

1 [Campaign and Governmental Conduct Code - Expanding Scope of Whistleblower Protection
2 Ordinance]

3 **Ordinance amending the Campaign and Governmental Conduct Code to broaden the**
4 **agencies with which a whistleblower may file a complaint, provide retaliation**
5 **protections for City contractors, increase the remedies available for whistleblowers**
6 **who have suffered retaliation, and establish greater confidentiality protections for**
7 **whistleblowers' identities.**

8 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
9 **Additions to Codes** are in *single-underline italics Times New Roman font*.
10 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.
11 **Board amendment additions** are in double-underlined Arial font.
12 **Board amendment deletions** are in ~~strikethrough Arial font~~.
13 **Asterisks (* * * *)** indicate the omission of unchanged Code
14 subsections or parts of tables.

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

16 Section 1. The Campaign and Governmental Conduct Code is hereby amended by
17 adding or revising Sections 4.100, 4.105, 4.107, 4.110, 4.115, 4.117, and 4.120, to read as
18 follows:

19 **SEC. 4.100. FINDINGS.**

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

This Chapter protects all City officers and employees, City contractors, and employees of
City contractors from retaliation for filing a complaint with, or providing information to, ~~the Ethics~~

FILED - B.R 3.41
10.2.17
7/31/18 File Reactivated

1 ~~Commission, Controller, District Attorney, City Attorney or complainant's department~~ any local, State,
2 or federal government agency, or a supervisory employee at any local, State, or federal government
3 agency, about improper government activity by City officers and employees, or unlawful activity
4 by City contractors and their employees in connection with a City contract.

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

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

13 **SEC. 4.105. COMPLAINTS OF IMPROPER GOVERNMENT ACTIVITY;**
14 **INVESTIGATION PROCEDURES; REFERRAL TO OTHER AGENCIES.**

15 (a) COMPLAINTS. Any person may file a complaint with any City department, or any
16 supervisory employee at a City department, the Ethics Commission, Controller, District Attorney or
17 City Attorney, or a written complaint with the complainant's department alleging that a City officer or
18 employee has engaged in improper government activity, or that a City contractor, or employee of
19 a City contractor, has engaged in unlawful activity in connection with a City contract. by: violating
20 local campaign finance, lobbying, conflicts of interest, or governmental ethics laws, regulations, or
21 rules; violating the California Penal Code by misusing City resources; creating a specified and
22 substantial danger to public health or safety by failing to perform duties required by the officer or
23 employee's City position; or abusing his or her City position to advance a private interest.

24 (b) ETHICS COMMISSION COMPLAINT PROCEDURES. The Ethics Commission
25 shall investigate complaints filed under this Section that allege violations of local campaign

1 finance, lobbying, conflicts of interest, and governmental ethics laws pursuant to the
2 procedures specified in Charter Section C3.699-13 and the regulations adopted thereunder.
3 Nothing in this subsection shall preclude the Ethics Commission from referring any matter to
4 any other City department, commission, board, officer, or employee or to other government
5 agencies for investigation and possible disciplinary or enforcement action. The Ethics
6 Commission may require that any City department, commission, board, officer, or employee
7 report to the Ethics Commission on the referred matter.

8 (c) REFERRAL. The Ethics Commission shall refer complaints that do not allege a
9 violation of law, regulation, or rule that is within the Ethics Commission's jurisdiction to the
10 appropriate agency for investigation and possible disciplinary or enforcement action. The
11 Commission may conduct preliminary investigations into such complaints to determine
12 whether the complaint contains sufficient information to warrant referral. The Ethics
13 Commission may require ~~that~~ any City department, commission, board, officer, or employee to
14 provide a written report regarding the department's investigation and any action that the department
15 has taken in response to the Ethics Commission's referral, within a time-frame that the Ethics
16 Commission shall specify~~report to the Ethics Commission on the referred matter.~~

17 **SEC. 4.107. COMPLAINTS BY CITIZENS AND EMPLOYEES; WHISTLEBLOWER**
18 **PROGRAM.**

19 (a) WHISTLEBLOWER PROGRAM. The Controller shall administer and publicize a
20 whistleblower and citizen complaint program for citizens and employees to report the misuse
21 of City funds, improper activities by City officers and employees, deficiencies in the quality
22 and delivery of government services, and wasteful and inefficient City government practices.
23 Subject to subsection (b), ~~The~~ Controller shall investigate and otherwise attempt to resolve
24 complaints reported to the Whistleblower Program. The Controller shall administer a hotline
25

1 telephone number and website and publicize the hotline and website through press releases,
2 public advertising and communications to City employees.

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

5 (~~i~~1) Those which another City agency is required by federal, state, or local law
6 to adjudicate: To that agency;

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

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

13 (~~iv~~4) Those which are subject to an existing, ongoing investigation by the
14 District Attorney, City Attorney, or Ethics Commission, where the applicable official or
15 Commission states in writing that investigation by the Controller would substantially impede or
16 delay his, her, or its own investigation of the matter: To the investigating office; and

17 (~~v~~5) Those which allege conduct that may constitute a violation of local campaign
18 finance, lobbying, conflict of interest, or governmental ethics laws, regulations, or rules: ~~To~~ the
19 Ethics Commission and the City Attorney.

20 Where the conduct that is the subject of the complaint may violate criminal law and any
21 civil or administrative law, statute, ordinance, or regulation, the Controller may take action on
22 the noncriminal aspects of the matter under this Section even if a referral has been made to
23 another agency under this Section.

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

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

7 (d) INFORMATION PROVIDED UNDER PENALTY OF PERJURY. In those instances
8 in which the Controller deems it appropriate, the Controller may require that persons making
9 complaints or providing information swear to the truth of their statements by taking an oath
10 administered by the Controller, or an agent of the Controller, or through written declarations
11 made under penalty of perjury under the laws of the State of California.

12 (e) REFERRAL AND RECOMMENDATION BY CONTROLLER. The Controller may
13 refer the complaint to a City department for investigation, either before conducting an initial
14 investigation or after doing so, and may recommend that a City department take specific
15 action based on the Controller's initial investigation. Within 60 days of receiving a complaint
16 for investigation or a recommendation by the Controller for specific action, or such other time
17 as the Controller shall specify, the City department shall report to the Controller in writing the
18 results of the department's investigation and any action that the department has taken in
19 response to a recommendation by the Controller that the department take specific action.

20 (f) REPORT BY DEPARTMENT AND FURTHER ACTION BY CONTROLLER. If the
21 Controller has recommended that a City department take disciplinary or other corrective
22 action that the department has declined to take, the department shall report to the Controller
23 its reasons for failing to do so within the timeframe that the Controller specifies for reporting
24 on its investigation of the complaint. If the Controller determines that the department's
25 reasons are inadequate and that further investigation may be appropriate, the Controller may

1 refer the matter to the Mayor, City Attorney, or District Attorney or to any officer or agency that
2 has jurisdiction over the matter.

3 (g) RESPONSIBILITY OF DEPARTMENTS. The department head shall be
4 responsible for compliance by his or her department with these duties. If department staff fail
5 to comply with the duties to investigate complaints referred by the Controller and to make the
6 reports required by this Section, the Controller shall notify the department head. If the
7 department head fails to take action to obtain the department's compliance with these duties,
8 the Controller may refer the matter to the Mayor, City Attorney, or District Attorney or to any
9 officer or agency that has jurisdiction over the matter.

10 **SEC. 4.110. DEFINITIONS.**

11 For purposes of this Chapter 1, the following words and phrases shall have the
12 following meanings:

13 ~~(a) The term "City" shall~~ means the City and County of San Francisco, its departments,
14 commissions and boards.

15 ~~(b) The term "Complainant's department"~~ includes the complainant's supervisor, the
16 executive director or highest ranking officer in the complainant's department, and the board or
17 commission overseeing the complainant's department.

18 "Improper government activity" shall mean violating local campaign finance, lobbying,
19 conflicts of interest, or governmental ethics laws, regulations, or rules; causing the gross waste, fraud,
20 or abuse of City resources; creating a specified and substantial danger to public health or safety by
21 failing to perform duties required by the officer or employee's City position; or abusing his or her City
22 position to advance a private interest.

23 ~~(c) The term "Preliminary investigation"~~ shall be limited to, but need not include: review
24 of the complaint and any documentary evidence provided with the complaint; interview of the
25 complainant; interview of the respondent, counsel to respondent and any witnesses who

1 voluntarily agree to be interviewed for this purpose; review of any relevant public documents
2 and documents provided voluntarily to the Commission.

3 “Unlawful activity” shall mean violating local campaign finance, lobbying, conflicts of interest,
4 or governmental ethics laws, regulations, or rules; causing the gross waste, fraud, or abuse of City
5 resources; or creating a specified and substantial danger to public health or safety by failing to
6 perform duties imposed by a City contract.

7 **SEC. 4.115. PROTECTION OF WHISTLEBLOWERS - CITY EMPLOYEES.**

8 (a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote,
9 suspend, or take other similar adverse employment action against any City officer or
10 employee because the officer or employee has in good faith (1~~7~~) filed a complaint with any
11 local, State, or federal government agency, including any supervisory employee at any local, State, or
12 federal government agency, the Ethics Commission, Controller, District Attorney or City Attorney, or a
13 written complaint with the complainant's department, alleging that a City officer or employee
14 engaged in improper government activity ~~by: violating local campaign finance, lobbying, conflicts~~
15 ~~of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by~~
16 ~~misusing City resources; creating a specified and substantial danger to public health or safety by~~
17 ~~failing to perform duties required by the officer or employee's City position; or abusing his or her City~~
18 ~~position to advance a private interest, (ii) filed a complaint with the Controller's Whistleblower~~
19 ~~Program, (2) filed a complaint with any local, State, or federal government agency, including any~~
20 ~~supervisory employee at any local, State, or federal government agency, alleging that a City~~
21 ~~contractor, or employee of a City contractor, engaged in unlawful activity, or (3~~##~~) provided any~~
22 information in connection with or otherwise cooperated with any investigation conducted under
23 this Chapter.

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

1 (i1) **Administrative Complaints.** Any city officer or employee, or former city
2 officer or employee, who believes he or she has been the subject of retaliation in violation of
3 §subsection (a) of this Section 4.115 may file a complaint with the Ethics Commission. The
4 complaint must be filed no later than two years after the date of the alleged retaliation.

5 The Ethics Commission shall investigate complaints of violations of §subsection
6 (a) of this Section 4.115 pursuant to the procedures specified in San Francisco Charter
7 Section C3.699-13 and the regulations adopted thereunder. The Ethics Commission may
8 decline to investigate complaints alleging violations of §subsection (a) if it determines that the
9 same or similar allegations are pending with or have been finally resolved by another
10 administrative or judicial body. Nothing in this §subsection shall preclude the Ethics
11 Commission from referring any matter to any other City department, commission, board,
12 officer, or employee, or to other government agencies for investigation and possible
13 disciplinary or enforcement action. The Ethics Commission may refer matters to the
14 Department of Human Resources with a recommendation. The Ethics Commission may
15 require that any City department, commission, board, officer, or employee provide a written
16 report regarding the department's investigation and any action that the department has taken in
17 response to the Ethics Commission's referral, within a time-frame that the Ethics Commission shall
18 specify report to the Ethics Commission on the referred matter.

19 (ii2) **Civil Complaints.** Any City officer or employee who believes he or she
20 has been the subject of retaliation in violation of §subsection (a) of this Section 4.115 may
21 bring a civil action against the City officer or employee who committed the violation. Such
22 action must be filed no later than two years after the date of the retaliation.

23 (iii3) **Burden of Establishing Retaliation.** In order to establish that retaliation
24 occurred under this Section 4.115, a complainant in a civil action must demonstrate, or the Ethics
25 Commission in an administrative proceeding must determine, by a preponderance of the evidence

1 that the complainant's engagement in activity protected under § subsection (a) was a
2 substantial motivating factor for the adverse employment action. The ~~employer~~ respondent may
3 rebut this claim if it demonstrates by a preponderance of the evidence that it would have taken
4 the same employment action irrespective of the complainant's participation in protected
5 activity.

6 (c) PENALTIES AND REMEDIES.

7 (~~#1~~) **Charter Administrative Penalties**. Any City officer or employee who violates
8 § subsection (a) of this Section 4.115 may be subject to administrative penalties pursuant to
9 Charter Section C3.699-13.

10 (~~#2~~) **Discipline by Appointing Authority**. Any City officer or employee who
11 violates § subsection (a) of this Section 4.115 shall be subject to disciplinary action up to and
12 including dismissal by his or her appointing authority. If no disciplinary action is taken by the
13 appointing authority, the Ethics Commission may refer the matter to the Civil Service
14 Commission for action pursuant to Charter Section A8.341.

15 (~~#3~~) **Civil Penalties**. Any City officer or employee who violates § subsection (a)
16 of this Section 4.115 may be personally liable in a civil action authorized under § subsection
17 (b)(~~#2~~) of this Section for a civil penalty not to exceed ~~\$5,000~~ \$10,000. The Ethics Commission
18 may adjust annually by regulation the penalties imposed by this subsection (c)(3) to reflect the change
19 in the California Consumer Price Index for that year, provided that such adjustments shall be rounded
20 off to the nearest \$100.

21 (4) **Redress for Retaliatory Employment Action**. Following an administrative hearing
22 and after making a finding that an adverse employment action has been taken for purposes of
23 retaliation, the Ethics Commission may, subject to the Charter's budgetary and employment provisions,
24 order the cancellation of the retaliatory termination, demotion, suspension or other adverse
25 employment action.

1 (d) RESERVATION OF AUTHORITY.

2 (~~1~~) **Civil Service Commission.** Nothing in this Section 4.115 shall interfere
3 with the powers granted to the Civil Service Commission by the ~~San Francisco~~ Charter.

4 (~~2~~) **Appointing Authority.** Nothing in this Section 4.115 shall interfere with the
5 power of an appointing officer, manager, or supervisor to take action with respect to any City
6 officer or employee, provided that the appointing officer, manager, or supervisor reasonably
7 believes that such action is justified on facts separate and apart from the fact that the officer
8 or employee filed a complaint with any local, State, or federal government agency, including any
9 supervisory employee at a local, State, or federal government agency, alleging that a City officer or
10 employee engaged in improper government activity, or cooperated with any investigation conducted
11 under this Chapter, an Ethics Commission investigation of such complaint; or filed a complaint with or
12 provided information to the Controller, District Attorney, City Attorney or the complainant's
13 department.

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

17 **SEC. 4.117. PROTECTION OF WHISTLEBLOWERS - CITY CONTRACTORS.**

18 (a) RETALIATION PROHIBITED. No City officer or employee may take steps to terminate a
19 contract with a City contractor, refuse to use a City contractor for contracted services, request that a
20 City contractor terminate, demote, or suspend one of its employees, or take other similar adverse
21 action against any City contractor or employee of a City contractor because the contractor or the
22 contractor's employee (1) filed a complaint with any local, State, or federal government agency,
23 including any supervisory employee at any local, State, or federal government agency, alleging that a
24 City officer or employee engaged in improper government activity, (2) filed a complaint with any local,
25 State, or federal government agency, including any supervisory employee at any local, State, or federal

1 government agency, alleging that another City contractor, or employee of another City contractor,
2 engaged in unlawful activity, or (3) provided any information in connection with or otherwise
3 cooperated with any investigation conducted under this Chapter.

4 (b) COMPLAINTS OF RETALIATION FOR HAVING FILED A COMPLAINT ALLEGING
5 IMPROPER GOVERNMENT ACTIVITY OR UNLAWFUL ACTIVITY.

6 (1) **Administrative Complaints.** Any City contractor or employee of a City contractor,
7 that believes it, he or she has been the subject of retaliation in violation of subsection (a) of this Section
8 4.117 may file a complaint with the Ethics Commission. The complaint must be filed no later than two
9 years after the date of the alleged retaliation.

10 The Ethics Commission shall investigate complaints of violations of subsection (a) of
11 this Section pursuant to the procedures specified in San Francisco Charter Section C3.699-13 and the
12 regulations adopted thereunder. The Ethics Commission may decline to investigate complaints
13 alleging violations of subsection (a) if it determines that the same or similar allegations are pending
14 with or have been finally resolved by another administrative or judicial body. Nothing in this
15 subsection shall preclude the Ethics Commission from referring any matter to any other City
16 department, commission, board, officer, or employee, or to other government agencies for investigation
17 and possible disciplinary or enforcement action. The Ethics Commission may refer matters to the
18 Department of Human Resources with a recommendation. The Ethics Commission may require that
19 any City department, commission, board, officer, or employee provide a written report regarding the
20 department's investigation and any action that the department has taken in response to the Ethics
21 Commission's referral, within a time-frame that the Ethics Commission shall specify.

22 (2) **Burden of Establishing Retaliation.** In order to establish that retaliation occurred
23 under this Section 4.117, the Ethics Commission in an administrative proceeding must determine, by a
24 preponderance of the evidence that the complainant's engagement in activity protected under
25 subsection (a) was a substantial motivating factor for the adverse action. The respondent may rebut

1 this claim if it demonstrates by a preponderance of the evidence that it would have taken the same
2 adverse action irrespective of the complainant's participation in protected activity.

3 (c) PENALTIES AND REMEDIES.

4 (1) Administrative Penalties. Any City officer or employee who violates subsection (a)
5 of this Section 4.117 may be subject to administrative penalties pursuant to Charter Section C3.699-13.

6 (2) Redress for Retaliatory Adverse Action. Following an administrative hearing and
7 after making a finding that an adverse action has been taken for purposes of retaliation, the Ethics
8 Commission may, subject to the Charter's budgetary and contracting provisions, order the cancellation
9 of retaliatory adverse action taken against a City contractor or employee of a City contractor.

10 (d) NOTICE OF WHISTLEBLOWER PROTECTIONS. The Controller shall prepare, and each
11 City department shall post a notice of whistleblower protections. The notice shall be posted in a
12 location that is conspicuous and accessible to City contractors and employees of City contractors.

13 **SEC. 4.120. CONFIDENTIALITY.**

14 (a) WHISTLEBLOWER IDENTITY. Any individual who files a complaint under Section
15 4.105 of this Chapter may elect to have his or her identity kept confidential as provided by
16 Charter Section C3.699-13(a). Such election must be made at the time the complaint is filed.

17 (b) COMPLAINTS AND INVESTIGATIONS. The Ethics Commission shall treat as
18 confidential complaints made under Section 4.105 of this Chapter, and related information,
19 including but not limited to materials gathered and prepared in the course of investigation of
20 such complaints, and deliberations regarding such complaints, as provided by Charter Section
21 C3.699-13(a).

22 (c) PENALTIES FOR DISCLOSURE OF WHISTLEBLOWER IDENTITY. Except as
23 provided in subsection (d), any City officer or employee who discloses the identity of any complainant
24 with the knowledge that the complainant elected to keep his or her identity confidential may be subject
25 to the administrative proceedings and penalties set forth in Charter Section C3.699-13.

1 ~~(e)~~(d) EXCEPTIONS.

2 (1) Conduct of Investigations. Nothing in this Section shall preclude the Ethics
3 Commission from disclosing the identity of an individual or other information to the extent
4 necessary to conduct its investigation.

5 (2) Referrals. Nothing in this Section shall preclude the Ethics Commission
6 from referring any matter to any other City department, commission, board, officer or
7 employee, or to other government agencies for investigation and possible disciplinary or
8 enforcement action.

9
10 Section 2. Effective Date. This ordinance shall become effective 30 days after
11 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
12 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
13 of Supervisors overrides the Mayor's veto of the ordinance.

14
15 Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors
16 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,
17 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal
18 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment
19 additions, and Board amendment deletions in accordance with the "Note" that appears under
20 the official title of the ordinance.

21 APPROVED AS TO FORM:
22 DENNIS J. HERRERA, City Attorney

23 By:


24 _____
25 ANDREW SHEN
Deputy City Attorney

n:\legana\as2016\1600739\01107429.docx