

ETHICS COMMISSION AND ANONYMOUS WHISTLEBLOWERS UNDER THE CONFRONTATION CLAUSE

In the November 2018 general election, voters approved a ballot measure ([Appendix A](#)) creating Article XIV of the Constitution of North Dakota ([Appendix B](#)). Article XIV contains several provisions related to government ethics applicable to lobbyists, legislators, other elected and appointed state officials, members of the Governor's cabinet, and employees of the legislative branch. The Legislative Assembly passed House Bill No. 1521 (2019) ([Appendix C](#)) to implement parts of Article XIV.

Section 3 of Article XIV creates an ethics commission and authorizes the commission to "adopt rules related to transparency, corruption, elections, and lobbying" and "investigate alleged violations of such rules, [Article XIV], and related state laws." The section also requires the commission to "maintain a confidential whistleblower hotline through which any person acting in good faith may submit relevant information." North Dakota Century Code Section 54-66-05, created by House Bill No. 1521, prohibits the commission from investigating, referring, or taking any other action regarding a complaint that is not accompanied by the complainant's name, address, and telephone number.

This memorandum addresses questions regarding whether due process requirements, particularly the confrontation clause in the Sixth Amendment to the United States Constitution, preclude the North Dakota Ethics Commission from investigating and bringing enforcement actions stemming from allegations made anonymously. This memorandum does not address the application of Section 54-66-05 to anonymous allegations.

INVESTIGATIONS AND ENFORCEMENT ACTIONS STEMMING FROM ANONYMOUS TIPS

Both the North Dakota Supreme Court and the Eighth Circuit Court of Appeals have ruled a government entity may investigate an anonymous tip and bring enforcement action against a person as a result of the investigation.

In a 2007 case, *State v. Loughead*, 726 N.W.2d 859 (ND 2007), the Game and Fish Department received an anonymous tip and investigated it. The investigation led to Mr. Loughead's conviction. Mr. Loughead claimed he was denied the constitutional right to confront and cross-examine a witness against him because the information that triggered the investigation was provided anonymously. The North Dakota Supreme Court disagreed with Mr. Loughead and said "[a] person does not have the constitutional right to confront a mere informer who does not testify against him." Quoting the United States Supreme Court, the North Dakota Supreme Court defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." The North Dakota Supreme Court said "[t]he information provided by the anonymous tipster was not 'testimony'" because the tipster "merely provided information about [the illegal activity] to the Game and Fish department, which warranted further investigation."

Similarly, in a 2014 case, *U.S. v. Wilkens*, 742 F.3d 354 (8th Cir. 2014), the Eighth Circuit Court of Appeals, which is the appeals court for federal cases in North Dakota, held a defendant's right to confront the defendant's accusers was not violated when the defendant was denied the opportunity to challenge an anonymous tip that led to an investigation and, ultimately, the defendant's conviction. The court said "the evidence presented at trial focused on information learned from a full investigation after the tip. Thus, the Confrontation Clause argument is misplaced as it does not involve confronting any 'witnesses against him.'"

Additionally, the North Dakota Supreme Court in the *Loughead* case noted the government cannot provide information, such as the name of an anonymous whistleblower, the government does not have. The inability to produce that information did not prevent the government from bringing its case against Mr. Loughead or prevent the court from upholding his conviction. The court also noted the government has an evidentiary privilege to refuse to disclose certain informers' names in cases where the names are known to the government. That privilege may be used to protect confidential informants, for example.

Provided a government entity does not use an anonymous tip as testimony, these cases indicate the government entity may investigate an anonymous tip and bring enforcement action against a person as a result of the investigation. If this were not the case, unlawful activity could be shielded from investigation and enforcement if the unlawful actor leaves an anonymous tip regarding the activity with an enforcement agency. While much of the caselaw on this issue results from criminal matters, the confrontation clause would not afford more protection in the civil or administrative context. There are a myriad of administrative decisions involving investigations that stemmed from anonymous tips, and at least one federal agency, the United States Securities and Exchange Commission, has reported to Congress on successful enforcement actions triggered by anonymous whistleblowers.

OTHER USES OF ANONYMOUS TIPS

There is a large body of caselaw regarding government entities' use of anonymous tips in searches and seizures and in criminal trials. The cases often turn on their specific facts, and a complete analysis of these uses of anonymous tips is beyond the scope of this memorandum. However, the cases indicate a witness's reference to an anonymous tip during an Ethics Commission enforcement proceeding may not trigger the right to confront and cross-examine the tipster. The United States Supreme Court and other courts have ruled a government entity may describe an anonymous tip that led to an investigation in court during a prosecution resulting from the investigation under some circumstances. For example, in *Woods v. Etherton*, 136 S.Ct. 1149 (2016), the Court said law enforcement officers' repeated descriptions of an anonymous tip during the prosecution of a drug dealer would not violate the drug dealer's right to confront witnesses against him if the descriptions were not made for their truth.

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