

MINUTES
Citizens' General Obligation Bond Oversight Committee
August 11, 2011
Hearing Room 416 - City Hall
San Francisco, CA 94102

1) Call to Order, Roll Call

Ms. Maura Lane, Committee Assistant, called the meeting to order at 9:35 a.m. at which time there was a quorum. The following Committee members were present: Jonathan Alloy, John Madden, Corey Marshall, Robert Muscat, Rebecca Rhine and Thea Selby (Acting Chair). The following member was absent: Sanford Garfinkel. Regina Callan and Terrance Flanagan were sworn in as members of the committee.

2) Election Of Officers

The Committee elected Thea Selby as the new Chairperson and Jonathan Alloy as Vice-Chair.

There was no public comment.

3) Approval of Minutes of the meeting held on April 28, 2011

The minutes of the January 2011 meeting were approved.

There was public comment from Patrick Monette-Shaw, who also provided the Committee with a transcript of the April 28th meeting. There was discussion regarding the availability of draft minutes that have not yet been approved by the Committee. Controller Ben Rosenfield responded that draft minutes can be posted on the CGOBOC web site, after review by the Chair. Nancy Werfel asked that specific bond reports be identified as such, rather than the practice of labeling everything as "CGOBOC". The clarification would help the public locate reports more easily.

4) Review of the Civil Grand Jury Report on the Whistleblower Program

On July 11, 2011, the Civil Grand Jury released a report titled "Whistling in the Dark: The San Francisco Whistleblower Program". The report and the response from the Controller's Office were provided to CGOBOC in July. These documents are also located on the Civil Grand Jury and Controller's web sites.

Ms. Selby, Chair, expressed her opinion that the Committee takes the report seriously and their appreciation of the efforts taken to prepare it. She also expressed her desire, on behalf of the Committee, to have a meaningful dialogue about what to do going forward. The Civil Grand Jury (hereafter to be referred to as CGJ) and the Controller's Office agreed on a format for presentations and responding to questions/requests for clarification from the Committee.

Hulda Garfulo, author of the report and CGJ member/former Chair, clarified some of the information in the report that she said may have been misinterpreted and responded to

questions from the Committee. Ms. Garfulo noted that she and some of the CGJ members met with Mr. Rosenfield, Controller, on July 29th, 2011 in response to his invitation. She expressed her disappointment about not receiving information about the dollar savings to the City of the program from the Controller's Office, while acknowledging that success of the program cannot be measured only in dollars and cents. She also wanted to address a comment about the tone of the report that some have regarded as biased in favor only of the Whistleblower. Ms. Garfulo said the CGJ disagrees with the comment regarding a bias and that a large number of people were interviewed, including non-Whistleblowers. She clarified the number of complaints reviewed as totaling 364. A large number of the 364 complaints did not have anything to do with waste, fraud or abuse, but were considered to be lower level issues.

There were questions from the Committee regarding whether the Ethics Commission was included in the interview process by the CGJ. The response was "yes" but the identity of those interviewed is confidential, by law. Ms. Selby asked if there were recommendations about retaliation and how it is tracked. Ms. Garfulo responded that there are two crucial issues – oversight and confidentiality. The recommendation cited in the CGJ report is that the Ethics Commission not be involved in the actual tracking but that an independent administrative law judge is appointed for appeals and is truly independent.

The Committee asked for clarification of issues referenced in the report regarding duplications, tracking numbers in the event of one person making more than complaint, recommendations about how to balance competing concerns surrounding confidentiality with the disclosure of results (a recurring theme), the rights of Whistleblowers and protections.

Ms. Rhine noted the request for benchmarking from the CGJ was also a critical piece of what may or may not be best practices in other areas. Ms. Garfulo said a few other cities had been reviewed based on population size and similarity to San Francisco. She also provided the names of cities that currently have reward systems. Ms. Rhine noted that financial incentives versus moral responsibility should be the subject of a more substantive discussion in that it is not as simple as it sounds in terms of human behavior.

Ms. Garfulo acknowledged that managing a Whistleblower Program is a very difficult task; one that takes a lot of time, effort and skill. The goal of the report was to look for ways to make the program better. Ms. Rhine expressed her point of view regarding the question of how a successful program is perceived, hence the question about benchmarking. Mr. Rosenfield noted that benchmarking reviews have been conducted in the Controller's Office. There is a rolling benchmarking report that is kept internally. It includes updates from other jurisdictions and has been refreshed in the past year. The Controller's Office does have a lot of information from other jurisdictions and best practices along with the questions/tensions that are inherent in all Whistleblower Programs. There are examples of annual reports and quarterly reports from other jurisdictions. Some of the changes the Controller's Office is considering going forward with, that have also been suggested by the CGJ, have been found through the process of reviewing the work of other jurisdictions.

Brian Clement, CGJ member, reviewed the data analysis of the spread sheet and said he found statistical discrepancies in the reporting. He said he has experience with tracking complaints and looking at numbers. Mr. Clement suggested that a way be found to filter out duplicates. He also commented on the tracking of the source of the records and that there was a priority ranking or source of the record. Mr. Rosenfield clarified that there is a field in the COWS database that allows the Controller's Office to track the source of the initial complaint. It is the basis of the annual report produced by the Controller's Office that provides data on the source of the complaints. The print-out field the CGJ reviewed does not contain this field. It does exist in the database. It is used for annual reporting. Mr. Clement acknowledged there may have been confusion and a lack of clarity when he asked about this specific field.

Ms. Selby acknowledged that the Committee did read the CGJK report. Some of the recommendations are good. The duplication seemed to be obvious. The Controller's Office is interested in taking up some of the recommendation.

Mr. Rosenfield reviewed the City's charter and various state laws that deal with the provisions about the confidentiality of information during the conduct of an investigation prior to its completion. State law is specifically a section that drives a lot of these issues under which the City operates and speaks to specific government code sections that address Whistleblower Programs provided by cities and counties. It was adopted ten years ago and implemented four years ago. It requires the Controller's Office to keep certain information confidential during the period of the investigation. There are certain allowances that would allow disclosure of limited information but the disclosure requirement applies to both the Whistleblower and the respondent (the person who may be the target of the complaint). The rules that govern treatment of that information following the completion of the investigation are also outlined in the state law and San Francisco's charter. He said he would speak to some of these rules during the Controller's response points where changes are suggested that he felt are in line with some of the CGJ recommendations to increase the transparency of the final investigative work so that the public can have a fuller understanding of more of the sustained complaints.

A Committee member made the observation that the Committee is responsible for oversight of the program and is not responsible for execution but the perception is that the Committee should look at things more from a city-wide perspective about how the program can be better. Mr. Alloy pointed out the dynamic tensions inherent in confidentiality and disclosure as well as issues about the rights of Whistleblowers to have access to information. The question of how the Controller's Office could provide status updates about confidential investigations was raised. Ken Roux, Committee Counsel, was asked to review how local and state law governs the ability to disclose portions of the process. Mr. Rosenfield offered to provide the pertinent government code and charter sections to the Committee following this meeting. The pertinent government code, Section 5307.6, is a single page that describes a lot of the rules and a framework under which decisions can be made as to what can be disclosed.

Ben Rosenfield, Controller, responded on behalf of the Controller's Office. Mr. Rosenfield provided an overview of the CGJ Report which contains fifteen findings and makes fourteen recommendations for improvement of the program. He expressed his opinion that the overall report leaves a false impression that the program is not meeting its goals because the report suffers from an incomplete review process on key points. At the same time, the overall recommendations in the report are in-line with current thinking on how the Controller's Office would like to enhance the Whistleblower Program, making the program more transparent, while protecting the complainant.

There were fifteen findings for the Whistleblower Program. The recommendations from the CGJ focus on 1) program independence, transparency and oversight; 2) the adequacy of the Whistleblower Program's website and complaint tracking system; 3) program promotion and outreach; and 4) Whistleblower protections and retaliation.

The CGJ report contained fourteen recommendations. The Controller's Office 1) agrees or partially agrees with eight recommendations; 2) disagrees with four recommendations; and 3) two of the recommendations are outside the Controller's Office jurisdiction. The Controller's Office agrees to the following recommendations: 1) changes to the Whistleblower Program website; 2) changes to the COWS database; 3) outreach to and education of City employees on the existence of the program and the complaint filing process; 4) benchmarking with other jurisdictions for confidentiality best practices; 5) developing a more proactive system for communicating with the complainant; 6) a public finding should be issued for sustained complaints – including what the investigation determined, the name of the respondent and actions taken; 7) tracking numbers sent to non-website initiated complaints; and 8) work with CGOBOC to ensure that Whistleblower oversight is effective.

The Controller's Office disagrees with the following recommendations: 1) CSA should perform all investigations; 2) create and institute a process to allow redirection of non-waste, fraud and abuse complaints to 311; 3) establish an appeals process using an independent administrative law judge; and 4) establish a reward system for substantiated high-risk whistleblower complaints.

The recommendations outside of the Controller's Office jurisdiction are: 1) an administrative law judge should deal with retaliation issues, responsibility for retaliation complaints should be removed from the Ethics Commission, and 2) if retaliation was a factor in layoff/terminations, employees should be awarded up to two years full salary as part of their severance package.

Whistleblower Program accomplishments include (but are not limited to) since 2004: 1) the program has received 2,328 complaints since its inception; 2) Whistleblower complaints have led to stronger controls over City resources, more efficient and effective program processes, and stronger departmental compliance with City regulations. The Program has received, investigated and resolved allegations of: 1) fraudulent claims by City contractors; 2) improper management and human resources practices in some City departments and programs; 3) employees conducting personal side-businesses on City time; 4) use of taxpayer funds for political purposes; 5) design flaws in City construction

projects; 6) improper use of City vehicles and other public resources; 7) unauthorized or improper timesheet practices and telecommuting; and 8) overtime usage by City managers and employees.

There was further discussion among the Committee, various CGJ members and the Controller's Office about a range of subjects within this topic, many of them repetitious. It was acknowledged that there may have been a lack of clarity or misunderstanding of the information provided by the Controller's Office in response to questions from the CGJ that were included in the CGJ report.

The Committee voted to approve the Controller's recommendations and response to the CGJ and to hold off on its own response until the next meeting, currently scheduled for September. This would allow the Controller's office to begin application of the agreed upon changes.

There was public comment/recommendations from Patrick Monette-Shaw, Rita O'Flynn, Dr. Derek Kerr, Dr. Maria Rivero, Nancy Werfel and Brian Clement about specific Whistleblower Program issues that were either general or pertained to their personal experiences. Hal Smith suggested sending a satisfaction survey to all Whistleblowers.

5) Presentation of the San Francisco Hospital Rebuild Program.

Ronald Alameida, SFGH Project Manager, presented a quarterly update as to the status of the Program. In addition to the budget and schedule information, Mr. Alameida reviewed accomplishments to-date in three areas.

Site and Tunnel Utilities: all underground tanks have been installed. The PG & E & 02 enclosures have been deferred.

Service Building: interior concrete is complete, emergency generators and switchgear have been delivered and placed in the basement, fuel oil and the MEP system are progressing and the exterior site work is almost completed.

New hospital project site: mass excavation is complete, protection slab assembly is complete, waterproofing will be complete at the end of August and tower crane assembly is underway.

Current and upcoming activities include:

Incremental Permits: Inc. 4 has been resubmitted for back check, Inc. 5 design finalization is underway and Inc. 6 plan approval is imminent.

Project Scope Buy-Outs: are 80% contracted, 15% are in current bidding, and 5% are outstanding. In addition, trade packages are at 2% below 50% construction document forecast.

Current Issues/Concerns: OSHPD staffing – Inc. 4 Plan Review, remaining trade bid buy-out trend, low voltage systems scope/cost and equipment seismic certification.

Other than a few minor questions about the location of information on the Gantt chart, Ms. Selby acknowledged the improvements and clarity of Mr. Alameida's report.

6) Opportunity for the Committee to comment on any matters within the Committee's jurisdiction.

The Committee will use part of their scheduled September 2011 meeting to discuss their response to the CGJ. The Ethics Commission will be invited to send a representative to the meeting because City rules regarding retaliation have been delegated to the Ethics Commission. This would also help to inform the Committee's response on its finding. The Committee's response is due by October 11th, 2011. Mr. Roux was asked to provide the Committee with information regarding the standing of the complainant within the law – what their rights are when they make a complaint and whether they have right of appeal because of their standing as a “party”. Part of the discussion will include how the Committee will interact with the Whistleblower Program and what the nature of the oversight might look as the relationships with some of the other “bodies” are fleshed out functionally.

Mr. Flanagan asked how the response will be written. Mr. Roux reminded the Committee about “seriatim” meetings. If a quorum of a policy body meets, the meeting must be noticed and agendized. If an e-mail is sent out and members begin to respond to it, this e-mail discussion may constitute a “seriatim” meeting – and – absent public notice and discussion, may violate the Brown Act and Sunshine Ordinance. The recommendation is for the Chair to send out a proposed draft to Committee members. In turn, Committee members would come to the September 29th meeting with their comments, prepared for an open discussion. The draft can then be formalized and final action taken. Although inefficient, the state and local law requires the Committee to conduct all of its business in public.

The Controller's Office has 60 days to respond. The Committee has 90 days under the law. The Committee was also reminded that the CGJ also made a separate investigation of the Ethics Commission because of the retaliation. The Committee will be provided with this report.

Mr. Rosenfield also informed the Committee about the cancellation of a contract because of a conflict of interest and responded to questions from the Committee about specifics.

There was public comment from Patrick Monette-Shaw, Dr. Rivera and Dr. Kerr regarding the Laguna Honda Hospital Gift Fund and conflicts of interests in a number of contacts. Nancy Werfel provided comment regarding the work load of the Committee and how it plans to get all of its work done with the current meeting schedule. She also suggested the Committee get information about its budget and how the funds are allocated, as well as liaisons to the various bond projects.

7) Opportunity for the public to comment on any matters within the Committee's jurisdiction.

There was public comment from Patrick Monette-Shaw, Dr. Maria Rivero regarding the Katz contract and Nancy Werfel about RBOC audits.

The meeting adjourned at 12:30 p.m.