection 3 of this section, the auditor may,  
on its own initiative, investigate incidents of improper state governmental action.

35           **5. (1) If it appears to the auditor, upon completion of the preliminary investigation,**  
36 **that the matter is so unsubstantiated that no further investigation, prosecution, or**  
37 **administrative action is warranted, the auditor shall so notify the whistleblower.**

38           **(2) The written notification shall contain a summary of the information received**  
39 **and of the results of the preliminary investigation with regard to each assertion of**  
40 **improper governmental action.**

41           **(3) In any case to which this section applies, the identity of the whistleblower shall**  
42 **be kept confidential unless the auditor determines that the information has been provided**  
43 **other than in good faith.**

44           **(4) With the agency's consent, the auditor may forward the assertions to an**  
45 **appropriate agency to investigate and report back to the auditor no later than sixty**  
46 **working days after the assertions are received from the auditor. The auditor is entitled to**  
47 **all investigative records resulting from such a referral. All procedural and confidentiality**  
48 **provisions of this chapter apply to investigations conducted under this subsection. The**  
49 **auditor shall document the reasons the assertions were referred.**

50           **6. During the preliminary investigation, the auditor shall provide written**  
51 **notification of the nature of the assertions to the subject or subjects of the investigation and**  
52 **the agency head. The notification shall include the relevant facts and laws known at the**  
53 **time and the procedure for the subject or subjects of the investigation and the agency head**  
54 **to respond to the assertions and information obtained during the investigation. This**  
55 **notification does not limit the auditor from considering additional facts or laws which**  
56 **become known during further investigation.**

57           **7. (1) If it appears to the auditor after completion of the preliminary investigation**  
58 **that further investigation, prosecution, or administrative action is warranted, the auditor**  
59 **shall so notify the whistleblower, the subject or subjects of the investigation, and the**  
60 **agency head and either conduct a further investigation or issue a report under subsection**  
61 **10 of this section.**

62           **(2) If the preliminary investigation resulted from an anonymous assertion, a**  
63 **decision to conduct further investigation shall be subject to review by a three-person panel**  
64 **convened as necessary by the auditor prior to the commencement of any additional**  
65 **investigation. The panel shall include a state auditor representative knowledgeable of the**  
66 **subject agency operations, a citizen volunteer, and a representative of the attorney**  
67 **general's office. This group shall be briefed on the preliminary investigation and shall**  
68 **recommend whether the auditor should proceed with further investigation.**

69           **(3) If further investigation is to occur, the auditor shall provide written notification**  
70 **of the nature of the assertions to the subject or subjects of the investigation and the agency**

71 head. The notification shall include the relevant facts known at the time and the procedure  
72 to be used by the subject or subjects of the investigation and the agency head to respond  
73 to the assertions and information obtained during the investigation.

74 8. Within sixty working days after the preliminary investigation period in  
75 subsection 3 of this section, the auditor shall complete the investigation and report its  
76 findings to the whistleblower unless written justification for the delay is furnished to the  
77 whistleblower, agency head, and subject or subjects of the investigation. In all such cases,  
78 the report of the auditor's investigation and findings shall be sent to the whistleblower  
79 within one year after the information was filed under subsection 3 of this section.

80 9. (1) At any stage of an investigation under this section the auditor may require  
81 by subpoena the attendance and testimony of witnesses and the production of documentary  
82 or other evidence relating to the investigation at any designated place in the state. The  
83 auditor may issue subpoenas, administer oaths, examine witnesses, and receive evidence.  
84 In the case of contumacy or failure to obey a subpoena, the superior court for the county  
85 in which the person to whom the subpoena is addressed resides or is served may issue an  
86 order requiring the person to appear at any designated place to testify or to produce  
87 documentary or other evidence. Any failure to obey the order of the court may be  
88 punished by the court as a contempt thereof.

89 (2) The auditor may order the taking of depositions at any stage of a proceeding or  
90 investigation under this chapter. Depositions shall be taken before an individual  
91 designated by the auditor and having the power to administer oaths. Testimony shall be  
92 reduced to writing by or under the direction of the individual taking the deposition and  
93 shall be subscribed by the deponent.

94 (3) Agencies shall cooperate fully in the investigation and shall take appropriate  
95 action to preclude the destruction of any evidence during the course of the investigation.

96 (4) During the investigation the auditor shall interview each subject of the  
97 investigation. If it is determined there is reasonable cause to believe improper  
98 governmental action has occurred, the subject or subjects and the agency head shall be  
99 given fifteen working days to respond to the assertions prior to the issuance of the final  
100 report.

101 10. (1) If the auditor determines there is reasonable cause to believe an employee  
102 has engaged in improper governmental action, the auditor shall report the nature and  
103 details of the activity to:

104 (a) The subject or subjects of the investigation and the head of the employing  
105 agency; and

106 (b) If appropriate, the attorney general or such other authority as the auditor  
107 determines appropriate.

108 (2) The auditor has no enforcement power except that in any case in which the  
109 auditor submits an investigative report containing reasonable cause determinations to the  
110 agency, the agency shall send its plan for resolution to the auditor within fifteen working  
111 days of having received the report. The agency is encouraged to consult with the subject  
112 or subjects of the investigation in establishing the resolution plan. The auditor may  
113 require periodic reports of agency action until all resolution has occurred. If the auditor  
114 determines that appropriate action has not been taken, the auditor shall report the  
115 determination to the governor and to the general assembly and may include this  
116 determination in the agency audit under chapter 29, RSMo.

117 11. Once the auditor concludes that appropriate action has been taken to resolve  
118 the matter, the auditor shall so notify the whistleblower, the agency head, and the subject  
119 or subjects of the investigation. If the resolution takes more than one year, the auditor  
120 shall provide annual notification of its status to the whistleblower, agency head, and  
121 subject or subjects of the investigation.

122 12. This section does not limit any authority conferred upon the attorney general  
123 or any other agency of government to investigate any matter.

105.1312. 1. Any person who is a whistleblower and who has been subjected to  
2 workplace reprisal or retaliatory action is presumed to have established a cause of action  
3 for the remedies provided under chapter 213, RSMo. For the purpose of this section  
4 "reprisal or retaliatory action" means, but is not limited to any of the following:

- 5 (1) Denial of adequate staff to perform duties;
- 6 (2) Frequent staff changes;
- 7 (3) Frequent and undesirable office changes;
- 8 (4) Refusal to assign meaningful work;
- 9 (5) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory  
10 performance evaluations;
- 11 (6) Demotion;
- 12 (7) Reduction in pay;
- 13 (8) Denial of promotion;
- 14 (9) Suspension;
- 15 (10) Dismissal;
- 16 (11) Denial of employment;
- 17 (12) A supervisor or superior encouraging coworkers to behave in a hostile manner  
18 toward the whistleblower; and

19           **(13) A change in the physical location of the employee's workplace or a change in**  
20 **the basic nature of the employee's job, if either are in opposition to the employee's**  
21 **expressed wish.**

22           **2. The agency presumed to have taken retaliatory action under subsection 1 of this**  
23 **section may rebut that presumption by proving by a preponderance of the evidence that**  
24 **the agency action or actions were justified by reasons unrelated to the employee's status**  
25 **as a whistleblower.**

26           **3. Nothing in this section shall prohibit an agency from making any decision**  
27 **exercising its authority to terminate, suspend, or discipline an employee who engages in**  
28 **workplace reprisal or retaliatory action against a whistleblower. However, the agency also**  
29 **shall implement any order under chapter 213, RSMo, other than an order of suspension**  
30 **if the agency has terminated the retaliator.**

**105.1315. A written summary of this chapter and procedures for reporting**  
2 **improper governmental actions established by the auditor's office shall be made available**  
3 **by each department or agency of state government to each employee upon entering public**  
4 **employment. Employees shall be notified by each department or agency of state**  
5 **government each year of the procedures and protections under sections 105.1300 to**  
6 **105.1330.**

**105.1318. The auditor shall have the authority to contract for any assistance**  
2 **necessary to carry out the provisions of sections 105.1300 to 105.1330.**

**105.1321. The cost of administering sections 105.1300 to 105.1330 shall be funded**  
2 **through the fund created under section 105.1330.**

**105.1324. A whistleblower wishing to provide information under sections 105.1300**  
2 **to 105.1330 regarding asserted improper governmental action against the state auditor or**  
3 **an employee of that office shall provide the information to the attorney general who shall**  
4 **act in place of the auditor in investigating and reporting the matter.**

**105.1327. The office of administration shall contract for a performance audit of the**  
2 **state employee whistleblower program on a cycle to be determined by the office of**  
3 **administration. The audit shall be done in accordance with generally accepted government**  
4 **auditing standards beginning with the fiscal year ending June 30, 2007. The audit shall**  
5 **determine at a minimum:**

6           **(1) Whether the program is acquiring, protecting, and using its resources such as**  
7 **personnel, property, and space economically and efficiently; the causes of inefficiencies or**  
8 **uneconomical practices;**

9           **(2) Whether the program has complied with laws and rules on matters of economy**  
10 **and efficiency;**

11 (3) The extent to which the desired results or benefits established by the legislature  
12 are being achieved;

13 (4) The effectiveness of the program; and

14 (5) Whether the auditor has complied with significant laws and rules applicable to  
15 the program.

105.1330. 1. There is hereby created in the state treasury the "State Employee  
2 Whistleblower Fund", which shall consist of funds appropriated from general revenue.  
3 The state treasurer shall be custodian of the fund and shall approve disbursements from  
4 the fund in accordance with sections 30.170 and 30.180, RSMo. Upon appropriation,  
5 money in the fund shall be used solely for the administration of sections 105.1300 to  
6 105.1330.

7 2. Notwithstanding the provisions of section 33.080, RSMo, to the contrary, any  
8 moneys remaining in the fund at the end of the biennium shall not revert to the credit of  
9 the general revenue fund.

10 3. The state treasurer shall invest moneys in the fund in the same manner as other  
11 funds are invested. Any interest and moneys earned on such investments shall be credited  
12 to the fund.

105.1333. Pursuant to section 23.253, RSMo, of the Missouri Sunset Act:

2 (1) The provisions of the new program authorized under sections 105.1300 to  
3 105.1330 shall automatically sunset six years after the effective date of sections 105.1300  
4 to 105.1330 unless reauthorized by an act of the general assembly; and

5 (2) If such program is reauthorized, the program authorized under sections  
6 105.1300 to 105.1330 shall automatically sunset twelve years after the effective date of the  
7 reauthorization of sections 105.1300 to 105.1330; and

8 (3) This section shall terminate on September first of the calendar year immediately  
9 following the calendar year in which the program authorized under sections 105.1300 to  
10 105.1330 is sunset.

[105.055. 1. No supervisor or appointing authority of any state agency  
2 shall prohibit any employee of the agency from discussing the operations of the  
3 agency, either specifically or generally, with any member of the legislature, state  
4 auditor, attorney general, or any state official or body charged with investigating  
5 such alleged misconduct.

6 2. No supervisor or appointing authority of any state agency shall:

7 (1) Prohibit a state employee from or take any disciplinary action  
8 whatsoever against a state employee for the disclosure of any alleged prohibited  
9 activity under investigation or any related activity, or for the disclosure of  
10 information which the employee reasonably believes evidences:

11 (a) A violation of any law, rule or regulation; or



12 (b) Mismanagement, a gross waste of funds or abuse of authority, or a  
13 substantial and specific danger to public health or safety, if the disclosure is not  
14 specifically prohibited by law; or

15 (2) Require any such employee to give notice to the supervisor or  
16 appointing authority prior to making any such report.

17 3. This section shall not be construed as:

18 (1) Prohibiting a supervisor or appointing authority from requiring that  
19 an employee inform the supervisor or appointing authority as to legislative  
20 requests for information to the agency or the substance of testimony made, or to  
21 be made, by the employee to legislators on behalf of the employee to legislators  
22 on behalf of the agency;

23 (2) Permitting an employee to leave the employee's assigned work areas  
24 during normal work hours without following applicable rules and regulations and  
25 policies pertaining to leaves, unless the employee is requested by a legislator or  
26 legislative committee to appear before a legislative committee;

27 (3) Authorizing an employee to represent the employee's personal  
28 opinions as the opinions of a state agency; or

29 (4) Restricting or precluding disciplinary action taken against a state  
30 employee if: the employee knew that the information was false; the information  
31 is closed or is confidential under the provisions of the open meetings law or any  
32 other law; or the disclosure relates to the employee's own violations,  
33 mismanagement, gross waste of funds, abuse of authority or endangerment of the  
34 public health or safety.

35 4. As used in this section, "disciplinary action" means any dismissal,  
36 demotion, transfer, reassignment, suspension, reprimand, warning of possible  
37 dismissal or withholding of work, whether or not the withholding of work has  
38 affected or will affect the employee's compensation.

39 5. Any employee may file an administrative appeal whenever the  
40 employee alleges that disciplinary action was taken against the employee in  
41 violation of this section. The appeal shall be filed with the state personnel  
42 advisory board; provided that the appeal shall be filed with the appropriate  
43 agency review board or body of nonmerit agency employers which have  
44 established appeal procedures substantially similar to those provided for merit  
45 employees in subsection 5 of section 36.390, RSMo. The appeal shall be filed  
46 within thirty days of the alleged disciplinary action. Procedures governing the  
47 appeal shall be in accordance with chapter 36, RSMo. If the board or appropriate  
48 review body finds that disciplinary action taken was unreasonable, the board or  
49 appropriate review body shall modify or reverse the agency's action and order  
50 such relief for the employee as the board considers appropriate. If the board finds  
51 a violation of this section, it may review and recommend to the appointing  
52 authority that the violator be suspended on leave without pay for not more than  
53 thirty days or, in cases of willful or repeated violations, may review and  
54 recommend to the appointing authority that the violator forfeit the violator's

55 position as a state officer or employee and disqualify the violator for appointment  
56 to or employment as a state officer or employee for a period of not more than two  
57 years. The decision of the board or appropriate review body in such cases may  
58 be appealed by any party pursuant to law.

59 6. Each state agency shall prominently post a copy of this section in  
60 locations where it can reasonably be expected to come to the attention of all  
61 employees of the agency.

62 7. (1) In addition to the remedies in subsection 6 of this section, a person  
63 who alleges a violation of this section may bring a civil action for damages  
64 within ninety days after the occurrence of the alleged violation.

65 (2) A civil action commenced pursuant to this subsection may be brought  
66 in the circuit court for the county where the alleged violation occurred, the county  
67 where the complainant resides, or the county where the person against whom the  
68 civil complaint is filed resides.

69 (3) An employee must show by clear and convincing evidence that he or  
70 she or a person acting on his or her behalf has reported or was about to report,  
71 verbally or in writing, a prohibited activity or a suspected prohibited activity.

72 (4) A court, in rendering a judgment in an action brought pursuant to this  
73 section, shall order, as the court considers appropriate, actual damages, and may  
74 also award the complainant all or a portion of the costs of litigation, including  
75 reasonable attorney fees.]