



# ETHICS COMMISSION

## CITY AND COUNTY OF SAN FRANCISCO

PETER KEANE  
CHAIRPERSON

DAINA CHIU  
VICE-CHAIRPERSON

PAUL A. RENNE  
COMMISSIONER

QUENTIN L. KOPP  
COMMISSIONER

YVONNE LEE  
COMMISSIONER

LEEANN PELHAM  
EXECUTIVE DIRECTOR

**Date:** January 16, 2018

**To:** San Francisco Ethics Commission

**From:** Kyle Kundert, Senior Policy Analyst

**Re:** **AGENDA ITEM 4 - Staff Memorandum regarding the status of the Whistleblower Protection Ordinance and possible Commission action.**

**Summary** This Memorandum provides a status update on the Whistleblower Protection Ordinance and requests further action by the Commission to advance its likelihood of enactment into law.

**Action Requested** Staff recommends that the Commission approve the Whistleblower Protection Ordinance provided at Attachment 2.

### Background

Following its review and analysis of the substantive recommendations contained in the 2014-2015 San Francisco Civil Grand Jury report ("Jury Report"), the Ethics Commission proposed changes to strengthen and clarify the City's Whistleblower Protection Ordinance (San Francisco Campaign & Governmental Conduct Code § 4.100 *et seq.*, or "WPO"). The Commission adopted proposed amendments to the WPO at its meeting on March 28, 2016, and transmitted them to the Board of Supervisors (BOS) on April 11, 2016, for enactment. Throughout this Memorandum, Staff refers to the Commission's original proposal as the 2016 WPO and provides it as Attachment 1 to this Memorandum. BOS President London Breed introduced the WPOs sponsor of the legislation on June 14, 2016 (File No.160689).

Almost immediately after introducing the WPO as approved by the Commission, Supervisor Breed requested that Staff engage the Controller's Office, Department of Human Resources, and the City's bargain units to determine whether any of those departments had comments regarding the Commission's proposed changes. Over the next several months and into early 2017, Staff engaged the Controller's Office, the Department of Human Resources, and interested bargaining units as requested by Supervisor Breed. Responding to constructive comments from those entities, Staff developed revised WPO language to reflect those changes, which are discussed in detail below. DHR is now working with Staff and the bargaining units to schedule the final meet and confer meeting regarding the latest version of the WPO, which Staff will refer to as the 2017 WPO herein. The 2017 WPO is provided as Attachment 2 to this Memorandum.

Due to time needed for Staff's ongoing discussions with its partner agencies, Supervisor Breed listed the 2016 WPO as inactive on October 2, 2017, pursuant to BOS Rule 3.41. As sponsor of

the legislation, President Breed has the ability to re-introduce either the 2016 WPO or the revised 2017 WPO at any time.

Staff summarizes and compares the two versions of the WPO below and provides a redlined/track changed version of the 2017 WPO as Attachment 3, so the Commission may review the proposed changes in detail.

### **The 2016 Version**

As adopted by the Commission in March of 2016, the proposed amendments to the Whistleblower Protection Ordinance would have:

1. Expanded whistleblower retaliation protections to include contractors operating within the scope of a contract with the City and County for activities covered by the WPO.
2. Strengthened the law by clarifying and expanding the types of “improper governmental activities” complaints that are subject to protection against retaliation to include alleged “gross waste, fraud and abuse of City resources.”
3. Strengthened accountability for investigations into alleged whistleblower retaliation by adding a new requirement that departments report to the Ethics Commission the results of a departmental investigation and actions taken in response to any Ethics Commission referral.
4. Clarified where the “preponderance of the evidence” standard applies in establishing that retaliation occurred: only in a civil action or an administrative proceeding before the Ethics Commission, not in the process of investigating the complaint.
5. Expanded remedies for retaliatory employment actions by authorizing the Ethics Commission to issue an Order following an administrative hearing in which a violation was found that calls for the cancellation of a retaliatory action.
6. Created new sanctions for the knowing disclosure of a Whistleblower’s identity to reinforce confidentiality provisions.
7. Expanded whistleblower retaliation protections to include covered complaints filed with a supervisory employee at any city, county, state or federal agency, not just those filed with their own department.

### **The 2017 Version**

After engaging the Controller’s Office, Department of Human Resources, and interested bargaining units, the 2017 version of the WPO that reflects feedback from these discussions also would accomplish 1-6 above. The 2017 WPO proposes a change to narrow the agencies with whom whistleblower complainants could file complaints to exclude state and federal agencies.

In discussions following the introduction of the 2016 WPO, the Controller’s Office and Department of Human Resources argued that encouraging complainants to file complaints alleging City waste outside the City would be nearly impossible to track and investigate. For the offices charged with investigating waste within the City, having firsthand information from the witness is paramount to a successful investigation. Moreover, most of the state or federal agencies with whom whistleblowers may file complaints alleging City waste would provide separate protection from retaliation under the applicable state and federal law. Finally, state and federal agencies are often prohibited from sharing information about an investigation with City officials. Therefore, complaints alleging retaliation would be difficult to investigate due to the lack of complete information. Based on its own additional investigative

experience and further assessment, Staff found this proposed change to be constructive and supports the revised version reflecting this change.

Notwithstanding this revision of one provision in the 2016 WPO, the 2017 WPO also would add the following, which that Staff believes would further clarify and strengthen the WPO's effectiveness in practice:

1. Expands the scope of protection for retaliation to include protection for employees who attempted to file a complaint in good faith with the required procedures set forth in the WPO, but did not file the complaint with the appropriate City department or official.
2. Requires supervisors to obtain training from the Controller, Ethics Commission, and DHR regarding their obligations under the WPO.
3. Expands investigatory authority for the Whistleblower Program to handle complaints alleging "improper government activity," to broadly include alleged violations of "any federal, state, or local law, regulation, or rule."
4. Clarifies that the WPO delineates responsibilities for two different functions of City government: the investigation of whistleblower complaints by the Controller's Whistleblower Program and separately the investigation of complaints alleging retaliation for engaging in protected activity by the Ethics Commission;
5. Incorporates the definition of "supervisor" from state law to eliminate any confusion among employees regarding who is obligated to assist employees with the filing of complaints alleging retaliation.
6. Obligates supervisors to complete a form proscribed by the Commission to assist them with the referral of complainants and complaints to the appropriate intake agency.
7. Permits the Commission to recommend—rather than cancel—retaliatory employment actions to ensure the Commission's official actions comply with existing City and state law as well as effective Memoranda of Understanding with the City's bargaining units.
8. Eliminates the Commission's authority to increase by regulation the civil penalties available to the City Attorney's Office to protect the Commission from legal liability for exercising authority beyond our statutory mandate.
9. Requires that any City officer or employee who retaliates against a City contractor for engaging in protected activity be disciplined.
10. Requires City officers and employees to treat as confidential the identity of any person who files a complaint under the WPO, as well as the investigative findings of an investigation into the whistleblower complaint.

DHR's Labor Relations Division and the City's Attorney's Office have concluded that the WPO is subject to meet and confer for two reasons. First, the proposed provision that would require supervisors in the City receive training on their obligations under the WPO affects their obligations under City law. Second, the proposed provision that would subject supervisors to administrative penalties for failing to refer to complaints alleging retaliation to the Ethics Commission affects their rights under City law.

### **Recommendation**

In its 2015 report, *San Francisco's Whistleblower Protection Ordinance is in Need of Change*, the Civil Grand Jury recommended (R.1.3) that if the Ethics Commission proposed amendments to the WPO and the Board failed to act within a reasonable time, then the Commission consider submitting such an

amendment directly to the voters pursuant to its authority under Charter Section 15.102. Staff has confirmed with the City Attorney's Office that the Commission has authority to submit certain amendments to the WPO involving governmental ethics laws to the voters; however, several of the substantive changes proposed by the Commission would fall outside the general governmental ethics framework. Therefore, Staff would need to analyze which provisions would qualify for Commission action and which would need to be removed before the Commission could place the WPO on the ballot. In addition, Staff has confirmed with the City Attorney's Office that an ordinance enacted by ballot measure is subject to meet and confer requirements, which must be satisfied *before* the Commission votes to place the WPO on the ballot.

To initiate the good faith negotiations with the City's bargaining units and move the most effective WPO possible toward enactment into law, Staff recommends that the Commission act to approve the 2017 version of the WPO, which is provided as Attachment 2. The 2017 WPO reflects changes requested by the Controller's Office, Department of Human Resources, and the City's interested bargaining units, and Staff agrees those changes would strengthen the overall effectiveness of the WPO in practice.

**ATTACHMENT 1**  
**Proposed Whistleblower Ordinance Amendments**  
Adopted by the Ethics Commission at its Regular Meeting on March 28, 2016

**SAN FRANCISCO WHISTLEBLOWER PROTECTION ORDINANCE**

**CHAPTER 1:**

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

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

**SEC. 4.100. FINDINGS.**

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

This Chapter protects all City officers, ~~and employees,~~ and contractors operating within the scope of a contract with the City and County of San Francisco, from retaliation (1) for filing a complaint with, or providing information to, the Ethics Commission, Controller, District Attorney, City Attorney, ~~or~~ (2) for 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, deficiencies in the quality and delivery of government services, and wasteful and inefficient City government practices.

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

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

(a) COMPLAINTS. Any person may file a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or with any supervisory employee at the complainant's department or at another City, County, state or federal agency, alleging that a City officer, employee or contractor operating pursuant to a contract with the City and County of San Francisco has engaged in improper government activity. ~~alleging that a City officer or employee has engaged in improper government activity by~~ Improper government activity means violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; ~~violating the California Penal Code by~~ misusing gross waste, fraud and abuse of 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.

(b) ETHICS COMMISSION COMPLAINT PROCEDURES. The Ethics Commission shall investigate complaints filed under this Section that allege violations of local campaign finance lobbying, conflicts of interest and governmental ethics laws pursuant to the procedures specified in Charter Section C3.699-13 and the regulations adopted thereunder. 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 require that any City department, commission, board, officer or employee report to the Ethics Commission on the referred matter.

(c) REFERRAL. The Ethics Commission shall refer complaints that do not allege a violation of law, regulation or rule that is within the Ethics Commission's jurisdiction to the appropriate agency for investigation and possible disciplinary or enforcement action. The Commission may conduct preliminary investigations into such complaints to determine whether the complaint contains sufficient information to warrant referral. The Ethics Commission may require that any City department, commission, board, officer or employee report to the Ethics Commission on the referred matter.

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

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

(a) WHISTLEBLOWER PROGRAM. The Controller shall administer and publicize a whistleblower and citizen complaint program for citizens and employees to report 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. Subject to subsection (b), the Controller shall investigate and otherwise attempt to resolve complaints reported to the Whistleblower Program. The Controller shall administer a hotline telephone number and website and publicize the hotline and website through press releases, public advertising and communications to City employees.

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

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

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

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

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

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

16 Where the conduct that is the subject of the complaint may violate criminal law and any civil or  
17 administrative law, statute, ordinance or regulation, the Controller may take action on the noncriminal  
18 aspects of the matter under this Section even if a referral has been made to another agency under this  
19 Section.

20 If a complaint is referred under this Section, the Controller shall inform the complainant of the  
21 appropriate procedure for the resolution of the complaint.  
22

23 (c) TRACKING AND INVESTIGATION. The Controller shall receive, track and investigate complaints  
24 made or referred to the Whistleblower Program. The investigation may include all steps that the  
25 Controller deems appropriate, including the review of the complaint and any documentary or other  
26 evidence provided with it, the gathering of any other relevant documents from any City department or  
27 other source, and interviews of the complainant and other persons with relevant information.  
28

29 (d) INFORMATION PROVIDED UNDER PENALTY OF PERJURY. In those instances in which the Controller  
30 deems it appropriate, the Controller may require that persons making complaints or providing  
31 information swear to the truth of their statements by taking an oath administered by the Controller, or  
32 an agent of the Controller, or through written declarations made under penalty of perjury under the  
33 laws of the State of California.  
34

35 (e) REFERRAL AND RECOMMENDATION BY CONTROLLER. The Controller may refer the complaint to a  
36 City department for investigation, either before conducting an initial investigation or after doing so, and  
37 may recommend that a City department take specific action based on the Controller's initial  
38 investigation. Within 60 days of receiving a complaint for investigation or a recommendation by the  
39 Controller for specific action, or such other time as the Controller shall specify, the City department shall  
40 report to the Controller in writing the results of the department's investigation and any action that the

1 department has taken in response to a recommendation by the Controller that the department take  
2 specific action.

3  
4 (f) REPORT BY DEPARTMENT AND FURTHER ACTION BY CONTROLLER. If the Controller has  
5 recommended that a City department take disciplinary or other corrective action that the department  
6 has declined to take, the department shall report to the Controller its reasons for failing to do so within  
7 the timeframe that the Controller specifies for reporting on its investigation of the complaint. If the  
8 Controller determines that the department's reasons are inadequate and that further investigation may  
9 be appropriate, the Controller may refer the matter to the Mayor, City Attorney or District Attorney or  
10 to any officer or agency that has jurisdiction over the matter.

11  
12 (g) RESPONSIBILITY OF DEPARTMENTS. The department head shall be responsible for compliance by  
13 his or her department with these duties. If department staff fail to comply with the duties to investigate  
14 complaints referred by the Controller and to make the reports required by this Section, the Controller  
15 shall notify the department head. If the department head fails to take action to obtain the department's  
16 compliance with these duties, the Controller may refer the matter to the Mayor, City Attorney or District  
17 Attorney or to any officer or agency that has jurisdiction over the matter.

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

#### 19 20 **SEC. 4.110. DEFINITIONS.**

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

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

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

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

32 (Added by Ord. 71-00, File No. 000358, App. 4/28/2000; amended by Ord. 29-02, File No. 020017, App.  
33 3/15/2002)

#### 34 35 **SEC. 4.115. PROTECTION OF WHISTLEBLOWERS.**

36 (a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote, suspend or take  
37 other similar adverse employment action against any City officer, ~~or employee, or contractor operating~~  
38 within the scope of a contract with the City and County of San Francisco because the officer, ~~or~~  
39 employee, ~~or contractor~~ has in good faith (i) filed a complaint with the Ethics Commission, Controller,  
40 District Attorney or City Attorney, or ~~a written complaint with~~ any supervisory employee at the

complainant's department or at another City, County, state or federal agency, alleging that a City officer or employee engaged in improper government activity by or contractor operating pursuant to a contract with the City and County of San Francisco, by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; ~~violating the California Penal Code by~~ misusing gross waste, fraud or abuse of 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 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.

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.

(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 that retaliation occurred under this Section, a complainant in a civil action must demonstrate, or the Ethics Commission in an administrative proceeding must demonstrate 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. 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 AND REMEDIES.**

(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.

(iv) **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~~ \$10,000 and increase annually with the rate of inflation.

(v) **Cancellation of Retaliatory Job Action.** 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.

(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 provided to any supervisory employee at the complainant's department or at another city, County, state or federal agency, a complaint alleging improper government activity by a ~~that a City officer or employee engaged in improper government activity by or contractor operating pursuant to a contract with the City and County of San Francisco.~~

(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.

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

**SEC. 4.120. CONFIDENTIALITY.**

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

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

(c) **SANCTIONS FOR DISCLOSURE.** Excepting circumstances described in Sec. 4.120(d)(i), any City officer or employee who knowingly discloses the identity of any complainant who expressed the desire 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.

~~(c)~~ (d) **EXCEPTIONS.**

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

(ii) **Referrals.** Nothing in this Section 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (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

19 **F1.107. CITIZENS' COMPLAINTS; WHISTLEBLOWERS.**

20

21 (a) The Controller shall have the authority to receive individual complaints concerning the quality and

22 delivery of government services, wasteful and inefficient City government practices, misuse of City

23 government funds, and improper activities by City government officers and employees. When

24 appropriate, the Controller shall investigate and otherwise attempt to resolve such individual complaints

25 except for those which:

- 26 (1) another City agency is required by federal, state, or local law to adjudicate,
- 27 (2) may be resolved through a grievance mechanism established by collective bargaining agreement
- 28 or contract,
- 29 (3) involve allegations of conduct which may constitute a violation of criminal law, or
- 30 (4) are subject to an existing, ongoing investigation by the District Attorney, the City Attorney, or
- 31 the Ethics Commission, where either official or the Commission states in writing that investigation by
- 32 the Controller would substantially impede or delay his, her, or its own investigation of the matter.

33 If the Controller receives a complaint described in items (1), (2), (3), or (4) of this paragraph, the

34 Controller shall advise the complainant of the appropriate procedure for the resolution of such

35 complaint.

36 (b) If the Controller receives a complaint alleging conduct that may constitute a violation of criminal

37 law or a governmental ethics law, he or she shall promptly refer the complaint regarding criminal

38 conduct to the District Attorney or other appropriate law enforcement agency and shall refer complaints

39 regarding violations of governmental ethics laws to the Ethics Commission and the City Attorney.

1 Nothing in this Section shall preclude the Controller from investigating whether any alleged criminal  
2 conduct also violates any civil or administrative law, statute, ordinance, or regulation.

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

18 (Added November 2003)

19

20

**ATTACHMENT 2**  
Proposed Whistleblower Ordinance Amendments  
2017 Proposal

FILE NO.

ORDINANCE NO.

[Campaign and Governmental Conduct Code - Expanding Whistleblower Protections]

**Ordinance amending the Campaign and Governmental Conduct Code to broaden the scope of whistleblower complaints, provide retaliation protections for City contractors, increase the remedies available for whistleblowers who have suffered retaliation, and establish greater confidentiality protections for whistleblowers' identities.**

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
**Additions to Codes** are in single-underline italics Times New Roman font.  
**Deletions to Codes** are in ~~striketrough italics Times New Roman font~~.  
**Board amendment additions** are in double-underlined Arial font.  
**Board amendment deletions** are in ~~striketrough Arial font~~.  
**Asterisks (\* \* \* \*)** indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The Campaign and Governmental Conduct Code is hereby amended by revising Sections 4.100, 4.105, 4.107, 4.115, and 4.120, and adding a new Section 4.117, to read as follows:

**SEC. 4.100. FINDINGS.**

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

This Chapter 1 fulfills the Charter's requirements for two City programs relating to whistleblowers, as required by Charter Appendix Section F1.107. First, as required by the Charter, the Office of the Controller receives and investigates whistleblower complaints concerning deficiencies in

1 the quality and delivery of City government services, wasteful and inefficient City government  
2 practices, misuse of City funds, and improper activities by City officers, employees, and contractors.

3 Second, as required by the Charter, this ordinance protects the confidentiality of  
4 whistleblowers, and protects City officers and employees from retaliation for filing whistleblower  
5 complaints or providing assistance with the investigation of such complaints. As set forth in this  
6 Chapter 1, the Ethics Commission has primary responsibility for ensuring such protections.

7 This Chapter protects all City officers and employees from retaliation for filing a complaint  
8 with, or providing information to, the Ethics Commission, Controller, District Attorney, City Attorney  
9 or complainant's department about improper government activity by City officers and employees.

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

13 Finally, this Chapter implements Charter Appendix Section F1.107. Section F1.107 directs the  
14 Controller, as City Services Auditor, to administer a whistleblower program and investigate reports of  
15 complaints concerning the misuse of City funds, improper activities by City officers and employees,  
16 deficiencies in the quality and delivery of government services, and wasteful and inefficient City  
17 government practices.

18  
19 **SEC. 4.105. COMPLAINTS ~~OF IMPROPER GOVERNMENT ACTIVITY~~;**  
20 **INVESTIGATION PROCEDURES; REFERRAL TO OTHER AGENCIES.**

21 (a) COMPLAINTS. Any person may file a complaint for investigation with the Office of  
22 the Controller's Whistleblower Program, Ethics Commission, ~~Controller~~, District Attorney, ~~or~~ City  
23 Attorney, or ~~a written complaint with~~ the complainant's department alleging that a City officer or  
24 employee has engaged in improper government activity, misused City funds, caused deficiencies  
25 in the quality and delivery of government services or engaged in wasteful and inefficient government

1 practices, or that a City contractor or employee of a City contractor has engaged in unlawful activity in  
2 connection with a City contract. by: violating local campaign finance, lobbying, conflicts of interest or  
3 governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City  
4 resources; creating a specified and substantial danger to public health or safety by failing to perform  
5 duties required by the officer or employee's City position; or abusing his or her City position to  
6 advance a private interest.

7 (b) ETHICS COMMISSION COMPLAINT PROCEDURES. The Ethics Commission  
8 shall investigate complaints filed under this Section 4.105 that ~~allege~~ contain potential violations  
9 of local campaign finance, lobbying, conflicts of interest, and governmental ethics laws  
10 pursuant to the procedures specified in Charter Section C3.699-13 and the regulations  
11 adopted thereunder. Nothing in this subsection (b) shall preclude the Ethics Commission from  
12 referring any matter to any other City department, commission, board, officer, or employee or  
13 to other government agencies for investigation and possible disciplinary or enforcement  
14 action. The Ethics Commission may require that any City department, commission, board,  
15 officer, or employee report to the Ethics Commission on the referred matter.

16 (c) REFERRAL. The Ethics Commission shall refer complaints that do not allege a  
17 violation of law, regulation or rule that is within the Ethics Commission's jurisdiction to the  
18 appropriate agency for investigation and possible disciplinary or enforcement action. The  
19 Commission may conduct preliminary investigations into such complaints to determine  
20 whether the complaint contains sufficient information to warrant referral. The Ethics  
21 Commission may require ~~that~~ any City department, ~~commission, board, officer or employee to~~  
22 provide a written report regarding the department's investigation and any action that the department  
23 has taken in response to the Ethics Commission's referral within a time-frame that the Ethics  
24 Commission shall specify. ~~report to the Ethics Commission on the referred matter.~~

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

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

11           (b) REFERRAL OF CERTAIN COMPLAINTS. The Controller shall refer the following  
12 complaints as set forth in this ~~sub~~Section (b):

13           ~~(i)~~ (1) Those which another City agency is required by federal, state, or local law  
14 to adjudicate: To that agency;

15           ~~(ii)~~ (2) Those which may be resolved through a grievance mechanism  
16 established by collective bargaining agreement or contract: To the official or agency  
17 designated in the agreement or contract;

18           ~~(iii)~~ (3) Those which involve allegations of conduct which may constitute a  
19 violation of criminal law: To the District Attorney or other appropriate law enforcement  
20 agency;

21           ~~(iv)~~ (4) Those which are subject to an existing, ongoing investigation by the  
22 District Attorney, City Attorney, or Ethics Commission, where the applicable official or  
23 Commission states in writing that investigation by the Controller would substantially impede or  
24 delay his, her, or its own investigation of the matter: To the investigating office; and  
25

1           ~~(+)~~ (5) Those which allege conduct that may constitute a violation of local  
2   campaign finance, lobbying, conflict of interest, or governmental ethics laws, regulations, or rules:  
3   To the Ethics Commission and the City Attorney.

4           Where the conduct that is the subject of the complaint may violate criminal law  
5   and any civil or administrative law, statute, ordinance, or regulation, the Controller may take  
6   action on the noncriminal aspects of the matter under this Section 4.107 even if a referral has  
7   been made to another agency under this ~~sub~~Section (b).

8           If a complaint is referred under this ~~sub~~Section (b), the Controller shall inform  
9   the complainant of the appropriate procedure for the resolution of the complaint.

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

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

21          (e) REFERRAL AND RECOMMENDATION BY CONTROLLER. The Controller may  
22   refer the complaint to a City department for investigation, either before conducting an initial  
23   investigation or after doing so, and may recommend that a City department take specific  
24   action based on the Controller's initial investigation. Within 60 days of receiving a complaint  
25   for investigation or a recommendation by the Controller for specific action, or such other time

1 as the Controller shall specify, the City department shall report to the Controller in writing the  
2 results of the department's investigation and any action that the department has taken in  
3 response to a recommendation by the Controller that the department take specific action.

4 (f) REPORT BY DEPARTMENT AND FURTHER ACTION BY CONTROLLER. If the  
5 Controller has recommended that a City department take disciplinary or other corrective  
6 action that the department has declined to take, the department shall report to the Controller  
7 its reasons for failing to do so within the ~~timeframe~~ time frame that the Controller specifies for  
8 reporting on its investigation of the complaint. If the Controller determines that the  
9 department's reasons are inadequate and that further investigation may be appropriate, the  
10 Controller may refer the matter to the Mayor, City Attorney, or District Attorney, or to any  
11 officer or agency that has jurisdiction over the matter.

12 (g) RESPONSIBILITY OF DEPARTMENTS. The department head shall be  
13 responsible for compliance by his or her department with these duties. If department staff fail  
14 to comply with the duties to investigate complaints referred by the Controller and to make the  
15 reports required by this Section 4.107, the Controller shall notify the department head. If the  
16 department head fails to take action to obtain the department's compliance with these duties,  
17 the Controller may refer the matter to the Mayor, City Attorney, or District Attorney, or to any  
18 officer or agency that has jurisdiction over the matter.

19 **SEC. 4.110. DEFINITIONS.**

20 For purposes of this Chapter I, the following words and phrases shall have the  
21 following meanings:

22 ~~(a) The term~~ "City" or "City agency" shall mean~~s~~ the City and County of San Francisco,  
23 its departments, commissions, task forces, committees, and boards.

1           ~~(b) The term~~ "Complainant's department" includes the complainant's supervisor, the  
2 executive director or highest ranking officer in the complainant's department, and the board or  
3 commission overseeing the complainant's department.

4           "Deficiencies in the quality and delivery of government services" shall mean the failure to  
5 perform a service, when performance is required under any law, regulation or policy, or under a City  
6 contract or grant.

7           "Improper government activity" shall mean violation of any federal, state, or local law,  
8 regulation, or rule, including but not limited to laws, regulations, or rules governing campaign finance,  
9 conflicts of interest, or governmental ethics laws; or action which creates a danger to public health or  
10 safety by the failure of City officers or employees to perform duties required by their positions.

11          "Improper government activity" does not include employment actions for which other remedies exist.

12          "Misuse of City funds" shall mean any use of City funds for purposes outside of those directed  
13 by the City.

14          ~~(c) The term~~ "Preliminary investigation" shall be limited to, but need not include all of  
15 the following: review of the complaint and any documentary evidence provided with the  
16 complaint; interview of the complainant; interview of the respondent, counsel to respondent  
17 and any witnesses who voluntarily agree to be interviewed for this purpose; review of any  
18 relevant public documents and documents provided voluntarily to the Commission.

19          "Supervisor" shall mean any individual having the authority, on behalf of the City, to hire,  
20 transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or  
21 the responsibility to routinely direct them, to adjust their grievances, or to effectively recommend such  
22 action, if, in connection with the foregoing, the exercise of that authority is not merely routine or  
23 clerical, but requires the use of independent judgment.

24          "Unlawful activity" shall mean violations of any federal, state or local law, regulation or rule  
25 including but not limited to those laws, regulations or rules governing campaign finance, conflicts of

1 interest or governmental ethics laws; or actions which create a danger to public health or safety by the  
2 failure of City officers or employees to perform duties imposed by a City contract.

3 “Wasteful and inefficient City government practices” shall mean the expenditure of City funds  
4 that could be eliminated without harming public health or safety, or reducing the quality of government  
5 services.

6 **SEC. 4.115. PROTECTION OF WHISTLEBLOWERS - CITY EMPLOYEES.**

7 (a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote,  
8 suspend, or take other similar adverse employment action against any City officer or  
9 employee because the officer or employee has in good faith:

10 (i) (1) filed a complaint as set forth in Section 4.105(a); with the Ethics Commission,  
11 Controller, District Attorney or City Attorney, or a written complaint with the complainant's  
12 department, alleging that a City officer or employee engaged in improper government activity by:  
13 violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws,  
14 regulations or rules; violating the California Penal Code by misusing City resources; creating a  
15 specified and substantial danger to public health or safety by failing to perform duties required by the  
16 officer or employee's City position; or abusing his or her City position to advance a private interest; (ii)  
17 filed a complaint with the Controller's Whistleblower Program, or

18 (2) attempted to file a complaint through the procedures set forth in Section 4.105(a)  
19 but, in good faith, did not file the complaint with the appropriate City department or official; or

20 (iii) (3) provided any information in connection with or otherwise cooperated with  
21 any investigation conducted under this Chapter 1.

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

24 (i) (1) Administrative Complaints. Any ~~city~~ City officer or employee, or former  
25 ~~city~~ City officer or employee, who believes he or she has been the subject of retaliation in

1 violation of ~~§~~subsection (a) of this Section 4.115 may file a complaint with the Ethics  
2 Commission. The complaint must be filed no later than two years after the date of the alleged  
3 retaliation.

4 The Ethics Commission shall investigate complaints of violations of ~~§~~subsection  
5 (a) of this Section 4.115 pursuant to the procedures specified in ~~San Francisco~~ Charter Section  
6 C3.699-13 and the regulations adopted thereunder. The Ethics Commission may decline to  
7 investigate complaints alleging violations of ~~§~~subsection (a) if it determines that the same or  
8 similar allegations are pending with or have been finally resolved by another administrative or  
9 judicial body. Nothing in this ~~§~~subsection (b)(1) shall preclude the Ethics Commission from  
10 referring any matter to any other City department, commission, board, officer, or employee, or  
11 to other government agencies for investigation and possible disciplinary or enforcement  
12 action. The Ethics Commission may refer matters to the Department of Human Resources  
13 with a recommendation. The Ethics Commission may require ~~that~~ any City department,  
14 ~~commission, board, officer or employee~~ to provide a written report regarding the department's  
15 investigation and any action that the department has taken in response to the Ethics Commission's  
16 referral within a time frame that the Ethics Commission shall specify. ~~report to the Ethics Commission~~  
17 ~~on the referred matter.~~

18 ~~(ii)~~ (2) **Civil Complaints.** Any City officer or employee who believes he or she  
19 has been the subject of retaliation in violation of ~~§~~subsection (a) of this Section 4.115 may  
20 bring a civil action against the City officer or employee who committed the violation. Such  
21 action must be filed no later than two years after the date of the retaliation.

22 ~~(iii)~~ (3) **Burden of Establishing Retaliation.** In order to establish under this  
23 Section 4.115 that retaliation ~~occurred under this Section~~, a complainant in a civil action must  
24 demonstrate, or the Ethics Commission in an administrative proceeding must determine, by a  
25 preponderance of the evidence, that the complainant's engagement in activity protected under

1 § subsection (a) was a substantial motivating factor for the adverse employment action. The  
2 ~~employer respondent~~ may rebut this claim if ~~#~~ the respondent demonstrates by a preponderance  
3 of the evidence that he, she, or it would have taken the same employment action irrespective of  
4 the complainant's participation in protected activity.

5 (4) Duty to Assist with Retaliation Complaints. Supervisors who receive a complaint  
6 alleging retaliation under this Chapter 1 must keep the complaint confidential and immediately assist  
7 the complainant with the filing of a complaint with the Ethics Commission. In addition, supervisors  
8 who receive a complaint alleging retaliation must complete a referral form that will be developed by  
9 the Ethics Commission and made available on its website. Supervisors who fail to comply with this  
10 subsection (b) are subject to the penalties and remedies set forth in subsection (c).

11 (c) PENALTIES AND REMEDIES.

12 ~~(i)~~ (1) Charter Administrative Penalties. Any City officer or employee who  
13 violates § subsection (a) of this Section 4.115 may be subject to administrative penalties  
14 pursuant to Charter Section C3.699-13.

15 (2) Redress for Retaliatory Employment Action. Following an administrative hearing  
16 and after making a finding that an adverse employment action has been taken for purposes of  
17 retaliation, the Ethics Commission may, subject to the Charter's budgetary and civil service provisions,  
18 recommend the cancellation of the retaliatory termination, demotion, suspension or other adverse  
19 employment action.

20 ~~(ii)~~ (3) Discipline by Appointing Authority. Any City officer or employee who  
21 violates § subsections (a) or (b)(4) of this Section 4.115 shall be subject to disciplinary action up  
22 to and including dismissal by his or her appointing authority. If no disciplinary action is taken  
23 by the appointing authority, the Ethics Commission may refer the matter to the Civil Service  
24 Commission for action pursuant to Charter Section A8.341.

1           ~~(iii)~~ **(4) Civil Penalties.** Any City officer or employee who violates ~~§~~ subsection  
2 (a) of this Section 4.115 may be personally liable in a civil action authorized under ~~Subsection~~  
3 ~~(b)(ii)~~ subsection (b)(2) of this Section for a civil penalty not to exceed ~~\$5,000~~ \$10,000.

4           (d) RESERVATION OF AUTHORITY.

5           ~~(i)~~ **(1) Civil Service Commission.** Nothing in this Section 4.115 shall interfere  
6 with the powers granted to the Civil Service Commission by the ~~San Francisco~~ Charter.

7           ~~(ii)~~ **(2) Appointing Authority.** Nothing in this Section 4.115 shall interfere with  
8 the power of an appointing officer, manager, or supervisor to take action with respect to any  
9 City officer or employee, provided that the appointing officer, manager, or supervisor  
10 reasonably believes that such action is justified on facts separate and apart from the fact that  
11 the officer or employee filed a complaint as set forth in Section 4.105(a), attempted to file such a  
12 complaint in good faith, or cooperated with an investigation of such a complaint. ~~filed a complaint~~  
13 ~~with, or cooperated with, an Ethics Commission investigation of such complaint; or filed a complaint~~  
14 ~~with or provided information to the Controller, District Attorney, City Attorney or the complainant's~~  
15 ~~department.~~

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

19           (f) WHISTLEBLOWER PROTECTION AWARENESS TRAINING.

20           (1) The Controller, in collaboration with the Ethics Commission, shall prepare, and all  
21 City departments shall distribute, materials to publicize and promote whistleblower protections as part  
22 of each department's new hire training programs.

23           (2) The Ethics Commission, in collaboration with the Controller and Department of  
24 Human Resources, shall prepare, and all City departments shall distribute, materials to publicize and  
25 promote supervisors' responsibilities under this Chapter 1. In addition, the Department of Human

1 Resources, in collaboration with the Controller and Ethics Commission, shall prepare web-based  
2 training for supervisors regarding their responsibilities under this Chapter 1, which shall be  
3 implemented by January 1, 2018. This training must be provided to all City supervisors annually by  
4 April of each year thereafter.

Commented [AS1]: Will need to come up with new date

5 **SEC. 4.117. PROTECTION OF WHISTLEBLOWERS - CITY CONTRACTORS.**

6 (a) RETALIATION PROHIBITED. No City officer or employee may take steps to terminate a  
7 contract with a City contractor; refuse to use a City contractor for contracted services; request that a  
8 City contractor terminate, demote, or suspend one of its employees; or take other similar adverse  
9 action against any City contractor or employee of a City contractor because the contractor or the  
10 contractor's employee;

11 (1) filed a complaint with any supervisor within a City agency alleging that a City  
12 officer or employee engaged in improper government activity, misused City funds, caused deficiencies  
13 in the quality and delivery of government services, or engaged in wasteful and inefficient government  
14 practices;

15 (2) filed a complaint with any supervisor within a City agency alleging that another  
16 City contractor, or employee of another City contractor, engaged in unlawful activity, misused City  
17 funds, caused deficiencies in the quality and delivery of government services or engaged in wasteful  
18 and inefficient government practices; or

19 (3) provided any information in connection with or otherwise cooperated with any  
20 investigation conducted under this Chapter 1.

21 **(b) COMPLAINTS OF RETALIATION.**

22 (1) Administrative Complaints. Any City contractor or employee of a City contractor,  
23 who believes it, he, or she has been the subject of retaliation in violation of subsection (a) of this  
24 Section 4.117 may file a complaint with the Ethics Commission. The complaint must be filed no later  
25 than two years after the date of the alleged retaliation.

1           The Ethics Commission shall investigate complaints of violations of subsection (a) of  
2 this Section 4.117 pursuant to the procedures specified in Charter Section C3.699-13 and the  
3 regulations adopted thereunder. The Ethics Commission may decline to investigate complaints  
4 alleging violations of subsection (a) if it determines that the same or similar allegations are pending  
5 with or have been finally resolved by another administrative or judicial body. Nothing in this  
6 subsection shall preclude the Ethics Commission from referring any matter to any other City  
7 department, commission, board, officer, or employee, or to other government agencies for investigation  
8 and possible disciplinary or enforcement action. The Ethics Commission may refer matters to the  
9 Department of Human Resources with a recommendation. The Ethics Commission may require any  
10 City department to provide a written report regarding the department's investigation and any action  
11 that the department has taken in response to the Ethics Commission's referral, within a time frame that  
12 the Ethics Commission shall specify.

13           (2) **Burden of Establishing Retaliation.** In order to establish that retaliation occurred  
14 under this Section 4.117, the Ethics Commission in an administrative proceeding must determine, by a  
15 preponderance of the evidence, that the complainant's engagement in activity protected under  
16 subsection (a) was a substantial motivating factor for the adverse action. The respondent may rebut  
17 this claim if it demonstrates by a preponderance of the evidence that it would have taken the same  
18 adverse action irrespective of the complainant's participation in protected activity.

19           (c) **PENALTIES AND REMEDIES.**

20           (1) **Administrative Penalties.** Any City officer or employee who violates subsection (a)  
21 of this Section 4.117 may be subject to administrative penalties pursuant to Charter Section C3.699-13.

22           (2) **Redress for Retaliatory Adverse Action.** Following an administrative hearing and  
23 after making a finding that an adverse action has been taken for purposes of retaliation, the Ethics  
24 Commission may, subject to the Charter's budgetary and contracting provisions, order the cancellation  
25 of retaliatory adverse action taken against a City contractor or employee of a City contractor.

1 (3) **Discipline by Appointing Authority.** Any City officer or employee who violates  
2 subsection (a) of this Section 4.117 shall be subject to disciplinary action up to and including dismissal  
3 by his or her appointing authority. If no disciplinary action is taken by the appointing authority, the  
4 Ethics Commission may refer the matter to the Civil Service Commission for action pursuant to Charter  
5 Section A8.341.

6 (d) **NOTICE OF WHISTLEBLOWER PROTECTIONS.** The Controller shall prepare, and each  
7 City department shall post, a notice of the whistleblower protections established by this Section 4.117.  
8 City contractors shall distribute the notice of protections to all of their employees.

9  
10 **SEC. 4.120. CONFIDENTIALITY.**

11 (a) **WHISTLEBLOWER IDENTITY.** City officers and employees shall treat as confidential  
12 the identity of any person who files a complaint as set forth in Section 4.105(a). A complainant may  
13 voluntarily disclose his or her identity. Any individual who files a complaint under Section 4.105 of  
14 this Chapter may elect to have his or her identity kept confidential as provided by Charter Section  
15 C3.699-13(a). Such election must be made at the time the complaint is filed.

16 (b) **COMPLAINTS AND INVESTIGATIONS.** City officers and employees shall treat as  
17 confidential complaints filed under Sections 4.105, 4.115, and 4.117, and related information,  
18 including but not limited to materials gathered and prepared in the course of investigating such  
19 complaints, and deliberations regarding such complaints. The Ethics Commission shall treat as  
20 confidential complaints made under Section 4.105 of this Chapter, and related information, including  
21 but not limited to materials gathered and prepared in the course of investigation of such complaints,  
22 and deliberations regarding such complaints, as provided by Charter Section C3.699-13(a).

23 (c) **PENALTIES.** Except as provided in subsection (d), violations of subsections (a) and (b)  
24 may be subject to the administrative proceedings and penalties set forth in Charter Section C3.699-13,  
25 in addition to disciplinary action up to and including dismissal by his or her appointing authority.

1           ~~(e)~~ (d) EXCEPTIONS.

2           ~~(i)~~ (1) Conduct of Investigations. Nothing in this Section 4.120 shall preclude the  
3           Controller's Office, Ethics Commission, District Attorney, and City Attorney from disclosing the  
4           identity of an individual or other information to the extent necessary to conduct its  
5           investigation.

6           (2) Legal Proceedings. Nothing in this Section 4.120 shall preclude City officers and  
7           employees from disclosing the identity of an individual or other information relating to a complaint to  
8           the extent required by the rules governing an administrative or court proceeding.

9           ~~(ii)~~ (3) Referrals. Nothing in this Section 4.120 shall preclude the Ethics  
10          Commission from referring any matter to any other City department, commission, board,  
11          officer, or employee, or to other government agencies, for investigation and possible  
12          disciplinary or enforcement action.

13  
14          Section 2. Effective Date. This ordinance shall become effective 30 days after  
15          enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
16          ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
17          of Supervisors overrides the Mayor's veto of the ordinance.

18  
19          Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors  
20          intends to amend only those words, phrases, paragraphs, subsections, sections, articles,  
21          numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal  
22          Code that are explicitly shown in this ordinance as additions, deletions, Board amendment  
23          additions, and Board amendment deletions in accordance with the "Note" that appears under  
24          the official title of the ordinance.

1 APPROVED AS TO FORM:  
2 DENNIS J. HERRERA, City Attorney

3 By: \_\_\_\_\_  
4 ANDREW SHEN  
Deputy City Attorney

5 n:\legana\as2017\1600739\01206491.docx

6  
7 NOTE: This submission is not meant to remove existing Sections 4.123, 4.130, or 4.135 from  
8 the Ordinance as written. Those sections are not changed by this submission, so they are not  
9 reproduced here, but the adoption of these proposed changes would not result in deletion of  
10 Sections 4.123, 4.130, or 4.135.

**ATTACHMENT 3**  
Redline comparison of Staff's Proposed Changes to the  
Whistleblower Protection Ordinance enacted by the Commission in 2016

FILE NO.

ORDINANCE NO.

[Campaign and Governmental Conduct Code - Expanding ~~Scope of Whistleblower Protection~~ Ordinance Protections]

Formatted: BdsupsNrm12pt

**Ordinance amending the Campaign and Governmental Conduct Code to broaden the scope of whistleblower complaints, provide retaliation protections for City contractors, increase the remedies available for whistleblowers who have suffered retaliation, and establish greater confidentiality protections for whistleblowers' identities.**

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
**Additions to Codes** are in single-underline italics Times New Roman font.  
**Deletions to Codes** are in ~~strikethrough italics Times New Roman font~~.  
**Board amendment additions** are in double-underlined Arial font.  
**Board amendment deletions** are in ~~strikethrough Arial font~~.  
**Asterisks (\* \* \* \*)** indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The Campaign and Governmental Conduct Code is hereby amended by ~~adding and~~ revising Sections 4.100, 4.105, 4.107, 4.115, ~~4.117~~, and 4.120, and adding a new Section 4.117, to read as follows:

**SEC. 4.100. FINDINGS.**

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

Formatted: Font: Times New Roman, Italic

This Chapter ~~sets forth~~1 fulfills the Charter's requirements for two City programs relating to whistleblowers, as required by Charter Appendix Section F1.107. First, as required by the City's Whistleblower Program Charter, the Office of the Controller receives and protects all City officers

Formatted: Font: Times New Roman, Italic, Underline

Formatted: Font: Times New Roman Italic, Italic, Underline

Supervisor Breed  
BOARD OF SUPERVISORS

Page 1

1 and employees, investigates whistleblower complaints concerning deficiencies in the quality and  
2 delivery of City government services, wasteful and inefficient City government practices, misuse of City  
3 funds, and improper activities by City officers, employees, and contractors.

4 Second, as required by the Charter, this ordinance protects the confidentiality of  
5 whistleblowers, and protects City officers and employees of City contractors from retaliation for  
6 reporting filing whistleblower complaints or providing assistance with the investigation of such  
7 complaints. As set forth in this Chapter 1, the Ethics Commission has primary responsibility for  
8 ensuring such protections.

9 This Chapter protects all City officers and employees from retaliation for filing a complaint  
10 with, or providing information to, the Ethics Commission, Controller, District Attorney, City Attorney  
11 or complainant's department about improper government activity by City officers and employees or  
12 unlawful activity by City contractors and their employees in connection with a City contract.

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

16 Finally, this Chapter implements Charter Appendix Section F1.107. Section F1.107 directs the  
17 Controller, as City Services Auditor, to administer a whistleblower program and investigate reports of  
18 complaints concerning the misuse of City funds, improper activities by City officers and employees,  
19 deficiencies in the quality and delivery of government services, and wasteful and inefficient City  
20 government practices.

21  
22 **SEC. 4.105. COMPLAINTS ~~OF IMPROPER GOVERNMENT ACTIVITY;~~**  
23 **INVESTIGATION PROCEDURES; REFERRAL TO OTHER AGENCIES.**

24 (a) COMPLAINTS. Any person may file a complaint for investigation with the Office of  
25 the Controller's Whistleblower Program, Ethics Commission, Controller, District Attorney, or City

Formatted: Font: Times New Roman Italic, Italic, Underline

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

1 Attorney, or ~~a written complaint with~~ the complainant's department alleging that a City officer or  
2 employee has engaged in improper government activity, misused City funds, caused deficiencies  
3 in the quality and delivery of government services or engaged in wasteful and inefficient government  
4 practices, or that a City contractor or employee of a City contractor has engaged in unlawful activity in  
5 connection with a City contract. by: violating local campaign finance, lobbying, conflicts of interest or  
6 governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City  
7 resources; creating a specified and substantial danger to public health or safety by failing to perform  
8 duties required by the officer or employee's City position; or abusing his or her City position to  
9 advance a private interest.

Formatted: Font: Times New Roman

10 (b) ETHICS COMMISSION COMPLAINT PROCEDURES. The Ethics Commission  
11 shall investigate complaints filed under this Section 4.105 that ~~allege~~ contain potential violations  
12 of local campaign finance, lobbying, conflicts of interest, and governmental ethics laws  
13 pursuant to the procedures specified in Charter Section C3.699-13 and the regulations  
14 adopted thereunder. Nothing in this subsection (b) shall preclude the Ethics Commission from  
15 referring any matter to any other City department, commission, board, officer, or employee or  
16 to other government agencies for investigation and possible disciplinary or enforcement  
17 action. The Ethics Commission may require that any City department, commission, board,  
18 officer, or employee report to the Ethics Commission on the referred matter.

Formatted: Font: Times New Roman, Italic, Strikethrough

19 (c) REFERRAL. The Ethics Commission shall refer complaints that do not allege a  
20 violation of law, regulation or rule that is within the Ethics Commission's jurisdiction to the  
21 appropriate agency for investigation and possible disciplinary or enforcement action. The  
22 Commission may conduct preliminary investigations into such complaints to determine  
23 whether the complaint contains sufficient information to warrant referral. The Ethics  
24 Commission may require ~~that~~ any City department, ~~commission, board, officer or employee~~ to  
25 provide a written report regarding the department's investigation and any action that the department

1 has taken in response to the Ethics Commission's referral within a time-frame that the Ethics  
2 Commission shall specify. ~~report to the Ethics Commission on the referred matter.~~  
3

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

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

14 (b) REFERRAL OF CERTAIN COMPLAINTS. The Controller shall refer the following  
15 complaints as set forth in this ~~Section:sub~~Section (b):

16 ~~(i)~~ (1) Those which another City agency is required by federal, state, or local law  
17 to adjudicate: To that agency;

18 ~~(ii)~~ (2) Those which may be resolved through a grievance mechanism  
19 established by collective bargaining agreement or contract: To the official or agency  
20 designated in the agreement or contract;

21 ~~(iii)~~ (3) Those which involve allegations of conduct which may constitute a  
22 violation of criminal law: To the District Attorney or other appropriate law enforcement  
23 agency;

24 ~~(iv)~~ (4) Those which are subject to an existing, ongoing investigation by the  
25 District Attorney, City Attorney, or Ethics Commission, where the applicable official or

1 Commission states in writing that investigation by the Controller would substantially impede or  
2 delay his, her, or its own investigation of the matter: To the investigating office; and

3 ~~(+)~~ (5) Those which allege conduct that may constitute a violation of local  
4 campaign finance, lobbying, conflict of interest, or governmental ethics laws, regulations, or rules:  
5 ~~To~~ the Ethics Commission and the City Attorney.

6 Where the conduct that is the subject of the complaint may violate criminal law  
7 and any civil or administrative law, statute, ordinance, or regulation, the Controller may take  
8 action on the noncriminal aspects of the matter under this Section 4.107 even if a referral has  
9 been made to another agency under this ~~Section, subSection (b).~~

10 If a complaint is referred under this ~~Section, subSection (b).~~ the Controller shall  
11 inform the complainant of the appropriate procedure for the resolution of the complaint.

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

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

23 (e) REFERRAL AND RECOMMENDATION BY CONTROLLER. The Controller may  
24 refer the complaint to a City department for investigation, either before conducting an initial  
25 investigation or after doing so, and may recommend that a City department take specific

Formatted: Font: Arial, Not Italic, No underline

1 action based on the Controller's initial investigation. Within 60 days of receiving a complaint  
2 for investigation or a recommendation by the Controller for specific action, or such other time  
3 as the Controller shall specify, the City department shall report to the Controller in writing the  
4 results of the department's investigation and any action that the department has taken in  
5 response to a recommendation by the Controller that the department take specific action.

6 (f) REPORT BY DEPARTMENT AND FURTHER ACTION BY CONTROLLER. If the  
7 Controller has recommended that a City department take disciplinary or other corrective  
8 action that the department has declined to take, the department shall report to the Controller  
9 its reasons for failing to do so within the ~~timeframe~~ *time frame* that the Controller specifies for  
10 reporting on its investigation of the complaint. If the Controller determines that the  
11 department's reasons are inadequate and that further investigation may be appropriate, the  
12 Controller may refer the matter to the Mayor, City Attorney, or District Attorney, or to any  
13 officer or agency that has jurisdiction over the matter.

14 (g) RESPONSIBILITY OF DEPARTMENTS. The department head shall be  
15 responsible for compliance by his or her department with these duties. If department staff fail  
16 to comply with the duties to investigate complaints referred by the Controller and to make the  
17 reports required by this Section 4.107, the Controller shall notify the department head. If the  
18 department head fails to take action to obtain the department's compliance with these duties,  
19 the Controller may refer the matter to the Mayor, City Attorney, or District Attorney, or to any  
20 officer or agency that has jurisdiction over the matter.

#### 21 **SEC. 4.110. DEFINITIONS.**

22 For purposes of this Chapter 1, the following words and phrases shall have the  
23 following meanings:

24 ~~(a) The term "City" or "City agency" shall mean~~ the City and County of San Francisco,  
25 its departments, commissions, task forces, committees, and boards.

Formatted: Font: Times New Roman, Italic, Strikethrough

1 ~~(b) The term~~ "Complainant's department" includes the complainant's supervisor, the  
2 executive director or highest ranking officer in the complainant's department, and the board or  
3 commission overseeing the complainant's department.

4 "Deficiencies in the quality and delivery of government services" shall mean the failure to  
5 perform a service, when performance is required under any law, regulation or policy, or under a City  
6 contract or grant.

7 "Improper government activity" shall mean ~~violations~~violation of any federal, state, or local  
8 law, regulation, or rule, including but not limited to laws, regulations, or rules governing campaign  
9 finance, conflicts of interest, or governmental ethics laws; or ~~actions~~action which ~~create~~creates a  
10 danger to public health or safety by the failure of City officers or employees to perform duties required  
11 by their positions. "Improper government activity" does not include ~~personnel~~employment actions for  
12 which other remedies exist.

13 "Misuse of City funds" shall mean any use of City funds for purposes outside of those directed  
14 by the City, ~~or local, state and federal law.~~

15 ~~(c) The term~~ "Preliminary investigation" shall be limited to, but need not include all of  
16 the following: review of the complaint and any documentary evidence provided with the  
17 complaint; interview of the complainant; interview of the respondent, counsel to respondent  
18 and any witnesses who voluntarily agree to be interviewed for this purpose; review of any  
19 relevant public documents and documents provided voluntarily to the Commission.

20 "Supervisor" or ~~supervisory employee~~" shall mean any individual having the authority, on  
21 behalf of the City, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or  
22 discipline other employees, or the responsibility to ~~routinely~~ direct them, to adjust their grievances, or  
23 to effectively recommend such action, if, in connection with the foregoing, the exercise of that authority  
24 is not merely routine or clerical, but requires the use of independent judgment.

1 "Unlawful activity" shall mean violations of any federal, state or local law, regulation or rule  
2 including but not limited to those laws, regulations or rules governing campaign finance, conflicts of  
3 interest or governmental ethics laws; or actions which create a danger to public health or safety by the  
4 failure of City officers or employees to perform duties imposed by a City contract.

5 "Wasteful and inefficient City government practices" shall mean the expenditure of City funds  
6 that could be eliminated without harming public health or safety, or reducing the quality of government  
7 services.

8 **SEC. 4.115. PROTECTION OF WHISTLEBLOWERS - CITY EMPLOYEES.**

9 (a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote,  
10 suspend, or take other similar adverse employment action against any City officer or  
11 employee because the officer or employee has in good faith:

12 ~~(i) (1) filed a complaint with any supervisory employee within a City agency alleging~~  
13 ~~that a City officer or employee engaged in improper government activity, misused City funds, caused~~  
14 ~~deficiencies in the quality or delivery of government services or engaged in wasteful and inefficient~~  
15 ~~government practices as set forth in Section 4.105(a); with the Ethics Commission, Controller, District~~  
16 ~~Attorney or City Attorney, or a written complaint with the complainant's department, alleging that a~~  
17 ~~City officer or employee engaged in improper government activity by: violating local campaign~~  
18 ~~finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the~~  
19 ~~California Penal Code by misusing City resources; creating a specified and substantial danger to~~  
20 ~~public health or safety by failing to perform duties required by the officer or employee's City position;~~  
21 ~~or abusing his or her City position to advance a private interest, (ii) filed a complaint with the~~  
22 ~~Controller's Whistleblower Program, or~~

23 ~~(ii) (2) filed a complaint with any supervisory employee within a City agency alleging~~  
24 ~~that a City contractor, or employee of a City contractor, engaged in unlawful activity, misused City~~

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman Italic, Italic, Strikethrough

1 ~~funds, caused deficiencies in the quality and delivery of government services or engaged in wasteful~~  
2 ~~and inefficient government practices; the Controller's Whistleblower Program, or~~

3 ~~(2) attempted to file a complaint through the procedures set forth in Section 4.105(a)~~  
4 ~~but, in good faith, did not file the complaint with the appropriate City department or official; or~~

5 ~~(iii)~~ (3) provided any information in connection with or otherwise cooperated with  
6 any investigation conducted under this Chapter 1.

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

9 ~~(i)~~ (1) **Administrative Complaints.** Any ~~city~~ City officer or employee, or former  
10 ~~city~~ City officer or employee, who believes he or she has been the subject of retaliation in  
11 violation of ~~§~~ subsection (a) of this Section 4.115 may file a complaint with the Ethics  
12 Commission. The complaint must be filed no later than two years after the date of the alleged  
13 retaliation.

14 The Ethics Commission shall investigate complaints of violations of ~~§~~ subsection  
15 (a) of this Section 4.115 pursuant to the procedures specified in ~~San Francisco~~ Charter Section  
16 C3.699-13 and the regulations adopted thereunder. The Ethics Commission may decline to  
17 investigate complaints alleging violations of ~~§~~ subsection (a) if it determines that the same or  
18 similar allegations are pending with or have been finally resolved by another administrative or  
19 judicial body. Nothing in this ~~§~~ subsection ~~(b)(1)~~ shall preclude the Ethics Commission from  
20 referring any matter to any other City department, commission, board, officer, or employee, or  
21 to other government agencies for investigation and possible disciplinary or enforcement  
22 action. The Ethics Commission may refer matters to the Department of Human Resources  
23 with a recommendation. The Ethics Commission may require ~~that~~ any City department,  
24 ~~commission, board, officer or employee~~ to provide a written report regarding the department's  
25 investigation and any action that the department has taken in response to the Ethics Commission's

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Underline

1 ~~referral within a time- frame that the Ethics Commission shall specify. report to the Ethics Commission~~  
2 ~~on the referred matter.~~

3 (ii) (2) **Civil Complaints.** Any City officer or employee who believes he or she  
4 has been the subject of retaliation in violation of § subsection (a) of this Section 4.115 may  
5 bring a civil action against the City officer or employee who committed the violation. Such  
6 action must be filed no later than two years after the date of the retaliation.

7 (iii) (3) **Burden of Establishing Retaliation.** In order to establish under this  
8 Section 4.115 that retaliation ~~occurred under this Section 4.115,~~ a complainant in a civil action must  
9 demonstrate, ~~or the Ethics Commission in an administrative proceeding must determine,~~ by a  
10 preponderance of the evidence, that the complainant's engagement in activity protected under  
11 § subsection (a) was a substantial motivating factor for the adverse employment action. The  
12 ~~employer respondent~~ may rebut this claim if ~~#~~ the respondent demonstrates by a preponderance  
13 of the evidence that he, she, or it would have taken the same employment action irrespective of  
14 the complainant's participation in protected activity.

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Underline

15 (4) ~~Duty to Report Assist with Retaliation Complaints to the Ethics Commission.~~  
16 ~~Supervisory employees. Supervisors who receive a complaint of alleging retaliation under this Chapter~~  
17 ~~1 must keep the complaint confidential and immediately report assist the complainant with the filing of a~~  
18 ~~complaint to with the Ethics Commission. In addition, supervisors who receive a complaint alleging~~  
19 ~~retaliation must complete a referral form that will be developed by the Ethics Commission.~~  
20 ~~Supervisory employees and made available on its website. Supervisors who fail to report complaints of~~  
21 ~~retaliation comply with this subsection (b) are subject to the penalties and remedies set forth in~~  
22 ~~subsection (c)(2) of Section 4.115.~~

23 (c) **PENALTIES AND REMEDIES.**

1           ~~(i)~~ (1) **Charter Administrative Penalties.** Any City officer or employee who  
2 violates ~~§~~subsection (a) of this Section 4.115 may be subject to administrative penalties  
3 pursuant to Charter Section C3.699-13.

4           (2) **Redress for Retaliatory Employment Action.** Following an administrative hearing  
5 and after making a finding that an adverse employment action has been taken for purposes of  
6 retaliation, the Ethics Commission may, subject to the Charter's budgetary and civil service provisions,  
7 recommend the cancellation of the retaliatory termination, demotion, suspension or other adverse  
8 employment action.

9           ~~(ii)~~ (2.3) **Discipline by Appointing Authority.** Any City officer or employee who  
10 violates ~~§~~subsection ~~s~~ (a) or (b)(4) of this Section 4.115 shall be subject to disciplinary action up  
11 to and including dismissal by his or her appointing authority. If no disciplinary action is taken  
12 by the appointing authority, the Ethics Commission may refer the matter to the Civil Service  
13 Commission for action pursuant to Charter Section A8.341.

14           ~~(iii)~~ (3.4) **Civil Penalties.** Any City officer or employee who violates ~~§~~subsection  
15 (a) of this Section 4.115 may be personally liable in a civil action authorized under ~~Subsection~~  
16 ~~(b)(ii)~~ subsection (b)(2) of this Section for a civil penalty not to exceed ~~\$5,000~~ \$10,000. ~~The~~  
17 ~~Ethics Commission may adjust annually by regulation the penalties imposed by this subsection (c)(3) to~~  
18 ~~reflect the change in the California Consumer Price Index for that year, provided that such adjustments~~  
19 ~~shall be rounded off to the nearest \$100.~~

20           (d) RESERVATION OF AUTHORITY.

21           ~~(i)~~ (1) **Civil Service Commission.** Nothing in this Section 4.115 shall interfere  
22 with the powers granted to the Civil Service Commission by the ~~San Francisco~~ Charter.

23           ~~(ii)~~ (2) **Appointing Authority.** Nothing in this Section 4.115 shall interfere with  
24 the power of an appointing officer, manager, or supervisor to take action with respect to any  
25 City officer or employee, provided that the appointing officer, manager, or supervisor

Formatted: Font: Times New Roman, Italic, Underline

1 reasonably believes that such action is justified on facts separate and apart from the fact that  
2 the officer or employee ~~took any of the actions listed in subsections 4.115(a)(1) (3); filed a complaint~~  
3 ~~as set forth in Section 4.105(a), attempted to file such a complaint in good faith, or cooperated with an~~  
4 ~~investigation of such a complaint; filed a complaint with, or cooperated with, an Ethics Commission~~  
5 ~~investigation of such complaint; or filed a complaint with or provided information to the Controller,~~  
6 ~~District Attorney, City Attorney or the complainant's department.~~

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

10 (f) WHISTLEBLOWER PROTECTION AWARENESS TRAINING.

11 (1) The Controller, in collaboration with the Ethics Commission, shall prepare, and all  
12 City departments shall distribute, materials to publicize and promote whistleblower protections as part  
13 of each department's new hire training programs.

14 (2) The Ethics Commission, in collaboration with the Controller, and Department of  
15 Human Resources, shall collaborate to ensure that whistleblower protection information prepare, and  
16 all City departments shall distribute, materials to publicize and promote supervisors' responsibilities  
17 under this Chapter 1. In addition, the Department of Human Resources, in collaboration with the  
18 Controller and Ethics Commission, shall prepare web-based training is developed and for supervisors  
19 regarding their responsibilities under this Chapter 1, which shall be implemented by January 1, 2018.  
20 This training must be provided to all City supervisors annually by April of each year thereafter.

Commented [AS1]: Need new date.

21 **SEC. 4.117. PROTECTION OF WHISTLEBLOWERS - CITY CONTRACTORS.**

22 (a) RETALIATION PROHIBITED. No City officer or employee may take steps to terminate a  
23 contract with a City contractor; refuse to use a City contractor for contracted services; request that a  
24 City contractor terminate, demote, or suspend one of its employees; or take other similar adverse  
25

1 action against any City contractor or employee of a City contractor because the contractor or the  
2 contractor's employee:

3 (1) filed a complaint with any ~~supervisory employees~~supervisor within a City agency  
4 alleging that a City officer or employee engaged in improper government activity, misused City funds,  
5 caused deficiencies in the quality and delivery of government services, or engaged in wasteful and  
6 inefficient government practices;

7 (2) filed a complaint with any ~~supervisory employees~~supervisor within a City agency  
8 alleging that another City contractor, or employee of another City contractor, engaged in unlawful  
9 activity, misused City funds, caused deficiencies in the quality and delivery of government services or  
10 engaged in wasteful and inefficient government practices; or

11 (3) provided any information in connection with or otherwise cooperated with any  
12 investigation conducted under this Chapter 1.

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

15 (1) **Administrative Complaints.** Any City contractor or employee of a City contractor,  
16 who believes it, he, or she has been the subject of retaliation in violation of subsection (a) of this  
17 Section 4.117 may file a complaint with the Ethics Commission. The complaint must be filed no later  
18 than two years after the date of the alleged retaliation.

19 The Ethics Commission shall investigate complaints of violations of subsection (a) of  
20 this Section 4.117 pursuant to the procedures specified in Charter Section C3.699-13 and the  
21 regulations adopted thereunder. The Ethics Commission may decline to investigate complaints  
22 alleging violations of subsection (a) if it determines that the same or similar allegations are pending  
23 with or have been finally resolved by another administrative or judicial body. Nothing in this  
24 subsection shall preclude the Ethics Commission from referring any matter to any other City  
25 department, commission, board, officer, or employee, or to other government agencies for investigation

1 and possible disciplinary or enforcement action. The Ethics Commission may refer matters to the  
2 Department of Human Resources with a recommendation. The Ethics Commission may require any  
3 City department to provide a written report regarding the department's investigation and any action  
4 that the department has taken in response to the Ethics Commission's referral, within a time- frame  
5 that the Ethics Commission shall specify.

6 (2) **Burden of Establishing Retaliation.** In order to establish that retaliation occurred  
7 under this Section 4.117, the Ethics Commission in an administrative proceeding must determine, by a  
8 preponderance of the evidence, that the complainant's engagement in activity protected under  
9 subsection (a) was a substantial motivating factor for the adverse action. The respondent may rebut  
10 this claim if it demonstrates by a preponderance of the evidence that it would have taken the same  
11 adverse action irrespective of the complainant's participation in protected activity.

12 (c) **PENALTIES AND REMEDIES.**

13 (1) **Administrative Penalties.** Any City officer or employee who violates subsection (a)  
14 of this Section 4.117 may be subject to administrative penalties pursuant to Charter Section C3.699-13.

15 (2) **Redress for Retaliatory Adverse Action.** Following an administrative hearing and  
16 after making a finding that an adverse action has been taken for purposes of retaliation, the Ethics  
17 Commission may, subject to the Charter's budgetary and contracting provisions, order the cancellation  
18 of retaliatory adverse action taken against a City contractor or employee of a City contractor.

19 (3) **Discipline by Appointing Authority.** Any City officer or employee who violates  
20 subsection (a) of this Section 4.117 shall be subject to disciplinary action up to and including dismissal  
21 by his or her appointing authority. If no disciplinary action is taken by the appointing authority, the  
22 Ethics Commission may refer the matter to the Civil Service Commission for action pursuant to Charter  
23 Section A8.341.

1 (d) NOTICE OF WHISTLEBLOWER PROTECTIONS. The Controller shall prepare, and each  
2 City department, shall post, a notice of the whistleblower protections established by this Section  
3 24.117. City contractors shall distribute the notice of protections to all of their employees.

4  
5 **SEC. 4.120. CONFIDENTIALITY.**

6 ~~(a) WHISTLEBLOWER IDENTITY.~~ (a) WHISTLEBLOWER IDENTITY. *City officers and*  
7 *employees shall treat as confidential the identity of any person who files a complaint as set forth in*  
8 *Section 4.105(a). A complainant may voluntarily disclose his or her identity. Any individual who files*  
9 *a complaint under Section 4.105 of this Chapter may elect to have his or her identity kept confidential*  
10 *as provided by Charter Section C3.699-13(a). Such election must be made at the time the complaint is*  
11 *filed.*

Formatted: Font: Times New Roman, Italic, Strikethrough

12 (b) COMPLAINTS AND INVESTIGATIONS. *City officers and employees shall treat as*  
13 *confidential complaints filed under Sections 4.105, 4.115, and 4.117, and related information,*  
14 *including but not limited to materials gathered and prepared in the course of investigating such*  
15 *complaints, and deliberations regarding such complaints. The Ethics Commission shall treat as*  
16 *confidential complaints made received under Section 4.105, 4.115, and 4.117 of this Chapter,*  
17 *and related information, including but not limited to materials gathered and prepared in the course of*  
18 *investigation of such complaints, and deliberations regarding such complaints, as provided by Charter*  
19 *Section C3.699-13(a).*

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

Formatted: Font: Times New Roman, Italic, Strikethrough

20 (c) PENALTIES ~~FOR DISCLOSURE OF WHISTLEBLOWER IDENTITY.~~ Except as provided  
21 in subsection (d), ~~any City officer or employee who discloses the identity violations of any complainant~~  
22 ~~with the knowledge that the complainant elected to keep his or her identity confidential subsections (a)~~  
23 ~~and (b) may be subject to the administrative proceedings and penalties set forth in Charter Section~~  
24 ~~C3.699-13, in addition to disciplinary action up to and including dismissal by his or her appointing~~  
25 ~~authority.~~

1        ~~(e)~~ (d) EXCEPTIONS.

2                ~~(i)~~ (1) Conduct of Investigations. Nothing in this Section 4.120 shall preclude the  
3        Controller's Office, Ethics Commission, District Attorney, and City Attorney from disclosing the  
4        identity of an individual or other information to the extent necessary to conduct its  
5        investigation.

6                ~~(ii) (2) Referrals. Nothing in this Section~~ (2) Legal Proceedings. Nothing in this  
7        Section 4.120 shall preclude City officers and employees from disclosing the identity of an individual or  
8        other information relating to a complaint to the extent required by the rules governing an  
9        administrative or court proceeding.

10               ~~(iii) (3) Referrals. Nothing in this Section 4.120~~ shall preclude the Ethics  
11        Commission from referring any matter to any other City department, commission, board,  
12        officer, or employee, or to other government agencies, for investigation and possible  
13        disciplinary or enforcement action.

14  
15        Section 2. Effective Date. This ordinance shall become effective 30 days after  
16        enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the  
17        ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board  
18        of Supervisors overrides the Mayor's veto of the ordinance.

19        #

20        #

21        #

22        #

23        #

24        #

25        #

Formatted: Font: Times New Roman, Italic, Underline

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

#  
#  
#

Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal Code that are explicitly shown in this ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the ordinance.

APPROVED AS TO FORM:  
DENNIS J. HERRERA, City Attorney

By: \_\_\_\_\_  
ANDREW SHEN  
Deputy City Attorney

n:\legana\as2016as2017\1600739\04145969401206491.docx

NOTE: This submission is not meant to remove existing Sections 4.123, 4.130, or 4.135 from the Ordinance as written. Those sections are not changed by this submission, so they are not reproduced here, but the adoption of these proposed changes would not result in deletion of Sections 4.123, 4.130, or 4.135.

Formatted: Indent: First line: 0.5"

Formatted: Normal, Tab stops: Not at 0.5" + 3"