

1 [Board Response - Civil Grand Jury - San Francisco's Whistleblower Protection Ordinance is
2 in Need of Change]

3 **Resolution responding to the Presiding Judge of the Superior Court on the findings**
4 **and recommendations contained in the 2014-2015 Civil Grand Jury Report, entitled**
5 **“San Francisco’s Whistleblower Protection Ordinance is in Need of Change;” and**
6 **urging the Mayor to cause the implementation of accepted findings and**
7 **recommendations through his/her department heads and through the development of**
8 **the annual budget.**

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10 WHEREAS, Under California Penal Code, Section 933 et seq., the Board of
11 Supervisors must respond, within 90 days of receipt, to the Presiding Judge of the Superior
12 Court on the findings and recommendations contained in Civil Grand Jury Reports; and

13 WHEREAS, In accordance with California Penal Code, Section 933.05(c), if a finding or
14 recommendation of the Civil Grand Jury addresses budgetary or personnel matters of a
15 county agency or a department headed by an elected officer, the agency or department head
16 and the Board of Supervisors shall respond if requested by the Civil Grand Jury, but the
17 response of the Board of Supervisors shall address only budgetary or personnel matters over
18 which it has some decision making authority; and

19 WHEREAS, Under San Francisco Administrative Code, Section 2.10(a), the Board of
20 Supervisors must conduct a public hearing by a committee to consider a final report of the
21 findings and recommendations submitted, and notify the current foreperson and immediate
22 past foreperson of the civil grand jury when such hearing is scheduled; and

23 WHEREAS, In accordance with San Francisco Administrative Code, Section 2.10(b),
24 the Controller must report to the Board of Supervisors on the implementation of

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1 recommendations that pertain to fiscal matters that were considered at a public hearing held
2 by a Board of Supervisors Committee; and

3 WHEREAS, The 2014-2015 Civil Grand Jury Report, entitled “San Francisco’s
4 Whistleblower Protection Ordinance is in Need of Change” (Report) is on file with the Clerk of
5 the Board of Supervisors in File No. 150603, which is hereby declared to be a part of this
6 Resolution as if set forth fully herein; and

7 WHEREAS, The Civil Grand Jury has requested that the Board of Supervisors respond
8 to Finding Nos. 1, 2, 3.1, 3.2, and 4, as well as Recommendation Nos. 1.2, 2.1, 2.2, 3, and 4
9 contained in the subject Report; and

10 WHEREAS, Finding No. 1 states: “The [Whistleblower Protection Ordinance] (WPO)
11 does not fully “protect” City officers and employees from retaliation for filing a complaint as
12 required by the Charter mandate of Proposition C, because it covers only a limited range of
13 complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its
14 deterrent effect;” and

15 WHEREAS, Finding No. 2 states: “The WPO also fails to fulfill the Charter mandate, in
16 that it does not cover all whistleblower disclosures specified in the Charter;” and

17 WHEREAS, Finding No. 3.1 states: “While other large California cities and counties
18 have relatively weak laws protecting their employees from retaliation for whistleblowing, this
19 does not relieve the Board of its responsibility under the Charter mandate, to enact an
20 ordinance that genuinely protects whistleblowers;” and

21 WHEREAS, Finding No. 3.2 states: “Whistleblower protection laws that cover
22 government employees at the state and Federal level can serve as a useful model for
23 improving the WPO;” and

24 WHEREAS, Finding No. 4 states: “The WPO creates an unwarranted obstacle to
25 administrative complaints of retaliation filed with the Ethics Commission, by imposing a

1 burden of proof on the complainant during preliminary review and investigation of such
2 complaints;” and

3 WHEREAS, Recommendation No. 1.2 states: “If the Ethics Commission fails to act
4 within a reasonable time, that the Board of Supervisors on its own amend the WPO to provide
5 real protection to whistleblowers, in conformity with the Charter mandate of Proposition C;”
6 and

7 WHEREAS, Recommendation No. 2.1 states: “That amendments to the WPO expand
8 the definition of whistleblowing to cover oral complaints to the complainant’s department;
9 disclosures to a City department or commission other than the complainant’s own; and
10 providing information to any of the recipients listed in the Charter mandate (hereafter “listed
11 recipients”), outside of the formal complaint or investigation process;” and

12 WHEREAS, Recommendation No. 2.2 states: “That these amendments further expand
13 the scope of covered disclosures to include “providing information” to any of the listed
14 recipients regarding improper government activities, whether or not such information is set
15 forth in a formal complaint, or provided during an official investigation;” and

16 WHEREAS, Recommendation No. 3 states: “That amendments to the WPO provide a
17 meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order
18 cancellation of a retaliatory job action, and increasing the limit of the civil penalty available
19 under the WPO to an amount adequate to repay the financial losses that can result from such
20 an action;” and

21 WHEREAS, Recommendation No. 4 states: “That amendments to the WPO include a
22 revision of Subsection 4.115(b)(iii) providing that the burden of proof set forth therein does not
23 apply during preliminary review and investigation of administrative complaints to the
24 Commission;” and

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1 WHEREAS, in accordance with California Penal Code, Section 933.05(c), the Board of
2 Supervisors must respond, within 90 days of receipt, to the Presiding Judge of the Superior
3 Court on Findings No. 1, 2, 3.1, 3.2, and 4 as well as Recommendations No. 1.2, 2.1, 2.2, 3,
4 and 4 contained in the subject Report; now, therefore, be it

5 RESOLVED, That the Board of Supervisors reports to the Presiding Judge of the
6 Superior Court that they disagree partially with Finding No. 1 for reasons as follows: the
7 confidentiality provisions for investigations are important as they protect both the complainant
8 and the respondent during the period when accusations are proved or disproved, but the
9 WPO does have limitations that could potentially be enhanced based on future
10 recommendations from the Ethics Commission; and, be it

11 FURTHER RESOLVED, That the Board of Supervisors reports that they disagree
12 partially with Finding No. 2 for reasons as follows: the WPO does fulfill the Charter mandate,
13 but could be improved; and, be it

14 FURTHER RESOLVED, That the Board of Supervisors reports that they agree with
15 Finding No. 3.1; and, be it

16 FURTHER RESOLVED, That the Board of Supervisors reports that they agree with
17 Finding No. 3.2; and, be it

18 FURTHER RESOLVED, That the Board of Supervisors reports that they disagree with
19 Finding No. 4 for reasons as follows: there is no empirical data to support this finding and it
20 does not indicate the scope and nature of the problem nor the solution to deal with the
21 problem; and, be it

22 FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation
23 No. 1.2 will not be implemented for reasons as follows: the Board of Supervisors will work with
24 the Ethics Commission to improve the WPO; however, the Board of Supervisors cannot
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1 predict the timing or outcome of the Ethics Commission’s actions nor the approvals by the
2 legislative body; and, be it

3 FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation
4 No. 2.1 will not be implemented for reasons as follows: the Board of Supervisors will work with
5 the Ethics Commission to improve the WPO; however, the Board of Supervisors cannot
6 predict the timing or outcome of the Ethics Commission’s actions nor the approvals by the
7 legislative body. The Board would also need a more specific definition of “oral complaints” in
8 order to warrant implementation of this recommendation; and, be it

9 FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation
10 No. 2.2 will not be implemented for reasons as follows: The Board of Supervisors will work
11 with the Ethics Commission to improve the WPO; however, the Board of Supervisors cannot
12 predict the timing or outcome of the Ethics Commission’s actions nor the approvals by the
13 legislative body. The Board would also need a more specific definition of what “providing
14 information” entails in order to warrant implementation of this recommendation since there is
15 no clear data that defines the problem; and, be it

16 FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation
17 No. 3 will not be implemented for reasons as follows: the Board of Supervisors concurs with
18 the Mayor’s Office, which states that “under the WPO, the Ethics Commission is provided with
19 punitive, not restorative, powers to respond to the finding of retaliatory job action. However,
20 there are a number of other avenues a complainant can pursue in such circumstances. As
21 the Civil Grand Jury notes, ‘City officers and employees have successfully litigated complaints
22 of whistleblower retaliation in state court.’ Contrary to the Jury’s claim that this proves the
23 ineffectiveness of the WPO, it in fact demonstrates that there is an established process for
24 filing a civil action. In addition, if an employee believes that he or she has been disciplined
25 without just cause or has suffered adverse job impact in retaliation for blowing the whistle, the

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

10 FURTHER RESOLVED, That the Board of Supervisors reports that Recommendation
11 No. 4 will not be implemented for reasons as follows: there should be minimum evidence
12 requirement to justify a whistleblower complaint in order for the Ethics Commission to pursue
13 an investigation; and, be it

14 FURTHER RESOLVED, That the Board of Supervisors urges the Mayor to cause the
15 implementation of accepted findings and recommendations through his/her department heads
16 and through the development of the annual budget.

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