



August 7, 2015

The Honorable John K. Stewart
Presiding Judge
Superior Court of California, County of San Francisco
400 McAllister Street
San Francisco, CA 94102

Dear Judge Stewart:

Pursuant to Penal Code sections 933 and 933.05, the following is in reply to the 2014-2015 Civil Grand Jury report, *San Francisco's Whistleblower Protection Ordinance Is In Need of Change*. I would like to thank the members of the Civil Grand Jury for their interest in the Whistleblower Protection Ordinance (WPO).

This is a policy area that I care deeply about—I first began working for the City and County of San Francisco in 1989 as the Investigator for the City's first Whistleblower Ordinance. I agree with the Jury's assertion that the City needs a strong and effective process for reporting complaints and protecting whistleblowers. These kinds of protections are a cornerstone of government accountability and transparency. I began my career in public service fighting for these protections, and I continue to care deeply about them.

Introduced in 2004, the Whistleblower Protection Ordinance provides an avenue for employees and government officers to report complaints without fear of reprisal. This program is one component of the City's efforts to protect City resources, deter fraudulent behavior, ensure confidentiality and protect complainants, and establish internal departmental controls. The result is a more efficient government.

The Jury concentrated on the Ethics Commission and its administration of the program, though the Controller's Office also plays a crucial role with respect to both internal and external whistleblower complaints, as does the Department of Human Resources. The Jury finds that as currently written, the WPO is too narrow in scope, more forms of disclosure should be covered, the burden of proof should be modified, and that more remedies for retaliation be provided.

Furthermore, in addition to the critical work of the Ethics Commission and the Controller's Office, existing Department of Human Resources processes negotiated directly with employee representatives provide additional mechanisms to respond to a situation of whistleblower retaliation.

A detailed response from the Mayor's Office to the Civil Grand Jury's findings and recommendations follows.

Findings:

Finding 1: The WPO does not fully “protect” City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.

Disagree, partially. The WPO, like most laws, may have limitations, and is one element of a broader framework of whistleblower protections and interventions. However, the confidentiality provisions for investigations are important as they protect both the complainant and the respondent during the period when accusations are proved or disproved. As currently structured, the program provides a balance between confidentiality and transparency that is important to maintain.

Finding 2: The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.

Disagree, partially. The Civil Grand Jury is correct in noting that the language in the Charter mandate does not exactly match that of the WPO. However, the Mayor’s Office disagrees with the finding that the WPO fails to fulfill the Charter mandate. The difference in language is the outcome of a normal legislative process. An ordinance is the product of an iterative process, informed by a number of legal and practical considerations that arise as it is being drafted, reviewed, and input from a wide variety of stakeholders is taken into account.

Finding 3.1: While other large California cities and counties have relatively weak laws protecting their employees from retaliation for whistleblowing, this does not relieve the Board of its responsibility under the Charter mandate, to enact an ordinance that genuinely protects whistleblowers.

Agree.

Finding 3.2: Whistleblower protection laws that cover government employees at the state and Federal level can serve as a useful model for improving the WPO.

Agree.

Finding 4: The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.

Disagree. The Mayor’s Office agrees that robust anti-retaliation provisions must be in place for complainants to feel comfortable coming forward. However, the burden of proof requirement is there for a reason—it creates an important balance by disincentivizing spurious complaints. Without this provision, there is a real risk that poorly-defined or even false complaints will be filed, siphoning away important staff resources from real retaliation investigations. The WPO is consistent with other government provisions on this matter, notably that of the State of California. (see:

http://spb.ca.gov/content/appeals/Appeals_Resource_Guide.pdf, bottom of page 18).

Recommendations:

Recommendation 1.4: If the Ethics Commission and the Board fail to act within a reasonable time, that the Mayor introduce legislation to the Board of Supervisors that would amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.

Recommendation will not be implemented. This sub-recommendation is part of a larger recommendation that first calls for the Ethics Commission to submit an amendment to the WPO to the Board of Supervisors. If the Ethics Commission fails to do so, the Board of Supervisors is to act on its own to amend the WPO. In the event that the Ethics Commission does not take action or the recommended amendment is not enacted by the Board of Supervisors, the Ethics Commission is to submit an amendment directly to the voters. In the event that none of these recommendations occur, Recommendation 1.4 calls for the Mayor to introduce legislation to the Board of Supervisors to amend the ordinance.

The amendment to the WPO recommended here is too vaguely-defined for the Mayor to take a position on it at this time. Further, the sequencing described in the recommendation is not consistent with the way the Mayor's Office approaches major changes to City law. If such changes were to be contemplated, a consensus-based approach would be adopted, with engagement from relevant City departments, stakeholders, legal and subject-matter experts, as well as other elected officials. This is a more effective method of enacting changes to City law.

Recommendation 2.1: That amendments to the WPO expand the definition of whistleblowing to cover oral complaints to the complainant's department; disclosures to a City department or commission other than the complainant's own; and providing information to any of the recipients listed in the Charter mandate (hereafter "listed recipients"), outside of the formal complaint or investigation process.

The recommendation requires further analysis.

Recommendation 2.2: That these amendments further expand the scope of covered disclosures to include "providing information" to any of the listed recipients regarding improper government activities, whether or not such information is set forth in a formal complaint, or provided during an official investigation.

The recommendation requires further analysis.

Recommendation 3: That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.

The recommendation will not be implemented. Under the WPO, the Ethics Commission is provided with punitive, not restorative, powers to respond to findings of retaliatory job action. However, there are a number of other avenues a complainant can pursue in such circumstances. As the Civil Grand Jury notes, "City officers and employees have successfully litigated complaints of whistleblower retaliation in state court." Contrary to the Jury's claim that this proves the ineffectiveness of the WPO, it in fact demonstrates that there is an established process for filing a civil action. In addition, if an employee believes that he or she has been disciplined without just cause or has suffered an adverse job impact in retaliation for blowing the

whistle, the employee can file a grievance through his or her union. A grievance of this nature may be resolved at the department or Department of Human Resources level, or be escalated to arbitration, in accordance with the negotiated rules of the employee's Memorandum of Understanding. If the Ethics Committee had investigated and found that a job action was in fact retaliation for activities protected by the Whistleblower Protection Ordinance, this ruling would likely influence the independent arbitrator, who does have the power to reverse a retaliatory job action. While the investigation and ruling of the Ethics Commission would be a critical step in the process, as the Ethics Commission notes in their response, labor relations are the responsibility of the Department of Human Resources.

Given the sufficient availability of existing options for complainants to pursue both civil penalties and reversal of the retaliatory job action, there is no need to amend the WPO in the manner recommended.

Recommendation 4: That amendments to the WPO include a revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not apply during preliminary review and investigation of administrative complaints to the Commission.

The recommendation will not be implemented. As noted above, the burden of proof requirement provides critical balance to the WPO by eliminating the element of moral hazard that its removal would enable.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Edwin M. Lee". The signature is fluid and cursive, with a large initial "E" and "L".

Edwin M. Lee
Mayor