



September 6, 2011

The Honorable Katherine Feinstein
Presiding Judge
Superior Court of California, County of San Francisco
400 McAllister Street
San Francisco, CA 94102

Dear Judge Feinstein:

The following is in response to the 2010-2011 Civil Grand Jury report, "Whistling In The Dark: The San Francisco Whistleblower Program." The Whistleblower Program ensures that the public trust in its government remains intact. When the Program began in 2004, the Controller's Office took its responsibility seriously to investigate any improper activity that resulted in theft, waste or misuse of City resources. Since then, the Controller's Office has effectively dispatched its duty, and therefore I disagree with the overall conclusion reached by the Civil Grand Jury that the Whistleblower Program has failed to live up to the expectations of the public.

As the Controller had stated in July of this year, the Whistleblower Program has received an average of 350 whistleblower complaints annually since 2004. The Controller's Office reviews all complaints, and where there are legitimate complaints, the Controller's Office takes appropriate action against the party at fault.

In addition to investigating complaints, the City Charter and our local laws also seek to protect whistleblowers from retaliation. This provides integrity to our Program and ensures that individuals can speak openly with the Controller's Office about questionable conduct. Furthermore, the Program's integrity is bolstered by the oversight of the Citizens' Audit Review Board, which reviews the Program's annual report and conducts a public review of the Program's policies and procedures.

Although the Civil Grand Jury faults the Controller's Office for a lack of transparency, ensuring confidentiality is essential to protect the whistleblower throughout the complaint process. I believe the Controller's Office does carefully weigh transparency and confidentiality. Failure to do so would result in a program that does not garner the trust of the public and City employees and would therefore be unable to carry out its mission. The Controller's Office implements the best practices of other whistleblower programs and it complies with local and state whistleblower laws with respect to disclosure of investigation work product.

The City is always looking to improve upon its programs to align them with best practices and to meet the expectations of the residents of San Francisco. While I agree with the Controller that this report does not fairly portray the Whistleblower Program, the City will look at ways to strengthen the Program and continue to fulfill the expectations of its residents to deter misuse of public dollars.

The Mayor's Office response to the Civil Grand Jury's findings is as follows:

Finding 1: The investigation of whistleblower complaints is not independent when performed by the targeted agency or department.

Response: Disagree. Consistent with other local whistleblower programs, the Controller's Office may refer complaints for investigations to another City department. According to Campaign and Governmental Code section 4.107(e), the Controller may refer a complaint to a City department for investigation, either before conducting an initial investigation or after doing an initial investigation.

According to the Controller's Office, it is often necessary to collaborate with departments in order to fully investigate complaints, as departmental staff may have specialized knowledge necessary to fully investigate the complaint. For example, the Controller's Office works with the Department of Human Resources to investigate complaints regarding the civil service system.

Finding 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.

Response: Disagree. While I agree that a final report should provide extensive detail on substantiated whistleblower complaints, issues of confidentiality necessitate avoiding full disclosure of all investigations pursuant to California Government Code section 53087.6(2). This code section does state that a report may be issued when a complaint has been substantiated or findings may be released after a completed investigation if it is deemed to serve the public interest.

Finding 7: The current Whistleblower protections are inadequate.

Response: Disagree. The City has an obligation to protect whistleblowers. As stated above, the City Charter prohibits retaliation against whistleblowers. Local laws assign the duty to investigate retaliation complaints to the Ethics Commission. Under the Whistleblower Ordinance, if the Ethics Commission finds that a City officer or employee was retaliated against because he or she made a complaint regarding improper governmental activity, the Commission may impose monetary fines against the City officer or employee who committed the retaliation. The Commission may also refer the matter to the Department of Human Resources or the Civil Service Commission with recommendations for further disciplinary action up to an including dismissal by the appointing authority.

Finding 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.

Response: Partially Disagree. The Civil Grand Jury did not provide any concrete statistics about employees that have filed a claim against the City rather than using the Ethics Commission. It is unknown why whistleblowers tend to turn to their unions or civil action rather than file a complaint with the Ethics Commission to resolve their concerns of retaliation. Perhaps it is because the whistleblower is concerned with preserving his or her position at work; or perhaps City employees are not fully cognizant of their rights under the Whistleblower Ordinance; or perhaps it is because the Whistleblower Ordinance, like whistleblower laws in general, puts the burden of proof that retaliation occurred upon the complainant.

Finding 11: Whistleblower Program staff are spending an inordinate amount of time on low level complaints.

Response: Disagree. As the Controller's Office stated in its response, it is unclear how the Civil Grand Jury determined that its office spent too much time focused on low level complaints. The Controller is given the authority by the City Charter to receive and investigate complaints that deal with the quality and delivery of government services and the use of government resources. It is the practice of the Whistleblower Program to refer low level complaints to departments for investigation.

Finding 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.

Response: Disagree. I agree that all whistleblower complaints should be taken seriously and investigated properly. However, I do not agree with the Civil Grand Jury's conclusion that the appropriate process to provide appeals to complainants is to allow for an administrative law judge to review closed complaints. At this time, complainants can use the court system or the Board of Supervisors Audit Committee as alternatives to the whistleblower complaint system.

Finding 14: Adding a reward program would create an incentive for individuals to become Whistleblowers.

Response: Disagree. No other local jurisdiction offers whistleblowers rewards. In its report, the Civil Grand Jury first mentions the idea of a rewards program on page 26 under the heading "Findings." However, nowhere in earlier parts of the report is there mention of data or facts to back up this finding. While I agree that common sense might dictate that providing an incentive may spur individuals to report a problem, this particular finding raises a claim without properly providing justification for the claim.

The Mayor's Office response to the Civil Grand Jury's recommendations is as follows:

Recommendation 1: CSA should perform all investigations. This would require a change to the Charter.

Response: Disagree; Will Not be Implemented. I agree with the Controller's Office response that requiring the City Services Auditor (CSA) to perform all investigations does not make sense from a workload standpoint. The standard practice for other whistleblower programs is to refer complaints for investigation. Requiring CSA to perform all investigations would require a change to the City Charter and would likely necessitate allocating more resources to CSA.

Recommendation 5: If a complaint is substantiated, a public Finding should be issued that details:

1. The nature of the complaint;
2. What the investigation determined;
3. The name of the respondent; and
4. The penalty applied or actions taken.

Response: Disagree; Will Not be Implemented. The Whistleblower Program issues an annual report that states complaint allegations and the outcome of investigations. Discussion of complaints and their outcomes in general terms is done to protect whistleblowers from retaliation. The disclosure of the name of the respondent is prohibited under state law, except under very limited circumstances.

Recommendation 6: An independent administrative law judge should deal with retaliation issues. The responsibility for retaliation complaints should be removed from the Ethics Commission.

Response: Disagree; Will Not be implemented. This recommendation is not warranted. The City Charter must be changed in order to have an administrative law judge deal with retaliation issues. The Ethics Commission is an appropriate venue for retaliation complaints to be heard.

Recommendation 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.

Response: Disagree; Will Not be Implemented. The City Charter must be changed in order to allow an administrative law judge to hear retaliation complaints. Should an instance ever occur where an employee is terminated without cause based upon his or her action as a whistleblower, there currently exist enough avenues to provide the employee with appropriate remedies. Retaliation issues are under the jurisdiction of the Ethics Commission. The Civil Grand Jury should consult with the Ethics Commission regarding this recommendation.

Under the Whistleblower Ordinance, if the Ethics Commission finds that a City officer or employee was retaliated against because he or she made a complaint regarding improper governmental activity, the Commission may impose monetary fines against the City officer or employee who committed the retaliation. The Commission may also refer the matter to the Department of Human Resources or the Civil Service Commission with recommendations for further disciplinary action up to an including dismissal by the appointing authority. Under current law, retaliation may take the form of a termination, demotion, suspension or similar adverse employment – the Civil Grand Jury's recommendation appears to restrict protections against retaliation to instances of termination only. Thus, the Civil Grand Jury's recommendation threatens to narrow the protections of the Ordinance.

Recommendation 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.

Response: Disagree; Will Not be Implemented. The Civil Grand Jury is correct that this change to allow 311 to take complaints of non-waste, fraud and abuse and filter these complaints will require a change in the City Charter. However, the Whistleblower Program does work with 311 to receive complaints of fraud, waste or abuse. 311 enters this information onto the Whistleblower Program's online complaint form, and submit this to the Program. I do not believe that this recommendation is warranted as the Controller's Office is tasked with receiving these types of complaints. The Controller's Office has consistently met its obligations and has worked to effectively manage the Whistleblower Program.

Mayor's Office Response to the Civil Grand Jury
September 6, 2011

Recommendation 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.

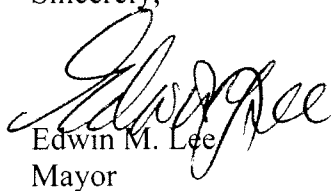
Response: Disagree; Will Not be Implemented. This recommendation is not warranted. As the Controller's Office states in its response, no other jurisdiction has an administrative law judge to review whistleblower complaints. A Charter amendment would be required to allow for an administrative law judge.

Recommendation 13: Establish a reward system for validated high-risk whistleblower complaints with a \$500 minimum or 10% of funds recovered, whichever is greater.

Response: Disagree; Will Not be Implemented. As I stated in my response to Finding 14, the Civil Grand Jury does not provide any evidence where other jurisdictions have a reward system and where that reward system has improved the whistleblower program. Absent specific data showing the efficacy of a reward system, this recommendation is not warranted.

Thank you again for the opportunity to comment on this Civil Grand Jury report.

Sincerely,


Edwin M. Lee
Mayor