

Amendment of the Whole
August 7, 2008

FILE NO. 080019

ORDINANCE NO.

1 [Implementing the Controller's Whistleblower Program.]

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3 **Ordinance amending the Campaign and Governmental Conduct Code by amending**
4 **Sections 4.100 and 4.115 and adding Sections 4.107 and 4.123 to implement the**
5 **provisions of Charter Appendix F1.107 for the operation of the Controller's**
6 **Whistleblower Program, to protect the confidentiality of whistleblowers and the**
7 **investigation of complaints, and to provide protection from retaliation, and repealing**
8 **Section 4.125 and adding a new Section 4.125 to prohibit the furnishing of false**
9 **information in, and require cooperation with, whistleblower investigations conducted**
10 **by the Controller or any other officer or department.**

11 Note: Additions are *single-underline italics Times New Roman*;
12 deletions are *strikethrough italics Times New Roman*.
13 Board amendment additions are double underlined.
Board amendment deletions are ~~strikethrough normal~~.

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

15 Section 1. The San Francisco Campaign and Governmental Conduct Code is hereby
16 amended by amending Section 4.100, to read as follows:

17 **SEC. 4.100. FINDINGS.**

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

23 This Chapter protects all City officers and employees from retaliation for filing a
24 complaint with, or providing information to, the Ethics Commission, Controller, District

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1 Attorney, City Attorney or complainant's department about improper government activity by
2 City officers and employees.

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

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

11 Section 2. The San Francisco Campaign and Governmental Conduct Code is hereby
12 amended by adding Section 4.107, to read as follows:

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

15 (a) WHISTLEBLOWER PROGRAM. The Controller shall administer and publicize a
16 whistleblower and citizen complaint program for citizens and employees to report the misuse of City
17 funds, improper activities by City officers and employees, deficiencies in the quality and delivery of
18 government services, and wasteful and inefficient City government practices. The Controller shall
19 investigate and otherwise attempt to resolve complaints reported to the Whistleblower Program. The
20 Controller shall administer a hotline telephone number and website and publicize the hotline and
21 website through press releases, public advertising and communications to City employees.

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

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

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

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

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

9 (v) Those which allege conduct that may constitute a violation of governmental ethics law:
10 to the Ethics Commission and the City Attorney.

11 Where the conduct that is the subject of the complaint may violate criminal law and any civil or
12 administrative law, statute, ordinance or regulation, the Controller may take action on the non-
13 criminal aspects of the matter under this Section even if a referral has been made to another agency
14 under this Section.

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

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

23 (d) INFORMATION PROVIDED UNDER PENALTY OF PERJURY. In those instances in
24 which the Controller deems it appropriate, the Controller may require that persons making complaints
25 or providing information swear to the truth of their statements by taking an oath administered by the

1 Controller, or an agent of the Controller, or through written declarations made under penalty of
2 perjury under the laws of the State of California.

3 (e) REFERRAL AND RECOMMENDATION BY CONTROLLER. The Controller may refer
4 the complaint to a City department for investigation, either before conducting an initial investigation or
5 after doing so, and may recommend that a City department take specific action based on the
6 Controller's initial investigation. Within 60 days of receiving a complaint for investigation or a
7 recommendation by the Controller for specific action, or such other time as the Controller shall
8 specify, the City department shall report to the Controller in writing the results of the department's
9 investigation and any action that the department has taken in response to a recommendation by the
10 Controller that the department take specific action.

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

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

1 Section 3. The San Francisco Campaign and Governmental Conduct Code is hereby
2 amended by amending Section 4.115, to read as follows:

3 **SEC. 4.115. PROTECTION OF WHISTLEBLOWERS.**

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

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

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

22 The Ethics Commission shall investigate complaints of violations of Subsection (a) of
23 this Section pursuant to the procedures specified in San Francisco Charter Section C3.699-13
24 and the regulations adopted thereunder. The Ethics Commission may decline to investigate
25 complaints alleging violations of Subsection (a) if it determines that the same or similar

1 allegations are pending with or have been finally resolved by another administrative or judicial
2 body. Nothing in this Subsection shall preclude the Ethics Commission from referring any
3 matter to any other City department, commission, board, officer or employee, or to other
4 government agencies for investigation and possible disciplinary or enforcement action. The
5 Ethics Commission may refer matters to the Department of Human Resources with a
6 recommendation. The Ethics Commission may require that any City department, commission,
7 board, officer or employee report to the Ethics Commission on the referred matter.

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

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

18 (c) PENALTIES.

19 (i) Charter Penalties. Any City officer or employee who violates Subsection (a) of
20 this Section may be subject to administrative penalties pursuant to Charter Section C3.699-
21 13.

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

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

6 (d) RESERVATION OF AUTHORITY.

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

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

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

20 Section 4. The San Francisco Campaign and Governmental Conduct Code is hereby
21 amended by adding Section 4.123, to read as follows:

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

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

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

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

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

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

19 (c) EXCEPTIONS. Nothing in this Section shall preclude the Controller from (i) disclosing
20 the identity of a person or other information to the extent necessary to conduct a civil or criminal
21 investigation or to take any enforcement action, including any action to discipline an employee or take
22 remedial action against a contractor, or (ii) releasing information as part of a referral when referring
23 any matter to another City department, commission, board, officer or employee, or to other
24 governmental agencies, for investigation and possible disciplinary, enforcement or remedial action, or
25 (iii) releasing information to the Citizens Audit Review Board so that it may carry out its duty to

1 provide advisory input to the Controller on the Whistleblower Program, provided that information is
2 prepared so as to protect the confidentiality of persons making complaints and of investigations, or (iv)
3 releasing information to inform the public of the nature of the actions taken by the Controller in the
4 operation of the Whistleblower Program provided that information is prepared so as to protect the
5 confidentiality of persons making complaints and of investigations.

6 Section 5. San Francisco Campaign and Governmental Conduct Code Section 4.125
7 is hereby repealed in its entirety.

8 ~~**SEC. 4.125. COOPERATION OF OTHER CITY DEPARTMENTS.**~~

9 ~~*All City departments, commissions, boards, officers and employees shall cooperate with and*~~
10 ~~*provide full and prompt assistance to the Ethics Commission in carrying out its duties under this*~~
11 ~~*Chapter.*~~

12 Section 6. The San Francisco Campaign and Governmental Conduct Code is hereby
13 amended by adding a new Section 4.125, to read as follows:

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

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

23 (b) COOPERATION REQUIRED. All City departments, commissions, boards, officers and
24 employees shall cooperate with and provide full and prompt assistance to the Controller, Ethics

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1 Commission, District Attorney, City Attorney, and all other commissions and departments, and any of
2 their agents, in carrying out their duties under this Chapter.

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

6 By: _____
7 PAULA JESSON
8 Deputy City Attorney

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