ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

Date: January 20, 2016

To: Members, Ethics Commission; Executive Director LeeAnn Pelham

From: Ben Hur and Jesse Mainardi

Re: Civil Grand Jury Whistleblower Protection Ordinance Recommendations

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Introduction & Summary

This memorandum provides an assessment of the substantive recommendations contained in the 2014-2015 San Francisco Civil Grand Jury report entitled "San Francisco's Whistleblower Protection Ordinance is in Need of Change." (Copy attached.)[1] The Civil Grand Jury's recommendations reflect a concern that the Ordinance has not protected City whistleblowers from retaliation, as evidenced by the lack of any retaliation complaint filed with the Commission resulting in enforcement.

The Civil Grand Jury's report recommended that the Ethics Commission propose certain changes to the Ordinance for approval by the Board of Supervisors. In response, the Commission indicated that it would conduct further analysis of the Civil Grand Jury's recommendations, and would provide an update to the Civil Grand Jury per California Penal Code section 933.05. In its own response to the Civil Grand Jury report, the Board indicated that it is looking to the Commission for its assessment of the recommended changes.

The Civil Grand Jury's specific recommendations broadly concern three issues: (1) the scope of the Ordinance; (2) the Ordinance's enforcement process; and (3) the Ordinance's remedy. This memorandum advises that the Commission pursue the following:

1. Develop and promulgate regulations clarifying that:

(a) Complaints must be filed in writing regardless of where they are filed;

(b) Submissions deemed informal whistleblower complaints by the Commission staff may trigger retaliation protections under the Ordinance;

[1] The relevant statutory language – i.e., the Charter and Article IV of the Campaign and Governmental Conduct Code (hereinafter the "Ordinance") – is also attached.

(c) The Ordinance covers a number of non-disciplinary retaliatory actions;

(d) Complaints filed with the Commission do not need to establish retaliation by a "preponderance of the evidence" during the preliminary review/investigation phase; and

(e) The Commission should have a standard timeline for completing whistleblower investigations;

2. Develop and propose amendments to the Ordinance that:

(a) Expand the Ordinance to cover disclosures to a City department or commission other than the complainant's own regarding all possible whistleblower complaints currently set forth in Sections 4.107 and 4.115;

(b) Allow the Commission to order cancelation of a retaliatory action; and

(c) Increase civil penalties from a maximum of $5,000 to $10,000.

Each of the recommendations is analyzed below.

Discussion

A. **Recommendations 2.1 and 2.2**. The Grand Jury's first two substantive recommendations overlap,[2] raising issues regarding the scope of the Ordinance and whether it fulfills the City Charter's mandate. These issues are addressed separately below.

Recommendation 2.1:	Expand the definition of whistleblowing to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and providing information to any of the recipients listed in the Charter mandate (hereafter "listed recipients"), outside of the formal complaint or investigation process.
Recommendation 2.2:	Expand the scope of covered disclosure to include "providing information" to any of the listed recipients regarding improper government activities, whether or not such information is set forth in a formal complaint, or provided during an official investigation.

Issue 1

Should the Ordinance be expanded to cover oral whistleblower complaints to the complainant's department?

[2] A representative of the Civil Grand Jury has confirmed that Recommendations 2.1 and 2.2 make similar points.

Answer and Analysis

No. The Grand Jury points out that the Charter does not require that a whistleblower to file a retaliation complaint filed with his or her own department in writing, but Section 4.115(a) of the Ordinance does. The Civil Grand Jury contends that this limitation with respect to complaints filed with an employee's department is unwarranted, and that most meritorious whistleblower complaints are actually made orally.

However, written evidence is important to establish that the Ordinance's protections have actually been triggered. Without a written record, it will be difficult to investigate complaints and investigations may become bogged down in lengthy assessments of whether the Ordinance's protections were triggered. Accordingly, the Commission's regulations should require that all complaints must be filed in writing.

Recommended Action

To the extent necessary, clarify by regulation that all complaints must be filed in writing.

Issue 2

Should the Ordinance be expanded to cover disclosures to a City department or commission other than the complainant's own?

Answer and Analysis

Yes. The Charter requires that the Ordinance provide protection to whistleblowers who filed their complaints with "the Ethics Commission, Controller, District Attorney or City Attorney or a City department of commission." The Civil Grand Jury correctly points out that the Charter does not require that a complaint is made to an employee's own department, and contends that this limitation in the Ordinance is unwarranted. Indeed, it would seem inappropriate to deny a whistleblower of retaliation protections simply because he or she submitted a complaint to the wrong department.

Relatedly, the Commission can propose further expanding the Ordinance to address another overlapping concern raised by the Civil Grand Jury. Under Section 4.115 of the Ordinance, complaints not filed with the Controller's Office will trigger retaliation protections only if they concern certain limited issues, which do not include waste or fraud.[3] The Civil Grand Jury contends that the Ordinance should be expanded to include disclosures of waste, fraud, abuse, and violations of general law. In fact, the Controller's Whistleblower Program

[3] For example, a whistleblower is protected only when a complaint filed with his or her own department concerns: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest

already covers "the misuse of City funds, improper activities by City officers and employees, deficiencies in the quality and delivery of government services, and wasteful and inefficient City government practices." (Section 4.107(a).)

Thus, the proposed changes should also specify that whistleblower complaints concerning the above issues that are filed with the "wrong" City department (e.g., misuse of City funds complaints not filed with the Controller's Office) will still trigger retaliation protections under the Ordinance. A whistleblower should not be deprived of retaliation protections simply because he or she submitted a complaint to the "wrong" department.

Recommended Action

Direct staff to draft a proposed amendments expanding the Ordinance to cover disclosures to a City department or commission other than the complainant's own regarding all possible whistleblower complaints currently set forth in Sections 4.107 and 4.115.

Issue 3

Should the Ordinance be expanded to cover "providing information" to any of the recipients listed in the Charter mandate regarding improper government activities, whether or not such information is set forth in a formal complaint or provided during an official investigation?

Answer and Analysis

The Commission can address this issue via regulation. The Civil Grand Jury correctly points out that the Charter contemplates protection for "filing a complaint with, or providing information to" various City departments regarding improper government activity. The Charter does not indicate that, in order to be protected, a whistleblower must "provide information" in connection with an official investigation. Section 4.115(a)(iii) of the Ordinance does impose this requirement. The Civil Grand Jury's apparent concern is that potential whistleblowers may not be inclined to file a formal complaint to a City department, but may wish simply to provide evidence of wrongdoing.

The Civil Grand Jury's concern can be addressed by a regulation indicating that for purposes of Section 4.115, a "complaint" triggering retaliation protections may be both formal and informal, so long as the complainant's action includes some statement indicative of an attempt to expose governmental wrongdoing.

"Providing information" pursuant to Section 4.115, however, should be limited to written or oral statements made to an investigator during the course of a whistleblower investigation conducted by the Ethics Commission, City Attorney, Controller or District Attorney.

Recommended Action

Direct staff to draft regulations indicating that both formal and informal complaints can trigger retaliation protections, provided the complainant's action includes some statement indicative of an attempt to expose governmental wrongdoing.

Issue 4[4]

Should the Ordinance be expanded to cover applicants for City employment and employees with City contractors from retaliation?

Answer and Analysis

No. The Grand Jury points out that the Ordinance does not protect applicants for City employment and employees of City contractors from retaliation. Indeed, the Charter only mandates protections for "City officers and employees." Practical considerations militate against expanding the Ordinance beyond the Charter mandate. For instance, unsuccessful applicants for City employment may be more likely to file unmeritorious complaints. Additionally, it would appear that injecting the whistleblower retaliation liability rules into City contractors' employment relationships may raise a number of issues, including potentially dissuading certain contractors from bidding on City work (particularly if the Commission were to obtain the ability to reinstate terminated employees, as discussed below). In this regard, each City department may be in a better position to determine whether their contracts should include whistleblower rules. That said, if some contractors are essentially acting as City employees and there is a clear way to identify such contractors (e.g., those that are filing Form 700s) the Commission should consider covering them.

Recommended Action

No further action on this issue is recommended.

Issue 5

Should the Ordinance be expanded to protect against certain non-disciplinary actions?

Answer and Analysis

The Commission can resolve this issue via regulation. Section 4.115(a) of the Ordinance lists the types of prohibited retaliation: termination, demotion, suspension or taking "other similar adverse employment action." The Grand Jury believes that non-disciplinary actions such as threats, transfers and changes in duties are not covered by the Ordinance.

Although it is unclear that this is the proper reading of Section 4.115(a), it is advisable to clarify what constitutes prohibited "retaliation" and to be sure that this term is defined broadly,

[4] Issues 4 and 5 were not explicitly recommendations by the Civil Grand Jury, but were mentioned in its report.

but also in a way that provides adequate guidance to both whistleblower and to Commission staff, particularly given that employment law is outside the Commission's institutional expertise.

Although the Grand Jury recommends an amendment to the Ordinance, the Commission could clarify the definition of "other similar adverse employment action" via regulation. The list proposed by the Grand Jury[5] seems to be a fairly comprehensive list representative of lists in other jurisdictions which could be changed by the Commission if found to be insufficient.

Recommended Action

Direct staff to draft regulations specifying the definition of "other similar adverse employment action."

B. **Recommendation 3**. Recommendation 3 concerns the remedies (or the lack thereof) available to whistleblowers filing complaints with the Ethics Commission.

Recommendation 3:	Provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increase the limit of the civil penalty available under the Ordinance to an amount adequate to repay the financial losses that can result from such an action.

Issue

Should the Ordinance be amended to authorize the Commission to order cancellation of a retaliatory job action and to impose the civil penalties to repay the financial losses that can result from such an action?

Answer and Analysis

Yes. The Civil Grand Jury found that the $5,000 per violation civil penalty set forth in Section 4.115(c) of the Ordinance does not provide the complainant with a meaningful remedy. In fact, the Ordinance does not provide the whistleblower with any remedy for complaints pursued administratively with the Commission; it only provides for punitive fines and, potentially, the discipline of a City officer or employee.

These considerations inform an analysis of the Civil Grand Jury's two recommendations. The first recommendation is to amend the Ordinance to allow the Commission to order

[5] That list of retaliatory actions includes threats, intimidation, transfers, detail reassignments, changes in duties, adverse performance evaluations, and failure to promote.

cancellation of a retaliatory job action, including reinstatement of a fired whistleblower.[6] This recommendations raises many complex and difficult issues.

On the one hand, a whistleblower interested in reinstatement may already pursue such a remedy in court. (Cal. Labor Code sections 98.6(c), 1102.5.) But it is unclear that the Commission should have the authority to provide this remedy, particularly given that the retaliation issues may be outside of the Commission's core institutional competency. Also, reinstating terminated employees may present certain problems. For example, the whistleblower's position may have already been filled by another City employee, whose own former position may also have been taken by another. Reinstating a whistleblower may thus "bump" a series of employees back to prior positions.

On the other hand, it does not appear that the Commission would ultimately order such reinstatement often, whether because of unmeritorious complaints, complainants who ultimately move on to other jobs, etc. Further, it would seem that the Ordinance should provide whistleblowers who have suffered retaliation – particularly those who are less sophisticated and perhaps less likely to pursue a claim in court – with an expedited administrative procedure for getting their jobs back. Thus, on balance, this first recommendation makes sense, but the Commission should be required to consider the totality of the circumstances before reinstating a whistleblower to his previous position.

The Civil Grand Jury's second recommendation is to amend the Ordinance to impose the civil penalties to repay the financial losses that can result from a retaliatory job action. Indeed, the $5,000 civil penalty does seem to be fairly low and should likely be increased. A proposed state ballot measure amending the Political Reform Act ("PRA") might provide some guidance. The Voters Right to Know Act, which was co-written by an original author of the PRA, increases certain of the PRA's penalties from $5,000 to $10,000.

Recommended Action

Direct staff to draft proposed amendments expanding the Ordinance to (1) authorize the Commission to order cancellation of a retaliatory job action if warranted based on the totality of the circumstances; and (2) raise the maximum civil penalty from $5,000 to $10,000.

C. **Recommendation 4**. The Grand Jury's fourth recommendation concerns the burden of proof on the complainant during the preliminary review/investigation stages of a complaint.

Recommendation 4:	Revise subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints does not apply during preliminary review and investigation of complaints.

[6] The Civil Grand Jury has indicated that reinstatement would result in the award of back pay by virtue of applicable labor law.

Issue

Should the Ordinance be revised to specify that a whistleblower does not have to prove retaliation by a preponderance of the evidence during preliminary review and investigation of stages of complaints?

Answer and Analysis

The Commission can resolve this issue via regulation. The Civil Grand Jury expressed concern that the Ordinance requires complainants to prove their claims at the preliminary review/investigation stage without fully participating in the confidential complaint process. Section 4.115(b)(iii) provides in relevant part that:

> In order to establish retaliation under this Section, a complainant must demonstrate by a preponderance of the evidence that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action.

The Civil Grand Jury found that this language creates an unwarranted obstacle to enforcing retaliation complaints filed with the Commission, by imposing a "preponderance of the evidence" burden of proof on the complainant during the preliminary review and investigation stages.[7] Interpreted in this manner, Section 4.115(b)(iii) would impose an unwarranted obstacle to enforcing retaliation complaints.

However, Section 4.115(b)(iii) should not be interpreted in this manner, although it appears that staff may have done so sometimes in the past. Moving forward, Section 4.115(b)(iii) should be interpreted to impose the "preponderance of the evidence" burden of proof during the adjudication of the whistleblower complaint. The Commission should issue regulations clarifying that the staff should investigate complaints fully as long as there is probable cause to believe that a violation has occurred. Any decision ***not*** to fully investigate a complaint should be ratified by the Commission. In most circumstances, the complainant should be given an opportunity to demonstrate to the Commission that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action.

In addition, the Commission should direct the Staff to propose a standard timeline for the handling of Whistleblower complaints so that complainants and the public have confidence that—absent extraordinary circumstances—complaints will be investigated and adjudicated within a reasonable amount of time.

[7] Preliminary review is generally intended to determine whether a full investigation of a complaint is warranted, and the Commission's enforcement regulations indicate that a full investigation generally should proceed if "there is reason to believe that a violation of law may have occurred." (Enforcement Regulation IV.C.)

Recommended Action

Direct staff to draft regulations specifying that the preponderance of the evidence standard does not apply during the investigatory phase, but only during the adjudication of the complaint by the Commission. In addition, the Staff should propose a standard timeline for the handling of Whistleblower complaints so that complainants and the public have confidence that, absent extraordinary circumstances, complaints will be investigated and adjudicated within a reasonable amount of time.

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SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE

May 2015

City and County of San Francisco
Civil Grand Jury, 2014-2015

Members of the Civil Grand Jury

Janice Pettey, Foreperson

Philip Reed, Foreperson Pro Tem

Anne M. Turner, Recording Secretary

Leonard Brawn

Morris Bobrow

Daniel Chesir

Matthew Cohen

Jerry Dratler

Herbert Felsenfeld

Allegra Fortunati

Mildred Lee

Marion McGovern

Fred A. Rodriguez

Gary Thackeray

Jack Twomey

Ellen Zhou

THE CIVIL GRAND JURY

The Civil Grand Jury is a government oversight panel of volunteers who serve for one year. It makes findings and recommendations resulting from its investigations.

Reports of the Civil Grand Jury do not identify individuals by name.

Disclosure of information about individuals interviewed by the jury is prohibited.

California Penal Code, section 929

STATE LAW REQUIREMENT

California Penal Code, section 933.05

Each published report includes a list of those public entities that are required to respond to the Presiding Judge of the Superior Court within 60 to 90 days, as specified.

A copy must be sent to the Board of Supervisors. All responses are made available to the public.

For each finding the response must:

1) agree with the finding, or
2) disagree with it, wholly or partially, and explain why.

As to each recommendation the responding party must report that:

1) the recommendation has been implemented, with a summary explanation; or
2) the recommendation has not been implemented but will be within a set timeframe as provided; or
3) the recommendation requires further analysis. The officer or agency head must define what additional study is needed. The Grand Jury expects a progress report within six months; or
4) the recommendation will not be implemented because it is not warranted or reasonable, with an explanation.

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Executive Summary

When government employees "blow the whistle" on official wrongdoing they can suffer retaliation in the workplace. Sometimes their plight makes headlines. Occasionally they file whistleblower retaliation lawsuits that result in sizeable cash awards or settlements that are likewise newsworthy. However, when such a case arises in San Francisco it seldom sees the light of day.

Since 1989, San Francisco has enacted a series of ordinances intended to protect City officers and employees from retaliation for reporting improper government activity. Over the years the scope of these so-called "whistleblower protection" laws has narrowed, and the protections they provide are currently much weaker than those afforded government employees at the state and federal level.

In 2003 the voters of San Francisco enacted Proposition C, which added the following mandate to the City Charter: "The Board of Supervisors shall enact and maintain an ordinance… protecting City officers and employees from retaliation for filing a complaint with, or providing information to, the Controller, Ethics Commission, District Attorney, City Attorney or a City department or commission about improper government activity by City officers and employees."

In this report, we conclude that the Board has failed to carry out this mandate because it has failed to enact and maintain an ordinance that genuinely protects those who make such reports.

If a City officer or employee suffers retaliation for disclosing improper activity, he or she may file a complaint with the Ethics Commission, which investigates such complaints as part of its wider mission of enforcing local laws pertaining to government ethics and political practices. In the fifteen-year history of the Commission, no complaint of whistleblower retaliation has ever resulted in a public accusation of wrongdoing, and all complaints have been investigated in secret and dismissed without any public proceeding.

The chief reason why whistleblower retaliation complaints have fared so poorly before the Commission is the narrow scope of the current law, known as the Whistleblower Protection Ordinance (WPO). The WPO protects only those who make disclosures "in house." The whistleblower must make his or her report of government wrongdoing only to certain agencies within City government, in certain approved ways, or the WPO does not apply. It does not protect disclosures that are made by other means, or to persons or entities that are not listed in the ordinance: for example, to news media, to outside law enforcement agencies, or to elected officials outside City government. Thus, a City employee who discloses government wrongdoing or corruption to the San Francisco *Chronicle,* or to the California Attorney General, or to the F.B.I., or to Congress, is not a "whistleblower" entitled to

protection under the WPO. If retaliation ensues and the employee complains to the Commission, his/her complaint will be dismissed.

To qualify for protection, the whistleblower's disclosure must also concern a topic that is among those listed in the ordinance. The list is limited: disclosures of waste, fraud or abuse in general are not included, nor are those concerning violations of general law. Whistleblowers who disclose such information are not protected from retaliation under the WPO; again, the Commission will dismiss their complaints.

The scope of the WPO is also limited, in that it forbids only a few types of retaliatory action – termination, demotion, suspension, and similar job actions – and leaves untouched a wide variety of lesser reprisals and coercion that are nonetheless serious and potentially costly to an injured party.

Whistleblower retaliation complaints face an additional obstacle before the Commission, in that the WPO imposes on the complainant an extra "burden of proof" in such cases that does not apply to any other type of complaint. This further restricts access to the complaint procedure.

Finally – and most seriously – even if a complaint clears all of these hurdles and results in a finding of retaliation, the Commission is unable to provide relief for the whistleblower. If a job is lost due to retaliation the Commission cannot restore it. All it can do is punish the guilty party.

These shortcomings not only harm whistleblowers, they violate the Charter mandate of Proposition C: that the Board enact and maintain an ordinance protecting whistleblowers.

While there are protections against retaliation provided by Federal and California law to whistleblowers, the federal Whistleblower Protection Act applies only to federal employees and applicants for federal employment, and California law requires that in most cases the employee must take an action to court in order to obtain relief from retaliation. Civil actions are costly and time-consuming. For that reason, there is a need for the WPO. It does not require the filing of a civil suit to obtain enforcement. Yet the current version of The WPO, as enacted and administered, fails to provide a City employee with meaningful protection against retaliation for reporting improper government activity and, therefore, needs to be amended. This report identifies the shortcomings of the WPO and makes recommendations for its improvement.

Background

In July 2014 the 2013-14 San Francisco Civil Grand Jury issued a final report entitled *Ethics in the City: Promise, Practice or Pretense.* In the course of that report that Jury found that San Francisco currently lacks "a strong whistleblower program with

protections against retaliation" and urged a future Civil Grand Jury to address the issue.[1]

Based on this recommendation, the current Civil Grand Jury undertook an investigation of the anti-retaliation provisions of the San Francisco Whistleblower Protection Ordinance,[2] Section 4.115, the full text of which is attached as Appendix A.

As currently written, the ordinance is very narrow. It prohibits City officers or employees from retaliating against a whistleblower only in certain specified ways: by termination, demotion, suspension, or "other similar adverse employment action."[3] Lesser forms of retaliation such as non-promotion, or a reassignment without loss of grade or pay are not prohibited. Moreover, it applies only if the whistleblower has made a certain type of report alleging violation of certain laws. If a report is not one of those listed in the WPO, or if it concerns a violation that is not listed, then retaliation can occur and the victim will have no recourse under the WPO.

1. The Evolution of the WPO

It was not always this way.

San Francisco first addressed the question of whistleblower protection in 1989, when Mayor Art Agnos signed the Improper Government Activities Ordinance (IGAO).[4] That law authorized the Mayor to investigate reports of official misconduct by City officers and officials that violated any City, state, or federal law whatsoever; or that otherwise involved gross misconduct or gross economic waste.[5] The ordinance also forbade threats or retaliation of any kind against those who made such reports.[6] If retaliation occurred, the law allowed the injured party to sue in court for up to $5,000 in civil damages. Employees and applicants for employment were provided this right.[7]

In 1993 the voters passed Proposition K, a Charter amendment that created the Ethics Commission. Despite the breadth of the term "ethics," the Commission was charged with enforcing a relatively small number of laws relating to political practices and government ethics. These included the IGAO.[8] The IGAO itself remained unchanged.

In 2000 the Board of Supervisors repealed the IGAO and replaced it with the first version of the WPO.[9] Approved by Mayor Willie L. Brown, Jr., the new law charged the Ethics Commission, rather than the Mayor's office as required under the IGAO, with investigating whistleblower disclosures.[10] Retaliation was still broadly prohibited[11] but the range of disclosures that would qualify for protection narrowed. Those revealing violations of general law, or gross misconduct or gross economic waste were no longer covered. Now, a covered disclosure had to allege violation of one of the laws enforced by the Ethics Commission, relating to political practices or

government ethics. If it did not, then the whistleblower was not protected against retaliation.[12]

In 2002 the Board of Supervisors and Mayor Brown amended the WPO.[13] Though entitled "Expanded Protections For Whistleblowers," the amendments narrowed the definition of retaliation to include only serious job actions such as termination, demotion, or suspension. Lesser forms of retaliatory discipline such as an official reprimand that might prevent a promotion were no longer prohibited; nor were threats or coercion. Applicants for City employment who had been covered under the previous law were no longer protected.[14] The range of covered disclosures was expanded somewhat, but remained quite restrictive.[15] Again, complaints alleging violations of general law, or gross misconduct or gross economic waste were not covered.

It was against this background of shrinking protections that the voters passed Proposition C, a 2003 Charter amendment that created an additional way to file complaints of improper government activities, this time with a new unit within the Controller's office known as the City Services Auditor (CSA).[16] It also required the Controller to publicize and administer a whistleblower hotline to receive such complaints, and added a new mandate requiring the Board of Supervisors to enact an ordinance protecting whistleblowers from retaliation.[17]

Despite this mandate, the Board of Supervisors made no substantive changes to the anti-retaliation provision of the WPO.[18] Thus, the law remains essentially as it was before the Charter mandate was enacted.

2. Scope of This Report

At present, two agencies – the CSA and the Ethics Commission – handle different aspects of the City's whistleblower program.

Primary responsibility for receipt of whistleblower disclosures rests with the CSA. The unit receives disclosures from employees and others, and investigates them as part of the Controller's general audit function.[19] This process was examined in a report by the 2010-11 San Francisco Civil Grand Jury report issued in July 2011.[20]

If a whistleblower believes that he or she has suffered retaliation for making a disclosure to the Controller, or various other agencies within City government, he or she may file a complaint with the Ethics Commission. The Commission is an independent agency that investigates such complaints as part of its law enforcement function.[21] No recent Civil Grand Jury report has examined this program.

When this Jury was empaneled, the 2010-11 Civil Grand Jury's report on the CSA was just three years old. In light of that fact, we chose not to repeat their inquiry. Instead, we limited our investigation to the Ethics Commission, and the anti-retaliation provisions of the WPO, which the Commission is charged to enforce.

Methodology

Members of the Jury conducted legal research using materials from the Government Information Center of the San Francisco Public Library, the online compilation of local ordinances provided by the Board of Supervisors, and other online resources provided by the City and other government entities.

We also relied on reports and other materials provided online by the Ethics Commission and the Office of the Controller. We interviewed members and staff of the Ethics Commission, the Office of the Controller, the City Attorney, the Board of Supervisors, as well as persons who filed retaliation complaints with the Commission. Additionally, we reviewed the documents and statistics provided to us by those agencies and interviewees.

Discussion

1. Whistleblower Retaliation Complaints before the Ethics Commission

Based on interviews with Ethics Commission staff and a review of the Commission's written regulations,[22] we summarize the Commission's complaint-handling process as follows.

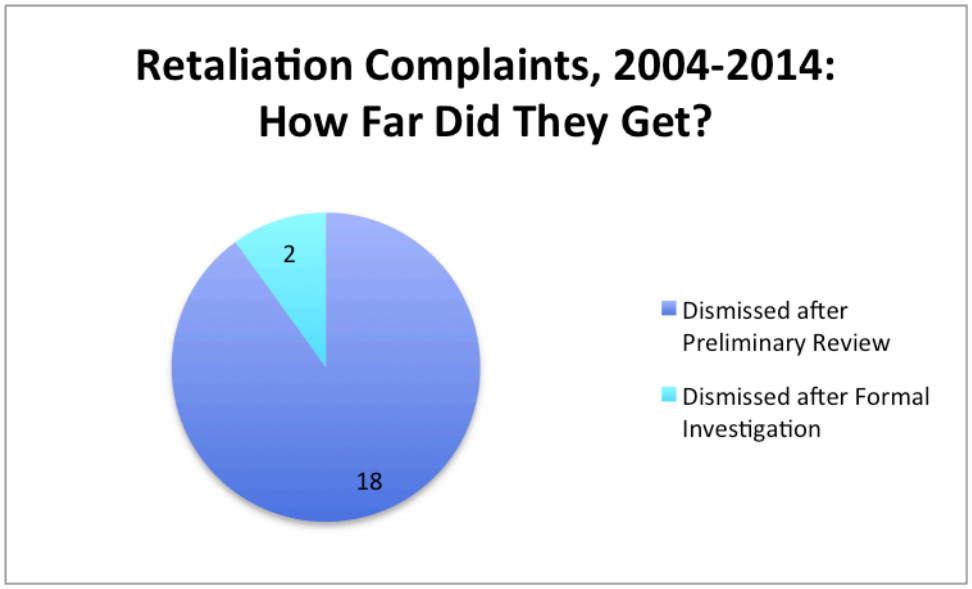
Preliminary Review. Complaints are received formally and informally, either via a form on the Commission's website or by other written or oral means. Investigators will listen to any complaint, and if it is within the Commission's jurisdiction they will look into it. That inquiry may include reviewing documents, communicating with the complainant, communicating with the person accused of wrongdoing, and other inquiries to determine whether a full investigation is warranted.

Referral to District Attorney, City Attorney. If, after preliminary review, the Commission's staff finds that there is "reason to believe that a violation of law may have occurred,"[23] they refer the matter to the District Attorney and the City Attorney for possible action. If those offices decline to act, the Commission may initiate a formal investigation.

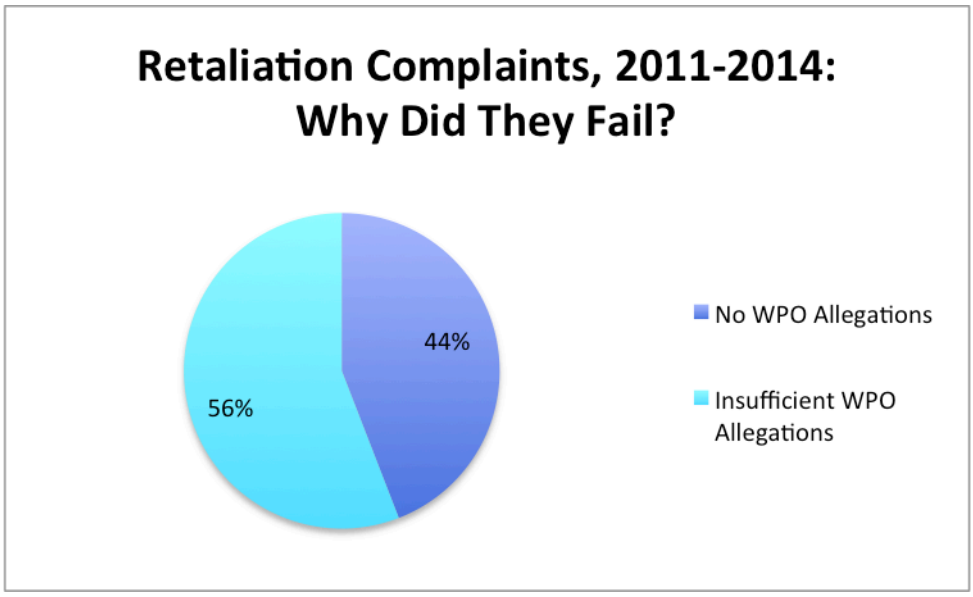
Formal Investigation. During a formal investigation Commission staff researches the matter in depth, gathers evidence, and may take sworn statements from the accused or others. If staff concludes that there is "probable cause to believe that a violation occurred" they report this to the Commission.[24] In this context "probable cause" means "there is reason to believe that the respondent" – meaning the accused – "committed a violation of law."[25]

Further Proceedings. The Commission will then consider the matter in closed session, and determine whether there is "a reasonable ground to suspect that the respondent has committed the violation" in question.[26] If so, it may issue a public Accusation and conduct a public hearing on the merits.[27] No whistleblower retaliation complaint has ever reached this stage. Indeed, Commission records show that since its inception in 2000, only two such complaints have ever survived preliminary review to become the subject of a formal investigation. Both were dismissed without resulting in a formal Accusation or any public action against the alleged retaliator.[28]

The Commission's staff confirmed this in interviews and through statistics they compiled at the Jury's request. They state that from January 1, 2004 through November 18, 2014, the Commission received 20 complaints that alleged either the type of whistleblowing or the type of retaliatory action that falls within the coverage of the WPO. Of those 20, eighteen were dismissed by the Executive Director after staff conducted a preliminary review, and two were dismissed by the Ethics Commission after staff initiated a formal complaint and conducted a formal investigation.



The Jury also asked Commission staff to provide statistics on the total number of retaliation complaints received by the commission, and whether or not the allegations satisfied the requirements of the WPO. Due to record-keeping constraints, staff was able to only provide this information for complaints received since January 1, 2011. From that date through November 18, 2014 the Commission received, and the Executive Director dismissed, a total of 34 whistleblower retaliation complaints, 15 of which alleged neither the type of whistleblowing nor the type of retaliatory action that is covered under the WPO. Thus, 44% of whistleblower retaliation complaints received during the last four years fell outside the scope of the WPO.



Commission staff members receive a substantial number of complaints that seem quite serious, from whistleblowers who have apparently suffered acts of retaliation, that must still be dismissed – either because the type of whistleblowing, or the type of retaliation that took place falls outside the parameters of the ordinance. This is the chief reason why retaliation complaints have fared so poorly before the Commission.

The WPO protects only those who make disclosures "in house." As already noted, the whistleblower must make his or her report of government wrongdoing only to certain agencies within City government, in certain approved ways, or the WPO does not apply. Approved recipients are the Ethics Commission, the Controller, the District Attorney, the City Attorney, and the whistleblower's own department. Reports to the four named agencies must be in the form of a "complaint"; those to the whistleblower's department must be "in writing."[29]

The WPO does not protect disclosures that are made by other means, or to persons or entities that are not listed in the ordinance: for example, to news media, to outside law enforcement agencies, or to elected officials outside City government. Thus, a City employee who discloses government wrongdoing or corruption to the San Francisco *Chronicle,* or to the California Attorney General, or to the F.B.I., or to Congress, is not a "whistleblower" entitled to protection under the WPO. If retaliation ensues and the employee complains to the Commission, his/her complaint will be dismissed.

The whistleblower's disclosure must also concern an enumerated subject. It must show that a City officer or employee violated a local ordinance governing political practices or government ethics; misused City resources so seriously that a crime was committed; endangered public health or safety; or took official action that advanced a private interest.[30] Disclosures of waste, fraud or abuse in general are not protected; nor are those concerning violations of general law.

The scope of the WPO is also limited, in that it forbids only certain types of retaliatory action and leaves untouched a wide variety of other coercive actions and reprisals that are nonetheless serious, and potentially costly to an injured party. Under the WPO, City officers or employees may not "terminate, demote, suspend or take other similar adverse employment action" against those who make a disclosure covered under the WPO. There is no explicit coverage for threats, intimidation, lesser forms of discipline, or for other job actions such as transfer, detail, reassignment, change in duties, adverse performance evaluations or failure to promote.[31]

Ethics Commission staff told us that in evaluating whistleblower retaliation complaints they liberally construe the phrase "similar adverse employment action" to include most other serious job actions, including non-disciplinary ones. The language of the WPO does not support such an interpretation. Termination, demotion and suspension — the only actions specified in the ordinance — are disciplinary actions that result in loss of job status and/or pay. If an employee is not selected for promotion or receives a performance evaluation of "above average" instead of "outstanding" there has been neither discipline nor loss of job status or pay. Such actions are not "similar" to termination, demotion or suspension in that respect, as they must be to qualify as "retaliation" under the WPO. That Ethics Commission staff is willing to treat them as such is further evidence that the definition needs to be broadened in order to fulfill the purpose of the ordinance.

Finally, some complainants are excluded from WPO protection because of their job status. As noted by our predecessor Civil Grand Jury,[32] the ordinance covers only City officers and employees. It does not cover applicants for City employment, or employees or applicants for employment with City contractors – even those who work side-by-side with City employees.[33] Statistics compiled by Commission staff show that since 2011, three retaliation complaints have been submitted by contractor employees, and one by an applicant for City employment. They comprised more than 10% of retaliation complaints received during that period, and all were dismissed because such employees are not covered by the WPO.

2. The "Burden of Proof" in Whistleblower Retaliation Complaints

Whistleblower retaliation complaints face an additional hurdle before the Commission. The WPO imposes the "burden of proof" on the whistleblower in such cases, something that does not apply to any other type of complaint to the Commission.

The "burden of proof" means the obligation to prove something.[34] In a legal proceeding, one of the participants -- known as the "parties" -- must prove the case or lose it. In a civil lawsuit, the plaintiff bears this burden of proof. In a criminal trial, the prosecution bears the burden.

Complaints before the Ethics Commission are analogous to criminal proceedings. When a complaint is filed with the Commission, its staff investigates. If staff finds reason to believe that a violation of law has occurred, the Executive Director prosecutes the matter before the full Commission, which sits as a quasi-court. Like a criminal prosecutor, the Executive Director bears the burden of proof in the matter. Like a witness who reports a crime to the police, the complainant who reports a violation to the Commission is not a party to the proceeding, and normally bears no burden of proof. Rather, the parties are the Executive Director and the person accused of violating the law. This procedure is established in the City Charter[35] and applies to all cases before the Ethics Commission, including those concerning retaliation for whistleblowing.[36]

In whistleblower retaliation cases, however, the WPO imposes an additional burden of proof on the whistleblower to show by a "preponderance of the evidence" that retaliation occurred. Subsection 4.115(b)(iii) of the WPO states, "In order to establish retaliation under this Section, a complainant must demonstrate by a preponderance of the evidence that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action."

The Commission applies this additional burden during its investigatory process. Although not a party to the proceeding, the WPO complainant must show by a "preponderance of the evidence" that retaliation occurred or the complaint will not go forward. The Commission's investigators require the complainant to meet this burden during preliminary review of retaliation complaints and also during formal investigation. If the complainant fails to do so, the complaint is dismissed without a public hearing.

A "preponderance of the evidence" means sufficient evidence to show that a factual claim is more likely true than false.[37] This is the same burden that falls on the plaintiff in civil court, to win a lawsuit. Thus, a whistleblower who complains of retaliation must "win" the case in the eyes of the Commission's staff, before they will agree to prosecute the matter.

This can be difficult, because complaints to the Commission are investigated in secret. Investigators are not required to share information with complainants, who lack the Commission's investigative resources, and may have no idea what evidence has been presented other than their own. Requiring them to prove their claims without fully participating in the procedure places a special burden on WPO complainants, that contributes to their lack of success before the Commission.

3. Remedies for Reprisal Under the WPO

Another deterrent against filing a complaint for retaliation under the WPO is that while the Commission can prosecute the person who retaliates it cannot provide

relief to the victim. Almost all complainants in whistleblower reprisal cases come to the Commission expecting to get their jobs back, or obtain some other form of relief, and are shocked to find that such relief is not available. Even if a job is lost due to retaliation, the Commission will not order reinstatement for the complainant or provide back pay or restoration of leave accruals, retirement credit, or other job benefits lost due to retaliation. All it can do is punish the retaliator.

The WPO does allow an injured party to file a civil complaint against the retaliator in state court, but limits her or his recovery to $5,000 — an amount that is unlikely to pay even for attorney's fees and other costs of suit, much less the actual financial damages that typically result from a serious job action such as termination. Indeed, this amount is even more inadequate today than it was in 1989, when it first appeared in the Improper Government Activities Ordinance. Based on the Consumer Price Index,[38] this recovery amount is worth in 2015 about half of what it was worth in 1989, the year in which the Improper Government Activities Ordinance was enacted.

4. So Where Do They Go?

California state law provides alternative protection to City and county employees who disclose government wrongdoing or mismanagement. The relevant statutes are cited and explained in Appendix B to this report.

The most pertinent one is California Labor Code Section 1102.5, which prohibits retaliation against employees who disclose violations of law, rule or regulation, or workplace safety or health issues.[39] Covered disclosures need not be in writing, and may be made to management, other government or law enforcement agencies, or others in authority. A wide variety of retaliatory job actions are prohibited, from discharge to minor changes in the terms of employment. An injured party may seek administrative relief and may also file a civil action in court. If successful, he or she may obtain reinstatement, reimbursement for lost wages and work benefits, damages, attorney fees, and a civil penalty of up to $10,000 per violation.[40]

At the Jury's request, the Office of the City Attorney compiled data concerning lawsuits and grievances filed against the City over the last 10 years, which raised claims of retaliation for whistleblowing under any law. This data is significant, because at least some of these cases might have been resolved before the Ethics Commission, had it been willing and able to provide relief to the injured party.

In the last ten years there have been eight lawsuits against the City that raised claims of retaliation for whistleblowing. As of January 2015 three of these cases were still pending, and the other five had been resolved by settlement. One settled for $750,000, the others for more modest amounts: $115,000; $75,000; $70,000; $57,000; and $5,000. The City Attorney defends most grievances filed by unions

against the City on behalf of City officers and employees,[41] and after a diligent search, they can find no grievance that raised a claim of reprisal for whistleblowing.

Thus, City officers and employees have successfully litigated complaints of whistleblower retaliation in state court, though none has had a public hearing before the Ethics Commission. This points to the ineffectiveness of the WPO as currently written.

5. The Charter Mandate: Protection for Whistleblowers

Since 2003, the City Charter has required protection for whistleblowers. This so-called "Charter mandate," passed by the voters as part of Proposition C, states: "The Board of Supervisors shall enact and maintain an ordinance… protecting City officers and employees from retaliation for filing a complaint with, or providing information to, the Controller, Ethics Commission, District Attorney, City Attorney or a City department or commission about improper government activity by City officers and employees."[42]

"To protect" can be defined as "to keep (someone or something) from being harmed, lost, etc."[43] If the WPO is to "protect" whistleblowers, as mandated by the Charter, then it must keep them safe from harm. This may be accomplished either by preventing retaliation, or by remedying its effects.

By way of prevention, the WPO requires each City department to post a notice of whistleblower protections prepared by the Controller.[44] A copy of the current notice is attached as Appendix D. It is addressed to the potential victim of retaliation, rather than the retaliator, and consists of a rather technical explanation of the victim's right to file a complaint of retaliation. It largely repeats the language of the ordinance, and by way of warning, does little more than state that retaliation is prohibited. Neither penalties nor remedies are discussed. Similar language is included in employee outreach sessions and public postings by the Controller on its web site and elsewhere, that encourage employees to "blow the whistle" on government wrongdoing. The notice language is technical, retaliation is a secondary issue, and there is scant mention of punishment for those who retaliate.

Enforcement actions under the WPO if well publicized could have a deterrent effect against retaliation; however, this is not the case. By law, the Ethics Commission must conduct its investigations in secret, until it issues a public Accusation charging a violation of law.[45] No complaint of retaliation for whistleblowing has ever reached this stage before the Commission. All such investigations have been conducted in secret. There have been no public Accusations, no public hearings, and no public convictions of violating the WPO.

The WPO also fails to "protect" whistleblowers, in that it provides no meaningful remedy for the effects of retaliation. Though state law provides other means of

relief, this was true as well in 2003, when the voters enacted Proposition C.[46] The Board of Supervisors presumably knew this when it proposed the measure, with its mandate that the Board "enact and maintain an ordinance… protecting City officers and employees from retaliation… ."[47] We therefore infer that this mandate contemplates a meaningful set of protections at the City level, in addition to those provided in state law.

On a practical level, providing employees with relief inside City government makes good sense. Employment lawsuits are expensive. They are seldom undertaken unless the amount of money at stake is sufficient to justify the cost. They are also risky: if a case is lost, so are the costs of suit. A whistleblower may feel strongly that his suspension was retaliatory, but if it lasted only a few days and cost only a few hundred dollars in lost pay, there may be insufficient damages to warrant the risk of suit. Finally, employment lawsuits can take a great deal of time to make their way through the courts. Even if successful, the monetary relief they provide may be "too little, too late" for one who has not worked for years. A well-designed ordinance could be a useful addition to state law, if it provided a relatively quick and easy local remedy, as an alternative to lengthy, expensive court proceedings. Yet the WPO does no such thing.

6. The Charter Mandate: Definition of "Whistleblowing"

The Charter mandate defines whistleblowing as "filing a complaint with, *or providing information to*, the Controller, Ethics Commission, District Attorney, City Attorney *or a City department or commission*…."[48] (Emphasis added.) Thus, any disclosure of improper government activities, to any City commission or department whatever, should be protected by local ordinance.

The WPO defines whistleblowing more narrowly. Included are complaints filed with the Controller, Ethics Commission, District Attorney, City Attorney; complaints to the complainant's department, but only if they are made in writing; and information provided during an investigation by the Ethics Commission or the Controller.[49] Excluded are oral complaints to the complainant's department, and complaints to other City departments or commissions. Also excluded is "providing information" in general, outside of a formal complaint or investigation.

The Charter mandate imposes no such restrictions. It requires protection "for filing a complaint with, or providing information to" any of the listed recipients – including any City department or commission – without regard to how such information is provided.

7. Comparable Laws Protecting Government Employees In Other Jurisdictions

For purposes of comparison, the Jury surveyed whistleblower protections that are available to government employees at the state and federal level, and also in comparable communities around the state.

The federal government and the state of California afford their employees strong protection. Whistleblowers are covered whether their disclosures are made "in house" or outside of government, to those in authority or the public at large. Protected disclosures may concern nearly any kind of government wrongdoing, including violations of law, mismanagement, safety hazards, waste of funds, or abuse of authority. The definition of retaliation is just as broad, covering nearly every type of job action from termination to routine decisions concerning work assignments, pay, leave, and other benefits. These protections extend not only to federal and state employees, but to applicants for government employment as well. If retaliation occurs the whistleblower can obtain full relief, up to and including restoration to a lost position, back pay and related benefits, money damages, attorney's fees and costs.[50] Further analysis of these laws may be found in Appendix B to this report.

By contrast to federal and state law, the other large cities and counties that we surveyed provide relatively weak protection for local government employees who "blow the whistle." We surveyed the whistleblower laws of Los Angeles, San Diego, San Jose and Oakland, and the counties of Santa Clara, Alameda and Los Angeles.[51] Appendix C catalogues these provisions, briefly described as follows.

The definition of "whistleblowing" varies from place to place. Some jurisdictions protect only disclosures that are made "in house," to one of their own agencies (Oakland, San Diego, Santa Clara County, Los Angeles County); while others protect those made inside and outside government (Alameda County, San Jose, Los Angeles). Some protect only disclosures that involve specific violations of law (Santa Clara County, Los Angeles, San Diego), while others protect those that concern a wide range of improper activities (Alameda County, Oakland, Los Angeles County, San Jose).

In general, retaliation is broadly defined. Most of the cities and counties we surveyed prohibit almost any retaliatory job action (Alameda County, Oakland, San Jose, San Diego); while others forbid "retaliation" or "reprisal" in general, without defining the term (Santa Clara County, Los Angeles County, Los Angeles).

Remedies, however, are scarce. Most provide no relief for the victim of retaliation (Alameda County, Santa Clara County, San Jose, Los Angeles County, San Diego); while just two allow the injured party to file a civil action in court, seeking a small monetary award (Oakland, Los Angeles). Thus, while the coverage of these laws varies, none provides effective relief to the victim of retaliation.

Be that as it may, the standard for San Francisco is set not by other cities or counties, but by its own Charter, which mandates an ordinance protecting its officers and employees from retaliation for whistleblowing. Such protections exist in federal and state government, and there is no reason why they could not exist in San Francisco as well.

8. Role of the Ethics Commission and the Board Of Supervisors

Under the Charter, the Ethics Commission has a duty to make recommendations to the mayor and the Board of Supervisors, concerning revisions to City ordinances related to governmental ethics.[52] Such revisions may be adopted by the Board of Supervisors, or submitted by the Commission directly to the voters at the next general election.[53]

The WPO is one of the governmental ethics laws to which these provisions apply.[54] If, as we have found, the ordinance needs to be strengthened, then the Commission has a duty to consider revising the law, either by recommending changes to the Board of Supervisors or by submitting them to the voters. By the same token, the Board of Supervisors has its own duty to consider changing the law to comply with the City Charter.

Such revisions should include expanding the definition of whistleblowing under the WPO to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and "providing information" to any of the listed recipients, outside of the formal complaint or investigation process. The Charter mandate specifically requires an ordinance protecting these disclosures, but they are not yet covered.

In our view, "protection" for whistleblowers is illusory unless it includes a meaningful remedy for the effects of retaliation. For that reason the Commission and the Board should consider authorizing the Ethics Commission to order cancellation of a retaliatory job action,[55] and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the whistleblower the financial losses that result from such an action.

Finally, the Commission and the Board should consider amending Subsection 4.115(b)(iii) of the WPO to clarify that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission.

FINDINGS AND RECOMMENDATIONS

Based on the discussion above we have come to the following conclusions and make

the following recommendations.

Finding 1:

The WPO does not fully "protect" City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.

Recommendation 1.1:

That the Ethics Commission recommend to the Board of Supervisors an amendment to the WPO that provides real protection for whistleblowers, in conformity with the Charter mandate of Proposition C.

Recommendation 1.2:

If the Ethics Commission fails to act, that the Board of Supervisors on its own amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.

Recommendation 1.3:

If the Ethics Commission requests that the Board amend the WPO and the Board fails to act, that the Commission consider submitting such an amendment directly to the voters.

Recommendation 1.4:

If the Ethics Commission and the Board fail to act, that the Mayor introduce legislation to the Board of Supervisors that would amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.

Finding 2:

The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.

Recommendation 2.1:

That amendments to the WPO expand the definition of whistleblowing to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and providing information to any of the recipients listed in the Charter mandate (hereafter "listed recipients"), outside of the formal complaint or investigation process.

Recommendation 2.2:

That these amendments further expand the scope of covered disclosures to include "providing information" to any of the listed recipients regarding improper government activities, whether or not such information is set forth in a formal complaint, or provided during an official investigation.

Finding 3.1:

While other large California cities and counties have relatively weak laws protecting their employees from retaliation for whistleblowing, this does not relieve the Board of its responsibility under the Charter mandate, to enact an ordinance that genuinely protects whistleblowers.

Finding 3.2:

Whistleblower protection laws that cover government employees at the state and Federal level can serve as a useful model for improving the WPO.

Recommendation 3:

That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.

Finding 4:

The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.

Recommendation 4:

That amendments to the WPO include a revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission.

Request for Responses

Pursuant to Penal Code Sec. 933.05, the civil grand jury requests responses as follows:

From the following individuals:

- Ethics Commission Executive Director: All findings, and Recommendations 1.1, 1.3, 2.1, 2.2, 3, 4

From the following governing bodies:

- Ethics Commission: All Findings, and Recommendations 1.1, 1.3, 2.1, 2.2, 3, 4.
- Board of Supervisors: All Findings, and Recommendations 1.2, 2.1, 2.2, 3, 4.
- Mayor: All Findings, and Recommendations 1.4, 2.1, 2.2, 3, 4

Response Matrix

Findings	*Recommendations*	*Responses Required*
<u>Finding 1:</u> The WPO does not fully "protect" City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.		Ethics Commission Executive Director, Ethics Commission, Board of Supervisors, Mayor
	<u>Recommendation 1.1:</u> That the Ethics Commission recommend to the Board of Supervisors an amendment to the WPO that provides real protection for whistleblowers, in conformity with the Charter mandate of Proposition C.	Ethics Commission Executive Director, Ethics Commission
	<u>Recommendation 1.2:</u> If the Ethics Commission fails to act within a reasonable time, that the Board of Supervisors on its own amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.	Board of Supervisors

Findings	*Recommendations*	*Responses Required*
	<u>Recommendation 1.3:</u> If the Ethics Commission requests that the Board amend the WPO and the Board fails to act within a reasonable time, that the Commission consider submitting such an amendment directly to the voters. <u>Recommendation 1.4:</u> If the Ethics Commission and the Board fail to act within a reasonable time, that the Mayor introduce legislation to the Board of Supervisors that would amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.	Ethics Commission Executive Director, Ethics Commission Mayor
<u>Finding 2:</u> The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.	<u>Recommendation 2.1:</u> That amendments to the WPO expand the definition of whistleblowing to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and providing information to any of the recipients listed in the Charter mandate (hereafter "listed	Ethics Commission Executive Director, Ethics Commission, Board of Supervisors, Mayor

Findings	*Recommendations*	*Responses Required*
	recipients"), outside of the formal complaint or investigation process. <u>Recommendation 2.2:</u> That these amendments further expand the scope of covered disclosures to include "providing information" to any of the listed recipients regarding improper government activities, whether or not such information is set forth in a formal complaint, or provided during an official investigation.	
<u>Finding 3.1:</u> While other large California cities and counties have relatively weak laws protecting their employees from retaliation for whistleblowing, this does not relieve the Board of its responsibility under the Charter mandate, to enact an ordinance that genuinely protects whistleblowers. <u>Finding 3.2:</u> Whistleblower protection laws that cover government employees at the state and Federal level can serve as a useful model for improving the WPO.	<u>Recommendation 3:</u> That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.	Ethics Commission Executive Director, Ethics Commission, Board of Supervisors, Mayor

Findings	*Recommendations*	*Responses Required*
<u>Finding 4:</u> The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.	<u>Recommendation 4:</u> That amendments to the WPO include a revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission.	Ethics Commission Executive Director, Ethics Commission, Board of Supervisors, Mayor

APPENDIX A: Full Text of SF Campaign & Gov't Conduct Code, Article IV, Chapter 1, Section 4.115 (“Protection for Whistleblowers”)

(a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote, suspend or take other similar adverse employment action against any City officer or employee because the officer or employee has in good faith (i) filed a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with the complainant's department, alleging that a City officer or employee engaged in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest, (ii) filed a complaint with the Controller's Whistleblower Program, or (iii) provided any information or otherwise cooperated with any investigation conducted under this Chapter.

(b) COMPLAINTS OF RETALIATION FOR HAVING FILED A COMPLAINT ALLEGING IMPROPER GOVERNMENT ACTIVITY.

(i) Administrative Complaints. Any city officer or employee, or former city officer or employee, who believes he or she has been the subject of retaliation in violation of Subsection (a) of this Section may file a complaint with the Ethics Commission. The complaint must be filed no later than two years after the date of the alleged retaliation.

The Ethics Commission shall investigate complaints of violations of Subsection (a) of this Section pursuant to the procedures specified in San Francisco Charter Section C3.699-13 and the regulations adopted thereunder.

The Ethics Commission shall investigate complaints of violations of Subsection (a) of this Section pursuant to the procedures specified in San Francisco Charter Section C3.699-13 and the regulations adopted thereunder. The Ethics Commission may decline to investigate complaints alleging violations of Subsection (a) if it determines that the same or similar allegations are pending with or have been finally resolved by another administrative or judicial body. Nothing in this Subsection shall preclude the Ethics Commission from referring any matter to any other City department, commission, board, officer or employee, or to other government agencies for investigation and possible disciplinary or enforcement action. The Ethics Commission may refer matters to the Department of Human Resources with a recommendation. The Ethics Commission may require that any

City department, commission, board, officer or employee report to the Ethics Commission on the referred matter.

(ii) Civil Complaints. Any City officer or employee who believes he or she has been the subject of retaliation in violation of Subsection (a) of this Section may bring a civil action against the City officer or employee who committed the violation. Such action must be filed no later than two years after the date of the retaliation.

(iii) Burden of Establishing Retaliation. In order to establish retaliation under this Section, a complainant must demonstrate by a preponderance of the evidence that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action. The employer may rebut this claim if it demonstrates by a preponderance of the evidence that it would have taken the same employment action irrespective of the complainant's participation in protected activity.

(c) PENALTIES.

(i) Charter Penalties. Any City officer or employee who violates Subsection (a) of this Section may be subject to administrative penalties pursuant to Charter Section C3.699-13.

(ii) Discipline by Appointing Authority. Any City officer or employee who violates Subsection (a) of this Section shall be subject to disciplinary action up to and including dismissal by his or her appointing authority. If no disciplinary action is taken by the appointing authority, the Ethics Commission may refer the matter to the Civil Service Commission for action pursuant to Charter Section A8.341.

(iii) Civil Penalties. Any City officer or employee who violates Subsection (a) of this Section may be personally liable in a civil action authorized under Subsection (b)(ii) of this Section for a civil penalty not to exceed $5,000.

(d) RESERVATION OF AUTHORITY.

(i) Civil Service Commission. Nothing in this Section shall interfere with the powers granted to the Civil Service Commission by the San Francisco Charter.

(ii) Appointing Authority. Nothing in this Section shall interfere with the power of an appointing officer, manager, or supervisor to take action with respect to any City officer or employee, provided that the appointing officer, manager, or supervisor reasonably believes that such action is justified on facts separate and apart from the fact that the officer or employee filed a complaint with, or cooperated with, an Ethics Commission investigation of such complaint; or filed a complaint with or provided information to the Controller, District Attorney, City Attorney or the complainant's department.

(e) NOTICE OF WHISTLEBLOWER PROTECTIONS. The Controller shall prepare, and each City department shall post a notice of whistleblower protections. The notice shall be posted in a location that is conspicuous and accessible to all employees.

APPENDIX B: The WPO Compared With Whistleblower Protection Laws Applicable To Federal, State, And Local Government Employees

The following is a comparison of whistleblower protection laws applicable to federal employees, California state employees, California local agency employees, and California employees in general, with the WPO applicable to employees of the City and county of San Francisco.

A. Who is Covered?

FEDERAL EMPLOYEES: Federal law covers both federal employees and applicants for federal employment. See 5 U.S.C. § 2302(b)(8).

CALIFORNIA STATE EMPLOYEES: California law covers both state employees and applicants for state employment. See Cal. Gov. Code § 8547.8

CALIFORNIA LOCAL AGENCY EMPLOYEES: California law also covers both employees and applicants for "local agency" employment; where a "local agency" means "any county, city, city and county, including any charter county, city, or city and county, and any district, school district, community college district, municipal or public corporation, political subdivision, or public agency of the state, or any instrumentality of any one or more of these agencies." Cal. Gov. Code § 53296; and see Cal. Gov. Code Article 4.5 ("Disclosure of Information: Local Government")

CALIFORNIA EMPLOYEES IN GENERAL: California law further covers employees in general, including "individuals employed by… any county, city, city and county, including any charter city or county, and any school district, community college district… ." *See* Cal. Labor Code § 1102.5(a) ("employees" protected), and § 1106 ("employee" defined). Applicants for employment are also covered. See Cal. Labor Code § 98.6(c)(1).

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: The WPO covers "[a]ny City officer or employee, or former City officer or employee," but does not cover applicants for employment. See WPO, Subsection 4.115(b).

B. Must Covered Disclosures Be Made in a Particular Way?

FEDERAL EMPLOYEES: In the context of federal employment the law covers, without limitation, "any disclosure… if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs... ." 5 U.S.C. § 2302(b)(8)(A). It also separately protects "any disclosure to the Special

Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures… ." 5 U.S.C. § 2302(b)(8)(B).

CALIFORNIA STATE EMPLOYEES: In the context of state employment, the law covers any "good faith communication" without limitation as to its recipient. See Cal. Gov. Code § 8547.2(e).

CALIFORNIA LOCAL AGENCY EMPLOYEES: In the context of local agency employment, the law covers only complaints made in writing to the local agency itself, within 60 days of the date of the act or event which is the subject of the complaint. See Cal. Gov. Code § 53297(a).

CALIFORNIA EMPLOYEES IN GENERAL: In the context of employment in general, state law covers disclosures to a government or law enforcement agency, a person with authority over the employee, or to another employee with authority to investigate, discover, or correct the violation or noncompliance in question. The disclosure may also be made to a public body conducting an investigation, hearing or inquiry. See Cal. Labor Code § 1102.5(a).

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: The WPO covers only disclosures that are made in particular ways. One is by "fil[ing] a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or a written complaint with the complainant's department…"; another, by "filing a complaint with the Controller's Whistleblower Program… ." WPO, Subsection 4.115(a). Also protected are disclosures made while "provid[ing] any information or otherwise cooperat[ing] with an investigation" of such complaints. *Id.* There is no protection for disclosures made by other means, or to other persons or entities; for example, to the news media, or to law enforcement agencies, or to elected officials.

C. What Type of Information Constitutes a Covered Disclosure?

FEDERAL EMPLOYEES: In the context of Federal employment, a covered disclosure is one that the disclosing party "reasonably believes evidences— (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety… ." 5 U.S.C. § 2302(b)(8)(A).

CALIFORNIA STATE EMPLOYEES: In the context of state employment, a covered disclosure is one that "discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity, or (2) a condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition." Cal. Gov. Code § 8547.2(e). In this context, "improper government activity" means "an activity by a state agency or by an employee that is undertaken in the performance of the employee's duties, undertaken inside a state office, or, if undertaken outside a state office by the employee, directly relates to

state government, whether or not that activity is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, (2) is in violation of an Executive order of the Governor, a California Rule of Court, or any policy or procedure mandated by the State Administrative Manual or State Contracting Manual, or (3) is economically wasteful, involves gross misconduct, incompetency, or inefficiency." Cal. Gov. Code § 8547.2(c).

CALIFORNIA LOCAL AGENCY EMPLOYEES: In the context of local agency employment, the law covers "the written provision of evidence regarding gross mismanagement or a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." See Cal. Gov. Code § 53296(c), (d).

CALIFORNIA EMPLOYEES IN GENERAL: Under California law applicable to employees in general, a covered disclosure is one that the employee has "reasonable cause to believe discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." Cal. Labor Code § 1102.5(a). Also protected are disclosures concerning employee safety or health, unsafe working conditions or work practices in the employee's employment or place of employment. See Cal. Labor Code § 6310.

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: Under the WPO, a covered disclosure is one "alleging that a City officer or employee engaged in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest... ." WPO, Subsection 4.115(a). If made through the Controller's Whistleblower Hotline, the definition of a protected disclosure is somewhat broader: it includes, "the misuse of City funds, improper activities by City officers and employees, deficiencies in the quality and delivery of government services, and wasteful and inefficient City government practices." WPO, Subsection 4.107(a).

D. What Type of Retaliatory Actions are Prohibited?

FEDERAL EMPLOYEES: Federal agencies are prohibited from "taking, failing to take, or threatening to take or fail to take" any of the following personnel actions as a result of a covered disclosure: "(i) an appointment; (ii) a promotion;(iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title; (ix) a

decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions… ." 5 U.S.C. § 2302(a)(2)(A).

CALIFORNIA STATE EMPLOYEES: California state employees are prohibited from taking any of the following actions as a result of a covered disclosure: "promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action." Cal. Gov. C. § 8547.3(b).

CALIFORNIA LOCAL AGENCY EMPLOYEES: California law prohibits local agency officers, managers or supervisors from taking the following actions as a result of a covered disclosure: "any act of intimidation, restraint, coercion, discrimination, or disciplinary action"; where "disciplinary action means any direct form of discipline" including but not limited to "the firing of an employee." See Cal. Gov. Code § 53296(b), (j).

CALIFORNIA EMPLOYEES IN GENERAL: California employers in general are prohibited from taking any of the following actions as a result of a covered disclosure: discharge, threat of discharge, demotion, suspension, retaliation, adverse action, or any other type of discrimination in the terms and conditions of employment. See Cal. Labor Code §§ 98.6(b)(1), 1102.5.

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: City officers or employees may not "terminate, demote, suspend or take other similar adverse employment action" against those who file a covered complaint. See WPO, Subsection 4.115(a). Threats and intimidation are not covered; nor are lesser forms of discipline, or other job actions such as transfer, detail, reassignment, change in duties, adverse performance evaluations or failure to promote.

E. What Enforcement Procedures are Provided?

FEDERAL EMPLOYEES: An injured party has a right to seek administrative relief by filing a complaint with the U.S. Office of Special Counsel, *see* 5 U.S.C. § 1214; and may also file an action before an independent adjudicator known as the U.S. Merit Systems Protection Board. See 5 U.S.C. §§ 1214(a)(3), 1221.

CALIFORNIA STATE EMPLOYEES: An injured party has a right to seek administrative relief by filing a written complaint with the State Personnel Board,

see Cal Gov. Code § 19683(a); and may also file a civil action in court. See Cal. Gov. Code § 8547.3(c).

CALIFORNIA LOCAL AGENCY EMPLOYEES: An injured party has no right to seek administrative relief. He or she may file a civil action in court against the alleged retaliator, if and when the latter has been convicted in court of criminal retaliation "with malicious intent… ." See Cal. Gov. Code § 53298.5(b).

CALIFORNIA EMPLOYEES IN GENERAL: An injured party has a right to seek administrative relief by filing a complaint with the Labor Commissioner, *see* Cal. Labor Code §§ 98.7, 1102.5; and may also file a civil action in court, regardless of whether he or she first seeks relief from the Labor Commissioner. See Cal. Labor Code §§ 1102.5; 98.7(f), (g); 244(a).

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: An injured party has a right to file an administrative complaint of retaliation with the Ethics Commission, and may also file a civil action in court against the alleged retaliator. See WPO, Subsection 4.115(b), (c); Charter, Sec. C3.699-13.

F. What Remedy is Provided?

FEDERAL EMPLOYEES: The injured party may obtain an order requiring that he or she be placed, as nearly as possible, in the position that he or she would have occupied had the retaliation not occurred; plus back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, compensatory damages (including interest, reasonable expert witness fees, and costs), and attorney's fees and costs. See 5 U.S.C. §§ 1214(g), 1221(g)(1).

CALIFORNIA STATE EMPLOYEES: Before the State Personnel Board, the injured party may obtain "appropriate relief, including, but not limited to, reinstatement, backpay, restoration of lost service credit, if appropriate, compensatory damages, and the expungement of any adverse records of the state employee or applicant for state employment who was the subject of the alleged acts of misconduct… ." Cal Gov. Code § 19683(c). In court, the injured party may recover money damages, including punitive damages "where the acts of the offending party are proven to be malicious," as well as "reasonable attorney's fees… ." Cal. Gov. Code § 8547.8(c).

CALIFORNIA LOCAL AGENCY EMPLOYEES: In court, the injured party may recover money damages, including punitive damages, as well as "reasonable attorney's fees as provided by law." Cal. Gov. Code § 53298.5(b).

CALIFORNIA EMPLOYEES IN GENERAL: Either before the Labor Commissioner or in court, the injured party many obtain "reinstatement and reimbursement for lost wages and work benefits caused by" the employer's retaliatory actions. See Cal. Labor Code §§ 98.6(b), (c); *id.*, § 1102.5. In addition, the employer may be liable for a civil penalty up to $10,000 per employee for each violation. *Id.* § 98.6(b)(3). The

injured party may also recover attorney fees pursuant to California Code of Civil Procedure § 1021.5.

SAN FRANCISCO CITY AND COUNTY EMPLOYEES: The WPO does not provide any direct relief to the injured party, and makes no provision for attorney fees. If the injured party files a civil action, it limits his or her recovery to "a civil penalty not to exceed $5,000." WPO, Subsection 4.115(c)(3). No other money damages may be recovered, either from the person who took the reprisal in question, or from the City and County. See *id.,* Sec. 4.135.

APPENDIX C: Comparison of Selected City And County Whistleblower Protection Ordinances and Policies

The following is a comparison of local whistleblower protection laws currently in effect in selected major cities and counties elsewhere in California.

A. Who is covered?

ALAMEDA COUNTY. Both county employees and applicants for county employment are covered. See Alameda County Admin. Code, Chapter 32 ("Protection of Employees Disciplined For Disclosing Information"), Sec. 3.52.030

OAKLAND: Only city officers or employees are covered. See Oakland Muni. Code 2.38.020

SANTA CLARA COUNTY: "Any person" is covered, without regard to employment status. See Santa Clara County Code, Sec. A25-751, A25-753

SAN JOSE: The policy covers "applicants, officers, officials, employees, or contractors" who work for the city. See City of San Jose Non-Retaliation Policy, City Administrative Policy Manual, Sec. 1.1.4 (hereafter "SJ Policy")

LOS ANGELES COUNTY: Any "person" is covered. County officers and employees are also expressly covered. See Los Angeles County Code Sections 5.02.060A, 5.02.060B

LOS ANGELES CITY: Any "person" is covered, without regard to employment status. See Los Angeles Municipal Code, Chapter IV, Article 9.5 ("Municipal Ethics and Conflicts of Interest"), Sec. 49.5.4 ("Protection Against Retaliation")

SAN DIEGO CITY: "[A]ny person" is covered, without regard to employment status. See San Diego Muni. Code, Article 6, Division 4 ("Ethics Commission"), Sec. 26.0415.

B. Must covered disclosures be made in a particular way?

ALAMEDA COUNTY: The ordinance covers "any written document containing a disclosure" of protected information, regardless of its recipient. See Alameda County Admin. Code, Sec. 3.52.020

OAKLAND: The ordinance covers any type of communication that "reports or otherwise brings to the attention of the City Auditor" any protected information. See Oakland Muni. Code 2.38.020

SANTA CLARA COUNTY: The ordinance covers only reports to the Office of the County Counsel, unless a report concerns activities within that Office, in which case

it should be made with the Office of the County Executive. See Santa Clara County Code, Sec. A25-751, A25-753

SAN JOSE: The policy covers "1. Making or filing an internal complaint with the City … 2. Providing informal notice to the City… 3. Participation in investigations and in court/administrative hearings… 4. Filing a complaint with a Federal or State enforcement or administrative agency 5. Disclosing information to a government or law enforcement agency … 6. Participating in or cooperating with a Federal or State enforcement agency that is conducting an investigation of the City … 7. Reporting… 8. Calling an internal or outside governmental agency's 'Whistleblower hotline' 9. Associating with another employee who is engaged in any of the protected activities enumerated here" SJ Policy, "Definitions", I. ("Protected activity" defined).

LOS ANGELES COUNTY: The ordinance covers any type of communication that "reports or otherwise brings to the attention of the auditor-controller or other appropriate agency, office or department of the county of Los Angeles" certain covered information. See Los Angeles County Code Sections 5.02.060A, 5.02.060B

LOS ANGELES CITY. The ordinance covers any type of communication that "reports" covered information "to the Ethics Commission or another governmental entity." See Los Angeles Municipal Code Sec. 49.5.4B.

SAN DIEGO CITY: The ordinance covers "mak[ing] a complaint or provid[ing] information to the [Ethics] Commission." See San Diego Muni. Code Sec. 26.0415.

C. What type of information constitutes a covered disclosure?

ALAMEDA COUNTY: The ordinance covers disclosures "regarding gross mismanagement or a significant waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." Alameda County Admin. Code, Sec. 3.52.020

OAKLAND: The ordinance covers disclosures of "information which, if true, would constitute one of the following: a work-related violation by a City officer or employee of any law or regulation; fraud, waste or mismanagement of City assets or resources; gross abuse of authority; a specific and substantial danger to public health or safety due to an act or omission of a City official or employee; or use of a City office, position or resources for personal gain." Oakland Muni. Code 2.38.020

SANTA CLARA COUNTY: The ordinance covers disclosure of "information that a County officer or employee has engaged in improper governmental activity in violation of state or federal law, County ordinance or administrative memoranda. Examples of such improper conduct include but are not limited to: violating local campaign finance laws, conflict of interest laws, or governmental ethics; misusing County resources; or using a County position to advance a private interest." Santa Clara County Code, Sec. A25-751

SAN JOSE: The policy covers disclosures "regarding alleged violations of City policy, local, State or Federal law… violation of State or Federal statute, or a violation or noncompliance with a State or Federal rule or regulation… unlawful activity… conflicts of interest, dishonesty or unethical conduct… ." San Jose Policy, "Definitions", I. ("Protected activity" defined).

LOS ANGELES COUNTY: The ordinance covers disclosure of "information which, if true, would constitute: a work-related violation by a county officer or employee of any law or regulation; gross waste of county funds; gross abuse of authority; a specific and substantial danger to public health or safety due to an act or omission of a county official or employee; use of a county office or position or of county resources for personal gain; or a conflict of interest of a county officer or employee." LA County Code Sec. 5.02.060A

LOS ANGELES CITY. The ordinance covers disclosures of "a possible violation of law… ." Los Angeles Municipal Code Sec. 49.5.4B.

SAN DIEGO CITY: The anti-retaliation provision applies to "complainants and witnesses" who "make a complaint or provide information to the Commission." San Diego Muni. Code Sec. 26.0415. The ordinance defines a "complainant" is one who "makes a complaint alleging violations of governmental ethics laws"; meaning, "local laws governing campaign contribution limits, campaign contribution disclosure, campaign expenditure disclosure, statements of economic interests, receipt and disclosure of gifts, conflicts of interest, lobbying registration and disclosure… ." *Id.*, Sec. 26.402.

D. What type of retaliatory actions are prohibited?

ALAMEDA COUNTY: The ordinance prohibits county officers, managers or supervisors from taking "any disciplinary action or disciplinary transfer against any employee, or any other act of intimidation, restraint, coercion or discrimination against any employee or applicant for employment in retaliation for a disclosure of information by the employee." See Alameda County Admin. Code Sec. 3.52.020, 3.52.040(A)

OAKLAND: The ordinance prohibits retaliation by taking or threatening "any adverse employment action, including discharge, discipline or demotion"; where "adverse employment action" is further defined as one that "had a detrimental and substantial effect on the terms, conditions, or privilege of a complainant's employment or required the complainant to work in a discriminatorily hostile or abusive work environment. A change that is merely contrary to a complainant's interests or liking is insufficient." See Oakland Muni. Code Sec. 2.38.040, 2.38.060, 2.38.070

SANTA CLARA COUNTY: The ordinance prohibits "[A]ny retaliation or reprisal by any County officer or employee against any complainant or informant" without limitation as to the type of action prohibited. See Santa Clara County Code, Sec. A25-753.

SAN JOSE: The policy prohibits the use, or attempted use of official authority "for the purpose of intimidating, threatening, coercing, directing or influencing any person with the intent of interfering with that person's duty" to disclose official wrongdoing. It further prohibits retaliation by "adverse employment action" which "may include, but is not limited to, any of the following: 1. Real or implied threats of intimidation to attempt or prevent an individual from reporting alleged wrongdoing or because of protected activity 2. Denying promotion to an individual because of protected activity 3. Taking any form of disciplinary action because of protected activity 4. Extending a probationary period because of protected activity 5. Altering work schedules or work assignments because of protected activity". SJ Policy, "Policy", "Definitions" ("Adverse Employment Action" defined).

LOS ANGELES COUNTY: The ordinance prohibits county officers or employees from using or threatening to use their official authority or influence either "to restrain or prevent any other person" from making a protected disclosure, or to take "any action as a reprisal against a county officer or employee… ." LA County Code Sections 5.02.060A, 5.02.060B

LOS ANGELES CITY. The ordinance prohibits threatening or effecting "any action as a reprisal… ." Los Angeles Municipal Code Sec. 49.5.4B.

SAN DIEGO CITY: The ordinance prohibits the use or threatened use of "any official authority, including discipline or termination, to discourage, restrain or interfere" with a complainant or witness before the Ethics Commission. San Diego Muni. Code Sec. 26.0415.

E. What enforcement procedures are provided?

ALAMEDA COUNTY: An injured party has a right to file an administrative claim of reprisal, which is investigated by the county administrator and the appropriate appointing authority, and ultimately referred to the Board of Supervisors for determination. See Alameda County Admin. Code Sec. 3.52.030.

OAKLAND: An injured party has a right to file an administrative complaint of retaliation with the City Auditor, and may also file a civil action in court against the alleged retaliator. See Oakland Muni. Code 2.38.050, 2.38.110.

SANTA CLARA COUNTY: The ordinance provides no right to file a complaint of retaliation, either administratively or in court. See Santa Clara County Code, Sec. A25.

SAN JOSE: An injured party "should immediately report the conduct to the applicable Department Director or to the City Manager's Office of Employee Relations." SJ Policy, "Complaint Procedures"

LOS ANGELES COUNTY: An injured party "may file a complaint with the director of personnel" who "shall investigate the complaint and thereafter prepare a report thereon which shall be forwarded to the board of supervisors." LA County Code Sec. 5.02.060C

LOS ANGELES CITY. An injured party has a right to file an administrative complaint of retaliation with the Ethics Commission. A civil action may also be filed in court against the alleged retaliator, either by the injured party – provided he or she is a resident of the City – or by the City Attorney or the Ethics Commission. See Los Angeles Municipal Code Sec. 49.5.4B, 49.5.16B.

SAN DIEGO CITY: The ordinance does not provide any procedure for enforcing its anti-retaliation provision. San Diego Muni. Code Sec. 26.0415.

F. What remedy is provided?

ALAMEDA COUNTY: The ordinance provides no remedy to the injured party, but merely restates the relief available to local agency complainants under state law; i.e., the right to file an action for money damages in court, if and when the accused has been convicted of criminal retaliation. See Alameda County Admin. Code Sec. 3.52.050; Cal. Gov. C. Sect. 53298.5(b).

OAKLAND: The ordinance provides no direct relief to the injured party, and makes no provision for attorney fees. If an injured party files an action in court, it limits his or her recovery to a civil penalty not to exceed $5,000. See Oakland Muni. Code 2.38.050, 2.38.110.

SANTA CLARA COUNTY: The ordinance provides no relief to the injured party. See Santa Clara County Code, Sec. A25.

SAN JOSE: The policy provides no relief to the injured party. See San Jose Policy.

LOS ANGELES COUNTY: The ordinance provides no relief to the injured party. See Los Angeles County Code Sec. 5.02.060

LOS ANGELES CITY. The ordinance provides no administrative relief to the injured party. If an injured party who is a resident of the City files an action in court, or if the City Attorney or Ethics Commission does so on the injured party's behalf, the injured party's recovery is limited to 50 percent of "an amount not more than… $5,000 per violation…"; the remaining 50 percent to be paid to the City. The court may also order injunctive relief. An injured party who prevails in court may also be awarded "that party's costs of litigation, including reasonable attorney fees." See Los Angeles Municipal Code Sec. 49.5.16B.

SAN DIEGO CITY: The ordinance does not provide any remedy for retaliation against complainants or witnesses. San Diego Muni. Code Sec. 26.0415.

APPENDIX D: Controller's Notice Of Whistleblower Protections

CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CONTROLLER

Ben Rosenfield
Controller

Monique Zmuda
Deputy Controller

Whistleblower Program – Protection from Retaliation

PROTECTION OF WHISTLEBLOWERS – RETALIATION PROHIBITED

Who is protected from retaliation?

Any current or former City officer or employee who believes s/he has been the subject of retaliation in violation of Article IV of the San Francisco Campaign and Governmental Conduct Code (Code) may file a complaint with the Ethics Commission, which shall investigate or refer the complaint.

What is "retaliation" under the Code?

The Code defines retaliation is the "termination, demotion, suspension, or other similar adverse employment action" taken against any city officer or employee for having participated in good faith in any of the following protected activities:

- Filing a complaint with the Ethics Commission, Controller, District Attorney, or City Attorney, or filing a written complaint with the complainant's department, alleging that a city officer or employee engaged in *improper governmental activity*.
- Filing a complaint with the Controller's Whistleblower Program.
- Cooperating with an investigation of a complaint conducted under the Code.

"Improper government activity" includes the following:

- Violating local campaign finance, lobbying, conflict of interests, or governmental ethics laws, regulations, or rules.
- Violating the California Penal Code by misusing city resources.
- Creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's city position.
- Abusing his or her city position to advance a private interest.

What protections are provided to a whistleblower?

You are protected from adverse employment action if you filed a complaint as defined above or cooperated with an investigation of a complaint under the Code.

What should I do if I believe I have been subject to retaliation?

If you believe you have suffered an adverse employment action because of a complaint you filed as listed in Code Section 4.115(a) or because of your cooperation with an investigation under the Code, you must file a complaint with the Ethics Commission within two years after the date of the alleged retaliation. (Code Section 4.115(b)(1))

How do I report that I have been retaliated against?

It is strongly recommended that you speak with an Ethics Commission investigator to determine whether the matter about which you are complaining is within the Ethics Commission's jurisdiction. If it is not within the Ethics Commission's jurisdiction, staff will refer you to the most appropriate agency.

To speak with an investigator, please call the Ethics Commission at (415) 252-3100.

More information regarding filing a complaint with the Ethics Commission may be found at:
http://www.sfethics.org/ethics/2009/05/complaints.html#ii

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Endnotes

[1] 2013-14 San Francisco Civil Grand Jury, *Ethics in the City: Promise, Practice or Pretense* (July 2014), p. 13.
[2] San Francisco Campaign & Gov't Conduct Code, Article IV, Chapter 1, Sec. 4.100, *et seq* (rev. 2008) (hereafter "Whistleblower Protection Ordinance" or "WPO").
[3] *Id.*, Subsection 4.115(a).
[4] San Francisco Administrative Code (hereafter "Admin. Code") §§ 16.400 through 16.404. See Ordinance 124-89, Approved 4/26/1989.
[5] Admin. Code §§ 16.400, 16.401.
[6] The Improper Government Activities Ordinance forbade City officers or employees to retaliate by "promising to confer or not to confer, or conferring or not conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, or approving any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action…." *Id*., Subsection 16.402(b).
[7] *Id*., Sec. 16.402.
[8] San Francisco Charter (hereafter "Charter"), Appendix C, Sec. C3.699-11, item 7.
[9] See Ordinance 71-00, Approved 4/28/2000, at p. 151ff.
[10] See WPO, Sec. 4.105 (2000).
[11] Under the new law, City officers or employees were forbidden to intimidate, threaten, coerce, or interfere with any individual because that individual had filed such a complaint, or cooperated in its investigation. They were also forbidden to discipline or otherwise retaliate against any City officer, employee or applicant for City employment for the same reason. See *id.*, Subsection 4.115(a) (2000).
[12] *Id.*, Sec. 4.105 (2000).
[13] See Ordinance 29-02, Approved 3/15/2002.
[14] See WPO, Subsection 4.115(a) (rev. 2002).
[15] To qualify for protection, a disclosure had to charge a City officer or employee with violating local laws regulating campaign finance, lobbying, conflicts of interest or governmental ethics, violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest. Whistleblowers were also protected if they cooperated in the investigation of such a complaint. *Id.*
[16] Specifically, it granted the Controller "authority to receive individual complaints concerning the quality and delivery of government services, wasteful and inefficient City government practices, misuse of City government funds, and improper activities by City government officers and employees." Charter, Appendix F, Subsection F1.107(a).
[17] *Id.*, Subsection F1.107(c).
[18] In 2008 the Board of Supervisors passed an ordinance expanding the list of complaints covered under the anti-retaliation provision to include those filed with the Controller's Whistleblower Program. Otherwise, it made no substantive changes to the anti-retaliation provisions. See Ordinance No. 205-08, approved 9/19/08; WPO, Subsection 4.115(b) (2008).
[19] *Id.*, Sec. 4.107.
[20] See *Whistling in the Dark: The San Francisco Whistleblower Program*, 2010-2011 San Francisco Civil Grand Jury.
[21] See *id.*, Subsection 4.115(b); Charter, Section C3.699-13.
[22] See "Ethics Commission Regulations For Investigations And Enforcement Proceedings" effective July 5, 1997; as amended through March 29, 2013.
[23] *Id.*, Sec. IV.C
[24] *Id.*, Sec. VII. If Commission staff concludes that probable cause does not exist they must notify the Commission of that fact, and the Commission remains free to consider the matter on the motion of any one of its members. *Id.*, Sec. VI.A.

[25] *Id.*, Sec. II.L.
[26] *Id.*, Sec. VIII.A.4.
[27] *Id.*, Sec. IX.
[28] See the Commission's "Enforcement Summaries" at *http://www.sfethics.org/ethics/2009/05/enforcement.html*, (complaints resolved 11/14/2011 and 7/23/2012).
[29] See WPO, Subsection 4.115(a). Also protected are disclosures made while providing any information or otherwise cooperating with an investigation of such complaints. *Id.*
[30] *Id.*, Subsection 4.115(a). If disclosures are made through the Controller's Whistleblower Hotline, the definition of a protected disclosure is somewhat more inclusive. It covers disclosures concerning "misuse of City funds, improper activities by City officers and employees, deficiencies in the quality and delivery of government services, and wasteful and inefficient City government practices." *Id.*, Subsection 4.107(a).
[31] *See id.*, Subsection 4.115(a).
[32] 2013-14 San Francisco Civil Grand Jury, *Ethics in the City: Promise, Practice or Pretense* (July 2014), p. 13.
[33] *See* WPO, Subsection 4.115(b).
[34] See Cal. Evid. Code Sec. 115; Witkin, *California Evidence* (5th Ed., 2012), at 175.
[35] Charter, Sec. C3.699-13.
[36] See WPO, Subsection 4.115(b)(i).
[37] See Witkin, *California Evidence* (5th Ed., 2012) at 207-08.
[38] See "CPI Inflation Calculator," published by United States Department of Labor, Bureau of Labor Statistics, on its web site at http://www.bls.gov/data/inflation_calculator.htm
[39] Cal. Labor Code § 1102.5 and sections that follow.
[40] See Cal. Labor Code §§ 98.6(b)(1), 1102.5. See also Cal. Government Code § 53296 (additional protections, applicable only to local agency employees).
[41] Under some labor contracts minor grievances are handled at the departmental level. These were not included in the search.
[42] See Charter, Appendix F, Subsection F1.107(c).
[43] See Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/protect
[44] See WPO, Subsection 4.115(e).
[45] See Charter, Appendix C, Subsection C3.699-13(a).
[46] California Government Code § 53296 was enacted in 1986, and last amended in 1994. California Labor Code § 1102.5 was enacted in 1937, and while additional protections were added in 2014, its former provisions were substantially as described above.
[47] Charter, Sec. F1.107(c)
[48] Charter, Appendix F, Sec. F1.107(c)
[49] See WPO, Subsection 4.115(a)
[50] See 5 U.S.C. §§ 1214, 1221, 2302; Cal. Gov. C. §§ 8547.2, 8547.3, 8547.8, 19683(a)
[51] See Los Angeles Municipal Code Sec. 49.5.4, 49.5.16B; San Diego Muni. Code Sec. 26.402, 26.0415, 26.0421, 26.0439; San Jose City Policy Manual, Sec. 1.1.4; Oakland Muni. Code Sec. 2.38.020 - 2.38.020, 2.38.110; Santa Clara County Code Sec. A25-751, A25-753; Alameda County Admin. Code Sec. 3.52.020 - 3.52.050; Los Angeles County Code Sec. 5.02.060 Neither Sacramento nor Fresno has an ethics commission or its equivalent, or any whistleblower protection ordinance or policy that the Jury could discern.
[52] See Charter, Sec. C3.699-11, item 6.
[53] See *id.,* Sec. 15.102.
[54] See "Ethics Commission Regulations For Investigations And Enforcement Proceedings", at p. 2 ("violation of law" defined).
[55] We suggest a two-step process. If, after a public hearing, the Commission finds that retaliation has occurred, it would issue a "cease and desist" order requiring the agency or department that took the action to retroactively cancel it, expunge personnel records related to the action, and restore any

back pay, service credit or other benefits that were lost as a consequence. Such orders are authorized under Charter Section C3.699(c)(i). At the same time, the Commission would provide the employing agency with an opportunity to nullify this order, by showing that the acting official reasonably believed that the action was justified, based on facts separate and apart from the complainant's whistleblowing. This would respect the "reservation of authority" set forth at Subsection 4.115(d)(ii) of the WPO.