



CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CONTROLLER

Ben Rosenfield
Controller

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September 9, 2012

Honorable Katherine Feinstein, Presiding Judge
San Francisco Civil Grand Jury
Superior Court of California
County of San Francisco
400 McAllister Street, Dept. 205
San Francisco, CA 94102

Re: Response to Civil Grand Jury Report on the San Francisco Whistleblower Program

Honorable Judge Feinstein:

The Office of the Controller has reviewed the Civil Grand Jury's report, "*Whistling in the Dark: The San Francisco Whistleblower Program*," dated July 11, 2011, and provides this required response to the report's findings and recommendations.

The Controller's Office thanks the Civil Grand Jury members for their service, and believes that Grand Jury reports can be an important tool for the improvement of government services.

Attached to this letter is an item-by-item response to the specific findings and recommendations of the report. We share the Civil Grand Jury's belief in the importance of a well-run Whistleblower Program and the need to continually seek to improve this vital government function. We are in full or partial agreement with 8 of the 14 recommendations in the report. In several cases, these recommendations have already been implemented, and the remainder will be during the current fiscal year.

However, we believe that the report leaves a general and false impression that the Whistleblower Program is not meeting its goal of investigating and resolving confidential claims of fraud, waste, and abuse of public resources. We believe that several errors in the report could have been corrected or clarified through a more thorough review process, which we would encourage in future reports.

Respectfully,



Ben Rosenfield
Controller

Controller's Office Response to Civil Grand Jury Whistleblower Program Report

Findings	Response to Finding	Recommendations	Response to Recommendations
<p>F 1) The investigation of whistleblower complaints is not independent when performed by the targeted agency or department.</p>	<p>Disagree. The San Francisco Charter (charter) states that the Controller's Office may refer a complaint to a City department, either before or after conducting an initial investigation. Further, the practice of referring certain complaints to departments for investigation is in alignment with standard practices of other local government whistleblower programs.</p>	<p>R 1) CSA should perform all investigations. This would require a Charter change.</p>	<p>Disagree. This recommendation will not be implemented. The Civil Grand Jury is correct in concluding that the Charter would need to be amended to require the Controller's Office to perform all investigations. As the Charter is currently written, the Controller has the authority to refer complaints for investigation. From a workload or specialization standpoint, it is neither practical nor advisable not to refer whistleblower complaints. It is also a standard protocol of whistleblower programs in other jurisdictions to refer complaints to those in the best position to investigate them, with involvement as appropriate from the central whistleblower program.</p>

Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 2) The Whistleblower Program is confusing and difficult to navigate.</p> <p>F 3)The City's Whistleblower website needs updating but this does not appear to be a high priority for the Whistleblower Program.</p>	<p>2) Disagree. The Civil Grand Jury does not elaborate on what makes the Whistleblower Program confusing and difficult to navigate. The Whistleblower Program makes great efforts to educate City employees on the complaint process via employee outreach and by meeting with complainants. For example, the Whistleblower Program is involved in new employee and new manager orientation programs conducted by the Department of Human Resources.</p> <p>3) Disagree in part. While upgrades to the website are needed, the Controller's Office disagrees that this is not a high priority. The Whistleblower Program met with the Department of Technology before the Civil Grand Jury's report to discuss potential changes to the web page, and will implement changes in the current fiscal year.</p>	<p>R 2) There are major deficiencies in the whistleblower procedures. The website should be revised to:</p> <ul style="list-style-type: none"> • Make it more user-friendly; • Provide clear guidelines for what qualifies as a whistleblower complaint as opposed to a general complaint; • Provide examples of what doesn't qualify as waste fraud and abuse; • Provide information about the investigation process when a complaint is submitted; • Provide detailed information about how confidentiality of the complainant can be maintained when contact information is supplied; • Regularly update the reports section and legal status sections; • Create a box that indicates there are additional documents to support the allegations in a complaint; • Provide information on who to contact if a whistleblower is facing retaliation; • Include a box indicating who to contact about the status of an investigation at regular intervals; • Describe the general procedure that will ensue in the course of the investigation. 	<p>Partially agree, and will be partially implemented. The Whistleblower Program website already contains a great deal of information (fraud, waste, and abuse definitions, legal statutes, complaint status check). The website does not have examples of what does not qualify as fraud, waste, or abuse because the charter gives the Controller the broad authority to receive individual complaints concerning the quality and delivery of government services, wasteful and inefficient City government practices, misuse of City government funds, and improper activities by City government officers and employees.</p> <p>The Whistleblower Program met with the Department of Technology before the issuance of the Civil Grand Jury's report to discuss potential changes to the website, and will incorporate several of the Civil Grand Jury's recommended changes to the website.</p>
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Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 4) The COWS/Internal record keeping/tracking system is inadequate.</p>	<p>4) Disagree in part. The COWS database meets the needs of the Whistleblower Program. The Whistleblower Program has explored possible enhancements to the COWS database with the Department of Technology. These potential upgrades will provide additional functionality and reporting capabilities.</p>	<p>R 3) The COWS system should be modified to: (1) Define whether it is a high-, medium-, or low-level risk complaint; (2) Remove the ability to edit or delete investigation notes after they have been entered; (3) Add a field to indicate the source (web, phone, letter, etc.); (4) Remove the constraint, if it exists, to allow investigators to copy full e-mails and correspondence into the notes.</p>	<p>Partially agree and will be partially implemented:</p> <p>1) Agree. We have discussed adding this feature to COWS with the Department of Technology, and will implement this recommendation.</p> <p>2) Disagree. It is unclear what benefit this change would provide. The inability to edit investigator notes would make the database more difficult to use.</p> <p>3 - 4) Disagree. The COWS database already allows the Whistleblower Program to record complaint source, and to copy and paste full emails into investigator notes. Complaint source statistics have been published in our fiscal year 2008-09 and 2009-10 annual newsletters.</p>
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Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 5) Confidentiality throughout the entire process eliminates any level of transparency.</p>	<p>Disagree. Confidentiality throughout the process is of utmost importance for the Whistleblower Program to succeed. Residents and employees file complaints with the program because it offers them a way to confidentially raise their concerns. Whistleblower investigations must remain confidential in order to prevent retribution against complainants. Failure to uphold confidentiality at any point of an investigation could result in acts of retaliation against those involved in the case. The risk and fear of retaliation can deter individuals from reporting allegations of wrongdoing.</p> <p>Further, California Government Code section 53087.6(2) states that such investigations shall be kept confidential. Specifically, the identities of those reporting the improper government activity and the employee or employees that are the subject of an investigation must be kept confidential.</p>	<p>R 4) A more proactive system must be developed for communicating with the whistleblower.</p>	<p>Partially agree and will be partially implemented. Whistleblowers are provided tracking numbers for their complaints, and can use these numbers on the program's website to learn the general status (progress or outcome) of the investigation of their complaint.</p> <p>The Whistleblower Program also issues an annual newsletter that summarizes selected complaints and their outcomes.</p> <p>The Whistleblower Program will implement a series of changes aimed at increasing communication with whistleblowers. Specifically, we are determining how to provide complainants with more information during the investigation process and the outcome of their complaints, while balancing the critical need to safeguard the confidentiality of both the complainant and others involved in the investigation.</p>
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Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 6) No detailed final public report of substantiated whistleblower complaints is issued by the City Services Auditor. The lack of public reporting of whistleblower investigations fails to provide transparency in government.</p>	<p>Disagree in part. California Government Code section 53087.6(2) states that investigations shall be kept confidential, except to issue any report of an investigation that has been substantiated, or to release any findings resulting from a completed investigation that are deemed necessary to serve the interests of the public. In any event, the identities of the individual or individuals reporting the improper government activity and the subject employee or employees must be kept confidential. Further, the practice of not releasing a detailed final report is in alignment with other local jurisdiction whistleblower programs.</p>	<p>R 5) If a complaint is substantiated, a public finding should be issued that details: the nature of the complaint; what the investigation determined; the name of the respondent; and the penalty applied or actions taken.</p>	<p>Partially agree. This recommendation will be implemented in part. Currently, the Whistleblower Program issues an annual report listing, in general terms, selected complaint allegations and the investigation outcome. These complaints are discussed in general terms in order to discourage retaliation against whistleblowers.</p> <p>In fiscal year 2011-12, in an effort to provide additional public information while maintaining confidentiality of individual complainants and others involved in the program, the Whistleblower Program will issue quarterly reports containing all sustained complaints in that quarter, and the corrective action taken. State Government Code prohibits the disclosure of the name of the respondent in most if not all cases.</p>
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Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 7) The current whistleblower protections are inadequate.</p> <p>F 8) The Jury found that whistleblowers who faced retaliation choose to initially use their union or sue the City rather than using the Ethics Commission to resolve their retaliation complaint.</p>	<p>Disagree. Retaliation issues are under the jurisdiction of the Ethics Commission. Accordingly, the Civil Grand Jury should consult with the Ethics Commission regarding these findings. The Ethics Commission has received three retaliation complaints since 2004, one of which was not related to a whistleblower complaint. Employee education about retaliation is a continued focus area of the Whistleblower Program, with planned expansion.</p>	<p>R 6) An independent administrative law judge should deal with retaliation issues. The responsibility for retaliation complaints should be removed from the Ethics Commission.</p> <p>R 7) If an employee who has filed a whistleblower complaint is laid off within two years of having filed the complaint, or within one year of the complaint being closed, an administrative law judge will conduct a full review. Should it be determined that retaliation is a factor in the layoff/termination; the employee shall be awarded up to two years full salary as part of his or her severance package.</p>	<p>Not appropriate for a response from the Controller's Office, as retaliation issues are under the jurisdiction of the Ethics Commission. Accordingly, the Civil Grand Jury should consult with the Ethics Commission regarding these findings and recommendations.</p>
<p>F 9) CGOBOC does not provide effective or independent oversight of the Whistleblower program.</p>	<p>Disagree. The Whistleblower Program meets quarterly with a representative of the Citizens Audit Review Board (CARB, which also functions as the Citizens' General Obligation Bond Oversight Committee, or CGOBOC) to discuss complaints and program administration, and provides feedback to program staff on individual cases.</p>	<p>R 8) CGOBOC must become an effective Whistleblower Program oversight entity by reviewing the number and type of whistleblower complaints, the investigative process used and the final results of investigations at least twice a year.</p>	<p>Agree. This recommendation has been implemented, and is ongoing. CARB has always been aware of its oversight responsibilities of the Whistleblower Program since its charter-mandated inception in 2004. The Whistleblower Program meets quarterly with a CARB representative to discuss complaints and program administration, and provides feedback to program staff on individual cases.</p> <p>The Whistleblower Program welcomes opportunities for enhanced oversight and feedback from CARB, and will work to support any enhanced level of oversight that CARB deems appropriate.</p>

Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 10) It appears there are no procedural mechanisms in place to address the following:</p> <p>A) Complainants are not consistently receiving the assigned complaint tracking number as an acknowledgement of their claim.</p> <p>B) The program fails to provide a meaningful way for complainants to obtain substantive information regarding the status of the investigation, specific actions being taken, and an opportunity to respond to the department's finding of the investigation.</p>	<p>Disagree. Procedures are in place to ensure that all complainants can receive a complaint tracking number, unless the complainant does not provide any contact information. Complainants who file through the web or 311 are automatically provided a tracking number when they submit a complaint. In fiscal year 2009-10, 83 percent of complainants filed through the web or through 311. Complainants who file through other means (letter, email, etc.) are provided a tracking number if they provide their contact information to the Whistleblower Program.</p> <p>Starting in fiscal year 2011-12, the Whistleblower Program will issue quarterly reports containing all sustained complaints in that quarter, and the corrective action taken. In addition, the program is exploring how to provide individual complainants with more information regarding the status of the investigation of their complaint and the action taken while balancing the need for confidentiality.</p>	<p>R 9) Anyone filing a non-website initiated complaint should be sent a form letter that indicates the tracking number and an acknowledgment that their complaint has been received.</p>	<p>Agree and implemented. The Whistleblower Program issues tracking numbers to all complainants who provide some form of contact information.</p>
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Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 11) Whistleblower Program staff are spending an inordinate amount of time on low level complaints.</p>	<p>Disagree. Consistent with the charter, the Whistleblower Program is intended to receive complaints concerning the quality and delivery of government services, wasteful and inefficient City government practices, misuse of City government funds, and improper activities by City government officers and employees. Of the complaints received that allege problems under the program's jurisdiction, potentially low importance complaints must be pursued as well as those of seemingly greater importance. Although some complaints are clearly of lower potential importance than others, it is unclear how the Civil Grand Jury determined that an inordinate amount of time is spent trying to resolve these complaints. The current practice of the Whistleblower Program is to refer low-level complaints to departments for investigation, with appropriate oversight and follow-up from the Whistleblower Program.</p>	<p>R 10) Create and institute a filter process to allow redirection of non-waste, fraud and abuse complaints to 311. This would require a change to the Charter.</p>	<p>Disagree. This recommendation will not be implemented. The charter gives the Controller the authority to receive complaints about issues other than fraud waste and abuse, including the quality and delivery of government services. The Civil Grand Jury is correct in concluding that the charter would have to be changed to allow this recommendation to be implemented.</p>
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Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 12) The Whistleblower Program is inadequately marketed by the program staff, as shown by the limited awareness of the program by many city employees.</p>	<p>Disagree. Continued and expanded outreach to city employees is a key focus of the Whistleblower Program. Outreach has for years included quarterly written communication to each of the City's 27,000 employees and periodic presentations at various department staff meetings. Outreach was recently expanded to include a segment about the program in both the new employee and new manager orientation training conducted by the Department of Human Resources.</p>	<p>R 11) The Office of the Controller should develop and implement training to educate all city employees about the Whistleblower Program.</p>	<p>Agree. Implementation continual and ongoing. See response to finding.</p>
<p>F 13) A process is needed to give complainants an avenue to appeal a whistleblower investigation if they have questions about how the investigation was conducted or if they disagree with the investigation's conclusions.</p>	<p>Disagree. If not in agreement with the findings of an investigation, complainants have many other means to pursue their concerns, including but not limited to department commissions, the Board of Supervisors Audit Committee, CARB, the Ethics Commission, the District Attorney, or the court system. The Whistleblower Program is unaware of any other local jurisdiction with a complaint appeals process.</p>	<p>R 12) Establish an appeals process using an independent administrative law judge for whistleblower complaints that qualify for review. Guidelines must be established to determine legitimate reasons for the appeal of a "dismissed", "no violation found" or "closed" complaint.</p>	<p>Disagree. This recommendation will not be implemented. See response to finding. The Whistleblower Program is unaware of any other local jurisdiction with a complaint appeals process.</p>

Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 14) Adding a reward program would create an incentive for individuals to become whistleblowers.</p>	<p>Disagree. The Controller's Office does not believe that rewards will enhance the effectiveness of the program.</p>	<p>R 13) Establish a reward system for substantiated high-risk whistleblower complaints with a \$500 minimum or 10% of funds recovered, whichever is greater.</p>	<p>Disagree. This recommendation will not be implemented. With the exception of the Assessor's Office Real Estate Watchdog Program and comparable tax revenue recovery programs, rewards are not a standard or recommended practice for local government whistleblower programs.</p>
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Controller's Office Response to Civil Grand Jury Whistleblower Program Report

<p>F 15) The San Francisco Whistleblower Program's confidentiality policies eliminate any possible transparency.</p>	<p>Disagree. The Whistleblower Program issues annual reports stating complaint volume, sources of complaints, and allegations and action taken on selected complaints. In fiscal year 2011-12 the program will issue quarterly reports containing all sustained complaints in that quarter, and the corrective action taken.</p>	<p>R 14) The Jury recommends that a best practices/benchmark study be done of other jurisdictions as to how confidentiality issues might be better managed.</p>	<p>Agree. Implemented and ongoing. The Whistleblower Program is overseen by the CARB and the Board of Supervisors' Government Audit & Oversight Committee, both of which provide accountability and transparency.</p> <p>Benchmarking and evaluation of other programs was conducted during the initial establishment of the program. As an ongoing practice in FY10-11, the Whistleblower Program began a refreshed benchmarking study to compare practices with local and state whistleblower programs. A preliminary report of this study's findings was provided to the Civil Grand Jury during its investigation. The study found that the program's practices are consistent with other local and state whistleblower programs. Review of the practices of programs in other jurisdictions is ongoing and will continue in the future.</p> <p>In fiscal year 2011-12, in an effort to provide additional public information while maintaining confidentiality of individual complainants and others involved in the program, the Whistleblower Program will issue quarterly reports containing all sustained complaints in that quarter, and the corrective action taken.</p>
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