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Date: January 20, 2016

To: Members, Ethics Commission; Executive Director LeeAnn Pelham

From: Ben Hur and Jesse Mainardi

Re: Civil Grand Jury Whistleblower Protection Ordinance Recommendations

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Introduction & Summary

This memorandum provides an assessment of the substantive recommendations contained in the 2014-2015 San Francisco Civil Grand Jury report entitled "San Francisco's Whistleblower Protection Ordinance is in Need of Change." (Copy attached.)[1] The Civil Grand Jury's recommendations reflect a concern that the Ordinance has not protected City whistleblowers from retaliation, as evidenced by the lack of any retaliation complaint filed with the Commission resulting in enforcement.

The Civil Grand Jury's report recommended that the Ethics Commission propose certain changes to the Ordinance for approval by the Board of Supervisors. In response, the Commission indicated that it would conduct further analysis of the Civil Grand Jury's recommendations, and would provide an update to the Civil Grand Jury per California Penal Code section 933.05. In its own response to the Civil Grand Jury report, the Board indicated that it is looking to the Commission for its assessment of the recommended changes.

The Civil Grand Jury's specific recommendations broadly concern three issues: (1) the scope of the Ordinance; (2) the Ordinance's enforcement process; and (3) the Ordinance's remedy. This memorandum advises that the Commission pursue the following:

1. Develop and promulgate regulations clarifying that:

(a) Complaints must be filed in writing regardless of where they are filed;

(b) Submissions deemed informal whistleblower complaints by the Commission staff may trigger retaliation protections under the Ordinance;

[1] The relevant statutory language – i.e., the Charter and Article IV of the Campaign and Governmental Conduct Code (hereinafter the "Ordinance") – is also attached.

25 Van Ness Avenue, Suite 220 • San Francisco, CA 94102-6053 • Phone (415) 252-3100 • Fax (415) 252-3112
E-Mail Address: ethics.commission@sfgov.org Web site: http://www.sfethics.org

(c) The Ordinance covers a number of non-disciplinary retaliatory actions;

(d) Complaints filed with the Commission do not need to establish retaliation by a "preponderance of the evidence" during the preliminary review/investigation phase; and

(e) The Commission should have a standard timeline for completing whistleblower investigations;

2. Develop and propose amendments to the Ordinance that:

(a) Expand the Ordinance to cover disclosures to a City department or commission other than the complainant's own regarding all possible whistleblower complaints currently set forth in Sections 4.107 and 4.115;

(b) Allow the Commission to order cancelation of a retaliatory action; and

(c) Increase civil penalties from a maximum of $5,000 to $10,000.

Each of the recommendations is analyzed below.

Discussion

A. **Recommendations 2.1 and 2.2**. The Grand Jury's first two substantive recommendations overlap,[2] raising issues regarding the scope of the Ordinance and whether it fulfills the City Charter's mandate. These issues are addressed separately below.

Recommendation 2.1:	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.
Recommendation 2.2:	Expand the scope of covered disclosure 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.

Issue 1

Should the Ordinance be expanded to cover oral whistleblower complaints to the complainant's department?

[2] A representative of the Civil Grand Jury has confirmed that Recommendations 2.1 and 2.2 make similar points.

Answer and Analysis

No. The Grand Jury points out that the Charter does not require that a whistleblower to file a retaliation complaint filed with his or her own department in writing, but Section 4.115(a) of the Ordinance does. The Civil Grand Jury contends that this limitation with respect to complaints filed with an employee's department is unwarranted, and that most meritorious whistleblower complaints are actually made orally.

However, written evidence is important to establish that the Ordinance's protections have actually been triggered. Without a written record, it will be difficult to investigate complaints and investigations may become bogged down in lengthy assessments of whether the Ordinance's protections were triggered. Accordingly, the Commission's regulations should require that all complaints must be filed in writing.

Recommended Action

To the extent necessary, clarify by regulation that all complaints must be filed in writing.

Issue 2

Should the Ordinance be expanded to cover disclosures to a City department or commission other than the complainant's own?

Answer and Analysis

Yes. The Charter requires that the Ordinance provide protection to whistleblowers who filed their complaints with "the Ethics Commission, Controller, District Attorney or City Attorney or a City department of commission." The Civil Grand Jury correctly points out that the Charter does not require that a complaint is made to an employee's own department, and contends that this limitation in the Ordinance is unwarranted. Indeed, it would seem inappropriate to deny a whistleblower of retaliation protections simply because he or she submitted a complaint to the wrong department.

Relatedly, the Commission can propose further expanding the Ordinance to address another overlapping concern raised by the Civil Grand Jury. Under Section 4.115 of the Ordinance, complaints not filed with the Controller's Office will trigger retaliation protections only if they concern certain limited issues, which do not include waste or fraud.[3] The Civil Grand Jury contends that the Ordinance should be expanded to include disclosures of waste, fraud, abuse, and violations of general law. In fact, the Controller's Whistleblower Program

[3] For example, a whistleblower is protected only when a complaint filed with his or her own department concerns: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abusing his or her City position to advance a private interest

already covers “the misuse of City funds, improper activities by City officers and employees, deficiencies in the quality and delivery of government services, and wasteful and inefficient City government practices.” (Section 4.107(a).)

Thus, the proposed changes should also specify that whistleblower complaints concerning the above issues that are filed with the “wrong” City department (e.g., misuse of City funds complaints not filed with the Controller’s Office) will still trigger retaliation protections under the Ordinance. A whistleblower should not be deprived of retaliation protections simply because he or she submitted a complaint to the “wrong” department.

Recommended Action

Direct staff to draft a proposed amendments expanding the Ordinance to cover disclosures to a City department or commission other than the complainant's own regarding all possible whistleblower complaints currently set forth in Sections 4.107 and 4.115.

Issue 3

Should the Ordinance be expanded to cover “providing information” to any of the recipients listed in the Charter mandate regarding improper government activities, whether or not such information is set forth in a formal complaint or provided during an official investigation?

Answer and Analysis

The Commission can address this issue via regulation. The Civil Grand Jury correctly points out that the Charter contemplates protection for “filing a complaint with, or providing information to” various City departments regarding improper government activity. The Charter does not indicate that, in order to be protected, a whistleblower must “provide information” in connection with an official investigation. Section 4.115(a)(iii) of the Ordinance does impose this requirement. The Civil Grand Jury’s apparent concern is that potential whistleblowers may not be inclined to file a formal complaint to a City department, but may wish simply to provide evidence of wrongdoing.

The Civil Grand Jury’s concern can be addressed by a regulation indicating that for purposes of Section 4.115, a “complaint” triggering retaliation protections may be both formal and informal, so long as the complainant’s action includes some statement indicative of an attempt to expose governmental wrongdoing.

“Providing information” pursuant to Section 4.115, however, should be limited to written or oral statements made to an investigator during the course of a whistleblower investigation conducted by the Ethics Commission, City Attorney, Controller or District Attorney.

Recommended Action

Direct staff to draft regulations indicating that both formal and informal complaints can trigger retaliation protections, provided the complainant's action includes some statement indicative of an attempt to expose governmental wrongdoing.

Issue 4[4]

Should the Ordinance be expanded to cover applicants for City employment and employees with City contractors from retaliation?

Answer and Analysis

No. The Grand Jury points out that the Ordinance does not protect applicants for City employment and employees of City contractors from retaliation. Indeed, the Charter only mandates protections for "City officers and employees." Practical considerations militate against expanding the Ordinance beyond the Charter mandate. For instance, unsuccessful applicants for City employment may be more likely to file unmeritorious complaints. Additionally, it would appear that injecting the whistleblower retaliation liability rules into City contractors' employment relationships may raise a number of issues, including potentially dissuading certain contractors from bidding on City work (particularly if the Commission were to obtain the ability to reinstate terminated employees, as discussed below). In this regard, each City department may be in a better position to determine whether their contracts should include whistleblower rules. That said, if some contractors are essentially acting as City employees and there is a clear way to identify such contractors (e.g., those that are filing Form 700s) the Commission should consider covering them.

Recommended Action

No further action on this issue is recommended.

Issue 5

Should the Ordinance be expanded to protect against certain non-disciplinary actions?

Answer and Analysis

The Commission can resolve this issue via regulation. Section 4.115(a) of the Ordinance lists the types of prohibited retaliation: termination, demotion, suspension or taking "other similar adverse employment action." The Grand Jury believes that non-disciplinary actions such as threats, transfers and changes in duties are not covered by the Ordinance.

Although it is unclear that this is the proper reading of Section 4.115(a), it is advisable to clarify what constitutes prohibited "retaliation" and to be sure that this term is defined broadly,

[4] Issues 4 and 5 were not explicitly recommendations by the Civil Grand Jury, but were mentioned in its report.

but also in a way that provides adequate guidance to both whistleblower and to Commission staff, particularly given that employment law is outside the Commission's institutional expertise.

Although the Grand Jury recommends an amendment to the Ordinance, the Commission could clarify the definition of "other similar adverse employment action" via regulation. The list proposed by the Grand Jury[5] seems to be a fairly comprehensive list representative of lists in other jurisdictions which could be changed by the Commission if found to be insufficient.

Recommended Action

Direct staff to draft regulations specifying the definition of "other similar adverse employment action."

B. **Recommendation 3**. Recommendation 3 concerns the remedies (or the lack thereof) available to whistleblowers filing complaints with the Ethics Commission.

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

Issue

Should the Ordinance be amended to authorize the Commission to order cancellation of a retaliatory job action and to impose the civil penalties to repay the financial losses that can result from such an action?

Answer and Analysis

Yes. The Civil Grand Jury found that the $5,000 per violation civil penalty set forth in Section 4.115(c) of the Ordinance does not provide the complainant with a meaningful remedy. In fact, the Ordinance does not provide the whistleblower with any remedy for complaints pursued administratively with the Commission; it only provides for punitive fines and, potentially, the discipline of a City officer or employee.

These considerations inform an analysis of the Civil Grand Jury's two recommendations. The first recommendation is to amend the Ordinance to allow the Commission to order

[5] That list of retaliatory actions includes threats, intimidation, transfers, detail reassignments, changes in duties, adverse performance evaluations, and failure to promote.

cancellation of a retaliatory job action, including reinstatement of a fired whistleblower.[6] This recommendations raises many complex and difficult issues.

On the one hand, a whistleblower interested in reinstatement may already pursue such a remedy in court. (Cal. Labor Code sections 98.6(c), 1102.5.) But it is unclear that the Commission should have the authority to provide this remedy, particularly given that the retaliation issues may be outside of the Commission's core institutional competency. Also, reinstating terminated employees may present certain problems. For example, the whistleblower's position may have already been filled by another City employee, whose own former position may also have been taken by another. Reinstating a whistleblower may thus "bump" a series of employees back to prior positions.

On the other hand, it does not appear that the Commission would ultimately order such reinstatement often, whether because of unmeritorious complaints, complainants who ultimately move on to other jobs, etc. Further, it would seem that the Ordinance should provide whistleblowers who have suffered retaliation – particularly those who are less sophisticated and perhaps less likely to pursue a claim in court – with an expedited administrative procedure for getting their jobs back. Thus, on balance, this first recommendation makes sense, but the Commission should be required to consider the totality of the circumstances before reinstating a whistleblower to his previous position.

The Civil Grand Jury's second recommendation is to amend the Ordinance to impose the civil penalties to repay the financial losses that can result from a retaliatory job action. Indeed, the $5,000 civil penalty does seem to be fairly low and should likely be increased. A proposed state ballot measure amending the Political Reform Act ("PRA") might provide some guidance. The Voters Right to Know Act, which was co-written by an original author of the PRA, increases certain of the PRA's penalties from $5,000 to $10,000.

Recommended Action

Direct staff to draft proposed amendments expanding the Ordinance to (1) authorize the Commission to order cancellation of a retaliatory job action if warranted based on the totality of the circumstances; and (2) raise the maximum civil penalty from $5,000 to $10,000.

C. **Recommendation 4**. The Grand Jury's fourth recommendation concerns the burden of proof on the complainant during the preliminary review/investigation stages of a complaint.

Recommendation 4:	Revise 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 does not apply during preliminary review and investigation of complaints.

[6] The Civil Grand Jury has indicated that reinstatement would result in the award of back pay by virtue of applicable labor law.

Issue

Should the Ordinance be revised to specify that a whistleblower does not have to prove retaliation by a preponderance of the evidence during preliminary review and investigation of stages of complaints?

Answer and Analysis

The Commission can resolve this issue via regulation. The Civil Grand Jury expressed concern that the Ordinance requires complainants to prove their claims at the preliminary review/investigation stage without fully participating in the confidential complaint process. Section 4.115(b)(iii) provides in relevant part that:

> In order to establish retaliation under this Section, a complainant must demonstrate by a preponderance of the evidence that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action.

The Civil Grand Jury found that this language creates an unwarranted obstacle to enforcing retaliation complaints filed with the Commission, by imposing a "preponderance of the evidence" burden of proof on the complainant during the preliminary review and investigation stages.[7] Interpreted in this manner, Section 4.115(b)(iii) would impose an unwarranted obstacle to enforcing retaliation complaints.

However, Section 4.115(b)(iii) should not be interpreted in this manner, although it appears that staff may have done so sometimes in the past. Moving forward, Section 4.115(b)(iii) should be interpreted to impose the "preponderance of the evidence" burden of proof during the adjudication of the whistleblower complaint. The Commission should issue regulations clarifying that the staff should investigate complaints fully as long as there is probable cause to believe that a violation has occurred. Any decision ***not*** to fully investigate a complaint should be ratified by the Commission. In most circumstances, the complainant should be given an opportunity to demonstrate to the Commission that the complainant's engagement in activity protected under Subsection (a) was a substantial motivating factor for the adverse employment action.

In addition, the Commission should direct the Staff to propose a standard timeline for the handling of Whistleblower complaints so that complainants and the public have confidence that—absent extraordinary circumstances—complaints will be investigated and adjudicated within a reasonable amount of time.

[7] Preliminary review is generally intended to determine whether a full investigation of a complaint is warranted, and the Commission's enforcement regulations indicate that a full investigation generally should proceed if "there is reason to believe that a violation of law may have occurred." (Enforcement Regulation IV.C.)

Recommended Action

Direct staff to draft regulations specifying that the preponderance of the evidence standard does not apply during the investigatory phase, but only during the adjudication of the complaint by the Commission. In addition, the Staff should propose a standard timeline for the handling of Whistleblower complaints so that complainants and the public have confidence that, absent extraordinary circumstances, complaints will be investigated and adjudicated within a reasonable amount of time.

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