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EXECUTIVE DIRECTOR

Date: September 12, 2014

To: Members, Citizens' General Obligation Bond Oversight Committee

From: John St. Croix, Executive Director

Re: Request for Information regarding complaints filed under Chapter IV of the San Francisco Campaign & Governmental Conduct Code

Dear Member Garcia:

I have received your request for information and welcome the opportunity to provide you and the other members of the Citizens' General Obligation Bond Oversight Committee (CGOBOC) information regarding the Ethics Commission's handling of complaints filed under Chapter IV of the San Francisco Campaign & Governmental Conduct Code ("SF C&GCC").

I appreciate that you acknowledge the confidentiality requirements existing in local and state law regarding the Ethics Commission's handling of these complaints. Although I am not able to provide details regarding any particular complaint filed with our office, I hope this response will provide some clarity regarding the Ethics Commission's processes for handling of such complaints.

Legal background

The Ethics Commission has the authority to investigate complaints that allege violations of certain state and local laws that relate to campaign finance, lobbying, campaign consultants, and governmental ethics. When the Ethics Commission receives a complaint alleging any of those violations, the matter is handled under section C3.699-13 of the City Charter, which requires confidentiality. The Ethics Commission also handles complaints alleging violations of the San Francisco Sunshine Ordinance, Administrative Code section 67, although not in a confidential manner.

In certain cases after a public hearing on the merits, the Ethics Commission may recommend to an appointing officer that a City officer be removed from office, pursuant to City Charter C3.699-13(c). Current law does not provide that the Ethics Commission may impose discipline on City officers or employees.

In addition to the matters listed above, Chapter IV requires the Ethics Commission to investigate complaints filed by City officers or employees or former City officers or employees alleging retaliation as defined in section 4.115(a).

Section 4.115(a) of SF C&GCC defines “retaliation” as the “termination, demotion, suspension, or other similar adverse employment action” taken against any City officer or employee for having in good faith participated in any of the following protected activities:

- Filing a complaint with the Ethics Commission, Controller, District Attorney or City Attorney, or filing a written complaint with the Complainant’s department, alleging that a City officer or employee engaged in improper government activity;
- Filing a complaint with the Controller’s Whistleblower Program; or
- Cooperating with an investigation of a complaint conducted under the Chapter.

“Improper government activity” by a City officer or employee includes the following:

- Violating local campaign finance, lobbying, conflicts of interests or governmental ethics laws, regulations or rules;
- Violating the California Penal Code by misusing City resources;
- Creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee’s City position; or
- Abusing his or her City position to advance a private interest.

The definition of “retaliation” in section 4.115(a) of SF C&GCC is thus much narrower than that at the state and federal level and is difficult to apply to most of the limited number of complaints presented to the Ethics Commission alleging retaliation, as defined in section 4.115(a) of SF C&GCC. Examples of common challenges with respect to such complaints are set forth below.

Common Enforcement Challenges

Ethics Commission staff advises all complainants (who are current or former City officers or employees) to contact the Ethics Commission if there are changes to their employment or if they believe they are being subjected to retaliation. As with all other complaints, Ethics Commission staff handles complaints alleging retaliation thoroughly and seriously. Nevertheless, staff has observed that many retaliation complaints raise the same challenges with respect to enforcement.

For example, complainants may contact the Ethics Commission alleging retaliation, but frequently the complainants are not current or former City officers or employees and/or the complainants have not participated in any of the protected activities. Over the past few years, the *majority* of complaints alleging retaliation have been submitted by individuals who are neither current nor former City employees. Additionally, many complaints allege retaliation when no adverse or any employment action has been taken. Another frequent allegation is that a complainant is being “retaliated against” by a co-worker (a peer or subordinate), even though the law does not apply to such activity.

In addition, section 4.115(b)(1) of SF C&GCC requires a City officer or employee, or former City officer or employee, to file a complaint alleging retaliation (as defined in SF C&GCC section 4.115(a)) within two years after the date of the alleged retaliation. Staff has been presented with complaints filed outside of the required two-year time period.

Moreover, staff has often been presented with evidence from an employer that it would have taken the same employment action irrespective of the complainant's participation in the protected activity, including employment actions occurring prior to the complainant's participation in any protected activity. Such evidence allows an employer to rebut allegations of retaliation pursuant to section 4.115(b)(3) of SF C&GCC.

General Overview of Program

During the past fiscal year, the Ethics Commission received four complaints alleging retaliation from individuals who had also filed a complaint with the Whistleblower Program at the Controller's Office: one individual was not a current or former City officer or employee; one complainant had not been subjected to any employment action; and two complainants presented allegations outside the two-year time period required by SF C&GCC section 4.115(b).

I have attached a copy of the Ethics Commission's most recent Annual Report, which includes the information required to be reported by SF C&GCC section 4.130. The Annual Report for the most recent fiscal year has yet to be approved. Please also note that SF C&GCC section 4.130 refers to matters filed under Chapter IV, so that the Ethics Commission includes information relevant to complaints filed under Chapter IV only.

The Ethics Commission has not recently provided any findings or recommendations on policies or practices resulting from the Ethics Commission's investigations of complaints filed under Chapter IV. Nevertheless, staff has long felt frustrated by the narrow scope of the retaliation law, as defined by section 4.115(a) of SF C&GCC. Indeed, the Ethics Commission is not frequently presented with a retaliation complaint that warrants a full investigation. However, it is unclear that it would be beneficial to expand the law to cover complainants who are not current or former City officers or employees, especially as no employment action would or could be taken against those individuals.

I am unable to explain why other City departments have chosen not to impose disciplinary actions as a result of complaints made to the Ethics Commission. Other City departments are not required to report to the Ethics Commission whether disciplinary actions are taken and I expect that reporting would not occur in the future as it would be a personnel matter. The Ethics Commission, pursuant to SF C&GCC section 4.115(c)(ii), may refer a matter to the Civil Service Commission pursuant to Charter section A8.341 (removal or discharge of permanent, non-probationary employees), only if no disciplinary action is taken by the appointing authority after a City officer or employee is found to have violated section 4.115(a). For the past several years, the Ethics Commission has not found a City officer or employee to have violated section 4.115(a) and therefore the Ethics Commission has not made any referrals to the Civil Service Commission or imposed any administrative penalties as a result of complaints made to the Ethics Commission.

I hope this response has been helpful to you and the other members of the CGOBOC. If you or other members of CGOBOC have any other questions, please let me know.