

2014-15 Civil Grand Jury Whistleblower Report
Department Responses

CGJ Year	Report Title	Finding	Response Required	2015 Responses (Agree/Disagree)	2015 Response Text
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 1: The WPO does not fully "protect" City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.	Ethics Commission & Executive Director	Agree, partially	The WPO does have some limitations that can be improved. However, the confidentiality provisions for investigations are important as they protect both the complainant and the respondent during the period when accusations are proved or disproved. There is a difference between "confidentiality" and "secrecy."
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 1: The WPO does not fully "protect" City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.	Board of Supervisors	Disagree, partially	The confidentiality provisions for investigations are important as they protect both the complainant and the respondent during the period when accusations are proved or disproved, but the WPO does have limitations that could potentially be enhanced based on future recommendations from the Ethics Commission.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 1: The WPO does not fully "protect" City officers and employees from retaliation for filing a complaint as required by the Charter mandate of Proposition C, because it covers only a limited range of complaints, it provides no effective remedy for the victim, and its secrecy provisions limit its deterrent effect.	Mayor	Disagree, partially	The WPO, like most laws, may have limitations, and is one element of a broader framework of whistleblower protections and interventions. However, the confidentiality provisions for investigations are important as they protect both the complainant and the respondent during the period when accusations are proved or disproved. As currently structured, the program provides a balance between confidentiality and transparency that is important to maintain.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 2: The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.	Ethics Commission & Executive Director	Agree, partially	The WPO may not reach all aspects of complaints provided in the Charter. However, defining "providing information" in terms of oral complaints may provide difficulties in that the record of the complaint is not memorialized as the person making the complaint and the person receiving the complaint could easily have different versions of the conversation.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 2: The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.	Board of Supervisors	Disagree, partially	The WPO does fulfill the Charter mandate, but could be improved.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 2: The WPO also fails to fulfill the Charter mandate, in that it does not cover all whistleblower disclosures specified in the Charter.	Mayor	Disagree, partially	The Civil Grand Jury is correct in noting that the language in the Charter mandate does not exactly match that of the WPO. However, the Mayor's Office disagrees with the finding that the WPO fails to fulfill the Charter mandate. The difference in language is the outcome of a normal legislative process. An ordinance is the product of an iterative process, informed by a number of legal and practical considerations that arise as it is being drafted, reviewed, and input from a wide variety of stakeholders is taken into account.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 3.1: While other large California cities and counties have relatively weak laws protecting their employees from retaliation for whistleblowing, this does not relieve the Board of its responsibility under the Charter mandate, to enact an ordinance that genuinely protects whistleblowers.	Ethics Commission & Executive Director	Agree	
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2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 3.2: Whistleblower protection laws that cover government employees at the state and Federal level can serve as a useful model for improving the WPO.	Ethics Commission & Executive Director	Agree	
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 3.2: Whistleblower protection laws that cover government employees at the state and Federal level can serve as a useful model for improving the WPO.	Board of Supervisors	Agree	
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2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 4: The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.	Ethics Commission & Executive Director	Agree, partially	The Commission was not party to the creation of the WPO, and so is not aware of the intended scope by the creators of the ordinance.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 4: The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.	Board of Supervisors	Disagree	There is no empirical data to support this finding and it does not indicate the scope and nature of the problem nor the solution to deal with the problem.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	Finding 4: The WPO creates an unwarranted obstacle to administrative complaints of retaliation filed with the Ethics Commission, by imposing a burden of proof on the complainant during preliminary review and investigation of such complaints.	Mayor	Disagree	The Mayor's Office agrees that robust anti-retaliation provisions must be in place for complainants to feel comfortable coming forward. However, the burden of proof requirement is there for a reason-it creates an important balance by disincentivizing spurious complaints. Without this provision, there is a real risk that poorly-defined or even false complaints will be filed, siphoning away important staff resources from real retaliation investigations. The WPO is consistent with other government provisions on this matter, notably that of the State of California. (see: http://spb.ca.gov/content/appeals/Appeals_Resource_Guide.pdf , bottom of page 18).

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2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 1.1: That the Ethics Commission recommend to the Board of Supervisors an amendment to the WPO that provides real protection for whistleblowers, in conformity with the Charter mandate of Proposition C.	Ethics Commission & Executive Director	May be implemented	The Ethics Commission is willing to suggest amendments to the WPO to the Board of Supervisors but will need the assistance of the City Attorney's Office, the Department of Human Resources and the Controller's Office. Also, due to an already heavy planned workload for this year, and in addition the upcoming election cycle, the Commission anticipates that it will not be able to begin this project until 2016. Further, should the Board of Supervisors communicate in writing to the Commission that they wish to conduct the drafting of these amendments, the Commission will defer to the Board.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 1.2: If the Ethics Commission fails to act within a reasonable time, that the Board of Supervisors on its own amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.	Board of Supervisors	Will not be implemented	The Board of Supervisors will work with the Ethics Commission to improve the WPO; however, the Board of Supervisors cannot predict the timing or outcome of the Ethics Commission's actions nor the approvals by the legislative body.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 1.3: If the Ethics Commission requests that the Board amend the WPO and the Board fails to act within a reasonable time, that the Commission consider submitting such an amendment directly to the voters.	Ethics Commission & Executive Director	May be implemented	If the Commission recommends amendment(s) to the Board that are not considered or not adopted, the Commission will then consider sending the amendment(s) to the voters.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 1.4: If the Ethics Commission and the Board fail to act within a reasonable time, that the Mayor introduce legislation to the Board of Supervisors that would amend the WPO to provide real protection to whistleblowers, in conformity with the Charter mandate of Proposition C.	Mayor	Will not be implemented	This sub-recommendation is part of a larger recommendation that first calls for the Ethics Commission to submit an amendment to the WPO to the Board of Supervisors. If the Ethics Commission fails to do so, the Board of Supervisors is to act on its own to amend the WPO. In the event that the Ethics Commission does not take action or the recommended amendment is not enacted by the Board of Supervisors, the Ethics Commission is to submit an amendment directly to the voters. In the event that none of these recommendations occur, Recommendation 1.4 calls for the Mayor to introduce legislation to the Board of Supervisors to amend the ordinance. The amendment to the WPO recommended here is too vaguely-defined for the Mayor to take a position on it at this time. Further, the sequencing described in the recommendation is not consistent with the way the Mayor's Office approaches major changes to City law. If such changes were to be contemplated, a consensus-based approach would be adopted, with engagement from relevant City departments, stakeholders, legal and subject-matter experts, as well as other elected officials. This is a more effective method of enacting changes to City law.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 2.1: That amendments to the WPO 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.	Ethics Commission & Executive Director	May be implemented	If and when the Commission considers amending the WPO, it will take these recommendations into consideration. It may be advisable to expand the scope of the definition of "providing information" but there needs to be provision for the memorializing of these reports.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 2.1: That amendments to the WPO 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.	Board of Supervisors	Will not be implemented	The Board of Supervisors will work with the Ethics Commission to improve the WPO; however, the Board of Supervisors cannot predict the timing or outcome of the Ethics Commission's actions nor the approvals by the legislative body. The Board would also need a more specific definition of "oral complaints" in order to warrant implementation of this recommendation.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 2.1: That amendments to the WPO 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.	Mayor	The recommendation requires further analysis	
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 2.2: That these amendments further expand the scope of covered disclosures 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.	Ethics Commission & Executive Director	May be implemented	If and when the Commission considers amending the WPO, it will take these recommendations into consideration. It may be advisable to expand the scope of the definition of "providing information" but there needs to be provision for the memorializing of these reports.

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2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 2.2: That these amendments further expand the scope of covered disclosures 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.	Mayor	The recommendation requires further analysis	
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 3: That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.	Ethics Commission & Executive Director	May be implemented	The Commission believes these recommendations may well improve the WPO and will also take them into consideration. The Commission notes that Employment Law is not part of our mandate and is normally handled by other departments. Many factors may come into consideration in this area such as MOU's and other labor agreements that are not properly part of the Ethics Commission mission. The Commission also notes that these proposals may create a large increase in staff workload.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 3: That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.	Board of Supervisors	Will not be implemented	The Board of Supervisors concurs with the Mayor's Office, which states that "under the WPO, the Ethics Commission is provided with punitive, not restorative, powers to respond to the finding of retaliatory job action. However, there are a number of other avenues a complainant can pursue in such circumstances. As the Civil Grand Jury notes, 'City officers and employees have successfully litigated complaints of whistleblower retaliation in state court.' Contrary to the Jury's claim that this proves the ineffectiveness of the WPO, it in fact demonstrates that there is an established process for filing a civil action. In addition, if an employee believes that he or she has been disciplined without just cause or has suffered adverse job impact in retaliation for blowing the whistle, the employee can file a grievance through his or her union. A grievance of this nature may be resolved at the department or Department of Human Resources level, or be escalated to arbitration, in accordance with the negotiated rules of the employee's Memorandum of Understanding. If the Ethics Committee had investigated and found that the job action was in fact retaliation for activities protected by the Whistleblower Protection Ordinance, this ruling would likely influence the independent arbitrator, who does have the power to reverse a retaliatory job action. While the investigation and ruling of the Ethics Commission would be a critical step in the process, as the Ethics Commission notes in their response, labor relations are the responsibility of the Department of Human Resources.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 3: That amendments to the WPO provide a meaningful remedy for the effects of retaliation, by authorizing the Ethics Commission to order cancellation of a retaliatory job action, and increasing the limit of the civil penalty available under the WPO to an amount adequate to repay the financial losses that can result from such an action.	Mayor	Will not be implemented	Under the WPO, the Ethics Commission is provided with punitive, not restorative, powers to respond to findings of retaliatory job action. However, there are a number of other avenues a complainant can pursue in such circumstances. As the Civil Grand Jury notes, "City officers and employees have successfully litigated complaints of whistleblower retaliation in state court." Contrary to the Jury's claim that this proves the ineffectiveness of the WPO, it in fact demonstrates that there is an established process for filing a civil action. In addition, if an employee believes that he or she has been disciplined without just cause or has suffered an adverse job impact in retaliation for blowing the whistle, the employee can file a grievance through his or her union. A grievance of this nature may be resolved at the department or Department of Human Resources level, or be escalated to arbitration, in accordance with the negotiated rules of the employee's Memorandum of Understanding. If the Ethics Committee had investigated and found that a job action was in fact retaliation for activities protected by the Whistleblower Protection Ordinance, this ruling would likely influence the independent arbitrator, who does have the power to reverse a retaliatory job action. While the investigation and ruling of the Ethics Commission would be a critical step in the process, as the Ethics Commission notes in their response, labor relations are the responsibility of the Department of Human Resources. Given the sufficient availability of existing options for complainants to pursue both civil penalties and reversal of the retaliatory job action, there is no need to amend the WPO in the manner recommended.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 4: That amendments to the WPO include a revision of 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 to the Commission.	Ethics Commission & Executive Director	May be implemented	As stated above, the Commission will carefully consider these recommendations when considering amending the ordinance. The Commission believes that there needs to be some demonstrable basis for a complaint in order to justify an investigation.
2014-15	SAN FRANCISCO'S WHISTLEBLOWER PROTECTION ORDINANCE IS IN NEED OF CHANGE	R 4: That amendments to the WPO include a revision of 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 to the Commission.	Board of Supervisors	Will not be implemented	There should be minimum evidence requirement to justify a whistleblower complaint in order for the Ethics Commission to pursue an investigation.

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