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CITY AND COUNTY OF SAN FRANCISCO

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LEEANN PELHAM
EXECUTIVE DIRECTOR

Date: February 24, 2016
To: Members of the Ethics Commission
From: LeeAnn Pelham, Executive Director
Re: Whistleblower Protection Ordinance Recommendations

Summary This memorandum provides recommendations to clarify and strengthen the Whistleblower Protection Ordinance ("Ordinance").

Action Requested That the Commission discuss and take action to provide its policy direction regarding the attached draft regulations and Ordinance amendments.

Background

At the Commission's regular meeting on January 25, 2016, the Commission discussed a January 20, 2016, memorandum prepared by Commissioner Ben Hur and former Acting Ethics Commission Executive Director Jesse Mainardi that assessed 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.*" The Civil Grand Jury's recommendations reflect a concern that the Ordinance has not provided "meaningful protection against retaliation for reporting improper governmental activities,"¹ and broadly concerned three issues:

- (1) the scope of the Ordinance: *To whom and by what method must complaints be filed to receive protection under the Ordinance? What is the nature or topic of complaints that warrant protection for whistleblowers? What types of retaliatory actions against whistleblowers should be covered under the Ordinance?*
- (2) the Ordinance's enforcement process: *What burden of proof should apply to those bringing forward a complaint to receive protection under the Ordinance?*
- (3) the Ordinance's remedy: *What relief should be provided to a complainants when retaliation in violation of the Whistleblower ordinance is found to have occurred?*

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 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.

¹ *San Francisco's Whistleblower Protection Ordinance is in Need of Change*, 2014-2015 San Francisco Civil Grand Jury, page 6.

The January 20, 2016, memorandum by Commissioner Hur and Mr. Mainardi provided the Commission's further analysis of the Civil Grand Jury's recommendations, and offered a series of recommendations to clarify and strengthen the City's Whistleblower protection provisions. Building on that foundation, this memorandum contains two approaches: draft language intended to clarify terms used in the existing Ordinance through Ethics Commission regulations, assuming the existing Ordinance is unchanged (Attachment 1); and draft Ordinance language to amend the statute, with accompanying regulations to clarify terms used in the amended ordinance (Attachment 2).

Should the Commission take action to revise draft regulations at its next meeting on February 29, 2016, any revised regulations would be circulated for further public review and comment, with further action by the Commission scheduled for a future meeting. Should the Commission take action to recommend draft amendments to the language of the Ordinance, Staff will discuss any legislative recommendations proposed by the Commission with members of the Board of Supervisors for its consideration and action. Following the Commission's final action on these items, Staff will provide an update on those developments to the Civil Grand Jury for its informational purposes per California Penal Code section 933.05.

Overview of Recommendations Contained in the January 20th Analysis

In their January 20th memo, Commissioner Hur and Mr. Mainardi advised 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;
 - (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.

January 20th Analysis of Grand Jury Recommendations and Proposed Language

For ease of reference, the section below recaps the analysis and recommendations contained in the January 20, 2016, memorandum by Commissioner Hur and Mr. Mainardi regarding the Civil Grand Jury's Whistleblower Protection Ordinance recommendations. It also summarizes draft language for proposed regulations assuming no changes to the existing Ordinance and, alternatively, draft language for statutory changes and regulations if the Ordinance were amended as shown. As noted above, the proposed language is detailed in Attachments 1 and 2.

Civil Grand Jury Recommendations 2.1 and 2.2

- 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
- 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.

Jan 20th Analysis and Response - Issue 1 Should the Ordinance be expanded to cover oral whistleblower complaints to the complainant's department?

No. 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 1 Under Existing Ordinance
Proposed Language A regulation to address this issue can be accomplished by further defining "complaint." To clarify what constitutes a written submission, proposed Regulation 4.105(a)-1 would provide that a "complaint" can be "any formal or informal writing such as a letter, email or other written communication sufficient to convey what the complainant reasonably believes evidences improper government activity..." The language would also reference oral communications recorded in writing by the recipient of the complaint. This approach is intended to acknowledge that the written record provided may vary in its degree of breadth or complexity, while still balancing the need for establishing in writing that protections have actually been triggered.

With an Amended Ordinance

Same as above.

Jan 20th Analysis and Response - Issue 2 Should the Ordinance be expanded to cover disclosures to a City department or commission other than the complainant's own?

Yes. 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 2 Under Existing Ordinance Proposed Language No clarifying regulation is proposed as the language of the Ordinance does not address complaints that are brought to an agency other than the complainant’s, except those brought to the Ethics Commission, Controller, District Attorney, or City Attorney.

With an Amended Ordinance

To ensure Whistleblower disclosures to other than the complainant’s own department would have protection under City law, Secs. 4.100, 4.105(a), and 4.115 would provide that protection also applies for filing a complaint with any supervisory employee at the complainant's department or at another City, County, state or federal agency. This approach would expand the points of contact for a Whistleblower to bring forward a concern about improper government activity to individuals in a governmental position with authority and responsibility to follow up appropriately.

Jan 20th Analysis and Response - 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?

The Commission can address this issue via regulation. 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 3 Under Existing Ordinance

Proposed Language

As noted above under Issue 1, proposed Regulation 4.105(a)-1 would provide that a “complaint” can be “any formal or informal writing such as a letter, email or other written communication sufficient to convey what the complainant reasonably believes evidences improper government activity...” The language would also reference oral communications recorded in writing by the recipient of the complaint.

With an Amended Ordinance

Same as above.

**Jan 20th Analysis
and Response - Issue 4**

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

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

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 if the Commission were to obtain the ability to reinstate terminated employees. 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 4 Under Existing Ordinance

Proposed Language

No clarifying regulation is proposed as the language of the existing Ordinance does not address complaints brought by or involving City contractors.

With an Amended Ordinance

As noted in the January 20th analysis above, to the extent that contractors are performing services on the City’s behalf and if there is a clear way to identify them, the Commission may wish to consider including contractors for purposes of Whistleblower protections.

If the Commission were to conclude that coverage as to employees also includes individuals who are working on the City’s behalf, within City departments, or side-by-side with City employees, pursuant to a contract with the City and County of San Francisco, it might want to explore language to accomplish that aim. Such an approach would recognize that individuals operating within the terms of a contract with the City and who bring forward information about improper governmental activity should also be afforded some protection against reprisal or retaliation by a city official or employee for engaging in that activity.

Under this approach, for example, the Ordinance could be amended to include complaints brought by or involving contractors operating within the scope of a contract with the City and County of San Francisco. Secs. 4.100, 4.105, and 4.115 would be amended to include reference to:

“...all City officers, employees, including contractors operating within the scope of a contract with the City and County of San Francisco” concerning “improper government activity by a city official or employee or by a contractor operating pursuant to a contract with the City and County of San Francisco.”

Should the Commission wish to further explore this approach, identifying protections appropriate to a contractually-based relationship with the City, rather than attempting to inject Whistleblower rules into a contractor’s employment relationships, would be necessary. In addition, the Commission may wish solicit further input through Staff from other City departments including the Controller’s Office and other agencies with significant procurement and contracting responsibilities to explore whether language could be developed for inclusion in all City contracts.

Jan 20th Analysis and Response - Issue 5

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

The Commission can resolve this issue via regulation. The Commission could clarify the definition of “other similar adverse employment action” via regulation. The list proposed by the Grand Jury [including threats, intimidation, transfers, detail reassignments, changes in duties, adverse performance evaluations, and failure to promote] 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.”

Issue 5 Under Existing Ordinance

Proposed Language New Ethics Commission Regulation 4.115(a)-1 proposes to define an “other similar adverse employment action” to broadly include effecting 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. As proposed, the language would address actions on the list identified by the Grand Jury, including threats, intimidation, transfers, detail reassignments, changes in duties, adverse performance evaluations, and failure to promote.

With an Amended Ordinance

Same as above.

Civil Grand Jury Recommendation 3

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.

Jan 20th Analysis and Response 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?

Yes. With respect to the first recommendation to amend the Ordinance to allow the Commission to order cancellation of a retaliatory job action, the Commission should be required to consider the totality of the circumstances before reinstating a whistleblower to his previous position.

With respect to the second recommendation, the \$5,000 civil penalty does seem low and should be increased.

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.

Proposed Language Under Existing Ordinance

No clarifying regulation is proposed as the language of the existing Ordinance does not address the cancellation of a retaliatory job action.

With an Amended Ordinance

Sec. 4.115(c) would be amended to provide that an officer or employee who violates the Ordinance may be liable in a civil action for a civil penalty of up to \$10,000.

In addition, a new subsection (v) could be added to Sec. 4.115(c) to provide that following an administrative hearing pursuant to Charter Section C3.699-13 and making a finding of a violation of Subsection (a), the Ethics Commission may issue an order calling for the cancellation of a retaliatory employment termination, demotion, suspension or other similar adverse employment action taken against any City officer or employee who exercised his or her right to protection under this Ordinance.

Civil Grand Jury Recommendation 4

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.

Jan 20th Analysis and Response 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?

The Commission can resolve this issue via regulation. 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. 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.

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.

Proposed Language Under Existing Ordinance

New Regulation 4.115(b)-1 would be created to clarify that the preponderance of the evidence standard shall apply during the adjudication of the complaint by the Ethics Commission and shall not apply during the preliminary review or investigation of any complaint.

To promote confidence that Commission staff will place appropriate priority on reviewing allegations of Whistleblower retaliation or reprisal, the Commission's enforcement regulations would include new language about the timeframe for when preliminary retaliation complaints will be initiated and, absent extraordinary circumstances, by when staff will strive to complete preliminary review of retaliation complaints. (See proposed Enforcement Regulation IV.A(1)(a)).

In addition, two new subsections would be added to existing enforcement regulations to support appropriate oversight by the Commission and accountability to complainants who have filed Whistleblower retaliation complaints.

Proposed Enforcement Regulation IV.A(1)(b) creates a reporting requirement that no less than quarterly, the Executive Director will provide, subject to confidentiality requirements of the Charter, a summary to the Ethics Commission on the status of all Whistleblower retaliation complaints that remain under preliminary review. For such matters pending over 90 days, an explanation for why Staff has not yet completed the preliminary review and a target preliminary review completion date will also be provided.

Proposed Enforcement Regulation IV.A(1)(c) provides that Commission staff will notify any complainant who has alleged retaliation and whose complaint remains under preliminary review 90 days after receipt. To preserve the confidentiality of Commission investigations, the notice will not provide a progress report or further detail about the Commission's review, but may seek additional information as necessary for purposes of conducting or completing the preliminary review.

With an Amended Ordinance

Under an amended Ordinance, the language of Sec. 4.115(c)(iii) could be revised directly to clarify that in order to establish that retaliation occurred, the Ethics Commission would in an administrative proceeding determine 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.

Proposed Enforcement Regulations IV.A(1)(a), (b), and (c) discussed above under the existing Ordinance would also apply under an amended Ordinance.

Other Possible Statutory Changes

Additional language is also included in Attachment 2 for the Commission’s consideration that is intended to clarify and/or strengthen several provisions of an amended Ordinance. These provisions are summarized below.

Definition of Improper Governmental Activities

The Ordinance could be strengthened by revising what constitutes “improper governmental activities” to include more broadly “gross waste, fraud and abuse of City resources.” This language would replace a more limiting reference that currently exists in Sec. 4.105 to “violating the California Penal Code by misusing City resources.”

Controller Referrals

Sec. 4.107(b)(v) addresses referral of certain complaints by the Controller to other departments or agencies. New language is proposed for this subsection to clarify that, in addition to the phrase “governmental ethics laws” that is currently referenced, the Controller would also refer to the Ethics Commission and City Attorney those that may constitute a violation of local campaign finance, lobbying, conflicts of interests laws, regulations or rules.

Commission Referrals

Sec. 4.115(b)(i) provides that the Ethics Commission may decline to investigate complaints alleging Whistleblower retaliation if it determines that the same or similar allegations are pending with or have been finally resolved by another administrative or judicial body. This section also contemplates that the Commission may choose to refer a matter to any other City department, commission, board, officer or employee, or to other government agencies for investigation and possible disciplinary or enforcement action. To further accountability, the Ordinance also provides that the Ethics Commission may require a report back on the referred matter. To clarify that process for departments receiving such a referral, the Commission may wish to consider proposed language to amend Sec. 4.115(b)(i) as follows:

A. Within [90] days of receiving a referral from the Ethics Commission under this Subsection for investigation and possible disciplinary or enforcement action, or such other time as the Ethics Commission shall specify, the City department shall report to the Ethics Commission in writing the results of the department's investigation and any action that the department has taken in response to the Ethics Commission’s referral.

Sanctions for Disclosure

Under a revised Ordinance, sanctions that may apply to any individual who unlawfully discloses the identity of any Whistleblower should be added. To accomplish that, the confidentiality provision of Sec. 4.120 could be amended to provide that the disclosure of the identity of a Whistleblower who has elected to have his or her identity kept confidential and who wishes to remain anonymous to the extent permitted by law may be subject to an administrative enforcement action and administrative penalty authorized in Charter Section C3.699-13 for violating the confidentiality protections of this ordinance or SFC&GC Code Sec. 3.228.

Attachments

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Regulation 4.105(a)-1. Complaint Submissions.

(a) A “complaint” can be any formal or informal writing such as a letter, email or other written communication sufficient to convey what the complainant reasonably believes evidences improper government activity by a city official or employee. A “complaint” can also include an oral communication recorded in writing by the recipient of the complaint.

Regulation 4.115(a)-1. Other Similar Adverse Employment Actions.

(a) An “other similar adverse employment action” includes effecting 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.

Regulation 4.115(b)-1. Preponderance of the Evidence.

(a) As used in Sec. 4.115(a), the preponderance of the evidence standard shall apply during the adjudication of the complaint by the Ethics Commission and shall not apply during the preliminary review or investigation of any complaint.

Ethics Commission Enforcement Regulation IV.A(1) – Whistleblower Retaliation Complaint Timeframes and Report to Commission

(a) Ethics Commission Staff will initiate a preliminary review of any complaint it receives that alleges retaliation under Campaign & Gov't Conduct Code, Article IV, Chapter 1, § 4.100, et seq. within two business days of receiving the complaint, and will work to complete the preliminary review within 90 days of receipt.

(b) No less than quarterly, the Executive Director shall provide a summary to the Commission of the status of all complaints received that allege Whistleblower retaliation that remain under preliminary review, and for matters that have been pending for over 90 days, an explanation for

1 why the Ethics Commission Staff has not completed the preliminary review and a target date for
2 its completion.

3 (c) Ethics Commission Staff will notify any complainant who has alleged retaliation under
4 Campaign & Gov't Conduct Code, Article IV, Chapter 1, § 4.100, et seq. and whose complaint
5 remains under preliminary review 90 days after receipt of that complaint that it remains under
6 preliminary review. To preserve the confidentiality of Commission investigations, the
7 notification shall not provide a progress report or further detail about the matter, but may
8 request additional information from the complainant as necessary for purposes of conducting
9 the preliminary review.

1 **ATTACHMENT 2**

2 **DRAFT WHISTLEBLOWER PROTECTION ORDINANCE AMENDMENTS**

3 *With Associated Draft Regulations Assuming the Changes Shown Below in ~~Strikeouts~~ and Underlined Text*

4

5 **SAN FRANCISCO WHISTLEBLOWER PROTECTION ORDINANCE**

6 **CHAPTER 1:**

7 **REPORTING IMPROPER GOVERNMENT ACTIVITY; PROTECTION OF WHISTLEBLOWERS**

- 8 Sec. 4.100. Findings.
- 9 Sec. 4.105. Complaints of Improper Government Activity; Investigation Procedures; Referral to Other Agencies.
- 10 Sec. 4.107. Complaints by Citizens and Employees; Whistleblower Program.
- 11 Sec. 4.110. Definitions.
- 12 Sec. 4.115. Protection of Whistleblowers.
- 13 Sec. 4.120. Confidentiality.
- 14 Sec. 4.123. Confidentiality Protection for Whistleblower Program Complainants and Investigations.
- 15 Sec. 4.125. Furnishing False or Misleading Information; Duty to Cooperate.
- 16 Sec. 4.130. Reports to the Board of Supervisors.
- 17 Sec. 4.135. Limitation of Liability.

18 **SEC. 4.100. FINDINGS.**

19 The City and County of San Francisco has a paramount interest in protecting the integrity of its
20 government institutions. To further this interest, individuals should be encouraged to report to the City's
21 Ethics Commission, Controller, District Attorney, City Attorney and the complainant's department
22 possible violations of laws, regulations and rules governing the conduct of City officers and employees.

23 This Chapter protects all City officers, ~~and employees,~~ and contractors operating within the scope of a
24 contract with the City and County of San Francisco, from retaliation (1) for filing a complaint with, or
25 providing information to, the Ethics Commission, Controller, District Attorney, City Attorney, or (2) for
26 filing a complaint with any supervisory employee at the complainant's department or at another City,
County, state or federal agency.

This Chapter ensures that complaints that do not allege a violation of law over which the Ethics
Commission or Controller has jurisdiction are directed to the appropriate agency for investigation and
possible disciplinary or enforcement action.

Finally, this Chapter implements Charter Appendix Section F1.107. Section F1.107 directs the
Controller, as City Services Auditor, to administer a whistleblower program and investigate reports of
complaints concerning the misuse of City funds, improper activities by City officers and employees,

1 deficiencies in the quality and delivery of government services, and wasteful and inefficient City
2 government practices.
3 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 29-02, File No. 020017, App.
4 3/15/2002; Ord. 205-08, File No. 080019, 9/18/2008)

5
6 **SEC. 4.105. COMPLAINTS OF IMPROPER GOVERNMENT ACTIVITY; INVESTIGATION PROCEDURES;**
7 **REFERRAL TO OTHER AGENCIES.**

8
9 (a) COMPLAINTS. Any person may file a complaint¹ with the Ethics Commission, Controller, District
10 Attorney or City Attorney, or with any supervisory employee at the complainant's department or at
11 another City, County, state or federal agency, alleging that a City officer, employee or contractor
12 operating pursuant to a contract with the City and County of San Francisco has engaged in improper
13 government activity. ~~alleging that a City officer or employee has engaged in improper government~~
14 activity by ~~Improper government activity means~~ violating local campaign finance, lobbying, conflicts of
15 interest or governmental ethics laws, regulations or rules; ~~violating the California Penal Code by~~
16 ~~misusing gross waste, fraud and abuse of~~ City resources; creating a specified and substantial danger to
17 public health or safety by failing to perform duties required by the officer or employee's City position; or
18 abusing his or her City position to advance a private interest.

19
20 (b) ETHICS COMMISSION COMPLAINT PROCEDURES. The Ethics Commission shall investigate
21 complaints filed under this Section that allege violations of local campaign finance lobbying, conflicts of
22 interest and governmental ethics laws pursuant to the procedures specified in Charter Section C3.699-
23 13 and the regulations adopted thereunder. Nothing in this subsection shall preclude the Ethics
24 Commission from referring any matter to any other City department, commission, board, officer or
25 employee or to other government agencies for investigation and possible disciplinary or enforcement
26 action. The Ethics Commission may require that any City department, commission, board, officer or
27 employee report to the Ethics Commission on the referred matter.

28
29 (c) REFERRAL. The Ethics Commission shall refer complaints that do not allege a violation of law,
30 regulation or rule that is within the Ethics Commission's jurisdiction to the appropriate agency for
31 investigation and possible disciplinary or enforcement action. The Commission may conduct preliminary

¹ See draft Ethics Commission Regulation 4.105(a)-1, which proposes to further define "complaint."

1 investigations into such complaints to determine whether the complaint contains sufficient information
2 to warrant referral. The Ethics Commission may require that any City department, commission, board,
3 officer or employee report to the Ethics Commission on the referred matter.

4 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 29-02, File No. 020017, App.
5 3/15/2002)

6

7 **SEC. 4.107. COMPLAINTS BY CITIZENS AND EMPLOYEES; WHISTLEBLOWER PROGRAM.**

8 (a) WHISTLEBLOWER PROGRAM. The Controller shall administer and publicize a whistleblower and
9 citizen complaint program for citizens and employees to report the misuse of City funds, improper
10 activities by City officers and employees, deficiencies in the quality and delivery of government services,
11 and wasteful and inefficient City government practices. Subject to subsection (b), the Controller shall
12 investigate and otherwise attempt to resolve complaints reported to the Whistleblower Program. The
13 Controller shall administer a hotline telephone number and website and publicize the hotline and
14 website through press releases, public advertising and communications to City employees.

15

16 (b) REFERRAL OF CERTAIN COMPLAINTS. The Controller shall refer the following complaints as set
17 forth in this Section:

18 (i) Those which another City agency is required by federal, state, or local law to adjudicate: To that
19 agency;

20 (ii) Those which may be resolved through a grievance mechanism established by collective
21 bargaining agreement or contract: To the official or agency designated in the agreement or contract;

22 (iii) Those which involve allegations of conduct which may constitute a violation of criminal law: To
23 the District Attorney or other appropriate law enforcement agency;

24 (iv) Those which are subject to an existing, ongoing investigation by the District Attorney, City
25 Attorney, or Ethics Commission, where the applicable official or Commission states in writing that
26 investigation by the Controller would substantially impede or delay his, her or its own investigation of
27 the matter: To the investigating office; and

28 (v) Those which allege conduct that may constitute a violation of local campaign finance, lobbying,
29 conflicts of interest or governmental ethics laws, regulations or rules: to the Ethics Commission and the
30 City Attorney.

31 Where the conduct that is the subject of the complaint may violate criminal law and any civil or
32 administrative law, statute, ordinance or regulation, the Controller may take action on the noncriminal

1 aspects of the matter under this Section even if a referral has been made to another agency under this
2 Section.

3 If a complaint is referred under this Section, the Controller shall inform the complainant of the
4 appropriate procedure for the resolution of the complaint.

5
6 (c) TRACKING AND INVESTIGATION. The Controller shall receive, track and investigate complaints
7 made or referred to the Whistleblower Program. The investigation may include all steps that the
8 Controller deems appropriate, including the review of the complaint and any documentary or other
9 evidence provided with it, the gathering of any other relevant documents from any City department or
10 other source, and interviews of the complainant and other persons with relevant information.

11
12 (d) INFORMATION PROVIDED UNDER PENALTY OF PERJURY. In those instances in which the Controller
13 deems it appropriate, the Controller may require that persons making complaints or providing
14 information swear to the truth of their statements by taking an oath administered by the Controller, or
15 an agent of the Controller, or through written declarations made under penalty of perjury under the
16 laws of the State of California.

17
18 (e) REFERRAL AND RECOMMENDATION BY CONTROLLER. The Controller may refer the complaint to a
19 City department for investigation, either before conducting an initial investigation or after doing so, and
20 may recommend that a City department take specific action based on the Controller's initial
21 investigation. Within 60 days of receiving a complaint for investigation or a recommendation by the
22 Controller for specific action, or such other time as the Controller shall specify, the City department shall
23 report to the Controller in writing the results of the department's investigation and any action that the
24 department has taken in response to a recommendation by the Controller that the department take
25 specific action.

26
27 (f) REPORT BY DEPARTMENT AND FURTHER ACTION BY CONTROLLER. If the Controller has
28 recommended that a City department take disciplinary or other corrective action that the department
29 has declined to take, the department shall report to the Controller its reasons for failing to do so within
30 the timeframe that the Controller specifies for reporting on its investigation of the complaint. If the
31 Controller determines that the department's reasons are inadequate and that further investigation may

1 be appropriate, the Controller may refer the matter to the Mayor, City Attorney or District Attorney or
2 to any officer or agency that has jurisdiction over the matter.

3
4 (g) RESPONSIBILITY OF DEPARTMENTS. The department head shall be responsible for compliance by
5 his or her department with these duties. If department staff fail to comply with the duties to investigate
6 complaints referred by the Controller and to make the reports required by this Section, the Controller
7 shall notify the department head. If the department head fails to take action to obtain the department's
8 compliance with these duties, the Controller may refer the matter to the Mayor, City Attorney or District
9 Attorney or to any officer or agency that has jurisdiction over the matter.

10 (Added by Ord. 205-08, File No. 080019, 9/18/2008)

11
12 **SEC. 4.110. DEFINITIONS.**

13 For purposes of this Chapter, the following words and phrases shall have the following meanings:

14 (a) The term "City" means the City and County of San Francisco, its departments, commissions and
15 boards.

16 (b) The term "complainant's department" includes the complainant's supervisor, the executive
17 director or highest ranking officer in the complainant's department, and the board or commission
18 overseeing the complainant's department.

19 (c) The term "preliminary investigation" shall be limited to, but need not include: review of the
20 complaint and any documentary evidence provided with the complaint; interview of the complainant;
21 interview of the respondent, counsel to respondent and any witnesses who voluntarily agree to be
22 interviewed for this purpose; review of any relevant public documents and documents provided
23 voluntarily to the Commission.

24 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 29-02, File No. 020017, App.
25 3/15/2002)

26
27 **SEC. 4.115. PROTECTION OF WHISTLEBLOWERS.**

28 (a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote, suspend or take
29 other similar adverse employment action² against any City officer, ~~or~~ employee, or contractor operating
30 within the scope of a contract with the City and County of San Francisco because the officer, ~~or~~

² See draft Ethics Commission Regulation 4.115(a)-1, which proposes to further define "other similar adverse employment action."

1 employee, or contractor has in good faith (i) filed a complaint with the Ethics Commission, Controller,
2 District Attorney or City Attorney, or ~~a written complaint~~ with any supervisory employee at the
3 complainant's department or at another City, County, state or federal agency, alleging that a City officer
4 or employee engaged in improper government activity by or contractor operating pursuant to a contract
5 with the City and County of San Francisco, by: violating local campaign finance, lobbying, conflicts of
6 interest or governmental ethics laws, regulations or rules; ~~violating the California Penal Code by~~
7 ~~misusing gross waste, fraud or abuse of~~ City resources; creating a specified and substantial danger to
8 public health or safety by failing to perform duties required by the officer or employee's City position; or
9 abusing his or her City position to advance a private interest, (ii) filed a complaint with the Controller's
10 Whistleblower Program, or (iii) provided any information or otherwise cooperated with any
11 investigation conducted under this Chapter.

12

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

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

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

29 A. Within [90] days of receiving a referral from the Ethics Commission under this Subsection
30 for investigation and possible disciplinary or enforcement action, or such other time as the
31 Ethics Commission shall specify, the City department shall report to the Ethics Commission in

1 writing the results of the department's investigation and any action that the department has
2 taken in response to the Ethics Commission's referral.

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

7 (iii) **Burden of Establishing Retaliation.** In order to establish that retaliation occurred under this
8 Section, a complainant in a civil action must demonstrate, or the Ethics Commission in an
9 administrative proceeding must demonstrate determine, by a preponderance of the evidence that
10 the complainant's engagement in activity protected under Subsection (a) was a substantial
11 motivating factor for the adverse employment action. The employer may rebut this claim if it
12 demonstrates by a preponderance of the evidence that it would have taken the same employment
13 action irrespective of the complainant's participation in protected activity.

14
15 (c) PENALTIES **AND REMEDIES.**

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

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

22 (iv) **Civil Penalties.** Any City officer or employee who violates Subsection (a) of this Section may be
23 personally liable in a civil action authorized under Subsection (b)(ii) of this Section for a civil penalty not
24 to exceed ~~\$5,000~~ \$10,000 and increase annually with the rate of inflation.

25 (v) **Cancellation of Retaliatory Job Action.** Following an administrative hearing pursuant to Charter
26 Section C3.699-13 and making a finding of a violation of Subsection (a), the Ethics Commission may issue
27 an order calling for the cancellation of a retaliatory employment termination, demotion, suspension or
28 other similar adverse employment action taken against any City officer or employee who exercised his
29 or her right to protection under this Ordinance.

30 (d) RESERVATION OF AUTHORITY.

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

1 (ii) **Appointing Authority.** Nothing in this Section shall interfere with the power of an appointing
2 officer, manager, or supervisor to take action with respect to any City officer or employee, provided that
3 the appointing officer, manager, or supervisor reasonably believes that such action is justified on facts
4 separate and apart from the fact that the officer or employee filed a complaint with, or cooperated
5 with, an Ethics Commission investigation of such complaint; or filed a complaint with or provided
6 information to the Controller, District Attorney, City Attorney; or provided to any supervisory employee
7 at the complainant's department or at another city, County, state or federal agency, a complaint alleging
8 improper government activity by a that a City officer or employee engaged in improper government
9 activity by or contractor operating pursuant to a contract with the City and County of San Francisco.

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

13 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 29-02, File No. 020017, App.
14 3/15/2002; Ord. 205-08, File No. 080019, 9/18/2008)

15
16 **SEC. 4.120. CONFIDENTIALITY.**

17 (a) WHISTLEBLOWER IDENTITY. Any individual who files a complaint under Section 4.105 of this
18 Chapter may elect to have his or her identity kept confidential as provided by Charter Section C3.699-
19 13(a). Such election must be made at the time the complaint is filed.

20
21 (b) COMPLAINTS AND INVESTIGATIONS. The Ethics Commission shall treat as confidential complaints
22 made under Section 4.105 of this Chapter, and related information, including but not limited to
23 materials gathered and prepared in the course of investigation of such complaints, and deliberations
24 regarding such complaints, as provided by Charter Section C3.699-13(a).

25
26 (c) SANCTIONS FOR DISCLOSURE. Excepting circumstances described in Sec. 4.120(d)(i), any City
27 officer or employee who discloses the identity of any complainant who has elected to have his or her
28 identity kept confidential and who wishes to remain anonymous to the extent permitted by law may be
29 subject to an administrative enforcement action and administrative penalty authorized in Charter
30 Section C3.699-13 for violating the confidentiality protections of this ordinance or SFC&GC Code Sec.
31 3.228.

1 ~~(c)~~ (d) EXCEPTIONS.

2 (i) **Conduct of Investigations.** Nothing in this Section shall preclude the Ethics Commission from
3 disclosing the identity of an individual or other information to the extent necessary to conduct its
4 investigation.

5 (ii) **Referrals.** Nothing in this Section shall preclude the Ethics Commission from referring any matter
6 to any other City department, commission, board, officer or employee, or to other government agencies
7 for investigation and possible disciplinary or enforcement action.

8 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000)

9

10 **SEC. 4.123. CONFIDENTIALITY PROTECTION FOR WHISTLEBLOWER PROGRAM COMPLAINANTS AND**
11 **INVESTIGATIONS.**

12 (a) WHISTLEBLOWER IDENTITY AND INVESTIGATIONS. Every officer and employee of the City shall
13 keep confidential:

14 (i) The identity of any person who makes a complaint to the Whistleblower Program under
15 Section 4.107 of this Chapter, and any information that would lead to the disclosure of the person's
16 identity, unless the person who made the complaint provides written authorization for the disclosure.

17 (ii) Complaints or reports to the Whistleblower Program and information related to the
18 investigation of the matter, including drafts, notes, preliminary reports, working papers, records of
19 interviews, communications with complainants and witnesses, and any other materials and information
20 gathered or prepared in the course of the investigation.

21 The protection of confidentiality set forth in this Section applies irrespective of whether the
22 information was provided in writing and whether the information was provided or is maintained in
23 electronic, digital, paper or any other form or medium.

24

25 (b) INQUIRY REGARDING IDENTITY PROHIBITED. In order to assure effective implementation of the
26 provisions of this Section providing confidentiality to whistleblowers, City officers and employees may
27 not use any City resources, including work time, to ascertain or attempt to ascertain directly or indirectly
28 the identity of any person who has made a complaint to the Whistleblower Program, unless such person
29 has provided written authorization for the disclosure. Nothing in this Section shall preclude an officer or
30 employee assigned to investigate a complaint under this Chapter from ascertaining the identity of a
31 complainant to the extent necessary to conduct the investigation.

32

1 (c) EXCEPTIONS. Nothing in this Section shall preclude the Controller from (i) disclosing the identity of
2 a person or other information to the extent necessary to conduct a civil or criminal investigation or to
3 take any enforcement action, including any action to discipline an employee or take remedial action
4 against a contractor, or (ii) releasing information as part of a referral when referring any matter to
5 another City department, commission, board, officer or employee, or to other governmental agencies,
6 for investigation and possible disciplinary, enforcement or remedial action, or (iii) releasing information
7 to the Citizens Audit Review Board so that it may carry out its duty to provide advisory input to the
8 Controller on the Whistleblower Program, provided that information is prepared so as to protect the
9 confidentiality of persons making complaints and of investigations, or (iv) releasing information to
10 inform the public of the nature of the actions taken by the Controller in the operation of the
11 Whistleblower Program provided that information is prepared so as to protect the confidentiality of
12 persons making complaints and of investigations.

13 (Added by Ord. 205-08, File No. 080019, 9/18/2008)

14

15 **SEC. 4.125. FURNISHING FALSE OR MISLEADING INFORMATION; DUTY TO COOPERATE.**

16 (a) FURNISHING FALSE OR MISLEADING INFORMATION PROHIBITED. When making or filing a
17 complaint pursuant to this Chapter or participating in an investigation conducted by the Controller,
18 Ethics Commission, District Attorney, City Attorney or any other department or commission, or any of
19 their agents, as authorized under this Chapter, City officers and employees may not knowingly and
20 intentionally furnish false or fraudulent evidence, documents, or information, misrepresent any material
21 fact, or conceal any evidence, documents or information for the purpose of misleading any officer or
22 employee or any of their agents.

23 (b) COOPERATION REQUIRED. All City departments, commissions, boards, officers and employees
24 shall cooperate with and provide full and prompt assistance to the Controller, Ethics Commission,
25 District Attorney, City Attorney, and all other commissions and departments, and any of their agents, in
26 carrying out their duties under this Chapter.

27 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000; Ord. 205-08, File No. 080019, 9/18/2008)

28

29 **SEC. 4.130. REPORTS TO THE BOARD OF SUPERVISORS.**

30 The Ethics Commission shall provide an annual report to the Board of Supervisors which shall include
31 the following:

32 (1) The number of complaints received;

- 1 (2) The type of conduct complained about;
- 2 (3) The number of referrals to the Civil Service Commission, other City departments, or other
- 3 government agencies;
- 4 (4) The number of investigations the Ethics Commission conducted;
- 5 (5) Findings or recommendations on policies or practices resulting from the Ethics Commission's
- 6 investigations;
- 7 (6) The number of disciplinary actions taken by the City as a result of complaints made to the Ethics
- 8 Commission; and
- 9 (7) The number and amount of administrative penalties imposed by the Ethics Commission as a result
- 10 of complaints made to the Commission.

11 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000)

12

13 **SEC. 4.135. LIMITATION OF LIABILITY.**

14 In adopting and enforcing this Chapter, the City undertakes to promote the general welfare. The City is
15 not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is
16 liable in money damages.

17 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000)

18

1 **F1.107. CITIZENS' COMPLAINTS; WHISTLEBLOWERS.**
2

3 (a) The Controller shall have the authority to receive individual complaints concerning the quality and
4 delivery of government services, wasteful and inefficient City government practices, misuse of City
5 government funds, and improper activities by City government officers and employees. When
6 appropriate, the Controller shall investigate and otherwise attempt to resolve such individual complaints
7 except for those which:

8 (1) another City agency is required by federal, state, or local law to adjudicate,

9 (2) may be resolved through a grievance mechanism established by collective bargaining agreement
10 or contract,

11 (3) involve allegations of conduct which may constitute a violation of criminal law, or

12 (4) are subject to an existing, ongoing investigation by the District Attorney, the City Attorney, or
13 the Ethics Commission, where either official or the Commission states in writing that investigation by
14 the Controller would substantially impede or delay his, her, or its own investigation of the matter.

15 If the Controller receives a complaint described in items (1), (2), (3), or (4) of this paragraph, the
16 Controller shall advise the complainant of the appropriate procedure for the resolution of such
17 complaint.

18 (b) If the Controller receives a complaint alleging conduct that may constitute a violation of criminal
19 law or a governmental ethics law, he or she shall promptly refer the complaint regarding criminal
20 conduct to the District Attorney or other appropriate law enforcement agency and shall refer complaints
21 regarding violations of governmental ethics laws to the Ethics Commission and the City Attorney.
22 Nothing in this Section shall preclude the Controller from investigating whether any alleged criminal
23 conduct also violates any civil or administrative law, statute, ordinance, or regulation.

24 (c) Notwithstanding any provision of this Charter, including, but not limited to Section C3.699-11, or
25 any ordinance or regulation of the City and County of San Francisco, the Controller shall administer a
26 whistleblower and citizen complaint hotline telephone number and website and publicize the hotline
27 and website through press releases, public advertising, and communications to City employees. The
28 Controller shall receive and track calls and emails related to complaints about the quality and delivery of
29 government services, wasteful and inefficient City government practices, misuse of government funds
30 and improper activities by City government officials, employees and contractors and shall route these
31 complaints to the appropriate agency subject to subsection (a) of this Section. The Board of Supervisors
32 shall enact and maintain an ordinance protecting the confidentiality of whistleblowers, and protecting
33 City officers and employees from retaliation for filing a complaint with, or providing information to, the
34 Controller, Ethics Commission, District Attorney, City Attorney or a City department or commission
35 about improper government activity by City officers and employees. The City may incorporate all
36 whistleblower functions set forth in this Charter or by ordinances into a unified City call center,
37 switchboard, or information number at a later time, provided the supervision of the whistleblower
38 function remains with the Controller and its responsibilities and function continue unabridged.

39 (Added November 2003)
40

1 **DRAFT REGULATIONS**
2 **OF AMENDED WHISTLEBLOWER PROTECTION ORDINANCE PROPOSED ABOVE**
3 *(Note: Regulations Below Assume Amendments That Appear in Underlined Text on pp. 3-14)*

4
5
6 **Regulation 4.105(a)-1. Complaint Submissions.**

7
8 (a) A “complaint” can be any formal or informal writing such as a letter, email or other written
9 communication sufficient to convey what the complainant reasonably believes evidences
10 improper government activity by a city official, employee or contractor operating pursuant to a
11 contract with the City and County of San Francisco. A “complaint” can also include an oral
12 communication recorded in writing by the recipient of the complaint.

13
14 **Regulation 4.115(a)-1. Other Similar Adverse Employment Actions.**

15 (a) An “other similar adverse employment action” includes effecting any reprisal; or taking or
16 directing others to take, or recommending, processing, or approving, any personnel action,
17 including but not limited to, appointment, promotion, transfer, assignment, performance
18 evaluation, suspension, or other disciplinary action.

19
20 **Ethics Commission Enforcement Regulation IV.A(1) – Whistleblower Retaliation Complaint**
21 **Timeframes and Report to Commission**

22 (a) Ethics Commission Staff will initiate a preliminary review of any complaint it receives that
23 alleges retaliation under Campaign & Gov't Conduct Code, Article IV, Chapter 1, § 4.100, et seq.
24 within two business days of receiving the complaint, and will work to complete the preliminary
25 review within 90 days of receipt.

26 (b) No less than quarterly, the Executive Director shall provide a summary to the Commission of
27 the status of all complaints received that allege Whistleblower retaliation that remain under
28 preliminary review, and for matters that have been pending for over 90 days, an explanation for
29 why the Ethics Commission Staff has not completed the preliminary review and a target date for
30 its completion.

1 (c) Ethics Commission Staff will notify any complainant who has alleged retaliation under
2 Campaign & Gov't Conduct Code, Article IV, Chapter 1, § 4.100, et seq. and whose complaint
3 remains under preliminary review 90 days after receipt of that complaint that it remains under
4 preliminary review. To preserve the confidentiality of Commission investigations, the
5 notification shall not provide a progress report or further detail about the matter, but may
6 request additional information from the complainant as necessary for purposes of conducting
7 the preliminary review.

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