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Date: March 23, 2016

To: Members of the Ethics Commission

From: LeeAnn Pelham, Executive Director

Subject: **AGENDA ITEM 6 – Whistleblower Protection Ordinance Recommendations**

Summary This memorandum provides recommendations to clarify and strengthen the Whistleblower Protection Ordinance (“Ordinance”).

Action Requested That the Commission discuss and take action at its regular meeting on March 28, 2016, to provide its policy direction regarding the attached draft regulations and Ordinance amendments.

Background

This item is continued from the Commission’s February 29th, 2016 meeting agenda and is provided to enable the Ethics Commission to consider recommendations to clarify and strengthen the Whistleblower Protection Ordinance.

At the Commission’s regular meeting on January 25, 2016, the Commission discussed a January 20, 2016, memorandum prepared by Commissioner Ben Hur and former Acting Ethics Commission Executive Director Jesse Mainardi that assessed 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.*” The Civil Grand Jury’s recommendations reflect a concern that the Ordinance has not provided “meaningful protection against retaliation for reporting improper governmental activities,”¹ and broadly concerned three issues:

- (1) the scope of the Ordinance: *To whom and by what method must complaints be filed to receive protection under the Ordinance? What is the nature or topic of complaints that warrant protection for whistleblowers? What types of retaliatory actions against whistleblowers should be covered under the Ordinance?*
- (2) the Ordinance’s enforcement process: *What burden of proof should apply to those bringing forward a complaint to receive protection under the Ordinance?*
- (3) the Ordinance’s remedy: *What relief should be provided to a complainants when retaliation in violation of the Whistleblower ordinance is found to have occurred?*

¹ *San Francisco’s Whistleblower Protection Ordinance is in Need of Change*, 2014-2015 San Francisco Civil Grand Jury, page 6.

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 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 January 20, 2016, memorandum by Commissioner Hur and Mr. Mainardi provided the Commission's further analysis of the Civil Grand Jury's recommendations, and offered a series of recommendations to clarify and strengthen the City's Whistleblower protection provisions. Building on that foundation, this memorandum contains two approaches: draft language intended to clarify terms used in the existing Ordinance through Ethics Commission regulations, assuming the existing Ordinance is unchanged (Attachment 1); and draft Ordinance language to amend the statute, with accompanying regulations to clarify terms used in the amended ordinance (Attachment 2).

Should the Commission take action to revise draft regulations at its meeting on March 28th, any revised regulations would be circulated for further public review and comment, with further action by the Commission scheduled for a future meeting. Should the Commission take action to recommend draft amendments to the language of the Ordinance, Staff will discuss any legislative recommendations proposed by the Commission with members of the Board of Supervisors for its consideration and action. Following the Commission's final action on these items, Staff will provide an update on those developments to the Civil Grand Jury for its informational purposes per California Penal Code section 933.05.

Overview of Recommendations Contained in the January 20th Analysis

In their January 20th memo, Commissioner Hur and Mr. Mainardi advised 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;
 - (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.

January 20th Analysis of Grand Jury Recommendations and Proposed Language

For ease of reference, the section below recaps the analysis and recommendations contained in the January 20, 2016, memorandum by Commissioner Hur and Mr. Mainardi regarding the Civil Grand Jury’s Whistleblower Protection Ordinance recommendations. It also summarizes draft language for proposed regulations assuming no changes to the existing Ordinance and, alternatively, draft language for statutory changes and regulations if the Ordinance were amended as shown. As noted above, the proposed language is detailed in Attachments 1 and 2.

Civil Grand Jury Recommendations 2.1 and 2.2

- 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
- 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.

Jan 20th Analysis and Response - Issue 1 Should the Ordinance be expanded to cover oral whistleblower complaints to the complainant's department?

No. 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 1 Under Existing Ordinance Proposed Language A regulation to address this issue can be accomplished by further defining “complaint.” Proposed Regulation 4.110 would provide that a “complaint” can be “any formal or informal writing such as a letter, email or other written communication sufficient to convey what the complainant in good faith believes evidences improper government activity...” The language would also reference oral communications

recorded in writing by the recipient of the complaint, or that is accompanied by written information that demonstrates improper government activity. This approach is intended to acknowledge that the written record provided may vary in its degree of breadth or complexity, while still balancing the need for establishing in writing that protections have actually been triggered.

With an Amended Ordinance

Same as above.

Jan 20th Analysis and Response - Issue 2 Should the Ordinance be expanded to cover disclosures to a City department or commission other than the complainant's own?

Yes. 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 2 Under Existing Ordinance Proposed Language No clarifying regulation is proposed as the language of the Ordinance does not address complaints that are brought to an agency other than the complainant’s, except those brought to the Ethics Commission, Controller, District Attorney, or City Attorney.

With an Amended Ordinance

To ensure Whistleblower disclosures to other than the complainant’s own department would have protection under City law, Secs. 4.100, 4.105(a), and 4.115 would provide that protection also applies for filing a complaint with any supervisory employee at the complainant's department or at another City, County, state or federal agency. This approach would expand the points of contact for a Whistleblower to bring forward a concern about improper government activity to individuals in a governmental position with authority and responsibility to follow up appropriately.

Jan 20th Analysis and Response - 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?

The Commission can address this issue via regulation. 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 3 Under Existing Ordinance
Proposed Language

As noted above under Issue 1, proposed Regulation 4.110 would provide that a “complaint” can be “any formal or informal writing such as a letter, email or other written communication sufficient to convey what the complainant in good faith believes evidences improper government activity...” The language would also reference oral communications recorded in writing by the recipient of the complaint, or that is accompanied by written information that demonstrates improper government activity.

With an Amended Ordinance

Same as above.

**Jan 20th Analysis
and Response - Issue 4**

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

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 if the Commission were to obtain the ability to reinstate terminated employees. 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.

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

Recommended Action

No further action on this issue is recommended.

Issue 4 Under Existing Ordinance
Proposed Language

No clarifying regulation is proposed as the language of the existing Ordinance does not address complaints brought by or involving City contractors.

With an Amended Ordinance

As noted in the January 20th analysis above, to the extent that contractors are performing services on the City's behalf and if there is a clear way to identify them, the Commission may wish to consider including contractors for purposes of Whistleblower protections.

If the Commission were to conclude that coverage as to employees also includes individuals who are working on the City's behalf, within City departments, or side-by-side with City employees, pursuant to a contract with the City and County of San Francisco, it might want to explore language to accomplish that aim. Such an approach would recognize that individuals operating within the terms of a contract with the City and who bring forward information about improper governmental activity should also be afforded some protection against reprisal or retaliation by a city official or employee for engaging in that activity.

Under this approach, for example, the Ordinance could be amended to include complaints brought by or involving contractors operating within the scope of a contract with the City and County of San Francisco. Secs. 4.100, 4.105, and 4.115 would be amended to include reference to:

"...all City officers, employees, including contractors operating within the scope of a contract with the City and County of San Francisco" concerning "improper government activity by a city official or employee or by a contractor operating pursuant to a contract with the City and County of San Francisco."

Should the Commission wish to further explore this approach, identifying protections appropriate to a contractually-based relationship with the City, rather than attempting to inject Whistleblower rules into a contractor's employment relationships, would be necessary. In addition, the Commission may wish solicit further input through Staff from other City departments including the Controller's Office and other agencies with significant procurement and contracting responsibilities to explore whether language could be developed for inclusion in all City contracts.

Jan 20th Analysis and Response - Issue 5

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

The Commission can resolve this issue via regulation. The Commission could clarify the definition of “other similar adverse employment action” via regulation. The list proposed by the Grand Jury [including threats, intimidation, transfers, detail reassignments, changes in duties, adverse performance evaluations, and failure to promote] 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.”

Issue 5 Proposed Language

Under Existing Ordinance

New Ethics Commission Regulation 4.115(a)-1 proposes to define an “other similar adverse employment action” to broadly include effecting any reprisal; or taking or directing others to take, or recommending, or approving, any negative personnel action, including but not limited to, appointment, promotion, transfer, reassignment, performance evaluation, suspension, termination, or other disciplinary action. As proposed, the language would address actions on the list identified by the Grand Jury, including threats, intimidation, transfers, detail reassignments, changes in duties, adverse performance evaluations, and failure to promote.

With an Amended Ordinance

Same as above.

Civil Grand Jury Recommendation 3

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.

Jan 20th Analysis and Response

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?

Yes. With respect to the first recommendation to amend the Ordinance to allow the Commission to order cancellation of a retaliatory job action, the Commission should be required to consider the totality of the circumstances before reinstating a whistleblower to his previous position.

With respect to the second recommendation, the \$5,000 civil penalty does seem low and should be increased.

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.

Proposed Language Under Existing Ordinance

No clarifying regulation is proposed as the language of the existing Ordinance does not address the cancellation of a retaliatory job action.

With an Amended Ordinance

Sec. 4.115(c) would be amended to provide that an officer or employee who violates the Ordinance may be liable in a civil action for a civil penalty of up to \$10,000.

In addition, a new subsection (v) could be added to Sec. 4.115(c) to provide that following an administrative hearing pursuant to Charter Section C3.699-13 and making a finding of a violation of Subsection (a), the Ethics Commission may issue an order calling for the cancellation of a retaliatory employment termination, demotion, suspension or other similar adverse employment action taken against any City officer or employee who exercised his or her right to protection under this Ordinance.

Civil Grand Jury Recommendation 4

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.

Jan 20th Analysis and Response 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?

The Commission can resolve this issue via regulation. 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. 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.

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.

Proposed Language Under Existing Ordinance

New Regulation 4.115(b)-1 could be created directly within regulations related to the Whistleblower Protection Ordinance to clarify that the preponderance of the evidence standard shall apply during the Ethics Commission's adjudication of a complaint alleging retaliation against a Whistleblower and shall not apply during the preliminary review or investigation of that complaint. Reference to this standard of proof also appears in existing SFEC Enforcement Regulation XII.A.2, which generally addresses the rules and procedures for Commission hearings on the merits. The Commission may wish to consider whether additional reference to this standard is necessary or desirable in these regulations.

To promote confidence that Commission staff will place appropriate priority on reviewing allegations of Whistleblower retaliation or reprisal, the Commission's enforcement regulations would include new language about the timeframe for when preliminary retaliation complaints will be initiated and, absent extraordinary circumstances, by when staff will strive to complete preliminary review of retaliation complaints. (See proposed Enforcement Regulation IV.A(1)(a)).

In addition, two new subsections would be added to existing enforcement regulations to support appropriate oversight by the Commission and accountability to complainants who have filed Whistleblower retaliation complaints.

Proposed Enforcement Regulation IV.A(1)(b) creates a reporting requirement that no less than quarterly, the Executive Director will provide, subject to confidentiality requirements of the Charter, a summary to the Ethics Commission on the status of all Whistleblower retaliation complaints that remain under preliminary review. For such matters pending over 90 days, an explanation for why Staff has not yet

completed the preliminary review and a target preliminary review completion date will also be provided.

Proposed Enforcement Regulation IV.A(1)(c) provides that Commission staff will notify any complainant who has alleged retaliation and whose complaint remains under preliminary review 90 days after receipt, and subsequently every 90 days thereafter that the complaint remains under preliminary review. To preserve appropriate confidentiality of Commission investigations, Ethics Commission staff providing such notification may not provide any details about its preliminary review, except as necessary to conduct the investigation.

With an Amended Ordinance

Under an amended Ordinance, the language of Sec. 4.115(c)(iii) could be revised directly to clarify that in order to establish that retaliation occurred, the Ethics Commission would in an administrative proceeding determine 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.

Proposed Enforcement Regulations IV.A(1)(a), (b), and (c) discussed above under the existing Ordinance would also apply under an amended Ordinance.

Other Possible Statutory Changes

Additional language is also included in Attachment 2 for the Commission's consideration that is intended to clarify and/or strengthen several provisions of an amended Ordinance. These provisions are summarized below.

Definition of Improper Governmental Activities

The Ordinance could be strengthened by revising what constitutes "improper governmental activities" to include more broadly "gross waste, fraud and abuse of City resources." This language would replace a more limiting reference that currently exists in Sec. 4.105 to "violating the California Penal Code by misusing City resources."

Controller Referrals

Sec. 4.107(b)(v) addresses referral of certain complaints by the Controller to other departments or agencies. New language is proposed for this subsection to clarify that, in addition to the phrase "governmental ethics laws" that is currently referenced, the Controller would also refer to the Ethics Commission and City Attorney those that may constitute a violation of local campaign finance, lobbying, conflicts of interests laws, regulations or rules.

Commission Referrals

Sec. 4.115(b)(i) provides that the Ethics Commission may decline to investigate complaints alleging Whistleblower retaliation if it determines that the same or similar allegations are pending with or have been finally resolved by another administrative or judicial body. This section also contemplates that the Commission may choose to refer a matter to any other City department, commission, board, officer or employee, or to other government agencies for investigation and possible disciplinary or enforcement action. To further accountability, the Ordinance also provides that the Ethics Commission may require a report back on the referred matter. To clarify that process for departments receiving such a referral, the Commission may wish to consider proposed language to amend Sec. 4.115(b)(i) as follows:

A. Within [90] days of receiving a referral from the Ethics Commission under this Subsection for investigation and possible disciplinary or enforcement action, or such other time as the Ethics Commission shall specify, the City department shall report to the Ethics Commission in writing the results of the department's investigation and any action that the department has taken in response to the Ethics Commission's referral.

Sanctions for Disclosure

Under a revised Ordinance, sanctions that may apply to any City officer or employee who knowingly discloses a Whistleblower's identity should be added. To accomplish that, the confidentiality provision of Sec. 4.120 could be amended to provide that the knowing disclosure of the identity of a Whistleblower who has expressed the desire to remain anonymous to the extent permitted by law may be subject to an administrative enforcement action and administrative penalty authorized in Charter Section C3.699-13 for violating the confidentiality protections of this ordinance or SFC&GC Code Sec. 3.228.

Attachments