

WHISTLING IN THE DARK:  
THE SAN FRANCISCO WHISTLEBLOWER PROGRAM



CIVIL GRAND JURY  
CITY AND COUNTY OF SAN FRANCISCO  
2010-2011

## THE CIVIL GRAND JURY

The Civil Grand Jury is a government oversight panel of volunteers who serve for one year. It makes findings and recommendations resulting from its investigations.

Reports of the Civil Grand Jury do not identify individuals by name.  
Disclosure of Information about individuals interviewed by the jury is prohibited.  
California Penal Code, section 929

## STATE LAW REQUIREMENT California Penal Code, section 933.05

Each published report includes a list of those public entities that are required to respond to the Presiding Judge of the Superior Court within 60 to 90 days as specified. A copy must be sent to the Board of Supervisors. All responses are made available to the public.

For each finding the response must:

- 1) agree with the finding, or
- 2) disagree with it, wholly or partially, and explain why.

As to each recommendation the responding party must report that:

- 1) the recommendation has been implemented, with a summary explanation; or
- 2) the recommendation has not been implemented but will be within a set timeframe as provided: or
- 3) the recommendation requires further analysis. The officer or agency head must define what additional study is needed. The Grand Jury expects a progress report within six months; or
- 4) the recommendation will not be implemented because it is not warranted or reasonable, with an explanation.

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# WHISTLING IN THE DARK: THE SAN FRANCISCO WHISTLEBLOWER PROGRAM

## SUMMARY

Whistleblowing in San Francisco is a high-risk decision.

Government transparency is vital in a democracy, and San Francisco's citizens demand it. There is no denying that bona fide policy reform can and does occur when a witness to organizational misconduct steps forth to report it.

Whistleblowers serve a particularly important role in curbing unchecked authority and abuse of power. Often uniquely situated as witnesses to "the people's business," government workers can function as important agents of change, forcing organizations to reform policy and enhance accountability.

Nearly eight years after its re-launch under a 2003 charter amendment, the Jury finds that the San Francisco's Whistleblower Program has failed in its mission to promote the identification of waste, fraud and abuse.

The existing program deals with mostly low-level issues, does not foster transparency, lacks a comprehensive tracking system, angers and confuses whistleblowers, lacks an appeals system, and fails to create effective and independent oversight.

The Civil Grand Jury decided to investigate the operation of the Whistleblower program and its effect on the whistleblowers themselves.

## INTRODUCTION

### Public Policy, Ethics and Whistleblowing

An important asset of government is public trust. When it is present, citizens are far more likely to believe that elected officials, political appointees, and career public servants are acting in the people's best interest. When public trust is shaken by misconduct, government effectiveness is undermined.

First instituted by federal agencies in the 1970's, public sector Whistleblower Programs were gradually adopted by state legislatures. In 1984, lab technician Vera English was fired for revealing widespread radiation contamination in the General Electric plant where she worked. She sued General Electric and the case worked its way to the highest court.

Her Supreme Court case established the right to pursue whistleblower retaliation claims in state courts. By 2000, nearly every state provided some form of whistleblower protection.

Cities and counties across the country began to recognize the benefits of instituting effective and robust Whistleblower Programs.

Policy initiatives mean little, however, if the organizational culture is at odds with essential principles of accountability and transparency. A poor or mediocre Whistleblower Program – one that seems to be something it is not – is perhaps worse than none at all. Applying an ethical Band-Aid is essentially useless without independent and principled oversight.

#### What Do San Franciscans Stand To Gain From a Well-Run Whistleblower Program?

The City of San Francisco – like local governments elsewhere – presently faces staggering budget deficits that ultimately will require increased revenue, spending cuts, or both. As citizens feel the pinch, they are increasingly intolerant of headlines that chronicle gross inefficiencies, excessive waste, and fiscal mismanagement in city government. This mistrust can translate into voter refusal to approve needed bond issues.

In 2010, a San Diego whistleblower investigation exposed a fraudulent scheme among the City's Parks & Recreation employees that recovered \$100,998 in misappropriated funds.

In Spokane, WA, a whistleblower tip revealed that a state parks project, originally budgeted at \$140,000, had ballooned to \$7 million as a result of gross waste and negligence. Notably, both jurisdictions operate comprehensive Whistleblower Programs that allow public access to the results of investigations.

San Francisco's Whistleblower Program in its current form has yielded underwhelming results as measured in dollars and cents.

While no 'good government' policy can function effectively in an ethical vacuum, a responsive and well-run Whistleblower Program would provide a means of alerting San Francisco officials to misconduct and abuse before it becomes endemic. By taking corrective action at an early stage, the City can minimize waste, improve morale and efficiency, and encourage staff accountability in departmental operations.

### Media Coverage and Costly Lawsuits

When legitimate complaints are ignored or dismissed, the news media is often a whistleblower's only available recourse. A program that properly addresses and resolves allegations of malfeasance "in-house" can significantly reduce the City's exposure to alarming press coverage.

The effort to contain the fallout from a local scandal was, in fact, a major impetus for Proposition C, the 2003 charter amendment that ushered in the current version of San Francisco's Whistleblower Program. It moved most of the program from the Ethics Commission to the Controller's Office. This ballot initiative was sponsored by the Board of Supervisors, who in urging its passage, invoked a recent scandal that had received widespread press coverage at the time.

Workers at the Port of San Francisco were alleged to have:

- Used stolen port property to remodel their own homes;
- Operated personal businesses from port offices;
- Falsified overtime records; and
- Retaliated against workers who objected to the alleged illegalities.

According to the Supervisors' ballot argument, "Their alleged activities might have cost the City millions."<sup>1</sup>

Moreover, exposure isn't limited to bad press. The City also risks liability from costly civil lawsuits. When the administrative system fails to heed allegations of governmental misconduct, whistleblowers can and do seek redress in the courts. Though the cost of litigation is often too prohibitive for many claimants, there are attorneys who will take whistleblower cases on a contingency basis. If they prevail, damage awards can be significant. The Jury is unable to determine the actual cost to the City because of confidentiality conditions of the settlements.

While claims against city departments typically settle out of court, the cumulative payout from the City can be costly. The Civil Grand Jury notes that a number of the individuals whom we interviewed for this report have filed suit against various city departments for damages under state and federal statutes.

Long-term benefits of investing in an effective Whistleblower Program cannot be measured solely in dollars and cents. By holding high-level department managers and elected officials to the same standards as other workers, the City has a greater opportunity to spur ethical behavior among public sector employees at all levels. By restoring confidence in good government ideals such as fair treatment and transparency, the City will maintain its ability to attract and retain high-caliber employees to the public sector.

## BACKGROUND & PROGRAM HISTORY

### Whistleblowing Basics

The term whistleblowing generally refers to a means of raising concerns about wrongdoing that occur within an organization, typically by a person situated within that organization.

In a government setting, reported misconduct is usually classified as a violation of laws or regulations, or as posing a threat to public interest. This includes fraud, waste, abuse of office, or health and safety violations.

Common examples of fraud, waste and abuse are:

- Theft of government resources
- Accounting irregularities
- Intentional misuse of government property or equipment
- Contractor fraud
- Record falsification
- Payroll or timekeeping fraud
- Kickbacks or bribes
- Gross disregard of policy and procedural controls

Whistleblower hotlines in the public sector, referred to in some jurisdictions as Fraud, Waste & Abuse Hotlines (FW&A), are an established mechanism for receiving complaints involving misuse of public resources.

Most hotlines maintained by local government Whistleblower Programs offer the caller anonymity, investigate complaints, and determine whether allegations are substantiated. Typically, they do not process labor-related or conduct claims such as sexual harassment or discrimination. These are the responsibility of the Human Resources Department or grievance units of labor unions.

### Conflicting Portrayals

Whistleblowers are perceived from two distinct points of view. To some, they are seen as disloyal, even traitorous; others regard them as heroic figures who possess the courage to voice dissent. Those whistleblowers whom we interviewed for this report felt a moral responsibility to expose what they believed to be negligence, fraud, or an abuse of authority.

## Incentives

Since 2006, San Francisco has offered significant reward money for those who report property owners who fail to pay their fair share of taxes. Reporting tax cheats to the Assessor-Recorder can net up to 10%<sup>2</sup> of what the City claims in lost revenue. A large number of Federal agencies offer financial rewards to whistleblowers.

Unlike other cities, the current Whistleblower Program does not offer any financial rewards.

## A Legacy of Legislative Tinkering

Administration and oversight of San Francisco's Whistleblower Program reflects a legacy of legislative tinkering. Over the course of the past two decades, a series of voter initiatives and amendments to the charter has resulted in a patchwork of changes without a cohesive core.

To understand how program management and responsibility for oversight was unbundled, transferring some functions to one department while retaining vestiges in another, the Jury looked at a series of ballot measures that have contributed to the scattered structure of the current program.

## San Francisco's First Whistleblower Ordinance (1989 – 1993)

San Francisco's Whistleblower Program was first established during the administration of mayor Art Agnos. A strong advocate for transparent city government, Mayor Agnos was interested in creating a mechanism for the prevention of waste, fraud and abuse in the mayoral Department of Employee Relations. In 1989, he recruited the department's Deputy Director, Edwin Lee, to serve as the first investigator of San Francisco's new Whistleblower Program. Mr. Lee, the current mayor, held that post until 1991.

## Proposition K (1993 – 2003)

With public confidence in San Francisco city government in decline, voters approved Proposition K (a charter amendment) on November 2, 1993 and established the City's Ethics Commission. As set forth in its mission statement, the commission was to:

- Clearly inform candidates for public office, members of the public, city employees and other officials about existing ethics laws and rules;
- Actively enforce all ethics laws and rules including campaign finance and open government laws;
- Recommend new laws, rules and programs that will lead to ethical compliance;
- Serve as a model for other elected and appointed officials and government employees; and,
- Faithfully adhere to its own Code of Ethics.

Upon passage of Proposition K, the task of administering the Whistleblower Program was transferred from the Mayor’s Office to the newly formed Ethics Commission.

For the next decade (1993 – 2003), the Whistleblower Program was placed exclusively within the Ethics Commission whose primary function then – as now—was to administer and enforce campaign finance law.

### Proposition C (2003 – Present)

The Whistleblower Program evolved once again under an initiative placed on the November 2003 ballot, sponsored by former City Controller Ed Harrington. This amendment to the Charter created a new division, City Services Auditor (CSA), within the Office of the Controller.

In taking responsibility for most of the Whistleblower Program’s functions, the CSA is required to:

- Administer a complaint website and telephone hotline;
- Receive, evaluate, track, and investigate citizen and employee complaints concerning inefficient city government practices, misuse of government funds and improper activities conducted by city government officials, employees and contractors;
- Investigate and resolve complaints when appropriate; and,
- Publicize the Whistleblower Program to city employees and the public.

Proposition C did little to make the program more unified and cohesive. Instead, the effect splintered jurisdiction of the program by allowing a key component of any strong Whistleblower Program – protecting complainants from retaliation – to remain under the auspices of the Ethics Commission.

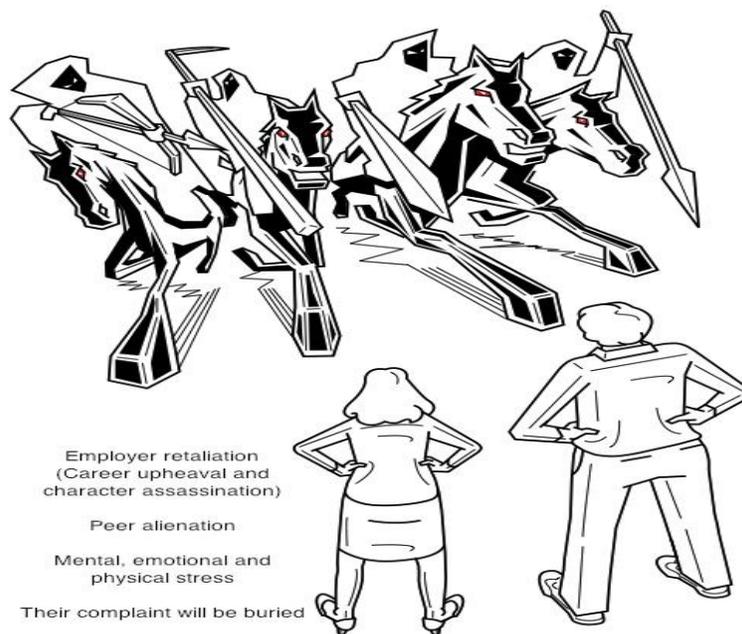
Moreover, there was also some concern at the time about a conflict of interest, whether real or perceived. As argued by Proposition C’s opponents, the City Services Auditor (including the Whistleblower Program) “should be an independent investigative post, not subject to political pressures by the Controller’s Office.”<sup>3</sup>

Oversight of CSA operations and the Whistleblower Program was delegated to the Citizens’ General Obligation Bond Oversight Committee (CGOBOC), a pre-existing citizen’s review panel established in 1992 by Proposition F.

## WHISTLEBLOWERS FACE THEIR FEARS

“ALL your work was done FOR you. All the evidence was presented to you. No one has even attempted to deny irrefutable facts that state a prima facie case of fraud and false claims against government funds. Yet all of you just sit there and collect your salaries as the defendants turn around and retaliate against whistleblowers. Amazing. Absolutely amazing!”

– Excerpt, San Francisco Whistleblower Complaint



Whistleblowers Face Their Fears

No discussion about public policy and whistleblowing can ignore the toll that is exacted from a man or woman on the inside who refuses to look the other way. Nor can we ignore the profound effect, cumulatively, of listening to so many credible, often harrowing accounts from the whistleblowers whom we interviewed.

A long time San Francisco General Hospital employee filed his first whistleblower complaint in 2004. After filing two more whistleblower complaints, he was placed on involuntary sick leave in 2007. Believing this to be retaliation for his whistleblower complaints, he filed a grievance through his union. The whistleblower suspected the Department of Public Health may have

been involved with his involuntary sick leave. From 2007 to 2011, the whistleblower reported experiencing many challenges: an inability to retire with the benefits earned, being denied his Social Security disability benefits, and facing ostracism from his former colleagues.

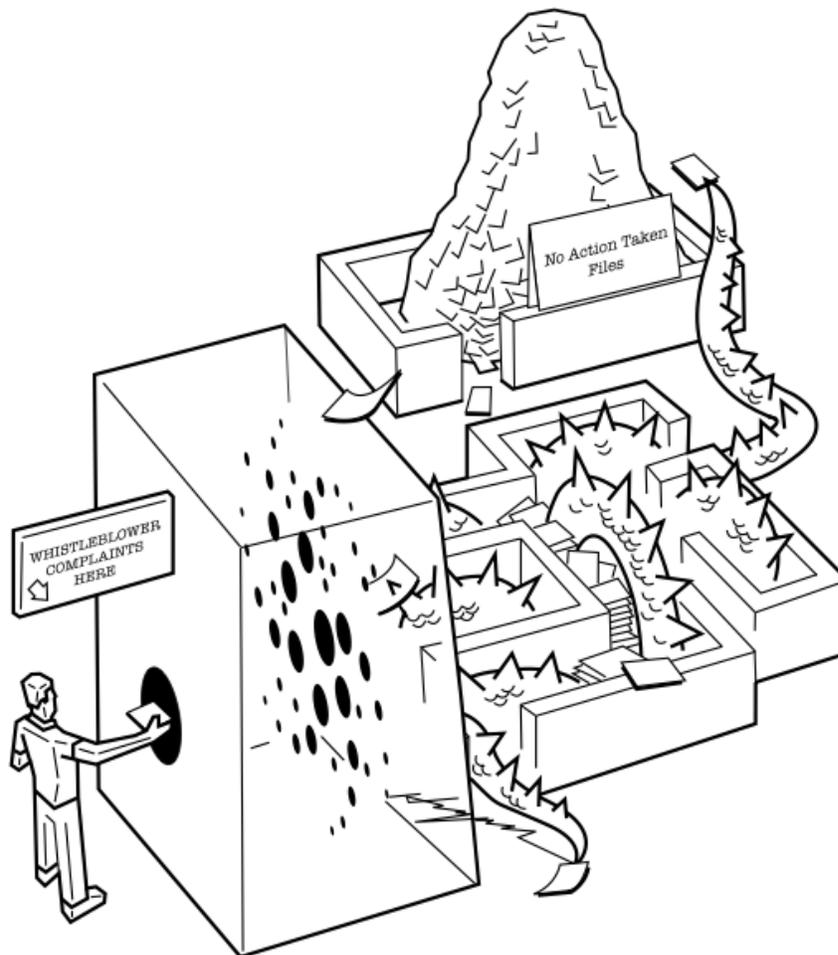
In 2009 the whistleblower filed a lawsuit against the City. In 2011, it was settled for an undisclosed amount.

### Personal Sacrifice and the Emotional Toll Endured

“It’s as if you become radioactive.”

— Witness Interview

Former city employee, describing the experience of being shunned by long-time colleagues as a direct result of blowing the whistle on managerial misconduct.



Imagine the pressure. Your boss, your boss's boss, and even your co-workers turn against you. You are mistreated daily, and threatened with suspension, demotion, termination. You have your family to consider, your security, your career, and your future. The personal toll extracted from those who stand alone in voicing their dissent can be overwhelming.

From a program policy perspective, there are several issues. Most glaringly, once a complaint is filed, the whistleblower is from that point forward, essentially shut out of the entire process and left to navigate a "black hole" where further access to the investigation is denied.

During witness interviews, whistleblowers repeatedly indicated that they weren't given, because of the confidentiality statutes, any specific information about the current status or the results of the investigation beyond a one line nebulous phrase (see section Complaint Status Updates below). As a result the complainants feel "left out in the cold" which reinforces whatever sense of isolation they are experiencing.

A member of the Ethics Commission staff filed five whistleblower complaints. The subject of one complaint was an incriminating e-mail sent erroneously to the unit where the staffer worked. He was directed by his supervisor to delete the e-mail. However, the staffer believed doing as he was told constituted a felony. Receiving a reprimand for his refusal, the staffer was told he was "insubordinate".

This employee was bumped from his position in early 2010 and felt this was done in retaliation for his whistleblowing activities. The Ethics Commission's sole duty under the Whistleblower program is to investigate complaints of retaliation. Where could this Ethics Commission staffer turn?

Like a number of whistleblowers who filed complaints through the Controller's Office, the former staffer felt frustrated, unprotected, and decided to take his story to the news media.

In the Jury's interview, he stated that had he to do it all over again he would have never been a whistleblower.

#### No Appeal Process and the Problems With Confidentiality

One of the problems with the Whistleblower program is the lack of an appeals process. The following illustrates one example of where an appeals process might have been appropriate. For the purpose of this report, we will call this next whistleblower "Ms. X." She detailed the difficulties encountered with filing a complaint related to a San Francisco non-profit. City and Federal funding, in the amount of \$100 million, was provided through the City to the non-profit in question.

Filed through the Controller's Whistleblower program, Ms. X explained her complaint was related to non-compliance with federal grant reporting requirements, deficiencies in the non-profit's internal financial accounting controls, and negligent management.

In response to Ms. X's whistleblower complaint, the Controller's Office indicated after, an "informal review", they found "no violations" and stated there was no budget for even a cursory audit that could have substantiated her complaint. Additionally, her case was closed with no explanation and no information provided.

Ms. X requested a return of any and all information relating to her complaint and was informed that she could not have the documents due to the confidentiality of investigation records. She declared she was in fact the whistleblower and waived her rights of confidentiality. The Controller's Office would not release even redacted documents. Believing this was not a satisfactory end to her complaint, Ms. X filed a request with the Sunshine Ordinance Task Force<sup>4</sup> for her documentation and information about the investigation.

Ms. X stated "...information is being kept from the public, and confidentiality should not preclude transparency." This San Francisco whistleblower has made continuous attempts to obtain the information related to her complaint and has expressed frustration over the lack of communication from the Whistleblower Program.

The Jury notes that confidentiality is an important aspect of the Whistleblower Program. Confidentiality protects individuals interviewed, and it guards alleged violators from having to face unsubstantiated complaints.

However, confidentiality is the proverbial "double-edged sword." While protecting the individuals in an investigation, it can also result in a lack of transparency as it relates to investigations. Confidentiality, as described by the whistleblowers interviewed, should not be a shield. Confidentiality should be a tool used carefully with balance provided to those being investigated and those whistleblowers filing complaints.

If a complainant is dissatisfied with the outcome of the whistleblower investigation, there is no process for appeal.

#### Limited Publicity of the Whistleblower Program

A simple fear for all is the fear of the unknown. In our interviews with some employees with grievances it was clear that they did not know about the Whistleblower Program. A case in

point, employees from a first responder's department told the Jury they had not been informed about the Whistleblower Program. Instead they filed a union grievance and ultimately filed a suit against the City.

To further illustrate this point, The Jury was told that not all employees in the six<sup>5</sup> city departments that received the most whistleblower complaints received training on the Whistleblower Program.

The City's employee handbook does little to promote the Whistleblower Program, devoting only a single paragraph to the subject. It is located near the end of the 45-page [manual](#)<sup>6</sup> on page 42:

“If You Suspect Improper or Criminal Activity on the Job  
As a City employee, you have a duty to report any incidents of improper or illegal activity involving your department or another City department. Never confront an employee whom you suspect is involved in illegal or criminal activity. Discuss the matter with your supervisor or departmental personnel officer. If you feel it necessary to protect your safety or avoid retaliation, you may report illegal or improper conduct to the Whistleblower Hotline at 554-CITY. You may make an anonymous report on the hotline. However, keep in mind that anonymous reports are more difficult to investigate.”

An enhanced Whistleblower publicity program may:

- Reduce the fear of workplace retaliation;
- Give employees information on what to expect when filing a whistleblower complaint.

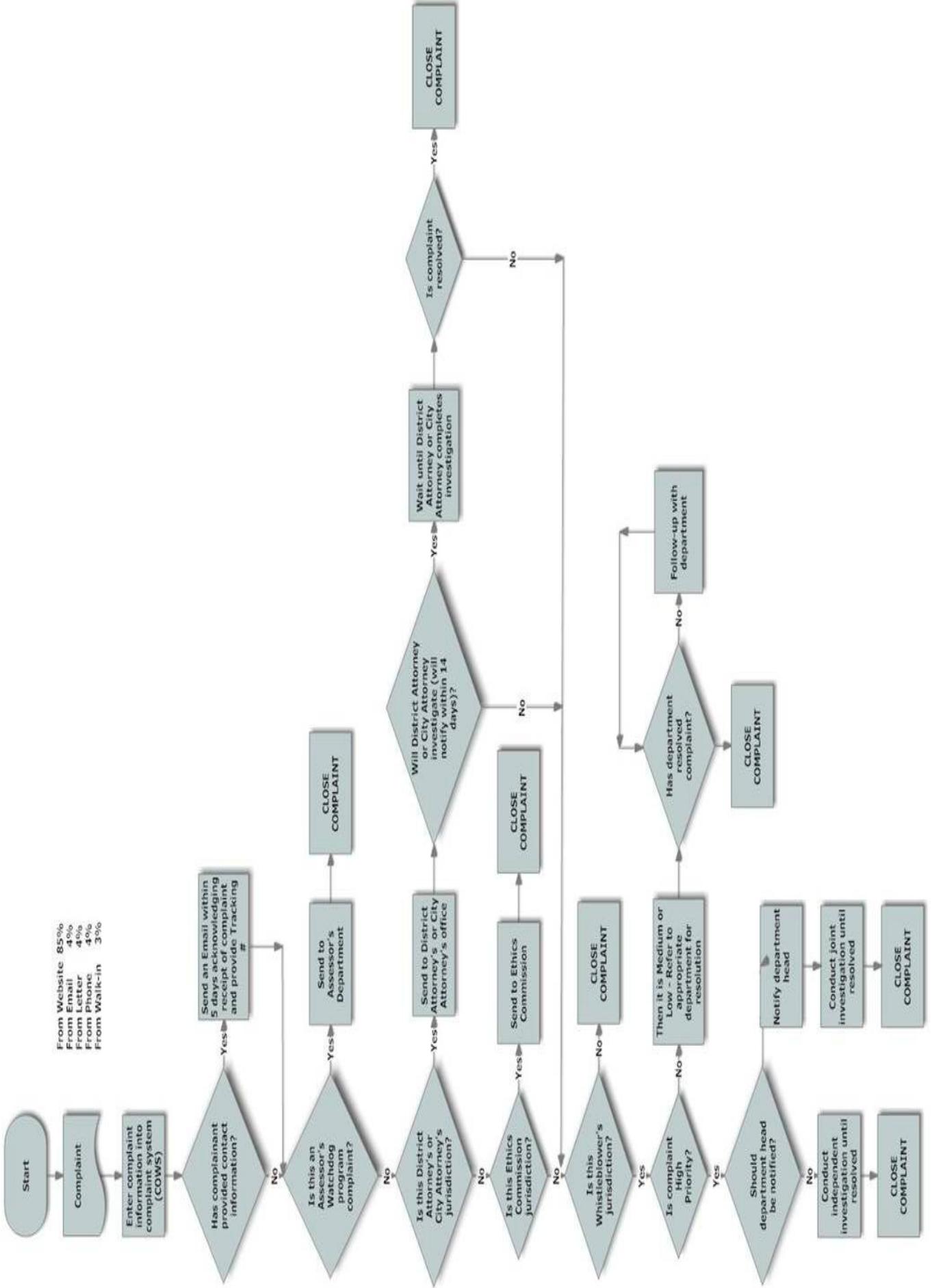
## TECHNOLOGY RELATED ISSUES

### Complaint Process

On the following page, a flowchart provides an overview of the complaint process once a complaint is entered into the system.

CSA determines the risk level<sup>7</sup> based on the potential cost to the City and/or the level of management involved. It is important to note that only high risk level complaints are investigated by the CSA. It is evident in the chart that the complaint process is complicated and a complaint can be lost in the bureaucracy.

# Complaint Process



### Whistleblower Program Website

San Francisco's Whistleblower Program is accessed via the Office of the Controller on the City's public website at [sfgov.org](http://sfgov.org). The following description is offered to web visitors:

"The City and County of San Francisco's Whistleblower Complaints Program receives and tracks complaints about the **quality and delivery of government services**, wasteful and inefficient City government practices, misuse of government funds, and improper activities by City government officials, employees and contractors. The Controller's Office operates the program and, when appropriate, the Controller's Office investigates and attempts to resolve individual complaints. If you are unsure whether your complaint should be reported to the Whistleblower Program, click on the Definitions link to the left to see definitions and examples.

To file your complaint online, click on the File Complaints link to the left. To file your complaint over the telephone, call the 311 Customer Service Center at 3-1-1/TTY: 415-701-2323. If outside the 415 area code, call 415-701-2311/TTY: 415-701-2323. 311 will also take non-whistleblower complaints and answer questions regarding any other City issue." (Emphasis added)

The fiscal year [2009-2010 Whistleblower Program Annual Report](#)<sup>8</sup> indicated that over 83% of the whistleblower complaints were filed on the website. With a statistic this powerful it should be self-evident why updating the website should be a priority for the Whistleblower Program.

To enter a complaint, the whistleblowers click on "Filing a Complaint" from the menu, and get a message asking them to click again to proceed to the complaint form. This screen provides very little information and requires another click to get to the next screen where the actual complaint information is entered. These screens don't provide any additional useful information. For example, it doesn't explain the investigation process, nor tell who to contact if the whistleblower is being retaliated against.

Nothing on these screens or in the Frequently Asked Questions section informs complainants about confidentiality when they choose to provide their contact details. There is no place on the complaint form for the complainant to indicate that his or her contact information should be kept confidential or if they have additional documentation to provide.

The information provided to the complainants on the website regarding confidentiality and protection from retaliatory conduct is limited to the following recitation of the City's Administrative Code:

“SEC. 4. 120. CONFIDENTIALITY. (a) WHISTLEBLOWER IDENTITY.

Any individual who files a complaint under Section 4. 105 of this Chapter may elect to have his or her identity kept confidential as provided by Charter Section C3. 699-13(a). Such election must be made at the time the complaint is filed.”

The website’s “Definitions” section is also a problem. Good examples of waste, fraud, and abuse are listed but the Jury found that 36 percent of the complaints filed with the Whistleblower Program might not fit into what one would logically call waste, fraud or abuse. The Jury would refer to the following complaints as minor and suggest that they should not fall within the scope of the Whistleblower Program:

- A Muni Driver was rude to me on the K line;
- Rude DPT employee;
- City Vehicle parked at employee's house;
- Employee smoking while writing ticket;
- City employee in vehicle talking on a cell phone.

No one denies the need to address these concerns, but involving trained auditors/program investigators in processing these complaints is a poor use of City resources. The 311 call center personnel may handle this type of complaint in a more efficient manner.

Additionally, the site should present examples defining what does or does **not** constitute waste, fraud or abuse. Adding this information may assist in reducing superficial complaints.

After a complaint is filed, a tracking number is issued. When this number is entered in the status page, it provides little to no detail other than whether the investigation is “OPEN” or “CLOSED”. Complainants are left to navigate the process on their own.

In some Jury interviews, it was indicated that if a whistleblower files a complaint in a manner other than through the website, such as a mailed-in complaint, the complainant is not always provided a tracking number. Without a tracking number they have no way to obtain even the minimal amount of information available on the status screen.

In addition the Whistleblower website is not current. The annual newsletter posted in the Whistleblower Program Summary Reports section was from the previous year. The Jury also noted the Legal Status section is not current.



<http://www.sfcontroller.org/index.aspx?page=32> taken on 5-24-2011.

The Jury was told more than once that the website was being updated. When asked about the timeline, the Jury received vague answers about both the timeline and what specific changes would be made.

### Complaint Status Updates

An effective program that gives periodic updates as to the investigation's status could reduce the angst and confusion whistleblowers experience. The reporting of progress in investigations reduces the fear that the complaint is not being addressed or taken seriously.

The status page lacks detail. The Jury was informed by program staff that, as per the charter, the information provided was minimal “to maintain program confidentiality.” Further, there is

no notification sent to the complainant when the status is changed or the investigation is closed. When an investigation is closed there is no information provided or a closing [report](#)<sup>9</sup>. To see any status change the whistleblower must look it up.

Listed below are samples of the one line status updates a whistleblower would find:

For the OPEN status:

Under investigation

Pending investigation

For the CLOSED status:

Investigated and closed

No violation found

Closed after initial investigation

Unable to substantiate with info given

Merged with previous complaint under original tracking number

Complaint issue is outside Whistleblower Program jurisdiction

Referred to Assessor's Real Estate Watchdog Program. Follow up at 554-5618

Investigated. Complaint sustained in part. Action taken.

Closed following investigation - Unable to substantiate

Unable to investigate with info given. Pls call 3-1-1 with more detail

Referred to other City agency for investigation

Investigated and closed Complaint sustained. Action taken

Closed without investigation.

Unable to substantiate with information given

Referred to department

This system is simply not welcoming or user friendly.

#### Controller's Office Whistleblower System (COWS) Database

The Controller's system for tracking whistleblower complaints is called COWS. The COWS tracking system is out of date. It currently does not support the Risk Level, even though the Whistleblower Policies & Procedures manual<sup>10</sup> indicates that assignment of a Risk Level ranking is used to prioritize and triage complaints. Instead, data regarding the Risk Level assessment is maintained in an Excel spreadsheet separate from the database.

In reviewing the complaints, a summary of the interactions is provided rather than the full text. For example, rather than including a verbatim e-mail exchange with another department the notes, from the investigator only indicate the date that the department was e-mailed and usually a brief summary. Including the full text from the e-mail in the notes field would ensure e-mails related to the investigation are retained with the rest of the investigation notes.

Currently investigation notes in COWS can be modified after they have been entered. To ensure credibility of the program the ability to edit or delete investigation notes should be removed.

## INVESTIGATIONS

### Review of Complaint Sampling

As summarized in this report's "Method of Investigation" section, the Grand Jury reviewed a statistical sampling of 364 redacted whistleblower complaints supplied by CSA from January 2009 to December 2010. An attempt to compare the investigation procedure as recorded in the COWS database with stated investigatory procedure was unsuccessful. The Jury learned that from 2005 through December of 2010, there had been no documentation of investigatory procedures in the Whistleblower Policy & Procedures manual.

Three things stood out about the data in the sampling we reviewed:

- Approximately 28% of the records were either duplicative or clearly outside of the Whistleblower Program jurisdiction.
- Around 36% of the sample complaints did not fall within the category of waste, fraud, or abuse. Altogether, the Jury believes strongly the majority of these complaints did not warrant the time and resources of a program investigator. These issues, even if deemed valid, did not constitute a bona fide whistleblower allegation, and could easily have been handled at the 311 call center.
- The majority of the investigations were performed by the department listed in the complaint rather than the Whistleblower Program investigators. The role of the investigators is to follow up and verify the department had concluded the investigation.

### Insufficient Oversight and Lack of Independent Review

The Citizens General Obligation Bond Oversight Committee (CGOBOC) was created in 1992 as a citizen's watchdog to review expenditures from general obligation bonds issued by the City and County of San Francisco. The duties of CGOBOC are enumerated in §5. 30 et seq. of the San Francisco Administrative Code. Under the ordinance, CGOBOC is required to meet at least four times a year. Its membership consists of nine appointees: two are appointed by the Controller, three are appointed by the Mayor, three by the Board of Supervisors and one by the Civil Grand Jury. All members serve a two-year term.

With the passage of Proposition C in 2003, CGOBOC's duties greatly expanded. Under authority of the Charter (Appendix § [F1. 111](#)<sup>11</sup>), the nine-member committee was assigned a secondary function as "Citizens Audit Review Board" (CARB), effective July 1, 2004. Serving in that capacity, in addition to existing duties, the committee was tasked with oversight of the City Services Auditor division of the Controller's Office.

The Jury found that apparently CGOBOC was unaware or failed to recognize that oversight of the Whistleblower Program was included as part of its oversight responsibilities.

Witnesses indicated to the Jury that when they appeared before a full CGOBOC committee in 2010 to give testimony about program problems, the panel members seemed unaware that the program existed or that they had oversight responsibility.

In fact, it took more than *seven years* for CGOBOC to finally set up a three-member Standing Committee to serve as a Citizen's Audit Review Board. There was virtually no meaningful whistleblower review undertaken until after the Review Board subcommittee was formed on July 18, 2010.

In a 2003 Controller's [Report](#),<sup>12</sup> the current structure of the oversight committee which oversees the CSA Division within the Office of the Controller is a "weak" and "diluted" monitoring model. CGOBOC depends exclusively on selected information prepared by the Controller and the City Services Auditor (CSA) – the very department that it is charged with overseeing. A perception of conflict of interest is present in such a system.

Clearly, CGOBOC is not an effective oversight body.

#### Inadequate Protections Against Retaliation

"I assure you, the next time I witness somebody dipping their hands into public funds to steal money intended to serve the disabled I will certainly not stick my neck out by blowing the whistle and being left abandoned to suffer the blowback of retaliation and retribution."

– Excerpt, San Francisco Whistleblower Complaint

When employees witness a functioning whistleblower program, their fear of retaliation may decrease. The prospect of having investigations publicly reported may bring additional focus on the program.

On the front page of the September 7, 2010 Whistleblower Program Annual Report the following appears:

The San Francisco Whistleblower Ordinance protects City employees and officers who, in good faith, file complaints of improper governmental activities by City employees and officers. The ordinance does not protect individuals from adverse employment action taken by the City and County of San Francisco regardless of whether or not they had filed a whistleblower complaint.

Those interviewed by the Jury indicated that, under the current configuration, there is no way to truly protect whistleblowers. They indicated that they had been laid off, intimidated and “bumped” from their jobs. Union membership has not protected the whistleblowers.

#### The Immediate Layoff

Doctor A and Doctor B, each employed at Laguna Honda for over 20 years, filed two whistleblower complaints in September 2009 citing conflict of interest and improper compensation by the hospital management. In March 2010, both doctors filed a third, unrelated complaint, alleging gross mismanagement and misappropriation of the hospital’s patient gift fund.

In March 2010 Doctor A had been informed he was being laid off, and that his employment with the City would be terminated in June 2010. In mid-March, the doctor filed a whistleblower retaliation complaint with the Ethics Commission asserting his termination was in retaliation for the multiple whistleblower complaints submitted.

In June 2010, the now former hospital employee was notified that his retaliation complaint would be investigated but only after the complaints of September 2009 have been investigated.

#### Hollow Assurances of Protections

Doctor B, who joined in filing the complaints, began to experience severe cutbacks to her patient programs. Doctor B told the Jury that she felt undue pressure from superiors at Laguna Honda. This pressure took a serious physical and emotional toll on a doctor whose entire medical career of over 20 years had been at Laguna Honda Hospital. Doctor B resigned her position in protest to the cutbacks and perceived harassment.

In the March 2010 patient gift fund complaint, an audit was requested. For reasons that were never clearly explained to the Jury, rather than conduct an audit, CSA referred this complaint to

the Ethics Commission for investigation. However, public and media pressure eventually forced the CSA to complete an audit, which validated many of the doctors' allegations and instructed restoration of \$350,000 to the Laguna Honda Patient Gift Fund.

The Doctors, in following the paper trail, made an information request under the Sunshine ordinance for correspondence between the Whistleblower Program and the Ethics Commission. The request was denied, because those documents are "confidential" in spite of the fact they belonged to the whistleblowers.

Additional records request were made seeking proof that the Controller's Whistleblower Program had been advised to suspend their investigation by the Ethics Commission. Receiving no cooperation from the Controller's Office, this case was heard before the Sunshine Ordinance Task Force in April 2011. The task force ruled in favor of the two physicians.

Even though their complaints had been well-founded and accurate, the Whistleblower Program could not prevent them from losing their jobs.

## CONCLUSION

As we began to hear from whistleblowers about their experience in navigating the program, common themes began to emerge. Time and time again, each independent witness we interviewed invoked similar – if not identical – phrases to describe the difficulties they encountered.

In our interviews we heard the following common themes:

- The program is a complete dead end with no communication;
- Investigators circle the wagons;
- Whistleblowers are regarded as a burden and threat;
- No information is provided at the end of the investigation;
- We had nowhere to turn.

The Civil Grand Jury concludes that the Whistleblower Program's ineffectiveness can be traced to inadequate procedures, lack of communication with complainants, and the need for truly independent oversight. To expedite efficiency, the program must develop updates to its internal tracking system and to the external website.

In reviewing actual complaint files, the Civil Grand Jury found that a high percentage of complaints received fall outside the scope of waste, fraud, and abuse. The program does not make the best use of the whistleblower investigator's time.

The Whistleblower Program should encourage individuals to file substantive complaints, but should simplify the process, making it easier to navigate. Additionally, once reports are completed, that information should be shared with the public to promote transparency in government.

Of paramount importance, the program does not protect the whistleblower.

## METHOD OF INVESTIGATION

The Grand Jury relied on a wide array of resources during the course of our investigation:

### Personal Interviews

- Interviewed Management and toured San Francisco 311 City Services Call Center operations and reviewed complete intake process.
- Interviewed employees from the two major departments responsible for Whistleblower Program administration, including staff at various levels of both the City Services Auditor Division of the Controller's Office and the Ethics Commission.
- Interviewed individuals who serve on commissions and committees charged with oversight of the Whistleblower Program. We also interviewed past and present members of the Sunshine Ordinance Task Force.
- Conducted approximately forty hours of direct, confidential interviews from whistleblowers, including current and former city employees whose employment spanned a broad spectrum of city departments. These whistleblowers provided us with voluminous records that detailed:
  - The information and evidentiary documents that they submitted to support their whistleblower claim; and,
  - All communications they received from Whistleblower Program personnel.
- Consulted and interviewed a leading expert and independent policy consultant who has conducted benchmark studies on the topic of whistleblowing. This author was one of the few to address "best practices" of successful Whistleblower Programs.

### Personal Attendance

Attended or audited the following hearings:

- Ethics Commission – December 2010
- Sunshine Ordinance Task Force – January 2011, April 2011
- CGOBOC – February 2011 and April 2011

### Data Collection, Representative Sampling and Cross-Referenced Complaints

- Reviewed 364 whistleblower complaints received by CSA via website, hotline and mail and entered into an internal database.
- To ensure proper representation of whistleblower complaints files, our review was based on a statistical sampling of the total number of complaints recorded by the CSA during a period of approximately two years, from January 1, 2009 through December 22, 2010. The total population of complaints available for sampling was calculated by adding the number of complaints received during calendar year 2009 (421) to those received during calendar year 2010 (383) for a sum total of 804 complaints. To achieve a 99% confidence level (with a 5% margin of error), 364 complaints were sampled.

### Reviewed Requested Data

- Sample of complaints representative of internal ranking by CSA as high-, medium- and low-risk;
- Six case investigation closing notes – prepared by CSA upon final disposition of investigation.

### Our Research

- Internal policies and procedures manuals maintained by CSA. Publication dates: May 2005, October 2010 & December 2010;
- Annual Reports – San Francisco Ethics Commission; City Services Auditor;
- Citizens General Obligation Bond Oversight Committee documents;
- City Services Auditor’s Annual Work Plan – 2010-2011;
- Meeting Agendas and minutes, including audio recordings of special hearings;

### Best Practices Review

- Researched and reviewed materials regarding the administration of governmental Whistleblower Programs in other jurisdictions, both within and outside California;
- Data comparisons regarding reported outcomes; the degree to which investigative information is disclosed upon conclusion of the investigation; whether or not independent auditors are used as a control measure to ensure integrity of internal auditing.

## FINDINGS

F 1) The investigation of whistleblower complaints **is not independent** when performed by the targeted agency or department.

F 2) The Whistleblower program is confusing and difficult to navigate.

F 3) The City's Whistleblower website needs updating but this does not appear to be a high priority for the Whistleblower Program.

F 4) The COWS/Internal record keeping/tracking system is inadequate.

F 5) Confidentiality throughout the entire process eliminates any level of transparency.

F 6) No detailed final public report of substantiated whistleblower complaints is issued by the City Services Auditor. The lack of public reporting of whistleblower investigations fails to provide transparency in government.

F 7) The current Whistleblower protections are inadequate.

F 8) - The Jury found that whistleblowers who faced retaliation choose to initially use their union or sue the City rather than using the Ethics Commission to resolve their retaliation complaint.

F 9) CGOBOC does not provide effective or independent oversight of the Whistleblower program.

F 10) It appears there are no procedural mechanisms in place to address the following:

A) Complainants are not consistently receiving the assigned complaint tracking number as an acknowledgement of their claim. B) The program fails to provide a meaningful way for complainants to obtain substantive information regarding the status of the investigation, specific actions being taken, and an opportunity to respond to the department's finding of the investigation.

F 11) Whistleblower Program staff are spending an inordinate amount of time on low level complaints.

F 12) The Whistleblower Program is inadequately marketed by the program staff, as shown by the limited awareness of the program by many city employees.

F 13) A process is needed to give complainants an avenue to appeal a whistleblower investigation if they have questions about how the investigation was conducted or if they disagree with the investigation's conclusions.

F 14) Adding a reward program would create an incentive for individuals to become Whistleblowers.

F 15) The San Francisco Whistleblower Program's confidentiality policies eliminate any possible transparency.

## RECOMMENDATIONS

R 1) CSA should perform all investigations. This would require a change to the Charter.

R 2) There are major deficiencies in the whistleblower procedures. The website should be revised:

- To make it more user-friendly;
- To provide clear guidelines for what qualifies as a whistleblower complaint as opposed to a general complaint;
- To provide examples of what doesn't qualify as waste fraud and abuse;
- To provide information about the investigation process when a complaint is submitted;
- To provide detailed information about how confidentiality of the complainant can be maintained when contact information is supplied;
- To regularly update the reports section and legal status sections;
- To create a box that indicates there are additional documents to support the allegations in a complaint;
- To provide information on who to contact if a whistleblower is facing retaliation;
- To include a box indicating who to contact about the status of an investigation at regular intervals;
- To describe the general procedure that will ensue in the course of the investigation.

R 3) The COWS system should be modified:

- To define whether it is a high-, medium-, or low-level risk complaint;
- Remove the ability to edit or delete investigation notes after they have been entered;
- Add a field to indicate the source (web, phone, letter, etc.)
- To remove the constraint, if it exists, to allow investigators to copy full e-mails and correspondence into the notes.

R 4) A more proactive system must be developed for communicating with the whistleblower.

R 5) If a complaint is substantiated, a public Finding should be issued that details:

1. The nature of the complaint;
2. What the investigation determined;
3. The name of the respondent; and
4. The penalty applied or actions taken.

R 6) An independent administrative law judge should deal with retaliation issues. The responsibility for retaliation complaints should be removed from the Ethics Commission.

R 7) If an employee who has filed a whistleblower complaint is laid off within two years of having filed the complaint, or within one year of the complaint being closed, an administrative law judge will conduct a full review. Should it be determined that retaliation is a factor in the layoff/termination; the employee shall be awarded up to two years full salary as part of his or her severance package.

R 8) CGOBOC must become an effective Whistleblower Program oversight entity by reviewing the number and type of whistleblower complaints, the investigative process used and the final results of investigations at least twice a year.

R 9) Anyone filing a non-website initiated complaint should be sent a form letter that indicates the tracking number and an acknowledgment that their complaint has been received.

R 10) Create and institute a filter process to allow redirection of non-waste, fraud and abuse complaints to 311. This would require a change to the Charter.

R 11) The Office of the Controller should develop and implement training to educate all city employees about the Whistleblower Program.

R 12) Establish an appeals process using an independent administrative law judge for whistleblower complaints that qualify for review. Guidelines must be established to determine legitimate reasons for the appeal of a "dismissed", "no violation found" or "closed" complaint.

R 13) Establish a reward system for substantiated high-risk<sup>13</sup> whistleblower complaints with a \$500 minimum or 10% of funds recovered, whichever is greater.

R 14) The Jury recommends that a best practices/benchmark study be done of other jurisdictions as to how confidentiality issues might be better managed.

## GLOSSARY

BUMPED	To oust usually by virtue of seniority or priority.
CSA	Central Services Auditor, a division in the Controller's Office.
CARB	Citizen's Audit Review Board.
CGOBOC	Citizens General Obligation Bond Oversight committee.
COWS	Controllers Office Whistleblower System.
Proposition F	Tracks whistleblower complaints inside the Central Services Auditor.
Proposition K	Created CGOBOC review panel established in 1992. The 1993 Charter amendment that established the Ethics Commission.

## ENDNOTES

<sup>1</sup> San Francisco Voter Information Pamphlet, November 2003 Election: *Rebuttal to Opponent's Argument Against Proposition C*, page 65.

<sup>2</sup> Assessor-Recorders FY 2009-2010 Annual Report  
<http://www.sfassessor.org/Modules/ShowDocument.aspx?documentid=696>

<sup>3</sup> [Nov. 2003 Voter Information Guide:](http://www.sfassessor.org/Modules/ShowDocument.aspx?documentid=696)  
[http://sfpl.info/pdf/main/gic/elections/November4\\_2003.pdf](http://sfpl.info/pdf/main/gic/elections/November4_2003.pdf)

<sup>4</sup> The Sunshine Ordinance Task Force advises the Board of Supervisors and provides information to other City departments on appropriate ways to implement the Sunshine Ordinance (Chapter 67 of the Administrative Code); ensures that deliberations of commissions, boards, councils and other agencies of the City and County are conducted before the people; and guarantees that City operations are open to the people's review.

<sup>5</sup> Department ranked by number of complaints

1. Department of Public Health
2. Department of Public Works
3. San Francisco Municipal Transit Agency
4. Department of Human Services
5. San Francisco Public Library
6. Department of Recreation and Parks

<sup>6</sup> <http://www.sfdhr.org/Modules/ShowDocument.aspx?documentid=2121>

<sup>7</sup> High-risk: defined as allegations which cost the City \$50,000 or greater; and any allegations which involve high-level management city employees.

Medium-risk: defined as allegations involving medium-level management

Low-risk: defined as allegations which cost the City \$10,000 or less; and any allegations involving low-level city employees.

(from Controller Office Whistleblower Presentation)

<sup>8</sup> <http://sfcontroller.org/Modules/ShowDocument.aspx?documentid=1129>

<sup>9</sup> [http://www.sandiego.gov/auditor/reports/fy11\\_pdf/hotline/holine\\_inv\\_misappropriation\\_of\\_funds.pdf](http://www.sandiego.gov/auditor/reports/fy11_pdf/hotline/holine_inv_misappropriation_of_funds.pdf)

<sup>10</sup> Whistleblower Policy and Procedures Manual, December 2010

<sup>11</sup> <http://www.sfcontroller.org/index.aspx?page=40>

<sup>12</sup> [http://www.sfcontroller.org/ftp/uploadedfiles/controller/Best\\_Practices\\_Report-Final\\_rev.pdf](http://www.sfcontroller.org/ftp/uploadedfiles/controller/Best_Practices_Report-Final_rev.pdf)

<sup>13</sup> High-risk whistleblower complaints are currently defined as allegations that will cost the City \$50,000 or greater, and/or involves high-level management city employees.

## RESPONSE MATRIX

FINDINGS	RECOMMENDATIONS	RESPONSE
<p>F 1) The investigation of whistleblower complaints <b>is not independent</b> when performed by the targeted agency or department.</p>	<p>R 1) CSA should perform all investigations. This would require a change to the Charter.</p>	<p>Office of the Controller Board of Supervisors Mayor</p>
<p>F 2) The Whistleblower program is confusing and difficult to navigate.</p> <p>F 3) The City's Whistleblower website needs updating but this does not appear to be a high priority for the Whistleblower Program.</p>	<p>R 2) There are major deficiencies in the whistleblower procedures. The website should be revised:</p> <ul style="list-style-type: none"> <li>▪ To make it more user-friendly;</li> <li>▪ To provide clear guidelines for what qualifies as a whistleblower complaint as opposed to a general complaint;</li> <li>▪ To provide examples of what doesn't qualify as waste fraud and abuse;</li> <li>▪ To provide information about the investigation process when a complaint is submitted;</li> <li>▪ To provide detailed information about how confidentiality of the complainant can be maintained when contact information is supplied;</li> <li>▪ To regularly update the reports section and legal status sections;</li> <li>▪ To create a box that indicates there are additional documents to support the allegations in a complaint;</li> <li>▪ To provide information on who to contact if a whistleblower is facing retaliation;</li> <li>▪ To include a box indicating who to contact about the status of an investigation at regular intervals;</li> <li>▪ To describe the general procedure that will ensue in the course of the investigation.</li> </ul>	<p>Office of the Controller</p>

<p>F 4) The COWS/Internal record keeping/tracking system is inadequate.</p>	<p>R 3) The COWS system should be modified:</p> <ul style="list-style-type: none"> <li>• To define whether it is a high-, medium-, or low-level risk complaint;</li> <li>• Remove the ability to edit or delete investigation notes after they have been entered;</li> <li>• To remove the constraint, if it exists, to allow investigators to copy full e-mails and correspondence into the notes.</li> </ul>	<p>Office of the Controller</p>
<p>F 5) Confidentiality throughout the entire process eliminates any level of transparency.</p>	<p>R 4) A more proactive system must be developed for communicating with the whistleblower.</p>	<p>Office of the Controller</p>
<p>F 6) No detailed final public report of substantiated whistleblower complaints is issued by the City Services Auditor. The lack of public reporting of whistleblower investigations fails to provide transparency in government.</p>	<p>R 5) If a complaint is substantiated, a public Finding should be issued that details:</p> <ol style="list-style-type: none"> <li>1. The nature of the complaint;</li> <li>2. What the investigation determined;</li> <li>3. The name of the respondent; and</li> <li>4. The penalty applied or actions taken.</li> </ol>	<p>Board of Supervisors  Mayor</p>
<p>F 7) The current Whistleblower protections are inadequate.</p> <p>F 8) - The Jury found that whistleblowers who faced retaliation choose to initially use their union or sue the City rather than using the Ethics Commission to resolve their retaliation complaint.</p>	<p>R 6) An independent administrative law judge should deal with retaliation issues. The responsibility for retaliation complaints should be removed from the Ethics Commission.</p> <p>R 7) If an employee who has filed a whistleblower complaint is laid off within two years of having filed the complaint, or within one year of the complaint being closed, an administrative law judge will conduct a full review. Should it be determined that retaliation is a factor in the layoff/termination; the employee shall be awarded up to two years full salary as part of his or her severance package.</p>	<p>Office of the Controller  Board of Supervisors  Mayor</p>
<p>F 9) CGOBOC does not provide effective or independent oversight of the Whistleblower program.</p>	<p>R 8) CGOBOC must become an effective Whistleblower Program oversight entity by reviewing the number and type of whistleblower complaints, the investigative process used and the final results of investigations at least twice a year.</p>	<p>Office of the Controller  CGOBOC  Board of Supervisors</p>

<p>F 10) It appears there are no procedural mechanisms in place to address the following: A) Complainants are not consistently receiving the assigned complaint tracking number as an acknowledgement of their claim. B) The program fails to provide a meaningful way for complainants to obtain substantive information regarding the status of the investigation, specific actions being taken, and an opportunity to respond to the department's finding of the investigation.</p>	<p>R 9) Anyone filing a non-website initiated complaint should be sent a form letter that indicates the tracking number and an acknowledgment that their complaint has been received.</p> <p>R 5) If a complaint is substantiated, a public Finding should be issued that details:</p> <ol style="list-style-type: none"> <li>1. The nature of the complaint;</li> <li>2. What the investigation determined;</li> <li>3. The name of the respondent; and</li> <li>4. The penalty applied or actions taken.</li> </ol>	<p>Office of the Controller</p>
<p>F 11) Whistleblower Program staff are spending an inordinate amount of time on low level complaints.</p>	<p>R 10) Create and institute a filter process to allow redirection of non-waste, fraud and abuse complaints to 311. This would require a change to the Charter.</p>	<p>Office of the Controller  Board of Supervisors  Mayor</p>
<p>F 12) The Whistleblower Program is inadequately marketed by the program staff, as shown by the limited awareness of the program by many city employees.</p>	<p>R 11) The Office of the Controller should develop and implement training to educate all city employees about the Whistleblower Program.</p>	<p>Office of the Controller</p>
<p>F 13) A process is needed to give complainants an avenue to appeal a whistleblower investigation if they have questions about how the investigation was conducted or if they disagree with the investigation's conclusions.</p>	<p>R 12) Establish an appeals process using an independent administrative law judge for whistleblower complaints that qualify for review. Guidelines must be established to determine legitimate reasons for the appeal of a "dismissed", "no violation found" or "closed" complaint.</p>	<p>Office of the Controller  Board of Supervisors  Mayor</p>

<p>F 14) Adding a reward program would create an incentive for individuals to become Whistleblowers.</p>	<p>R 13) Establish a reward system for validated high-risk whistleblower complaints with a \$500 minimum or 10% of funds recovered, whichever is greater.</p>	<p>Office of the Controller  Board of Supervisors  Mayor</p>
<p>F 15) The San Francisco Whistleblower Program's confidentiality policies eliminate any possible transparency.</p>	<p>R 14) The Jury recommends that a best practices/benchmark study be done of other jurisdictions as to how confidentiality issues might be better managed.</p>	<p>Office of the Controller</p>