




CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CONTROLLER

Ben Rosenfield
Controller

Monique Zmuda
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To: Mayor Edwin Lee
Members, Board of Supervisors
Members, Citizens' Audit Review Board

From: Ben Rosenfield, Controller 

Date: July 11, 2011

Re: Civil Grand Jury Report on the City's Whistleblower Program

The Civil Grand Jury released a report today on the City's Whistleblower Program, entitled "Whistling in the Dark: The San Francisco Whistleblower Program." This brief memo serves as an initial response to this report from the Controller's Office, which is responsible for the administration of the program. I look forward to further discussion of the report at upcoming meetings of both the Citizen Audit Review Board / General Obligation Bond Oversight Committee and the Board of Supervisor Government Audit and Oversight Committee.

General Comments

I want to offer my thanks to the Grand Jury members for their service, and believe that Grand Jury reports, when thoroughly researched, are an important tool for the improvement of government services. The report outlines areas for further improvement of the program, which we welcome and will adopt where appropriate. These include suggested improvements to the program website, helpful adjustments to the technology tool we use to track cases, and suggestions for more depth in the program's annual public reports.

However, from my perspective, I believe that the overall report leaves a false impression that the program is not meeting its goal of investigating and resolving confidential claims of fraud, waste, and abuse of public resources because it suffers from an incomplete review process on other key points. The Civil Grand Jury did not interview or ask for feedback from the professional investigators or others responsible for the administration of the program on many of the issues contained in the final report. Further, they allowed no

opportunity to review fact-based errors in the report, and ultimately present some key opinions as fact.

The Civil Grand Jury team spent only a total of approximately four hours interviewing staff responsible for managing and operating the program. This time included my only interview with the Civil Grand Jury members responsible for the report, held for approximately one hour nearly six months ago. At the Civil Grand Jury's request, we provided over 364 individual case files for their review. We were never asked for any further interviews regarding these reports nor asked any questions regarding the conduct of any individual investigations, including those ultimately referenced in the report. My offer to discuss any information that was unclear or ambiguous with the Civil Grand Jury team was declined.

The program has received 2,228 complaints since its inception in 2004. The report is heavily reliant on forty hours of interviews, which appear from the report's discussion to be based on five individual complainants. If our understanding is correct, this represents approximately one-quarter-of-one-percent (0.25%) of all filers since the program's inception. Based on standard practices for professional audits, we provided the Civil Grand Jury members with a statistical case sampling method and suggested means that the Grand Jury could employ to randomly sample feedback from complainants— it would not appear that this occurred. All told, the Civil Grand Jury members, per the methodology section of the report, would appear to have spent ten times as long interviewing a small group of complainants as they did those who run the program and investigate the complaints. The report team would have come to a greater understanding of how and why the program works the way it does if they had spent adequate time with the program staff themselves.

General Program Accomplishments

As outlined in our public annual reports, the program has received an average of approximately 350 whistleblower complaints annually since the voter initiative that established the program in our office in 2004.

Given State and local laws and the policies and procedures that govern the program, details of these individual complaints are confidential information in order to protect the confidentiality of the whistleblower and others involved in any subsequent investigation. While complainants received through the program are broad and varied, some examples of complaints types that the program has investigated and found to have merit include:

- The program has received, investigated, and resolved allegations of fraudulent claims by City contractors. As an example, a recent claim that a contractor was receiving reimbursement with City funds for alcohol, cigarettes, and other fictitious expenditures. After investigation, the claim was found to have merit and the City no longer contracts with the organization.

- The program has received, investigated, and resolved allegations of improper management and human resources practices in some City departments and programs. As an example, a recent claim alleged that a program manager in a City department had hired and promoted numerous relatives within their area of direct oversight. After an extensive investigation, conducted with the Department of Human Resources, the claim was found to have merit, and a host of personnel actions were taken, including the termination of four employees.
- The program has received, investigated, and resolved allegations of impropriety in bidding and contract processes. As an example, a recent claim alleged that a software procurement process was tampered with to tilt the process towards a given bidder. The investigation substantiated some irregularities in the bidding process, which was subsequently abandoned and restarted.
- Other examples of complaints received and ultimately substantiated in some form include reports of employees conducting personal side-businesses on City time, use of taxpayer funds for political purposes, design flaws in City construction projects, improper use of City vehicles and other public resources, and unauthorized or improper timesheet practices, telecommuting, and overtime usage by city managers and employees.

At the Civil Grand Jury's request, we provided details regarding several of the more complex cases the program has received and investigated during the past two years. The final report, however, makes no mention of any of them, despite statements in the report that the program "has yielded underwhelming results" and "spends an inordinate amount of time on low level cases." Had the Civil Grand Jury reviewed a representative sample of complaints in the study, we believe that they would have found that the program has met its goals for those cases that were found to have merit. While there is room for improvement in the functioning of any City service including the Whistleblower Program, we find some of the report's generalizations to be unsupported by facts.

Whistleblower Protection

We agree in the strongest terms with the Civil Grand Jury's findings that complainant protection is critically important to the effective operation of any whistleblower program. The risk and fear of retaliation can deter individuals from reporting allegations of wrongdoing. The City Charter prohibits retaliation against whistleblowers, and local laws assign investigation of retaliation complaints to the Ethics Commission. The report, however, describes this separation as "splintered jurisdiction." In fact, this separation of the complaint and retaliation processes is considered a best-practice in whistleblower programs, and is employed in the design of whistleblower programs at all levels of government.

Accordingly, comments regarding the process for investigating claims of retaliation, including the use of administrative law judges and other suggestions, should be directed to the Ethics Commission and not the Controller's Office. Unfortunately, the Executive Director of the Ethics Commission does not appear to have been interviewed during the preparation of the report on these issues or suggestions.

Program Oversight

The Controller's Office agrees with the Civil Grand Jury that adequate oversight by an independent governing body is of utmost importance. The program welcomes additional oversight if desired by policy-makers and helpful to the overall functioning of the program, but the Civil Grand Jury report does not appear to be aware of several facts regarding current oversight of the program.

The voter initiative that established the Whistleblower Program within the Controller's Office assigned the oversight of the program to the Citizens' Audit Review Board, a body which also sits as the General Obligation Bond Oversight Committee.

The Civil Grand Jury does not mention that, since the program's inception in 2004, the board has each year appointed an official liaison from the Citizens' Audit Review Board to the Whistleblower Program, who regularly receives updates and provides feedback on overall program metrics, reviews the program's policies and procedures, and provides feedback to program staff on individual cases. The Citizens' Audit Review Board has typically also held a public review of the program's annual report, and during this past year, has conducted a public review of the program's policies and procedures. The Government Audit and Oversight Committee of the Board of Supervisors also typically holds a public hearing on the program's annual report.

Effective oversight is always a work-in-progress for any governing body, and I look forward to further conversation with both the Board of Supervisors' Government Audit and Oversight Committee and Citizens' Audit Review Board regarding their thoughts on the report's suggestion of more regular discussion of the program.

Outreach and Program Visibility

We agree with the Civil Grand Jury's statements that whistleblower programs can only be effective if employees, contractors, and members of the public are aware of its existence and operation. Continued and expanded outreach to employees is a key focus of the program, and has for years included quarterly written communication to each of the City's 27,000 employees and regular presentation at various department staff meetings. We have expanded this outreach in the past two years to include a segment on the program in both new employee and new manager orientation training programs conducted by the

Department of Human Resources. Most recently, we have developed a program to distribute department-wide e-mail reminders to employees regarding the program. Importantly, the City's 311 customer service center provides an invaluable referral service to the program, whereby the program automatically receives complaints from members of the public without their need to contact – or even be previously aware of – the program. We discussed these efforts with the Civil Grand Jury, but they are not mentioned in the final report.

While continued expansion of these efforts is necessary for the continued growth of the program, the report does not mention any of these long-standing or planned outreach efforts before asserting that the program “is inadequately marketed by program staff.”

Balancing Confidentiality and Transparency

The Civil Grand Jury report makes several recommendations to modify the process used to inform a complainant of the progress of the investigation of their complaint. Currently, whistleblowers are provided a tracking number for their complaint, and are informed in general terms of the progress or outcome of the investigation of their complaint. In our continued effort to maintain a balance between transparency and confidentiality, and protect complainants from retaliation, we benchmark ourselves against other whistleblower programs to ensure that we are in alignment with best practices. Further, the program adheres to all local and state whistleblower laws regarding investigation work product disclosure.

We concur that these procedures can be more fully developed, and in some ways enhanced to allow more transparency into the investigative process by the whistleblower. However, the confidentiality of other participants in the investigative process – who are encouraged to participate under the shield of anonymity that the program necessarily provides – need to be carefully weighed in this disclosure to the initial whistleblower. I look forward to further conversation with the Citizens' Audit Review Board regarding possible modifications to program policies and procedures in this area.

Again, I appreciate the attention and recommendations from the Civil Grand Jury regarding the City's Whistleblower Program. While the Controller's Office takes issue with the research method and some of the conclusions reached in the report, we share their belief in the importance of a well-run whistleblower program and the need to continually seek to improve this vital government function. Please feel free to contact me or Tonia Lediju, Audit Director, at (415) 554-7500 with any questions or concerns.