

CITY COUNCIL
CITY OF NEW YORK

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TRANSCRIPT OF THE MINUTES

Of the

COMMITTEE ON OVERSIGHT AND INVESTIGATIONS

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B E F O R E: RITCHIE J. TORRES

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RORY I. LANCMAN
KEITH POWERS
CARLINA RIVERA
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A P P E A R A N C E S (CONTINUED)

Ricardo Morales, Whistleblower

Robert Kraus, Attorney, Law Firm of Kraus and
Zuchlewski

Gregory Krakower, Leal Counsel Law Firm of
Getnik & Getnik, LLP

Margaret Garnett, Commissioner, Department of
Investigation

Pat Russo, President, Chef's Choice Food
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2 (sound check) (pause) (gavel)

3 CHAIRPERSON TORRES: Good morning. I am
4 City Council Member Ritchie Torres, and I chair the
5 Committee on Oversight and Investigations. I'm joined
6 by my colleague Council Member Kalman Yeger. The
7 recent impeachment of President Donald Trump, which
8 arose from a series of whistleblower complaints is as
9 good an occasion as any for the City of New York to
10 examine with a critical eye, the strength of its own
11 whistleblower laws. Over the course of five years
12 from 2015 to 2018 only 172 New York City employees
13 sought whistleblower protection. Out of 170 cases
14 only one employee received whistleblower protection.
15 Ponder that statistic for a moment. One employee in a
16 workforce of nearly 400,000, one employee made \$93
17 billion worth of operations. There is something
18 wrong with this picture. Why on earth are there so
19 vanishingly few whistleblowers in New York City? No
20 one can seriously contend that there is virtually no
21 whistleblowing in New York City because there is
22 virtually no malfeasance, no mismanagement on which
23 to blow a whistle. New York is far from the platonic
24 ideal of good government. It is far more plausible
25 that the lack of whistleblowing stems from something

2 systemic, inadequacies in the whistleblower law
3 itself, inadequacies in the manner in which the law
4 is enforced and inadequacies in the extent to which
5 the public workforce has been educated about its own
6 whistleblower rights and responsibilities. The
7 public workforce often feels inhibited from reporting
8 abuse, corruption and fraud. That sense of inhibition
9 flows from a fear of retaliation from a lack of clear
10 legal protection and from a lack of public awareness
11 about the full range of whistleblower rights and
12 responsibilities conferred local, state and federal
13 law. As we evaluate the city's Whistleblower Law in
14 particular, the committee will consider the following
15 descriptive and normative questions: Which parties
16 are covered by the law, and which parties should be
17 covered by the law? Which forms of misconduct are
18 covered by the law and which forms of misconduct
19 should be covered by the law? What reporting
20 requirements exist and what reporting requirements
21 should exist? What enforcement mechanisms exist, and
22 what enforcement mechanisms should exist? And
23 finally, what remedies exists and what remedies should
24 exist? I for one have a series of concerns about the
25 efficacy of the city's Whistleblower Law? First, the

2 law is reactive rather than proactive. It waits for
3 employees to fall victim to retaliation and then
4 intervenes when the damage is done. It fails to
5 protect former employees, prospective employees, and
6 interns. It fails to protect against blacklisting,
7 which is no doubt a form of retaliation. It fails to
8 offer employees a right to a timely investigation. It
9 fails to offer employees a private right of action,
10 and it fails to offer them remedies clearly defined
11 and enforceable by law. Second, the law emphasizes
12 process to the exclusion of substance. That is it is
13 concerned less with protecting whistleblowers and
14 more with prescribing the precise manner in which the
15 whistle is blown. By way of illustration if I as a
16 city employee report corruption to a local City
17 Council member, then I am eligible for whistleblower
18 protection under local law, but if I as a city
19 employee report the same exact corruption to a local
20 borough president then I am ineligible for
21 whistleblower protection under the law. Why should
22 it matter where the information is reported or to
23 whom the information is reported? The arbitrary
24 nature of the reporting requirements reflects a
25 disregard for the purpose of a whistleblower statute.

2 The purpose of a whistleblower statute is not to
3 micro manage how the whistle is blown or to whom the
4 whistle is blown. The purpose first and foremost is
5 to protect the whistleblowers from retaliation. A
6 law that refuses protection to whistleblowers based
7 on mere technicalities is counterproductive and
8 corrosive to the government. In addition to
9 evaluating the city's whistleblower law at large, we
10 will consider a proposed amendment Intro 1770, which
11 would extend whistleblower protection to those who
12 cooperate with the City Council on oversight and
13 legislative matters. Intro 1770 is only the first
14 chapter in what promise to be a comprehensive rewrite
15 of the whistleblower statute. As Chair of the
16 Oversight and Investigations Committee, I am on a
17 personal mission to ensure that New York City has the
18 strongest whistleblower protections in the United
19 States. The committee's rewrite of the whistleblower
20 statute is going to be informed by three types of
21 testimony. First, we will elicit testimony from
22 Ricardo Morales, who will put a human face on the
23 arduous process of seeing whistleblower protection.
24 Then we will zoom outward and elicit testimony from
25 Brad KRAKOWER, who will offer an expert legal opinion

2 on the workings of the city's whistleblower law where
3 it succeeds, where it fails, how it compares to
4 systems elsewhere in the country, and finally we will
5 elicit testimony from Commissioner Margaret Garnett
6 who is in charge of enforcing the city's
7 whistleblower law. The public will have the benefit
8 of an anecdotal perspective and academic perspective
9 and an operational perspective. At a time when the
10 President of the United States Donald Trump is waging
11 war on whistleblowing, we in New York City must do
12 what we can to fundamentally strengthen
13 whistleblowing in our own back yard. The reality of
14 what we do here matters more than our rhetoric about
15 what happens elsewhere. In the end, a strong
16 whistleblower law is an expression of our commitment
17 to good government. With that said, I will all up
18 the first panel. Ricardo Morales and Robert Kraus.
19 Can you (background comment) Yes. okay, okay. Can you
20 raise your right hand? Do you swear to tell the
21 truth, and the whole truth in your testimony and in
22 response to questions from Council Members?

23 RICARDO MORALES: (off mic) I do.

24 CHAIRPERSON TORRES: Do you have an
25 opening statement?

2 RICARDO MORALES: (off mic) Yes.

3 CHAIRPERSON TORRES: Okay, you may
4 proceed. Oh, yep, yep.

5 RICARDO MORALES: (off mic) The reason
6 why I want to do this...(on mic) thank you, um, is to
7 support good government more than anything else. The
8 idea that the bill that the bill that you're
9 introducing or even your efforts go to that concept
10 of good government. I applaud you. what is necessary
11 here is that we must promote the public's trust and
12 the integrity of government decision making, its
13 transparency and accountability. You're doing that
14 in such a great way in terms of oversight, additional
15 oversight and protections for those individuals,
16 those souls who are willing to put everything on the
17 line to expose corruption, mismanagement, criminal
18 activity, conflict of interests and any other thing
19 that fails the public in terms of governmental
20 actions. The fact that you have thoughtfully in this
21 environment looked at it, you looked at that the
22 historical nature of whistleblowing. You looked at
23 the stats behind it. It's now an international,
24 national and local discourse about whistleblowing,
25 and to me it's all about good government. It's

2 absolutely about good government no matter how it
3 turns out and the ability for people like me to be
4 able to come forward and not only be protected, but
5 also get the message across that government works.
6 It's good and a lot of good people work at it. Thank
7 you.

8 CHAIRPERSON TORRES: Um, obviously I want
9 to, you know, it's worth stating that you were...there
10 is ongoing litigation between you and the City of New
11 York. So, I understand that you're limited to—we're
12 going to speak largely in broad generalities about
13 your experience, but before we go into some detail
14 about your experience with the city's whistleblower
15 process, um, just tell me about your history public
16 service to the city. How long did you serve the city
17 and what positions.

18 RICARDO MORALES: Okay. I started working
19 with the city in 1995 as the Assistant General
20 Counsel at the New York City Housing Authority for
21 it's Housing Litigation Unit. Then I moved on. I was
22 promoted to Deputy General Counsel at the Housing
23 Authority with more responsibilities and then finally
24 I became the General Counsel at the Housing Authority
25 and held that position for approximately eight years.

2 From there I was promoted to become the Chairman of
3 the New York City Housing Authority, and served in
4 that position for a while, and then during that
5 period of time I was honored by the New York City
6 Conflict of Interest Board with the Ethics and
7 Government Award, the highest award that you could
8 get for ethics in government. From there I moved onto
9 the General Counsel at the New York City
10 Comptroller's Office. I was promoted to First Deputy
11 Comptroller in charge of all of the operations, day-
12 to-day operations with the Comptroller's Office and
13 from that position I moved onto the Deputy
14 Commissioner for Asset Management at DCAS where I was
15 in charge of the city's real estate portfolio, and
16 over 37 million square feet of real estate along with
17 this gorgeous building that we had here and any
18 acquisitions, dispositions in leasing of properties
19 of the city of New York.

20 CHAIRPERSON TORRES: So, you've served in
21 high level positions at the New York City Housing
22 Authority, the Comptroller's Office and the
23 Department of City DCAS, Citywide Administrative
24 Services. Before your ultimate termination, were you
25

2 ever terminated previously, disciplined, demoted or
3 otherwise poorly evaluated?

4 RICARDO MORALES: No, that had never
5 happened. Never happened at DCAS, never happened at
6 any other work. In fact, my career actually are
7 promotions. I am what they call a career
8 professional in government with my abilities and
9 skills. I'm a graduate of Amherst College. I went
10 to Georgetown Law School. So, I have a pretty decent
11 background, and each one of those positions that I've
12 held have been positions with an enormous amount of
13 influence, enormous amount of confidentiality,
14 enormous amount of...dollar amounts of hundreds of
15 millions of dollars in terms of budgetary
16 responsibilities, contracting real estate deals. So I
17 was at the highest levels of government when I was in
18 my 21 years of public service.

19 CHAIRPERSON TORRES: When did you apply
20 for a whistleblower status, and how did you apply for
21 it?

22 RICARDO MORALES: I applied for it after
23 my termination. I was terminated in February 24th of
24 2017. I applied in April of 2017.

2 CHAIRPERSON TORRES: And what was the
3 process like, the process of apply for whistleblower
4 status?

5 RICARDO MORALES: Well, the process is
6 arduous. It was long with some communications or
7 more lack of communication than communication. It
8 just seemed like a, um, and empty gesture on the part
9 of DOI. Can I put it in perspective for you?

10 CHAIRPERSON TORRES: Sure.

11 RICARDO MORALES: Rivington was one of
12 the biggest I guess scandals of...of the current
13 Administration in terms of the focus and a number of
14 investigations and probes into that transaction on
15 the Lower East Side. The New York City Comptroller's
16 Office commenced an investigation in March of 2017,
17 and finished it and published it in August of '17,
18 150 days. They interviewed 50 to 60 high level
19 individuals and went over pored over tens of
20 thousands of documents, and they did it in five
21 months. The Department of Investigations did the
22 same investigation on the same matter starting in
23 March and ending in July of 2017 for about 136 days,
24 the same routine. They interviewed dozens of high
25 officials, they looked at tens of thousands of

2 documents notwithstanding resistance that the
3 corporation counsel had given to submitting
4 documents, they issued a report. Right? the U.S.
5 Attorney's Office for the Southern District of New
6 York started an investigation on the same matter
7 probably in February or March of 2017 and finished
8 their ultimate grand jury panel in March of 2018,
9 which would be 12 to 13 months. I received a response
10 from DOI in October of 2018, 18 months after I
11 initiated my request for some kind of relief under
12 the statute. That perspective five months, four and
13 a half months, a year of intense investigation. DOI
14 was with me in most of those investigations, had the
15 same documents that were used in the other
16 investigations and still took a year and a half to
17 arrive at a decision, and I was not that lucky one of
18 170 in that period, that five-year period. So you
19 could imagine my disappointment, but I was not
20 surprised.

21 CHAIRPERSON TORRES: A year and a half
22 strikes me as a...as an unreasonably long time. During
23 the year and a half, how consistently and frequently
24 did DOI communicate with you?

2 RICARDO MORALES: I'm going to let my
3 attorney who is handling some of that Robert Kraus
4 answer some of those questions, but I could tell you
5 infrequent, and we had to kind of pester the
6 Department of Investigation for some kind of response
7 or—and by the way, they did not interview me until
8 probably July of 2019 notwithstanding the fact that
9 there were—I had been cooperating with DOI.

10 CHAIRPERSON TORRES: I'm sorry. So you
11 went more than a year--more than a year after you
12 applied for whistleblower status. You were not
13 interviewed by DOI?

14 RICARDO MORALES: That is correct I was
15 not. Yes. Mr. Kraus.

16 ROBERT KRAUS: (off mic) Yes, um so my
17 name is Robert (on mic) My name is Robert Kraus. I am
18 a partner in the firm of Kraus and Zuchlewski, and I
19 do a fair amount of work representing whistleblower
20 including Mr. Morales and, um, I was representing him
21 through the period of the DOI investigation and I
22 handled all of the contact with the investigation,
23 um, with the investigators at DOI, except for when
24 they interviewed Mr. Morales, um, 13 months after
25 his—he filed his complaint, and, um, I think it's

2 fair to say that I pestered them a bit about when
3 they were going to interview Mr. Morales because in
4 my experience the first thing you want to do when you
5 get a complaint or a first interview is certainly of
6 the complainant usually. So, it struck me as very
7 odd and, um, it didn't build my confidence in the
8 process when it took 13 months to, um, to finally
9 interview the complainant, and in terms of the
10 communications they were inconsistent--

11 CHAIRPERSON TORRES: Can I ask about
12 that. Have--do you have previous experience with DOI's
13 whistleblower investigations or before Mr. Morales?

14 ROBERT KRAUS: Other, certainly other
15 forums yes and not with the DOI--

16 CHAIRPERSON TORRES: Okayl

17 ROBERT KRAUS: --because--because--

18 CHAIRPERSON TORRES: But your experience
19 is it unusual to wait more than a year before
20 interviewing the complainant?

21 ROBERT KRAUS: Yes.

22 CHAIRPERSON TORRES: And is 18 months an
23 unusually long time to complete a whistleblower
24 investigation?

25 ROBERT KRAUS: Yes, it is.

2 CHAIRPERSON TORRES: And what about the
3 communication? How frequent and consistent was the
4 communication between you and DOI?

5 ROBERT KRAUS: Uh, it was—it was
6 infrequent and it was always initiated by me, and
7 there were periods—generally the answer was: We're
8 looking into it. We're looking into it. I would let
9 a month go by, and then I would call again. We're
10 looking into it, we're looking into it and nothing
11 would happen. They wouldn't ask to even interview Mr.
12 Morales, and, um, then after I continued to pester,
13 other officials at the DOI got involved in every
14 communication I had, which I thought was—was odd and
15 a little troubling, and, um then ultimately after I
16 continued to push, they interviewed Mr. Morales 13
17 months later and then issued their—rather summary
18 report 18 months after his complaint had been filed.

19 CHAIRPERSON TORRES: So, when you
20 received a final determination--and again, I'm not
21 going to ask about details because of ongoing
22 litigation—did it come in the form of a report or a
23 letter? How detailed was the explanation?

24

25

2 ROBERT KRAUS: The explanation there was
3 really no factual analysis to conclude their findings
4 and it was two pages and three sentences.

5 CHAIRPERSON TORRES: So, it was not the
6 kind of detailed report that one would expect as a
7 consequence of an 18-month investigation?

8 ROBERT KRAUS: One hundred percent.

9 CHAIRPERSON TORRES: Mr. Morales, what
10 impact has this process had on your life?

11 RICARDO MORALES: I could tell you that
12 from the moment of my termination and retaliation for
13 my being cooperative with the, um, with the probes
14 and the investigations and the grand jury, it's been
15 horrible. My reputation has been ruined. Um, my
16 employability is almost zero. The cost in terms of
17 just trying to find gainful employment a person with
18 my kind of background with my kind of education after
19 service in government should be able to pick up a
20 not-for-profit job fairly quickly. I got comments
21 from--my social network shrunk immediately I got
22 comments from people who I knew for many, many years,
23 you're little toxic Ricardo, um, you're a little
24 radio active. We have to wait, and then, of course,
25 the phone calls stopped. The invitations stopped and

2 all this other stuff. I'll give you a sad anecdote
3 for his holiday season. We were going to go to a
4 Christmas party and we almost didn't make it. It was
5 an annual event, and my wife was kind of sad about it
6 and I said what's going on She says well I wish that
7 we could make it to the party. I says because ever
8 since this happened we haven't gotten invitations to
9 go anywhere outside of family gatherings, of course,
10 and I, you know, it dawned on me. I said, you know,
11 she's absolutely right. Before we would be out more
12 socially et cetera and be invited to it. That's
13 another cost, right? I even feel that when I enter
14 this building, right, it seems like all eyes are on
15 me, oh, Ricardo is around, um, as if though I'm some
16 kind of plague. Um, look, it's not easy. It's not
17 easy on you economically, financially, reputation
18 wise, employability. It's not good on your health.
19 It's not good on a number of levels on it, but I'll
20 tell you something, and this is to all
21 whistleblowers: Do not get discouraged, right. If
22 you're going to stand for something, stand for
23 something that makes sense. If you're going to stand
24 that you know that this is good government, and you

2 want good government, and you—and you want to walk
3 the walk and talk the talk, this is the price of it.

4 CHAIRPERSON TORRES: Although, let me
5 play I guess devil's advocate for a little bit
6 because in life we have to make calculated risks,
7 right? Most of us are on job loss away from losing
8 everything, our lives, our livelihood, our ability to
9 support our family, and just based on what you were
10 describing to me you went from serving in the highest
11 positions at the Housing Authority, at the
12 Comptroller's Office, at DCAS one of the few people
13 of color in those positions--

14 RICHARD MORALES: That's correct.

15 CHAIRPERSON TORRES: --to becoming in
16 your words unemployable. That's a heavy price to pay.

17 RICHARD MORALES: It is a heavy price.

18 CHAIRPERSON TORRES: That's irreparable
19 harm arguably. So given that reality, do you at some
20 level regret sharing information that set this whole
21 process in motion?

22 RICHARD MORALES: I do not regret it. I
23 believe that the mechanisms that you're putting forth
24 will help other people be a little bit more brave. It
25 is not easy, but I do not regret doing what I did

2 because I think if I'm try to myself and to my
3 principles, and I'm a man of faith that I did it
4 because it was the right thing. Having said that,
5 not everybody has the same gumption or the same
6 support system that I have. I have a beautiful wife
7 who supports me for 37 years and takes—and takes care
8 of me and my family. So, I have the kind of support
9 that I need when I get home. People may not have
10 that, and it is a tremendous, tremendous burden on
11 the family on everybody else when these things
12 happen, and as you get older, right, um, I always
13 thought that I would end my career on a high note
14 working for government as long as I could as long as
15 the government would have me, and that avenue has
16 shut down from the state, the city and local, and
17 when I have applied for jobs outside of the state,
18 this whole situation has come up in conversations
19 because so...because of the newspaper coverage. Right?
20 Everybody admires a, um, person who has gumption.
21 Nobody wants to be that person.

22 CHAIRPERSON TORRES: Final question.
23 What—what can and should we do as a city to break the
24 culture of fear that inhibits whistleblowing?

2 RICHARD MORALES: There has to be support
3 for the individuals, right? This whole idea of me
4 waiting 18 months, being interviewed 13 months after
5 the events when DOI was with me all the way through
6 is nonsense. It's hypocritical. It's an abandonment
7 and it's a betrayal. So how do you stop that? I think
8 the measures that are in this bill you have—you're
9 having a 90-day period of time for the report to be
10 done, takes a lot of the discretion and politics out
11 of things because you have to act quickly. It
12 prioritizes the work that has to done. To...to think
13 that you have 36, three dozen complaints on a annual
14 basis, and they can't get them our within three
15 months, four months or six months is ludicrous. It's
16 because they're not—they're giving lip service to
17 people who have to come in and report corruption, but
18 when it comes to backing people, there's not back-up,
19 and what you're trying to do here I applaud because
20 at least you'll give some other whistleblower and
21 other people some teeth so that they could go and say
22 yes I am being protected, and that's what's important
23 here, and I...I think that you got to continue and even
24 if it's an uphill battle, it's to change that dynamic
25 so that other people will come forward and say, yes,

2 there's something wrong. Yes, there's corruption.
3 Yes, there's conflict of interest. Yes, there's
4 abuse of power? Yes, there are these things so that
5 we could have a better government, alright so these
6 donors don't control things that there's no--there's
7 no discriminatory that's going on, and that's--that's
8 what I say. That would be the message. I think the
9 reason why I'm here and a lot of people told me, you
10 know, you shouldn't go--continue to put yourself in--
11 in--in harm's way by making public statements and
12 public appearances, is because I believe in this. I
13 believe in government and I believe that there's an
14 honest way of doing things, and I support what you're
15 doing 100%.

16 CHAIRPERSON TORRES: Thank you for
17 speaking out. Thank you for your testimony. Do any
18 of my colleagues have any questions or? Then we're
19 going to call up the--the second panel. Thank you so
20 much for your remarks.

21 RICARDO MORALES: Thank you.

22 CHAIRPERSON TORRES: Gregory Krakower.
23 Gregory, I hope I'm pronouncing your name correctly,
24 sir.

2 GREGORY KRAKOWER: [off mic] You did.

3 CHAIRPERSON TORRES: Okay. (background
4 noise) Mr. Krakower, can you raise your right hand.
5 Can you swear to tell the truth and the full truth in
6 your testimony and before today's committee and in
7 response to Council Member's questions?

8 GREGORY KRAKOWER: I do.

9 CHAIRPERSON TORRES: You may proceed. Do
10 you have an opening statement?

11 GREGORY KRAKOWER: Yes.

12 CHAIRPERSON TORRES: Okay, continue.

13 GREGORY KRAKOWER: Mr. Chris Moyer. Good
14 morning Mr. Chairman. My name is Gregory Krakower. I
15 am a counselor at the law firm of Getnik & Getnik,
16 LLP. Based in Manhattan. I'm also an adjunct
17 professor at Cardozo Law School where I teach
18 whistleblower statutes and corporate fraud, a course
19 that I established in 2015 when I served as Senior
20 Advisor and Counselor to the New York State Attorney
21 General. I played a leading role in drafting and
22 implementing several state whistleblower laws
23 including the New York False Claims Act, and the
24 views I express here are all my own. Let me begin by
25 expressing my appreciation to you, Mr. Chairman for

1 inviting me here and to other members of this
2 committee. Chairman, you asked me here to speak out
3 about model whistleblower protections and aspects of
4 whistleblower laws that this committee and the City
5 Council as a whole can examine in order to improve
6 and increase protections for whistleblowers in New
7 York City. But first, I'd like to briefly comment on
8 Intro 1770. The legislation is timely and important.
9 Intro 1770 if passed will augment New York City law
10 to ensure that there is no place here for threats and
11 pressure tactics aimed at intimidating and
12 discouraging—discouraging whistleblowers from
13 cooperating with the City Council. Eight million New
14 Yorkers rely on the City Council to provide
15 meaningful oversight of programs and officials that
16 directly impact our lives. Such oversight is not
17 possible when public officials or others fear for
18 their livelihood and possibly even their safety when
19 cooperating with the Council. Intro 1770 is a good
20 first step, Mr. Chairman and your desire to examine a
21 wide array of potential improvement to the city's
22 whistleblower laws, and it is an effort that all New
23 Yorkers should applaud. Where should the city start
24 when considering adopting new whistleblower laws just
25

2 on a broad level? All whistleblower laws do one or
3 more of three critical things: Protect
4 whistleblowers, reward whistleblowers and/or empower
5 whistleblowers, and from experience, the best do all
6 three. First protection. At a minimum any
7 whistleblower law should protect whistleblowers from
8 unnecessary disclosure and from retaliation by
9 employers. Superior laws also protect against
10 industrywide blacklisting and recognize that in the
11 so called gig economy independent contractors and
12 agents need protection as well, and too often
13 protection is couched in in terms of merely providing
14 back pay and hypothetical reinstatement for a
15 whistleblower who has the fortitude and stamina to
16 win a lawsuit. A whistleblower who has won a
17 retaliation lawsuit has lost more than just pay. As
18 some New York laws actually recognize, but not others
19 real protection requires rewarding whistleblower at a
20 minimum double back pay, interest and costs and it
21 bears mentioning few whistleblowers wish to return to
22 work for an employer or contractor who has retaliated
23 against them. Second is rewards. There are some
24 federal and state programs that reward whistleblowers
25 with their percentages of damages and penalties that

2 government agencies recover because of information
3 they provide and because of their bravery. The SEC,
4 the CFTC, the IRS run such programs as do some
5 states. They have been remarkably successful and
6 endorsed across the political spectrum. City
7 agencies that have the power to levy significant
8 fines against large scale illegal activities by major
9 corporations should welcome the adoption of similar
10 programs here in New York City to incentivize
11 whistleblowers who can bring serious illegal activity
12 to light, and the third is empowerment. Some laws in
13 addition to rewarding whistleblowers grant them the
14 right to initiate enforcement action on behalf of the
15 government and a qualified right to pursue them if
16 the government declines to prosecute the case itself.
17 The New York State False Claims Act, which only
18 covers fraud against the government, is a best case
19 example of this. It contains model anti-retaliation
20 protections, rewards whistleblowers and empowers them
21 to initiate enforcement actions all of which is
22 supervised by government officials to protect the
23 public's interest in fair and effective law
24 enforcement, and the results of the statute I think
25 speak for itself both in city and state. Dangerous

2 and illegal practices have been rooted out in
3 government funded healthcare programs. Corrupt and
4 discriminatory contract practices have been exposed
5 and eradicated and complicated schemes against the
6 city' Pension Fund stopped, and hundreds of millions
7 of dollars, hundreds have been return to New York
8 taxpayers, and yet this model can be expanded to
9 beyond just fraud against the government. But
10 whistleblower laws whatever they are can only work as
11 well as they are administered. Government agencies
12 need to actively recruit, listen to and work with
13 whistleblowers. Dedicated whistleblower advocates
14 and government agencies, speedy and fair
15 investigations and prompt and open communication with
16 whistleblowers can make all the difference, and what
17 good is a whistleblower law any whistleblower law if
18 people don't know about it? Government agencies and
19 contractors can and should be required to inform
20 employees, workers and subcontractors about
21 applicable whistleblower protections, and—and this
22 not novel by the way. MTA contractors are required
23 in this state New York MTA to tell employees about
24 the protection and rewards offered by New York State
25 law along with the contact information of the

2 Attorney Genera and the MTA Inspector General. Why
3 just MTA contractors? And when you think of who can
4 be a whistleblower, I think we need to think more of
5 just our typical private sector employee or
6 government or government official who sees corruption
7 at their office. Honest businesses that know of
8 wrong doing in their industry are increasingly taking
9 advantage of whistleblower laws to report one scoff
10 law or dishonest competitors because honest
11 businesses are tired of paying an integrity tax by
12 losing sales and profits to their wrongdoer
13 competitors. And finally, New York State and City
14 whistleblower laws can be, as pointed out, confusing
15 and inconsistent as to who can qualify for a
16 whistleblower, the type of illegal conduct that can
17 be reported, the agencies to which conduct must be
18 reported and the remedies that are offered. New York
19 City has the authority and opportunity to clarify,
20 modernize and strengthen these laws as well as enact
21 new laws that better serve enforcement agencies and
22 better serve the public. Laws that protect, reward
23 and/or empower whistleblowers send a message that New
24 York City and New Yorkers reject the discredited
25 attitude that deems whistleblowers as traitors,

2 snitches or disloyal individuals. Instead, at their
3 best they establish a public private partnership in
4 the battle against fraud and illegality and for
5 integrity. See something, say something, get fired
6 become see something say something and the city's got
7 your back. Thank you Mr. Chairman.

8 CHAIRPERSON TORRES: Thank you. Can I
9 call you Professor?

10 GREGORY KRAKOWER: Uh, just Greg is fine.

11 CHAIRPERSON TORRES: That's just Greg.

12 I...so you shared with us your thoughts on best
13 practices--

14 GREGORY KRAKOWER: Yes.

15 CHAIRPERSON TORRES: --and the
16 Whistleblower Law. What do you make of New York
17 City's law. There's perception that New York City
18 where the progressive capital of America with some of
19 the strongest whistleblower protections is that
20 factor fiction in your opinion?

21 GREGORY KRAKOWER: There are some good
22 things in the law and then there are some not so good
23 things, and one of the--the less attractive is how
24 confusing it is and how limited it is in some areas.
25 Um, it is unclear from a policy perspective when New

2 York City law would protect someone who reports
3 certain delineated agencies--

4 CHAIRPERSON TORRES: Yeah.

5 GREGORY KRAKOWER: DOI, the City Council
6 and the Public Advocate's Office for example, but not
7 others. It's-it's-whistleblower bingo is not a good
8 practice of law. If internally or externally a public
9 or private sector employee or independent contractor
10 has information that's relevant to law enforcement,
11 they shouldn't be retaliated against for reporting
12 something to their superior even in the private
13 sector, their superior in their agency to not only
14 city agencies but...but...but State and other enforcement
15 agencies as well. If you want someone to come
16 forward broad-you know, someone says when you
17 list...when you make a list that you have to report to
18 X, Y and A, B and C, it means if you report to all
19 these other agencies you're not protected.

20 CHAIRPERSON TORRES: So, your criticism
21 is that the reporting requirements are too rigid and
22 restrictive?

23 GREGORY KRAKOWER: And narrow.

24 CHAIRPERSON TORRES: And narrow.

25

2 GREGORY KRAKOWER: That's right. it's
3 unclear to me. I mean, you know, the SEC actually
4 went through this.

5 CHAIRPERSON TORRES: So what are...what are
6 the ideal requirements?

7 GREGORY KRAKOWER: That if you...if...if
8 someone who a private sector employee or public
9 sector is retaliated against for reporting illegal
10 conduct and gross mismanagement that the city law
11 does to their supervisor internally to a private
12 sector entity or internally to a public sector agency
13 and they are retaliated against, the are a
14 whistleblower and should be protected. Um, you know,
15 many whistleblowers try to work within their company
16 in the private sector for example because they think
17 that if they go up the chain someone will listen to
18 them with in their business. Most people don't think
19 that companies that they work for are dishonest. If
20 in going up that chain internally to a private
21 company someone is retaliated against, that shouldn't
22 be legal.

23 CHAIRPERSON TORRES: So, I am quickly
24 going to go through the five categories.

2 GREGORY KRAKOWER: Public sector. I'm
3 sorry

4 CHAIRPERSON TORRES: I'm going to quickly
5 go through the five categories that are laid out
6 There is a question of who should be covered--

7 GREGORY KRAKOWER: Right.

8 CHAIRPERSON TORRES: --what should be
9 covered, what are the reporting requirements? What
10 are reporting mechanisms? What are the remedies? On
11 the question of coverage, who should be covered?

12 GREGORY KRAKOWER: The--

13 CHAIRPERSON TORRES: The--the Local Law
14 covers public employees and public contractors and
15 subcontractors. Is there anyone else who is not
16 covered who should be covered?

17 GREGORY KRAKOWER: Sure. Comp-comp-
18 people who work at companies who for example take the
19 city's Consumer Protection Law, who risk New Yorkers'
20 not only livelihood but data privacy, they might not
21 be a city contractor. They are someone who comes
22 forward and says: New Yorkers under the CPL or under
23 New York laws are in danger because of something at
24 my company. They should be protected, and they
25 should be protected whether they come to the

2 government agencies or they go to their employers or
3 Corporate Compliance Department. If you have a
4 regulatory regime, and you take the important, um,
5 the important conduct that we care about, consumer
6 protection, environmental law is an area where, you
7 know, state law sometimes sort of drops the ball in
8 terms of whistleblowing. You broaden the conduct,
9 and you broaden the people to whom that person can
10 report, and so you don't fire them. You don't fire
11 them if they have a reasonable basis for belief of
12 not only illegal conduct, and this I think actually
13 12-113 does very well or gross mismanagement. That
14 would be an example, and I could think of others,
15 but, you know, it...

16 CHAIRPERSON TORRES: What about—what
17 about the forms of misconduct that are covered? The
18 law covers criminality, conflicts of interest,
19 corruption, gross mismanagement, abuse of authority.
20 Is that sufficiently comprehensive or should it
21 include other forms of misconduct?

22 GREGORY KRAKOWER: I actually think
23 in...in—in 12-113 is actually a very—compared to some
24 other laws a very good broad description. For
25 example State Law 75-B covers illegal conduct. In

2 this case the city law is a little bit better because
3 it covers gross mismanagement and abuse of authority.
4 Now, it cover gross mismanagement and abuse of
5 authority but then it narrows in the next paragraph
6 by saying: But only if it's by another city officer
7 or employee or an officer of the contractor or
8 subcontractor that happens to be dealing with the
9 agency. But in terms of going beyond just illegality
10 and to what the law states as gross mismanagement or
11 abuse of authority is actually a really positive
12 aspect of current law. It goes beyond Civil Service
13 Law Section 76-b for example--

14 CHAIRPERSON TORRES: And--and--and

15 GREGORY KRAKOWER: --without getting into
16 details.

17 CHAIRPERSON TORRES: And if I understand
18 correctly, the--the three comprehensive whistleblower
19 statutes applicable to local and state employees are
20 the Admin Code, Civil Service Law and Labor Law.

21 GREGORY KRAKOWER: There are some others.
22 There is the New York False Claims Act covers
23 retaliation for all fraud against local and state
24 governments and the State Law gives really anybody
25 private or public sector employee the right to sue

2 New York City or-or to sue any entity in the state
3 actually for retaliation not just for reporting fraud
4 against the government by the way, but for taking
5 actions in furtherance to stop a fraud, and I think
6 that's important, too. I think that's a-that's a part
7 where the law, New York City law is not clear.
8 Report-you-you said yourself, Mr. Chairman, it's you
9 want to be proactive. If someone is internally in a
10 company or an agency and says no, I don't-I don't
11 want to do that, they should be protected even if they
12 don't then go and fill out on their own, which you
13 know is-is tough to do if you're not, you know-well,
14 I have problems understanding all the reporting
15 requirements in 12-113 or hire a lawyer. The State
16 False Claims Act covers furtherance of efforts to
17 stop a fraud, which by the way itself could be
18 improved on.

19 CHAIRPERSON TORRES: But, I guess to your
20 earlier point unlike the state statute the Civil
21 Service Law, which limits, um, whistleblower
22 protection to violations of law--

23 GREGORY KRAKOWER: Right.

24 CHAIRPERSON TORRES: --the, the Local Law
25 extends well beyond violations of law.

2 GREGORY KRAKOWER: Yes.

3 CHAIRPERSON TORRES: Just gross
4 authority—I'm sorry, gross mismanagement and abuse
5 of authority.

6 GREGORY KRAKOWER: That I think is the
7 good part about—is one of the positive aspects and
8 there are others that are --

9 CHAIRPERSON TORRES: So, that's—that's
10 one of the upsides. What about the enforcement
11 mechanisms? So Local Law designated DOI as the
12 enforcement agency. It creates a private right of
13 action for public contractors and subcontractors, but
14 fails to do so for public employees. Should public
15 employees have a private right of action under the
16 city's Whistleblower Law?

17 GREGORY KRAKOWER: Well, first of all,
18 I'm not...I—I think the word employee needs to be
19 expanded in the day and age of the—as I said in my
20 opening testimony, of independent contractors.

21 CHAIRPERSON TORRES: But we're
22 specifically referring to public employees in the
23 strictest sense of the word. Should public employees
24 the 400,000 people who are directly employed by New
25 York City should those employees any of them, all of

2 them have private right of action under the city's
3 Whistleblower Law?

4 GREGORY KRAKOWER: Absolutely they should
5 and here's an example of the inconsistencies As I
6 mentioned the False Claims Act. Why would we give a
7 New York City employee a private right of action for
8 retaliation to stop a fraud against the government.
9 which section—which state law does, but you don't
10 give that employee a private right of action for all
11 of the other conduct within city law, and the
12 inconsistency itself speaks to, you know, no one
13 would write a policy lie that. So a city employee
14 that sees a fraud against the government can—and is
15 retaliated against, can sue, can sue the city under
16 state law. But they can't sue the city under the
17 city's law for all the other conduct that city law
18 covers. It's not fraud against the government, gross
19 mismanagement, conflict of interest, crimes other
20 than in Section 75-B. I'd like to see we want to end
21 this. (sic)

22 CHAIRPERSON TORRES: And there is a
23 private right of action available under State Law?

24 GREGORY KRAKOWER: There is for illegal
25 conduct. Yes.

2 CHAIRPERSON TORRES: For public, for city
3 employees?

4 GREGORY KRAKOWER: Yes, certainly for the
5 False Claims Act absolutely. For retaliation yes.

6 CHAIRPERSON TORRES: What about under,
7 under Civil Service Law?

8 GREGORY KRAKOWER: Um, I believe that's
9 the case yes, and—and—and by the way private right of
10 actions are not all equal. There are different
11 statutes of limitations.

12 CHAIRPERSON TORRES: Right.

13 GREGORY KRAKOWER: There are—so, it's—
14 it's—Section 215 has a two-year statute of
15 limitation. Section 740 of the Labor Law, which
16 covers Labor Law violations has a one year. The False
17 Claims Act has 10-year statute of limitations for
18 retaliation. So, you know, fraud against the
19 government is bad and there are some great laws, but
20 so is environmental and consumer and misuse of
21 authority as well and you're correct. There's lesser
22 protections for those kinds of conduct is something
23 that doesn't make sense and it should be improved in
24 City Law.

2 CHAIRPERSON TORRES: Okay, final
3 question. You go through, you wait months if not
4 years to secure whistleblower protection. You finally
5 do. Are you clear about the remedies that result from
6 whistleblower protection under Local Law?

7 GREGORY KRAKOWER: Not entirely, no.
8 There is for public employees it's not spelled out
9 for example that you're entitled to more than just
10 your back pay. Um, this Local Law and the same law
11 for contractors actually says double back pay. So,
12 it's confusing of who you are whether you'll get the
13 same remedy. Um, there is—you know otherwise in that
14 the big, of course distinction is there's no private
15 right of action for one group and there is for
16 another. Um, and that, you know, to have a remedy
17 without an enforcement mechanism is a fundamental
18 difference.

19 CHAIRPERSON TORRES: Okay, thank you for
20 your testimony.

21 GREGORY KRAKOWER: Yes.

22 CHAIRPERSON TORRES: Our next panel will
23 consist of Commissioner of the Department of
24 Investigations Margaret Garnett. (background
25 comments/pause) Commissioner, can you raise your

2 right hand? Do you swear to tell the truth, and the
3 whole truth in your testimony before today's
4 committee and your response to Council Members'
5 questions?

6 COMMISSIONER GARNETT: I do.

7 CHAIRPERSON TORRES: You may proceed.

8 COMMISSIONER GARNETT: Good morning
9 Chairman Torres, members of the Committee on
10 Oversight and Investigations. My name is Margaret
11 Garnett, and I'm the Commissioner of the New York
12 City Department of Investigation. Thank you for
13 inviting me to address the committee on Intro No.
14 1770. The proposed legislation in relation to
15 whistleblower protections for employees who face
16 adverse personal actions. New York City's
17 whistleblower scheme is foundational to DOI's mission
18 of rooting out corruption, fraud, waste and other
19 wrong doing from city government. New York City is a
20 leader in fighting municipal corruption in part
21 because of its comprehensive system of duties to
22 report and cooperate, strong protections for
23 employees they act on those duties, and an
24 independent and robust Inspector General system in
25 the Department of Investigation. In my testimony

2 today I would like to first provide the committee
3 with an understanding of the rules that that
4 currently guide how and when wrong doing must be
5 reported. Second, explain how the current
6 whistleblower protection statute functions. Third,
7 summarize DOI's recent experience with the current
8 whistleblower statute, and finally, highlight some
9 concerns and recommendations that I hope the
10 committee will consider as it evaluates the proposed
11 legislation. There are currently three places in the
12 city's governing documents that set out important
13 aspects of the city's system for reporting wrong
14 doing. One is Executive Order 16, which mandates the
15 affirmative obligation of all public officers and
16 employees to report corruption, fraud and other wrong
17 doing or risk their jobs and professional advancement
18 if they do not. Executive Order 16 also mandates
19 that all public officers and employees cooperate
20 fully with DOI investigations. This duty to
21 cooperate with DOI investigations is also included in
22 Chapter 49 of the City Charter with the list of
23 duties of public officers and employees. The third
24 place is Section 12-113 of the New York City
25 Administrative Code also known as that whistleblower

2 Protection Statute, which protects public servants
3 from retaliation when they act on their duty to
4 report wrong doing. As amended by Local Law 33,
5 which expanded whistleblower protections to include
6 complaints about children's educational welfare,
7 health and safety and later to include officers and
8 employees of vendors who have contracts with the city
9 valued at \$100,000 or more. The current
10 Whistleblower Protection Law codified in Section 12-
11 113 of the Administrative Code has five elements that
12 must be satisfied in order for an individual employee
13 to be protected by the law. First, the complainant
14 must be an officer or employee of a city agency or a
15 contractor with city contracts over \$100,000. I'm
16 sorry. Second, the complaint must involve
17 corruption, criminal activity, conflict of interest,
18 gross mismanagement, abuse of authority or the
19 health, safety or welfare of a child. Ordinary
20 mismanagement, disagreements about policy or
21 procedures or objections to decisions that are within
22 the lawful discretion of agency heads or elected
23 officials are not covered. Third, individuals must
24 make these complaints to DOI or to any member of the
25 City Council, or the Public Advocate or the City

2 Comptroller each of whom has a duty to refer those
3 complaints to DOI. Employees and officers of
4 contractors may also qualify for—~~for~~ protection if
5 they make such a report to the city Chief Procurement
6 Officer their agency Chief Contracting Officer, or an
7 agency head or commissioner of the contracting agency
8 all of whom must then refer the complaint to DOI.

9 Individuals making a report concerning conduct
10 involving the health, safety or educational welfare
11 of a child may also be covered by the statute if they
12 report wrong doing to a superior officer or to the
13 Mayor. The fourth element is that the complainant
14 must have suffered an adverse personnel action, which
15 can potentially include a wide range of things like
16 termination, demotion, suspension, disciplinary
17 action, negative performance evaluations, salary
18 reduction, denial of promotions or raises or
19 significant unwanted changes in duties or work
20 environment. Fifth and finally, the adverse
21 personnel action must have been the result of the
22 individual's report of the wrong doing at issue.

23 When DOI receives a complaint that alleges
24 retaliation even if it does not specifically
25 reference with supervisor protection or the statute,

2 we conduct a thorough inquiry. The current law
3 requires that DOI acknowledge the receipt of the
4 complain within 15 days, provide a final written
5 statement to the complainant explaining how the
6 matter was resolved, and if the complaint of
7 retaliation is substantiated provide a report of our
8 findings and recommendations to the relevant agency.
9 The law also calls for DOI to conduct public
10 education efforts to that employees and officers of
11 covered agencies and contractors are aware of their
12 rights and responsibilities under the law. In
13 addition to our other public outreach efforts, DOI
14 conducts regular outreach to the city's workforce
15 through both in-person and online corruption
16 prevention training. In Fiscal Year 2019, we
17 conducted 449 in-person corruption prevention
18 lectures that reached over 16,000 city employees in
19 person, an increase of 15% from the previous fiscal
20 year. In addition, more than 33,000 employees also
21 completed online anti-corruption training through
22 DOI's Citywide E-Learning Module. I believe these
23 efforts are key to increasing awareness among the
24 city workforce about corruption risks, their
25 obligation to report wrong doing and the related

2 whistleblower protections when they do. Before I
3 move on to discuss DOI's most recent whistleblower
4 annual report, I'd like to clarify the meaning of
5 whistleblower as I have generally used it in my
6 testimony so far. New York City's law classify
7 individuals as a whistleblower only when they raise a
8 claim of retaliation in their employment as a result
9 of reporting wrong doing. In contrast the term
10 whistleblower is often used colloquially or in the
11 media to describe any individual who reports wrong
12 doing of any kind. I believe we are very fortunate in
13 New York City that thanks in part to DOI's long and
14 storied history as an effective anti-corruption
15 investigator. Hundreds of city employees stepped
16 forward to report corruption, fraud, criminality,
17 waste and abuse of authority to DOI each year. Many,
18 many more public servants voluntarily provide crucial
19 information about these issues to DOI in the course
20 of our investigations even if those investigations
21 were not initiated by a report from a city employee.
22 These actions are vital to DOI's effectiveness and
23 these individuals should be commended for embracing
24 good government principles, promoting integrity and
25 confidence in city government and ensuring that city

2 operations and services are not damaged by the
3 corrosive effects of corruption, fraud and waste.
4 The fact that the law does not label these
5 individuals as a whistleblower until there's an
6 allegation of retaliation in no way diminishes the
7 significant contribution to government integrity made
8 ty the officers and employees who report wrong doing
9 to us every day. In deed as I will discuss in a
10 moment, a very small fraction of these whistleblowing
11 individuals allege or suffer workplace retaliation
12 for reporting wrong doing. I view this as a
13 tremendously positive sign because it indicates that
14 a wide range of city employees understand their duty
15 to report and duty to cooperate, that DOI's overall
16 commitment to complainant confidentiality is
17 effective and respected and that where the identify
18 of a complainant does become known, there is
19 widespread understanding among city supervisors that
20 workplace retaliation for reporting wrong doing is
21 illegal in New York City and will not be tolerated.
22 By October 31st each year DOI is required to submit a
23 letter report to the Mayor and the Speaker of the
24 City Council describing the complaints from the
25 previous fiscal year that fall within the

2 Whistleblower Law. I have attached a copy of our most
3 recent Fiscal Year 2019 whistleblower letter to my
4 testimony today so the committee members can see
5 those statistics in detail. DOI began posting these
6 letters to our public website with the letter that I
7 have attached in 2019 to further government
8 transparency and public education on whistleblower
9 issues in New York City. In Fiscal Year 2019, which
10 covers the period from July 1, 2018 through June 30,
11 2019, DOI received 32 complaints of retaliation from
12 whistleblowers, two more than the prior fiscal year.
13 These complaints came from individuals who alleged
14 job related retaliation or sought workplace
15 protection for reporting misconduct in city
16 government. To substantiate a complaint, DOI must
17 find that all five elements of the law have been met
18 as I described a moment ago. Although the law has
19 very specific requirements, DOI applies a broad lens
20 in this area being that DOI carefully reviews all
21 complaints of alleged retaliation regardless of
22 whether the complainant specifically invokes the law,
23 but identifies themselves as a whistleblower. In
24 addition, we generally take a broad view of whether
25 any individual qualifies under each of the five

2 elements. In Fiscal Year 2019 DOI substantiated five
3 whistleblower complaints. The highest number of
4 substantiated whistleblower retaliation complaints in
5 a single year since at least 2014. The previous year
6 for instance saw no substantiated investigations.
7 Given that the numbers have historically been small,
8 I do not believe there is any particular reason for
9 this one-year uptick or any conclusion that should be
10 drawn from a single year's statistic standing alone
11 other than this was a year with complaints that
12 merited substantiation. Our statistics include
13 whistleblower complaints received and investigated by
14 DOI and also by the Special Commissioner of
15 Investigation for the New York City School District,
16 which has a reporting function to DOI. In Fiscal
17 Year 2019 three of the five substantiated matters
18 were within the investigative jurisdiction of DOI and
19 two with the investigative jurisdiction of the
20 Special Commissioner. The five substantiated matters
21 were remedied in the following ways: Two of the five
22 individuals were reinstated to their positions with
23 full back pay. The one additional individual DOI
24 directed the agency to cease adverse unwarranted
25 personnel actions against the individual and in the

2 case of the two Department of Education employees,
3 SCI directed the school's officials to reinstate the
4 two employees to their position with back pay, and
5 removed disciplinary and other relevant documents
6 from their personnel files. I turn now to
7 highlighting some concerns and recommendations for
8 the committee's consideration as it evaluates Intro
9 1770, and the current state of New York City's
10 whistleblower regime. First, as I mentioned earlier,
11 currently the foundational duties that underlie
12 whistleblower protections including the affirmative
13 duty to report and the duty to cooperate, and the
14 details of what those protections mean are found in
15 three separate places. Any revision of the
16 Whistleblower Protection Statute provides an
17 opportunity to integrate those various elements a
18 single place as well as give legislative status to
19 the duty to report. Doing so would incorporate the
20 full scope of New York City's Anti-Corruption
21 Whistleblower System into one comprehensive piece of
22 legislation. It would also provide an opportunity to
23 specify that the duty to report and the duty to
24 cooperate on matters relating to corruption or
25 criminality apply to officers and employees of

2 contractors with contracts above \$100,000 with the
3 city. Currently, a version of these duties is
4 standard language in the city's contracts, but is not
5 required by law. Under current law employees and
6 officers of contracts are protected by the
7 whistleblower law if they report corruption of fraud
8 in connection with their city contract, but they are
9 not legally bound to report or legally bound to
10 cooperate in any investigation. Including these
11 duties along side the protections would better mirror
12 what we require and expect of city employees. The
13 opportunity to create parity on these matters is
14 particularly important as the city relies more each
15 year on private entities to provide a variety of
16 public services and as we embark on several major
17 infrastructure projects that will involve significant
18 private contracts, such as the construction of
19 borough based jails East Side Resiliency Project.
20 These proposed provisions would clarify for city
21 employees and contractors that they have specific
22 mandates to report corruption and to cooperate with
23 corruption investigations, and would pair these
24 duties in one statute with what is necessary to
25 effectuate them, which are legal protections when

2 employees are retaliated against for reporting or
3 cooperating? In my view the duties and the
4 protections go hand in hand and placing them in the
5 same piece of legislation would provide clarity as
6 well as make any future needed revisions or
7 amendments to the Whistleblower Rules easier and more
8 comprehensive. Consolidating these existing concepts
9 in the same piece of legislation would also support
10 the addition, which I believe is necessary of clear
11 language in the statute requiring all city agencies
12 and those city contractors subject to the law to
13 notify their employees of this coherent set of
14 duties, responsibilities and protections. Second,
15 DOI would also recommend that the statute be revised
16 in the relevant places to clarify that full
17 whistleblower protections are afforded to those
18 individuals who make reports to the Special
19 Commissioner of Investigation for the New York City
20 School District about matters within the School
21 District. In a similar vein DOI also does not object
22 to the language in the proposed bill that would
23 extend whistleblower protection to those who are
24 subject to workplace retaliation when they cooperate
25 with the City Council as a legislative or oversight

body regarding the types of complaints covered by the current law. In other words, those matters that relate to corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority. Third, DOI recommends that a time limitation be placed on when retaliation complaints can be made. There is currently no statute of limitations in the law, but the longer an allegation goes unreported, the harder it is to uncover the facts and ensure that valid claims are vindicated. Based on our review of similar state and federal statutes, and our own experience of the city's whistleblower investigator, DOI submits that the appropriate time period in which to report claims of retaliation should be two years from the date that the complainant was informed of the alleged adverse personnel action. Fourth, DOI does not oppose the addition of some requirements that provide regular updates regarding its whistleblower investigations to the complainant, and also to the Council Speaker where the claim of retaliation arises from cooperation with a Council investigation. However, we would recommend the proposed language be revised to require only that whistleblower investigations be completed as promptly

2 as practicable, and that the 90-day period apply only
3 to the frequency of which DOI will provide required
4 status updates. Based on our experience conducting
5 these investigations, it is not realistic to assume
6 as a default that such investigations can be
7 completed with 90 days. As in all of our
8 investigations DOI is focused on finding the facts
9 and leaving no stone unturned. However, we do
10 recognize the anxiety that workplace retaliation
11 creates for whistleblower complainants, and do oppose
12 the transparency and increased sense of urgency that
13 a 90-day status reporting requirement could bring.
14 Fifth, DOI supports the addition of language that
15 establishes a clear plan of action when allegations
16 of retaliatory action are made against the DOI
17 Commissioner or executive level DOI personnel. We
18 agree with the proposed language that such
19 allegations would best be referred to the city's
20 Corporation Counsel, but recommend including specific
21 language that the Corporation Counsel would be
22 empowered to hire a qualified outside attorney to
23 serve as an acting deputy commissioner for the
24 purposes of investigation and recommending action on
25 the allegation if the allegation warranted such

2 appointment. We respectfully submit that this
3 procedure should not apply to allegations that
4 related to adverse personnel action taken by DOI
5 supervisors below the commissioner title executive
6 level. DOI currently has its own internal Inspector
7 General who is capable of carrying out DOI's
8 obligation to fairly investigate and take action on
9 this type of lower level retaliation complaint as it
10 would for any other city agency. With revisions and
11 additions, I have suggested here the city's
12 Whistleblower Statute would be a robust comprehensive
13 law, one that could be a national model for what is
14 expected of those who witness corruption in
15 government, and what is expected of government when
16 whistleblowers step forward and suffer retaliation. I
17 cannot stress enough how important and distinctive
18 New York City's overall whistleblower system is,
19 composed of both strong obligations and robust
20 protections. It has important symbolic value as a
21 signal of the city's commitment to the ideal of
22 honest government, and it also yields results. DOI
23 regularly initiates important investigations base on
24 public servants who heed their affirmative obligation
25 to report corruption. Our investigations into

2 retaliation complaints have restored the livelihoods
3 of those who honored that duty. A comprehensive and
4 effective whistleblower statute is good government in
5 action holding public servants accountable and
6 protecting them when they do the right thing and
7 fostering a culture that does not tolerate
8 corruption, fraud, self dealing or waste of public
9 funds. Thank you again for the opportunity to come
10 and comment on this important issue. I'm happy to
11 answer any questions you have.

12 CHAIRPERSON TORRES: Thank you,
13 Commissioner for your testimony. We've been joined--
14 we were joined previously by Council Members Rivera,
15 Power and Kallos. We're presently joined by Council
16 Member Salamanca. Commissioner, I know you said we
17 cannot over-interpret one year's worth of statistics,
18 but it's notable that we went from only one
19 substantiated case of a whistleblower over the span
20 of five years to five in FY 2019 and that was your
21 first year as Commissioner

22 COMMISSIONER GARNETT: So, for half-for
23 half of--

24 CHAIRPERSON TORRES: Yes.

2 COMMISSIONER GARNETT: --the-the city's
3 fiscal year--

4 CHAIRPERSON TORRES: Right.

5 COMMISSIONER GARNETT: -runs from summer
6 to summer. So, I became DOI Commissioner on December
7 10th of 2018. So, for approximately half of that
8 period I was the Commissioner of DOI.

9 CHAIRPERSON TORRES: but do you think
10 that spike was random or was there something done
11 internally to drive more substantiation?

12 COMMISSIONER GARNETT: So, I can't point
13 to anything that was done internally to, um, increase
14 that number. I think I'm always, um, skeptical of one
15 year's number in isolation. I think that if we saw
16 over time similar uptick, I would find that notable
17 and want to understand why I think a single year, um,
18 when there were a lot of unusual events in that year
19 I would-I just am not prepared to put too much weight
20 on it or interpret that by itself.

21 CHAIRPERSON TORRES: Explain as briefly
22 as you can the process of a whistleblower
23 investigation. I come to DOI. I seek whistleblower
24 protection. What does that process actually look
25 like?

2 COMMISSIONER GARNETT: Sure so, um, I
3 think the first thing I would say is that we aim to
4 cast a broad net so that any claim that contains
5 within it any complaint that we receive at DOI that
6 contains within it an allegation that the person was
7 retaliated against in their employment, we try to
8 sweep that up in a net and initially classify it as a
9 potential whistleblower retaliation investigation
10 even if the complainant doesn't self-identify in that
11 way. So, our Complaint Department as well as our
12 intake people on every slot at DOI are trained to
13 identify and flag things that are alleged
14 retaliation. Once we have those complaints, we would
15 typically reach out first to the complainant. That
16 would be standard practice, um, to meet with them and
17 understand more about what their allegation is, and
18 then from there the investigation would proceed in
19 the way that any other DOI investigation with similar
20 allegations would proceed. So, um, we go about
21 gathering the relevant city documents including
22 emails, phone records, underlying documentation.

23 CHAIRPERSON TORRES: Can I briefly
24 interrupt.

25 COMMISSIONER GARNETT: Sure.

2 CHAIRPERSON TORRES: Is there a dedicated
3 unit for whistleblower investigation or does it vary
4 depending on the agency.

5 COMMISSIONER GARNETT: It varies
6 depending on the agency.

7 CHAIRPERSON TORRES: But it's done by the
8 unit that oversees the agency?

9 COMMISSIONER GARNETT: Yes.

10 CHAIRPERSON TORRES: okay.

11 COMMISSIONER GARNETT: Yes.

12 CHAIRPERSON TORRES: I'm sorry.

13 COMMISSIONER GARNETT: Yes, the Inspector
14 General that oversees the agency that is alleged to
15 have retaliated is the squad that would be assigned
16 to the whistleblower investigation. The only way
17 that would vary is if there was some kind of conflict
18 of interest or ethical conflict where I could imagine
19 a circumstance where members of a particular squad
20 had investigated the underlying allegations, and
21 where I might view it to be more appropriate for
22 different investigators to look at the retaliation
23 claim separately. So, that's always a possibility,
24 but the default would be that the matter would go to

2 the squad that oversees the agency alleged to have
3 retaliated.

4 CHAIRPERSON TORRES: Um, it seems like we
5 have a respectful disagreement. Just judging by your
6 testimony I get the impression that yes the system
7 is, um, has room—there's room for improvement, but
8 you believe it works fundamentally well that it's
9 fundamentally a strong system. Is that a fair
10 characterization of your...?

11 COMMISSIONER GARNETT: Yeah, I—I do and I
12 think that the—the numbers really tell the story in
13 the sense of you see consistently over, you know, the
14 years over which we have good records with, you know,
15 three different DOI commissioners, two different
16 Mayors, um, that the numbers of city employees, um,
17 who come forward to report wrong doing to us remains
18 extremely high. Um, the number of DOI investigations
19 open, based on that information remains high. The
20 incidents in which city employees refuse to cooperate
21 with DOI investigations remains extremely low and
22 rare, um,, and I think from—from our perspective
23 looking at the statistics, as well as our overall
24 experience what—to me the more logical explanation
25 for the relatively low number of substantiated

2 retaliation complaints is that retaliation is
3 thankfully relatively rare, um, and that where we've
4 found the evidence to support the allegation that is
5 substantiated, I can speak certainly to the ones from
6 Fiscal Year 19, five were substantiated. In ever
7 cases the agency took the action that was recommended
8 based on the outcome of that investigation, and as
9 far as I'm aware, I don't believe we've ever had a
10 situation at DOI certainly with the last 20 years in
11 which a retaliation claim was substantiated, and the
12 agency refused to reinstate the person or take the
13 other action that we recommended.

14 CHAIRPERSON TORRES: Yes. So I'm
15 admittedly a skeptic about the effectiveness of our
16 Whistleblower Law. So, I just want to break down the
17 law category by category. I want to start with the
18 question of who is covered and who should be covered.
19 The Admin Code covers city employees as well as city
20 contractors and subcontractors. As I noted earlier
21 in my opening statement, it fails to cover those who
22 were formerly or prospectively employed. You know,
23 protecting against black listing or it fails to cover
24 interns. Should the city's Whistleblower Law cover
25 prospective employees, former employees and interns?

2 COMMISSIONER GARNETT: So, um, I'll
3 confess that I haven't given a lot of thought to
4 those categories--

5 CHAIRPERSON TORRES: Yeah.

6 COMMISSIONER GARNETT: --before today. I
7 mean I think that it would be possible to cover, um,
8 prospective employees. I would imagine that if a
9 person presumably the way that that would work is a
10 person would allege that they were denied city
11 employment for which they were otherwise qualified
12 solely in retaliation for, um, having been-- You
13 know, the difficulty is that the tricky thing is to--
14 you have to imagine a person who is not a city
15 employee, but is in a position to identify wrong
16 doing for the kind that is specified in this statute,
17 reports about wrong doing or cooperates in an
18 investigation of that wrong doing subsequently
19 applies for a city job, and is denied that job
20 because the prior cooperation of reporting is known.
21 I think if you had a situation like that, my
22 suspicion is that those facts would be pretty rare.
23 If you had a situation like that, I think that it
24 could make sense to give that person protection. The
25 difficulty it seems to me is that the hiring process

2 is quite a different process from the process by
3 which persons are subject to adverse personal action
4 in a job they already have. So there might be some
5 difficulty in investigating that in a ways that could
6 really get to the bottom of the answer. What we have
7 found is that in the case of adverse personnel
8 actions, there typically is quite a paper trail. Um,
9 many people are involved. There's emails, there's
10 phone records, and we're able to get a pretty good
11 picture of this timeline and how that circumstance
12 came about. Um, I think the hiring process is a
13 little different so that would be my hesitation.

14 CHAIRPERSON TORRES: It sounds like you
15 have no objection in principle, but investigatively
16 complex. Is that--?

17 MISSIONER GARNETT: I have no objection
18 to the principle that someone should not be denied
19 the opportunity for city employment, for which they
20 otherwise would be the top candidate because they've
21 been involved in reporting wrong doing. I-I'd be
22 firmly in support of that principle. I-I have some
23 concerns about how you could design the statute in a
24 way that would make it effective to get at those
25 situations if they occur.

2 CHAIRPERSON TORRES: It's for their
3 concern. The city's Whistleblower Statute protects
4 those or seeks to protect those who have suffered,
5 experienced retaliation. What about those who were
6 threatened with retaliation that never materialized?

7 COMMISSIONER GARNETT: So, as I said, at
8 DOI we try to cast a broad net in terms of what we
9 consider to be retaliation, and, um, we are in
10 generally regular communication with complainants on
11 our underlying investigations. Um, so certainly if
12 we—if a complainant told us that they had been
13 threatened with retaliation or that they—and it
14 certainly has happened that complainants have told us
15 that, you know, they—the sense a chill. Everybody
16 knows I'm talking to you. You know, I'm no longer in
17 meetings that I once was or things like that. um, we
18 take that into account and when we ultimately make
19 referrals to the agency or, you know, that's a
20 circumstance where I could imagine us making a
21 referral to the agency or if it were appropriate to
22 the Law Department or to City Hall to say that we
23 think that inappropriate conduct is occurring in
24 terms of the treatment of this employee, and
25 corrective action needs to be taken.

2 CHAIRPERSON TORRES: But-but-but-but just
3 a strict reading of the law is your—did you construe
4 the law to prohibit the threat of retaliation? Does—
5 can—can the threat of retaliation constitute a basis
6 for granting whistleblower protection?

7 COMMISSIONER GARNETT: No.

8 CHAIRPERSON TORRES: Okay.

9 COMMISSIONER GARNETT: There has to be
10 some action taken.

11 CHAIRPERSON TORRES: So, then the
12 question is should the—should the threat of
13 retaliation constitute a basis for granting
14 whistleblower protection?

15 COMMISSIONER GARNETT: I think I'd take a
16 similar view that in—as a principled matter I think
17 that it should be illegal to threaten employees with
18 retaliation, and so my only question would be--

19 CHAIRPERSON TORRES: Well let me, let me
20 take an egregious case. I'm a city employee and I
21 receive an email from my supervisor I am going to
22 fire you if you speak up?

23 COMMISSIONER GARNETT: But I know you're
24 talking real life.

2 CHAIRPERSON TORRES: And I can prove it,
3 but it--

4 COMMISSIONER GARNETT: Shut your mouth
5 with--

6 CHAIRPERSON TORRES: Shouldn't I receive
7 whistleblower protection if I can prove it that
8 definitively?

9 COMMISSIONER GARNETT: Yes, I-I-I think
10 that it would be consistent with the principles of
11 the Whistleblower Statue to include threats of
12 retaliation as an actionable claim. Yeah.

13 CHAIRPERSON TORRES: Okay, not as
14 compelling, what about the fear of retaliation? Even
15 in-even in the absence of a threat I-I-I've-I've
16 shared information with DOI that has aided
17 investigation into corruption and fraud, and Ii-and I
18 fear retaliation. Should the fear of retaliation be
19 the basis for whistleblower protection?

20 COMMISSIONER GARNETT: On that one I have
21 to say no because I-I think that when people come
22 forward there are a range-you know, I've worked in
23 law enforcement a long time. So, in my-in my former
24 life, um, I dealt a lot with informants, with
25 cooperating defendants and, um, the situations are

2 not so different, um, from the city employees to come
3 forward in role as DOI Commissioner in—in this way,
4 which is that people have a huge range of motives for
5 doing so from the purest heart to complicated
6 personal motives, and everything in between. People's
7 experience of what that experience is like also
8 covers a huge range. For some people it's—it's quite
9 uncomplicated, you know, they—they saw something,
10 they called. They come in to be interviewed. It
11 doesn't present them with much anxiety and they go on
12 with their lives, and for other people it's quite
13 different experience and again, everything in
14 between. So, I think—I don't think that a person's
15 feelings are actionable in almost any area of the
16 law. I think the way that we handle that is to try to
17 reassure complainants that if they are—do suffer
18 retaliation, we'll investigate that thoroughly, and
19 work to protect them if those claims are
20 substantiated. We educate them about what the law
21 requires, what their rights are, and I think that
22 that is really the most that can be done because I
23 don't see sort of as—as a lawyer, as well as DOI
24 Commissioner--

25 CHAIRPERSON TORRES: Right.

2 COMMISSIONER GARNETT: I don't see a way
3 that you could effectively craft a legislation that
4 would create some action or remedy because you fear
5 retaliation.

6 CHAIRPERSON TORRES: I guess one-one of
7 my frustrations with the law is that it's reactive,
8 right. It waits for the perspective whistleblower to
9 fall victim to retaliation and then it-it offers a
10 path to a remedy, and you know, when you are
11 suffering retaliation, when you lose a job, that can
12 be-that's catastrophic for most of us. Right, most
13 of us cannot survive the loss of a job. Most of us
14 cannot survive months or years of lost income. You
15 know, what if DOI had the ability to grant
16 provisional or presumptive whistleblower status in
17 anticipation of retaliation? Is that something that
18 you would object to in principle?

19 COMMISSIONER GARNETT: So, you know it's-
20 that's-that's a concept that my staff and I have done
21 a lot of research on to look to see are there other
22 places in-because really, um, our thought on the
23 Whistleblower Protection Law in New York City is-is a
24 kind of employment law, right, and it-it makes
25 illegal certain kinds of employment actions and give

2 the employee subject to them certain kinds of
3 protections, right. So-so in that way the-the
4 structure of vindicating those rates should have a
5 lot of parallels whether that's sexual harassment,
6 gender or racial discrimination, other kinds of
7 retaliatory firings that are prohibited by a wide
8 range of employment law context whether federally, at
9 state level, or and the city also has very robust
10 protections for private and public employees for
11 certain kinds of discrimination, and when we looked
12 around for a model of how something like that could
13 work, what we-we could not find any such model, and -
14 and what we found overwhelmingly is that the
15 structure of employee protection law in the United
16 States is to create remedies to-after the fact to
17 reinstate for back pay, for damages for emotional
18 harm or-or medical bills or damage to reputation or
19 professional advancement. You know, the different
20 circumstances have a range of different remedies that
21 are permitted, but we could not find any example of a
22 sort of temporary protective bubble once you file a
23 claim, and as we thought about how that might work in
24 the city, that started to make a lot of sense to us
25 because many city employees work in a role in which

1 they're essentially a sort of fungible clog. You know
2 they are one of 37 procurement analysts in their
3 agency, but many, many hundreds of more city
4 employees particularly those in more sensitive
5 positions, um, work in a role in which they have
6 access to sensitive information. They're empowered to
7 speak on behalf of their agency. They are the only
8 person in the agency who does their job, and the
9 circumstances of even a temporary whistleblower
10 protection it seems to me could create enormous
11 logistical problems for city agencies to--because it's
12 impossible. In order to work that bubble would sort
13 of have to come down at a very early stage. Before we
14 had been able to determine--

16 CHAIRPERSON TORRES: I'm not sure if I'm
17 following logistical challenge. If-if--

18 COMMISSIONER GARNETT: Well, I'll give you
19 an example from --

20 CHAIRPERSON TORRES: Yes.

21 COMMISSIONER GARNETT: --your own staff.
22 I assume you have a pretty small staff in your
23 Council office, and that everyone who works for you
24 has access to sensitive information about this
25 committee, about your role as City Council and if

2 there were a circumstance where one of those people
3 had accused you of wrongdoing, and came to DOI about
4 it and we were investigating, I-I suspect that in
5 that kind of small and intimate city office where
6 there's a lot of relationships of trust, that you
7 would not feel comfortable under those circumstances
8 allowing that employee to continue to have access to
9 your personal calendar, to your email to sensitive
10 matters within your Council Office.

11 CHAIRPERSON TORRES: Because he reported
12 me.

13 COMMISSIONER GARNETT: He--well yes, but in
14 that--

15 CHAIRPERSON TORRES: But that's precisely
16 the kind of conduct for which I should not be able to
17 retaliate against him or her?

18 COMMISSIONER GARNETT: I'm not talking
19 about retaliation. Imaging a situation where you
20 deeply believed that the allegation is founded in
21 nothing, and that when investigation is over, you'll
22 be vindicated. Likewise, your staff member believes
23 that they are correct, and when the investigation is
24 over they'll vindicated. To try to resolve those
25 matters on very limited information I became--I became

2 increasingly convinced and on the advice of my staff
3 that such a regime is not workable, and that it would
4 be an outlier in how U.S. law treats employment
5 actions of any kind in which the remedy is
6 reinstatement, back pay, additional financial
7 damages, and I would be reluctant to recommend a--

8 CHAIRPERSON TORRES: I just want to
9 challenge it for a moment because I just following
10 the hypothetical that you laid out, even if I'm the
11 target of whistleblower complaint, I do reserve the
12 right to modify duties, demote based on reasons
13 unrelated to the reporting of the complaint. So,
14 that--that right would even--would continue even in a
15 world where there were presumptive or probational
16 whistleblower status. Right? The purpose of the
17 whistleblower status is to prevent me from
18 retaliating against the employee simply because he or
19 she reported to DOI something that he or she believed
20 was wrongdoing on my part.

21 COMMISSIONER GARNETT: Right. so the form
22 that that would take would be at the most if--if what
23 you're saying is that you would retain the righty to
24 demote, change duties, even fire..

2 CHAIRPERSON TORRES: Well, like if you
3 decide to not show up to work for a week, that's a
4 basis on which you can be fired.

5 COMMISSIONER GARNETT: Okay.

6 CHAIRPERSON TORRES: Right. so that's so
7 it's clear that the firing likely resulted not from
8 the report of the wrongdoing, but from actual
9 performance from actual..

10 COMMISSIONER GARNETT: But you're
11 imagining a world where that's clear and in our
12 experience with these situations it's—it's not so
13 clear.

14 CHAIRPERSON TORRES: None of this—none of
15 this is clear, but—but—and I don't want to dwell on
16 this, but it seems to me granting someone
17 whistleblower status at the beginning before
18 retaliation could spare them years of misery, years
19 of lost income, years of reputational damage. You
20 know, in some cases there's a sense in which not
21 everyone can be made whole, right? The experience
22 of—of going through the process and losing back pay
23 and really the psychological trauma that can do
24 irreparable damage, right. You know, the notion that
25 you can be made whole at some level is a fiction and

2 so I—I want to see if there's some mechanism by which
3 we can prevent the retaliation in the first place,
4 but I understand it's complicated. I don't want to
5 dwell on this, but if you have any final remarks on
6 this.

7 COMMISSIONER GARNETT: No, I—I think the
8 only final thing I would say on that point is that,
9 um, I think the world you're envisioning where maybe
10 we would send just a warning letter to the agency,
11 this person has provided information to DOI or is
12 cooperating with DOI. This is a reminder that you are
13 not allowed to retaliate against them for that
14 behavior. That's a world that I don't think many—I
15 mean when I think about the hundreds of employees
16 each year who come forward to give us information
17 and the many hundreds more who cooperated in DOI
18 investigations, one of the things that makes that
19 effective and they are relying on is that we will
20 keep their identity confidential for as long as it's
21 possible to do so, and in many cases the identity of
22 the original complaint or tipster never becomes known
23 even where the matter become a criminal case or we
24 issue a public report or there's some other publicity
25 about the outcome, we take that—we take that

2 responsibility of confidentiality very seriously.
3 So, I think any change in this area would have to
4 incorporate due consideration for that and that any
5 sort of warning letter to the agency or protective
6 bubble before retaliation happens would necessarily
7 entail essentially outing that employee to their
8 agency.

9 CHAIRPERSON TORRES: Yes. You could have
10 both, right? You could allow for confidentiality or
11 you allow for provisional whistleblower status
12 depending on the preferences of the complainant, but
13 I don't want to—I don't want to dwell on this. The
14 question of what forms of misconduct should be
15 covered. The Administrative Code covers corruption,
16 criminality, conflict of interest, gross
17 mismanagement and abuse of authority. Should the
18 city's whistleblower Law cover forms of misconduct
19 beyond what is presently covered?

20 COMMISSIONER GARNETT: I think it's
21 pretty comprehensive I have to say. You know, I—I
22 think that, um, the language is designed to capture
23 both criminality, which is usually the feature of
24 most other Whistleblower Laws, but goes beyond that
25 to encompass things that are not necessarily

2 criminal, but that go to various forms of public
3 corruption that are not criminal, but nonetheless
4 should be acted on. So, I think the coverage is
5 pretty comprehensive.

6 CHAIRPERSON TORRES: Do you track the
7 number of complaints from each category?

8 COMMISSIONER GARNETT: Um, we do not
9 break down complaints into those categories often
10 because many kinds of conduct fall--would--would
11 already--

12 CHAIRPERSON TORRES: Overlap.

13 COMMISSIONER GARNETT: --fall within more
14 than one. Yeah.

15 CHAIRPERSON TORRES: Right. So, I want
16 to get to that. It seems to me I could be wrong. The
17 meaning of criminality straight forward, corruption
18 straight forward, conflict to interest straight
19 forward. What is not so straight forward is the
20 meaning of gross mismanagement and abuse of
21 authority. So how--how exactly would you define that?
22 Can you give me an example? First, what's the
23 difference between mismanagement and gross
24 mismanagement and second, what is an example of gross

2 mismanagement separate and apart from criminality,
3 corruption and conflict of interest?

4 COMMISSIONER GARNETT: Um...

5 CHAIRPERSON TORRES: And the same for
6 abuse of authority.

7 COMMISSIONER GARNETT: Yeah, so, you
8 know, I think—I'll start with abuse of authority
9 because I think that's a little bit easier. Um, I
10 think--

11 CHAIRPERSON TORRES: That is easier, yeah.

12 COMMISSIONER GARNETT: There might be
13 many circumstances in which abuse of authority would
14 overlap with the city Conflicts of Interest Law, but
15 because the city's con—so for example, I know you
16 know this, but maybe the public doesn't and other
17 don't, the city's conflict of interest law would
18 prohibit me as a Commissioner from directing my
19 subordinates to do personal things for me. So, you
20 know, I—I can't require and employee at DOI to drive
21 me somewhere for a personal errand. I can't ask my
22 secretary to take care of personal matters for me or
23 make the birthday invitations for my child's birthday
24 party. But, I think there are versions of that kind
25 of behavior, abuse of subordinates that would not

2 fall within kind of the technical—fairly technical
3 requirements of the Conflict of Interest Law. So, I
4 think one example of abuse of authority would be a
5 misuse of your city position for personal gain, and I
6 think there are species of that that might fall just
7 outside of the technical requirements of Article 68,
8 but that would still be actionable, and that would be
9 viewed as an abuse of authority that you are using
10 somehow through authority over subordinates your city
11 position the conduct and mission of your agency for
12 any purpose other than the public interest or the
13 mission of your agency could arguably fall under that
14 in a way that's not necessarily criminal. Um, the
15 gross mismanagement I think like many terms in the
16 law it can be a gray area, and I think reasonable
17 people might disagree about a given situation of
18 mismanagement. Like take a situation which an agency
19 head consistently delegated nearly all their
20 authority for major decisions to a subordinate, and
21 we receive a complaint that, you know, major
22 decisions involving hundreds of thousands of dollars,
23 millions of dollars where significant policy
24 decisions that are supposed to be and historically
25 have been in my agency signed off on by the

2 Commissioner are not even being reviewed by her at
3 all. I have no idea how she spends her time. This is
4 coming from an employee in an agency, and these
5 matters are going out the door under a delegated
6 signature with no commissioner level review at all.
7 That's just an example of the situation that I think
8 would give us concern again depending on the
9 surrounding facts, and could arise to the level of
10 gross negligence. (sic)

11 CHAIRPERSON TORRES: Well, since these
12 phrases are so open-ended, does DOI have rules or
13 guidance that clarifies the meaning of gross
14 mismanagement or--?

15 COMMISSIONER GARNETT: Well, since we
16 don't have an internal memo that lays that out. I
17 think as with other things we would be guided by
18 precedent. Like have we had situations like this in
19 the past? How have we handled them? Are we handling
20 them in a way that--

21 CHAIRPERSON TORRES: Because I'm thinking
22 if I'm a pro-if I'm a prospective whistleblower, and
23 I know of mismanagement, and I'm figuring out, you
24 know is this gross mismanagement or just
25 mismanagement, there--there's--there's no guidepost

2 available to me to make that determination. I have to
3 go according to my own judgment, and there's no
4 guarantee that DOI is going to agree with my
5 judgment.

6 COMMISSIONER GARNETT: Well, yes, there's
7 no guarantee DOI is going to agree.

8 CHAIRPERSON TORRES: Yeah, well let me—let
9 me ask that question differently: Should we simply
10 remove the qualifier? Should we simply say
11 mismanagement?

12 COMMISSIONER GARNETT: Well, the reason
13 why I think the qualifier is useful is that—I'll just
14 use my own experience. I run an agency of 600
15 people. I think anyone who is in a management
16 position that there are—there—there will always be
17 employees who disagree with decisions that you've
18 made that are within your lawful discretion, are no
19 corrupt, are not self-dealing. There will—because
20 human beings are running city agencies, there will be
21 situations in which someone makes a choice that in
22 retrospect is not the best choice. Maybe they've
23 been promoted beyond their competency, and they make
24 mistakes even significant mistakes, and I think that
25 it is important to give some latitude within agencies

2 to manage their employees in a way that can handle
3 disagreements about policy sort of the ordinary kinds
4 of management mistakes that can happen that we don't
5 elevate those kinds of disagreements to a situation
6 where someone cannot be demoted, transferred even
7 terminated. Because one thing I think that sometimes
8 gets lost in these debates is that substantiating a
9 whistleblower retaliation complaint is a finding of
10 wrong doing, but like in order to do that, you—we,
11 DOI would be finding that a city supervisor or agency
12 head engaged in wrongdoing. They broke the law, and I
13 think that finding should be reserved for situations
14 that merit it, and certainly we at DOI I think take
15 very seriously our obligation to communicate to
16 complainants, to supervisors in the city, to the
17 public that it is illegal in New York City to
18 retaliate against city employees for reporting wrong
19 doing, and when we're evaluating complaints we take—I
20 think it's fair to say just reviewing the history. I
21 haven't had many of these yet myself, but reviewing
22 the history we take a generous view of whether the
23 outlines(sic) are satisfied, and that if it is a
24 situation where the overall tenor of the situation is
25 that and a city employee has been retaliated against

2 for reporting wrong doing that we want to try to
3 vindicate that situation. So, I don't think that
4 again based on just my historical review of what
5 happened before I arrived, I just did not see
6 situations where a hyper technical parsing of these
7 categories is what results in a complaint not being
8 substantiated. So, I'm not saying that it can't
9 happen.

10 CHAIRPERSON TORRES: Yeah.

11 COMMISSIONER GARNETT: Um, a future DOI
12 Commissioner I suppose could direct a hyper technical
13 parsing of these five elements to deny people
14 vindication. What I can say is I have not see that
15 happening at DOI.

16 CHAIRPERSON TORRES: Well, what if you
17 had, what if I were a Parks employee, and I had
18 information about a poorly managed program in the
19 Parks Department. May not grossly mismanaged, but a
20 poorly managed, and I shared it with my local Council
21 Member Kalman Yeger, and—and the information I shared
22 informed his questioning at a hearing, and informed
23 the City Council's performance of this oversight
24 function, and then my supervisor finds out and said
25 you spoke to the City Council without authorization.

2 You're fired. Is that--is that something that should
3 be permitted that I as a constituent providing
4 information that aided my local Council Member's
5 performance of his oversight functions, and then I
6 was fired. Should that be permitted under our
7 Whistleblower Law?

8 COMMISSIONER GARNETT: So, I think all--
9 well, I'll limit myself to saying about that is that
10 I do think--I can speak to what would happen if that
11 person came to DOI. I think it's as a little bit more
12 complicated when you're talking about the Council
13 mainly because DOI is within-- You know, as a legal
14 matter we're within the executive part of the city.
15 We share in the city's attorney-client privilege. We
16 have--we're obligated to keep things confidential
17 that--

18 CHAIRPERSON TORRES: And the hypothetical
19 I have it seems no violation of confidentiality laws
20 or privacy laws.

21 COMMISSIONER GARNETT: Right.

22 CHAIRPERSON TORRES: Right.

23 COMMISSIONER GARNETT: So--so that's why
24 I'm hesitating a little bit because I could imagine
25 situations in which a lower level employee not

2 authorized to speak for the agency, not authorized to
3 break the privilege, to disclose confidential
4 deliberative matters that there's a separation of
5 powers issue there. I don't want to get too bogged
6 down in my political science hat in my former life,
7 but I think when you're talking about city agency
8 employees speaking to the Council it gets a lot more
9 complicated. So, I wouldn't want to opine on that
10 specific situation without giving it more thought.
11 What I can tell you is that if that person came to
12 DOI and they were cooperating in a matter any matter
13 under DOI's jurisdiction, and we found that they had
14 been retaliated against, we would take action on
15 that.

16 CHAIRPERSON TORRES: So, it's okay to
17 report mismanagement to DOI but not to City Council.
18 (laughs) because of separation of powers? Is that
19 the--?

20 COMMISSIONER GARNETT: Well, I-I--

21 CHAIRPERSON TORRES: Okay.

22 COMMISSIONER GARNETT: As I said, I think
23 there are lot more complications--

24 CHAIRPERSON TORRES: Yes.

25

2 COMMISSIONER GARNETT: --that I wouldn't
3 want to speak sort of in a--in a flip manner about
4 those. They're very complicated issues when it's
5 visiting the City Council. I can only speak for how
6 it would work within DOI, and I think that as I said,
7 we have not nor do I imagine going forward we would
8 be parsing finally the distinction between gross
9 mismanagement and ordinary mismanagement if an
10 employee was retaliated against for making that
11 report.

12 CHAIRPERSON TORRES: Reporting
13 requirements. Under the Administrative Code a public
14 employee or contractor or subcontractor is required
15 to report it either to DOI or to a select set of
16 elected officials, the Comptroller, the Public
17 Advocate, a local City Council Member, and then under
18 Executive Order 16 all public employees have an
19 affirmative obligation to report Who has a duty to
20 report beyond public employees?

21 COMMISSIONER GARNETT: So, the
22 contractors have and their employees have no duty to
23 report. Their--it is possible that--

24 CHAIRPERSON TORRES: The contractors have
25 no duty to report?

2 COMMISSIONER GARNETT: They have no duty
3 to report, and one of the suggestions that I made
4 earlier in my testimony is that if the Council were
5 inclined to evaluate, you know, a preamble or
6 something like that to the Whistleblower Statute that
7 would incorporate the duties that give rise to the
8 protection, it would be an opportunity to apply those
9 duties to--

10 CHAIRPERSON TORRES: So, if the NYCHA
11 monitor found corruption and fraud at the New York
12 City Housing Authority the monitor has no legal
13 obligation to report that to DOI--

14 COMMISSIONER GARNETT: That's right.

15 CHAIRPERSON TORRES: --even though it's
16 city funded?

17 COMMISSIONER GARNETT: That's right.

18 CHAIRPERSON TORRES: Wow. Okay.

19 COMMISSIONER GARNETT: The--I will say
20 that the city's contracts typically include standard
21 language about cooperating with any investigation by
22 DOI, opening your books and records and so on, but we
23 have seen contracts that don't include that language,
24 um, and--and there's nothing that requires that
25 language by law.

2 CHAIRPERSON TORRES: So there's the duty
3 to report. Does the duty—is the duty to cooperate,
4 is that universally binding?

5 COMMISSIONER GARNETT: Um, no. As I said,
6 it's—it is standard language in the city's contracts,
7 but in a variety of circumstances we have seen
8 contracts in the course of other investigations that
9 did not have that language.

10 CHAIRPERSON TORRES: Would it apply to
11 this—the monitor of NYCHA?

12 COMMISSIONER GARNETT: I believe the
13 monitor does not currently have a contract with the
14 city. So, if—if the city chose to include that
15 language in its contract with the monitor, then—then
16 it would apply to them.

17 CHAIRPERSON TORRES: So, hence the need
18 for a statutory change?

19 COMMISSIONER GARNETT: Yeah, it's—it's
20 certainly our recommendation that since employees of
21 city contractors are protected—right now there's a
22 disconnect between what we expect and require of city
23 employees, our own employees versus what we require
24 and expect of employees of vendors who are working o
25 city matters. So, both groups of employees are

2 protected by the Whistleblower Statute if they are
3 retaliated against, but right now only the city
4 employees have a duty—have a legal duty to report and
5 to cooperate.

6 CHAIRPERSON TORRES: Well, what happens—
7 so, the—the duty to report applies expressly to
8 public employees?

9 COMMISSIONER GARNETT: Yes.

10 CHAIRPERSON TORRES: What happens when
11 you fail to report?

12 COMMISSIONER GARNETT: I can be subject
13 to disciplinary action or termination.

14 CHAIRPERSON TORRES: And how often does
15 that transpire?

16 COMMISSIONER GARNETT: Um, very rarely,
17 but in my time as Commissioner I know I've signed at
18 least one letter that went to the agency head
19 informing them that an employee of theirs had refused
20 to cooperate.

21 CHAIRPERSON TORRES: But the law allows an
22 employee to report indirectly through elected
23 officials?

24 COMMISSIONER GARNETT: Yes.

2 CHAIRPERSON TORRES: What happens if I
3 report it to a local City Council Member? Is the
4 Council Member legally bound to report it
5 immediately?

6 COMMISSIONER GARNETT: Well, I think the
7 implication of the statute is that there will be
8 prompt reporting, and I think prompt reporting would
9 be necessary for DOI to do its work, but if the
10 matter relates to corruption or criminality, it's
11 supposed to be promptly reported to DOI.

12 CHAIRPERSON TORRES: And what happens when
13 an elected official rails to report it immediately to
14 DOI?

15 COMMISSIONER GARNETT: So, we haven't had
16 that situation that I'm aware of since I've been
17 Commissioner.

18 CHAIRPERSON TORRES: Yeah, but
19 hypothetically.

20 COMMISSIONER GARNETT: I'm sorry?

21 CHAIRPERSON TORRES: Hypothetically.

22 COMMISSIONER GARNETT: Again, it's
23 complicated with elected officials because they have
24 an independent status. So, um, hypothetically
25 depending on how serious I thought the situation was,

2 in all likelihood my first step would be to notify
3 the Speaker of the Council that that that had
4 occurred. I don't know what rules the Council has
5 internally in terms of its own ethical proceedings or
6 other proceedings, but that would be the first step
7 that I would take if I thought it was a serious
8 breach is to notify the Speaker of the Council.

9 CHAIRPERSON TORRES: No, I-I find the
10 selection of elected officials in the Whistleblower
11 Law to be reporteess. Right? If I report corruption,
12 fraud, gross mismanagement to my local Council
13 Member, then I'm eligible for whistleblower
14 protection potentially. But if I report it to my
15 local borough president, then I'm ineligible, right?
16 Doesn't that strike you as arbitrary. Shouldn't--
17 shouldn't what matters is what you're reporting not
18 to whom you report it?

19 COMMISSIONER GARNETT: Well, um, so I
20 know that this question of whether the group of
21 reported like reporteess should be brought in was
22 addressed pretty thoroughly at--the Council held a
23 hearing in 2002, a series of hearings 2002 and 2003
24 about various proposals to expand the list of
25 eligible reporteess, and I think the concern that was

2 raised then, which I would still share now is that
3 part of the duty to report and part of the embodiment
4 of reporting in the Whistleblower Protection Statute
5 is to ensure that—to create the most likely situation
6 where allegations will be investigated effectively,
7 and in a timely way. So, I think the list is
8 actually not random except that you're going to
9 object to what I'm about to say so the list I think
10 derived from who are the elected officials in the
11 city. So, for example, um, you know a community board
12 would be different than your City Council because
13 they're not electives. So, they don't have the same
14 obligations. They don't have the same duty to serve
15 in a way that the City Council Members do, the Public
16 Advocate, the Comptroller. Now, borough presidents
17 are elected, and I think that if—if the Council—if
18 this committee felt that that was an appropriate
19 addition, and it repaired with the same obligation
20 that the Council, Public Advocate and Comptroller
21 have to report relevant complaints to DOI that we
22 have no objection to that, but I—I—I do think that—I
23 heard briefly the tail end of the previous witness'
24 testimony that essentially any kind of reporting to
25 any entity should qualify, and I would really urge

2 caution on that because I do think that limiting the
3 list to--

4 CHAIRPERSON TORRES: Like let me--I'll
5 play Devil's Advocate and I don't know what is the
6 correct interpretation of the law, right, but when
7 you mean a Council Member I think what is meant is
8 the office of the Council Member, right. If you
9 report it to a staffer does that qualify as report it
10 to the Council Member?

11 COMMISSIONER GARNETT: Well as I said,
12 we--constituents or with constituents are mediate
13 with the staff. So, does the.

14 COMMISSIONER GARNETT: Right. You know,
15 I mean I think that DOI would interpret a complainant
16 bringing that matter calling your general office
17 number and speaking to a staffer as--as qualifying
18 just like at DOI.

19 CHAIRPERSON TORRES: Right.

20 COMMISSIONER GARNETT: I don't personally
21 answer the phone at DOI.

22 CHAIRPERSON TORRES: Bit that might be
23 because my office like your agency we're agents of
24 the city.

25 COMMISSIONER GARNETT: Right.

2 CHAIRPERSON TORRES: We're institutions
3 embedded in the city of New York. The same is true
4 of our local community board right. If I—if I go to
5 a local community board, and report corruption and I
6 have a great relationship with the district manager,
7 you know, why should I not qualify for whistleblower
8 protection simply because I went to a district manager
9 rather than a Council Member. It seems arbitrary to
10 me.

11 COMMISSIONER GARNETT: So, I don't think
12 it's arbitrary because I think that, um, the goal of
13 the—the list is to create—to create a balance between
14 as we said not—not arbitrarily cutting people off
15 from whistleblower protection while also serving the
16 interest of ensuring that those kinds of complaints
17 are funneled as quickly as possible to the entity
18 that can actually investigate them, which is DOI.
19 So, community boards and—and their members don't have
20 the same duties and obligations as elected officials
21 or as DOI. They might not be as trained or as versed
22 in what should be done with those matters. They don't
23 have the same responsibilities. They don't have the
24 same staff, and so I think in evaluating that list
25 there needs to be very thoughtful consideration about

2 a balance between again not-not cutting someone off
3 from protection where they-we might think in
4 principle they deserve it, but also not damaging the
5 likelihood that those complaints will be followed up
6 on and investigated properly by expanding the list
7 beyond what is reasonable and practical.

8 CHAIRPERSON TORRES: Enforcement
9 mechanisms. The City Whistleblower Law designates DOI
10 as the enforcement agency. DOI conducts the
11 investigation for determining whether-for the purpose
12 of determining whether whistleblower status should be
13 granted. What happens when a member of the City
14 Council is the target of a whistleblower complaint?
15 But DOI has the authority to investigate
16 whistleblower complaints, and at the same time the
17 City Council has the authority to investigate member
18 misconduct. How do you reconcile DOI's authority to
19 investigate whistleblower complaints with the City
20 Council's authority to investigate itself? How do you
21 reconcile that both in theory and in practice?

22 COMMISSIONER GARNETT: Well, I mean if-
23 if DOI received a whistleblower complaint that
24 involved a member of the Council engaged in any of
25 these categories of misconduct, we would view

2 ourselves as empowered to conduct and investigation
3 and would investigate that. It's true that DOI does
4 not have the power to remove a sitting City Council
5 Member. So, you know, in-in contrast to the kinds of
6 other situations we've been talking about where we
7 can direct a city agency, we've substantiated this,
8 and our recommendation is that the person be
9 reinstated or that the disciplinary matter be removed
10 from their file.

11 CHAIRPERSON TORRES: Well, I think it's
12 clear that you have the authority, but there are
13 complications that arise when two entities are
14 investigating the same matter. So, how do you cope
15 with that complication?

16 COMMISSIONER GARNETT: Uhm.--

17 CHAIRPERSON TORRES: Like does--because the
18 law --it's not clear to me that the law addresses
19 this situation.

20 COMMISSIONER GARNETT: No, what I can say
21 is that, um--

22 CHAIRPERSON TORRES: And this is really a
23 hypothetical so--

24 COMMISSIONER GARNETT: Yes, I know you're
25 presenting it as hypothetical, that the way we would--

1 the way we typically handle matters in which there's
2 a potential overlap between the DOI investigation and
3 an internal Council investigation is first by picking
4 up the phone and speaking to the Counsel's office,
5 the Counsel for the Council the General Counsel's
6 Office for at the Council and making sure that we
7 have—and I think certainly during my time as DOI
8 Commissioner, we've had good professional
9 communication between the Counsel's office for the
10 Council, and our squad that investigates the City
11 Council in terms of ensuring our access to documents,
12 ensuring that whatever we are doing and the Council's
13 internal process doesn't create problems one for the
14 other. So, I think that's always going to be the
15 first step. I think because of the separation of
16 powers issues that if you had a situation in which
17 you could not agree, there's no one to go to, right?
18 There's no—there's no higher authority in a dispute
19 between the City Council and DOI. Um, I think I've—
20 it's I've been fortunate so far one year in not to
21 have had that situation, but, um, you know, I think
22 if we couldn't agree then DOI would carry on with its
23 own obligations.
24

2 CHAIRPERSON TORRES: Which would be
3 proceeding with the investigations.

4 COMMISSIONER GARNETT: Yes.

5 CHAIRPERSON TORRES: We've been joined by
6 Council Member Mark Treyger. What is the--do you
7 track the--the length of your investigations? Do you--
8 do you have stats on the median length of your--of DOI
9 whistleblower investigations? Because we heard, and I
10 I know you cannot comment on specific cases, but we
11 heard testimony earlier from Ricardo Morales who
12 observed that his investigation took a year and a
13 half, and that he went a year without undergoing an
14 interview from DOI. Do you track the median length
15 of whistleblower investigations--

16 COMMISSIONER GARNETT: Um--

17 CHAIRPERSON TORRES: --and if so, what is
18 the median length

19 COMMISSIONER GARNETT: So, we do keep
20 track for all of our investigations. We have a case
21 management system. It notes when an investigation was
22 opened and when it's closed. Um, I don't have that
23 specific stat in front of me right now, but I could
24 provide it to your staff after the hearing because we
25 do have the ability to run those kinds of number. I-I

2 would just note that I don't know why. I wasn't here
3 for Mr. Morales' testimony, but I don't know why he
4 would say that he wasn't spoken to during that time.
5 It's not accurate.

6 CHAIRPERSON TORRES: The—the legislation
7 proposes a three-month deadline, which you're
8 adamantly against. Are you opposed to any deadline
9 like a—what about a one-year deadline? Would you
10 opposed that as well?

11 COMMISSIONER GARNETT: Yes. I mean I
12 think investigations are—if you asked me how long
13 should an investigation take, I think my response
14 would be: How long is a piece of string? Um, it
15 depends what you need the string for, and the same is
16 true for investigations of all kinds that there—the
17 matters can vary tremendously and complexly. I think
18 we have the civil allegations that could reasonably
19 be disposed of in 30 to 60 days, and others that
20 because of ongoing criminal cases that we don't
21 control the timing of, or the complexity of the
22 matter, the difficulty of getting the evidence that
23 we would be hesitant to close until we were confident
24 that we had done everything we could to get to the
25 bottom of whether the allegations were true or not

2 true, and I think putting an artificial deadline pm
3 that doesn't make sense, is not responsive to the
4 reality of investigations, and could potentially mean
5 that investigations are closed at an artificial
6 deadline when more crucial time--

7 CHAIRPERSON TORRES: Look, it seems like
8 no matter what we do there's a trade-off, but how do
9 we account, you know, justice delayed is justice
10 denied, and the longer a whistleblower investigation
11 is delayer the greater the injustice, the harm done
12 to the applicant, the complainant. How-how do we-how
13 do we address that if not through a deadline?

14 COMMISSIONER GARNETT: Well, as I said, I
15 do-I do think that some useful headway on that. I
16 mean first of all, I would say that in-certainly the
17 year that I have been DOI Commissioner I have not
18 seen evidence that whistleblower complaints are-are
19 languishing or not being given proper attention. Um,
20 but the reality is that, you know, everyone is-is
21 overworked, and triaging and-and shifting their
22 priorities of what is on their plate. So, I do think
23 that some-it would be a useful measure, as I said in
24 my testimony to require that DOI provide updates
25 every 90 days to a complainant. I think that having

2 to write that letter to update a complainant yes your
3 matter is still ongoing. This is the current status
4 does provide some use—potentially provides some
5 useful additional sense of urgency beyond what
6 investigators would already feel.

7 CHAIRPERSON TORRES: Yes. Although that
8 letter could be as simple as your case is ongoing.

9 COMMISSIONER GARNETT: That's true, but,
10 um, I—I guess an example that I would give you from —
11 from my prior life is that when I was a federal
12 prosecutor, um, the federal laws have that there's
13 the Speedy Trial Act, and there's certain dates by
14 which things are supposed to happen, but judges have
15 the discretion to extend that time period based on a
16 variety of factors, and when you as the prosecutor
17 had to write a letter saying I know we're coming up
18 against a time table, but here are the reasons why I
19 need an extension. The fact of having to write that
20 letter and—and an agency can put in place measures
21 that you need, you know, additional supervisory
22 approval to write more than three such letters
23 requesting more time. So, you know, I do think that
24 there—the—the utility of having to write that letter
25 and the tickler that it provides, the potential tools

2 that it would provide for as Commissioner of DOI to
3 require higher level supervisory review for certain,
4 you know, X number of such letters, um, I think would
5 be a useful tool. I'm not promising that, um, it's a
6 pancea, but I do think that it has some utility and
7 it's something we should try.

8 CHAIRPERSON TORRES: Finally, the
9 question of remedies. Suppose DOI grants
10 whistleblower status to a public employee, what—that
11 happens next? What—what remedies does DOI typically
12 recommend?

13 COMMISSIONER GARNETT: So where an
14 employee has been terminated we would recommend
15 reinstatement with back pay if that's what their
16 employee wants. Um, thinking—just thinking about the
17 five substantiated matters from the last year, um,
18 two—only two involved termination, two of the five.
19 Um, two involved steps having been taken such as, um,
20 unborn to a negative performance reviews, denials of
21 promotions, change of duties, essentially icing an
22 employee out, and the recommendations there, which
23 was accepted by the agency and implement was that all
24 those negative materials be removed from their
25 personnel file, that the individuals be restored to

2 their prior duties and responsibilities, and in
3 those—in those two cases that the supervisors who had
4 implemented the negative reviews and other action be
5 themselves disciplined and removed from supervision
6 of those employees. And in the—the fifth situation,
7 it was one where the employee had—I just want to make
8 sure I'm sufficiently anonymizing. The employee had
9 alleged and we substantiated essentially retaliation
10 from his colleagues for having been—reported wrong
11 doing, and a failure on the part of the agency to
12 protect him from retaliation by his colleagues to
13 include supervisors, non-direct supervisors, but
14 other supervisors in the agency denying sort of
15 ordinary promotions and in essence going along with
16 the hazing that colleagues were imposing for the
17 employee having report wrong doing.

18 CHAIRPERSON TORRES: You know, typically
19 when DOI conducts an investigation that results in a
20 report, and recommendation, those recommendations are
21 exactly that a recommendation. Are your
22 whistleblower recommendations binding upon agencies?
23 Could agencies in theory ignore your recommendations
24 in part or in full?

2 COMMISSIONER GARNETT: Yes. So, in theory
3 they could. In preparation for this hearing I—I went
4 back as far as I could go back. I couldn't find an
5 instance in which we'd substantiated a whistleblower
6 claim and the agency had not implemented the remedy.
7 I think if we had that situation I certainly wouldn't
8 hesitate to take that to the Law Department or to
9 city hall or whoever the right authority is over that
10 agency to notify them that an agency was continuing
11 to not take corrective action against the
12 substantiated whistleblower.

13 CHAIRPERSON TORRES: So, it could be the
14 case that you're an applicant who waits years for a
15 determination and then once you receive a
16 whistleblower status, there's not guarantee--

17 COMMISSIONER GARNETT: That's right.

18 CHAIRPERSON TORRES: --that you will
19 actually receive reinstatement and back pay?

20 COMMISSIONER GARNETT: Now, there's no
21 guarantee. That's right. I will say that--that
22 instances--

23 CHAIRPERSON TORRES: Okay, okay.

24 COMMISSIONER GARNETT: So, you know, we
25 provide a public--the law requires us to provide a

2 letter to the whistleblower informing them that the
3 matter has been substantiated, and what our
4 recommended action is to the agency. So, I think,
5 you know, certainly there are potential remedies in
6 the courts or other remedies, but right now the
7 statute does not provide. If an agency refused to
8 abide by recommendations there's no remedy in the
9 stat--that's within the statute.

10 CHAIRPERSON TORRES: Which brings me to
11 my--so that's a problem and my question in the event
12 of an agency ignoring your recommendation, which is
13 theoretically possible. Should employees have a
14 private right of action so that you have some
15 mechanism by which to vindicate your rights as a
16 whistleblower?

17 COMMISSIONER GARNETT: So, I'll confess
18 that it's not my area of expertise--

19 CHAIRPERSON TORRES: Yeah

20 COMMISSIONER GARNETT: --but the private
21 right of action for employment is. So I would
22 hesitate opine on that. I do think--

23 CHAIRPERSON TORRES: Well, that's worth
24 noting that contractors and subcontractors have a
25

2 private right of action, and so do employees under
3 state law.

4 COMMISSIONER GARNETT: Right.

5 CHAIRPERSON TORRES: So, the question
6 would city employees enjoy a private right of action
7 under local law at least in cases where the agency
8 has ignored DOI's recommendation, and that will be my
9 final question.

10 COMMISSIONER GARNETT: So I think that
11 that is certainly workable and the state law provides
12 a model for that. So, I-I-I-have no position in
13 opposition to that. It's just advising about how you
14 would do it is just not my area of expertise.

15 CHAIRPERSON TORRES: Great. Thank you,
16 Commissioner. I think Council Member Kallos, you have
17 questions, right?

18 COUNCIL MEMBER KALLOS: I want to start
19 with a thank you to our Oversight Chair Ritchie
20 Torres for looking into this very important issue. I
21 want to thank our DOI Commissioner Margaret Garnett
22 for, you know, an amazing career of work and all the
23 investigations you've been conducting since you came
24 in and in particular I know that it-I would say it's
25 not a week goes by that we're not passing along a

2 person who is trying to blow a whistle at an agency,
3 and I think I guess one thing that would be helpful I
4 think for anyone watching at home is just when do the
5 whistleblower protections kick in because I think in
6 our conversations you've mentioned that sometimes a
7 complaint isn't sufficient to trigger those
8 whistleblower protections and I did have a specific
9 question because we—we did have somebody who I
10 believe shared information with us that I believe
11 should be qualified for the whistleblower protections
12 who did have an adverse employment action. So I did
13 want to get an update on that case to the extent you
14 can share.

15 COMMISSIONER GARNETT: So, I can't talk
16 about any ongoing investigation--

17 COUNCIL MEMBER KALLOS: okay.

18 COMMISSIONER GARNETT: -because those are
19 confidential.

20 COUNCIL MEMBER KALLOS: Well, with that
21 being said, I'll just say thank you for your
22 partnership on that ongoing investigation, and just
23 working with us on just when people are in an agency
24 and, just if anyone is watch at home, and you work
25 and you're a city employer watching the live stream,

2 you can come to any Council Member or you can go to
3 DOI direct to share any concerns that you have and
4 you will get whistleblower protection. So, I guess
5 the first part of the question is when somebody who's
6 making a complaint to their Council Member or to the
7 DOI go from just a person who's giving a tip to get
8 whistleblower protection.

9 COMMISSIONER GARNETT: So, the—the
10 Whistleblower Protection Law applies when an employee
11 has suffered an adverse personal action, which could
12 be runs the gamut from termination on the one hand,
13 um, all the way down to an unwanted change in duties
14 and work environment. So sometimes it could be
15 something potentially as small as I used to have an
16 office and now I'm a cubicle. I used to supervise 30
17 people. Now I supervise two people. I used to be
18 regularly included in certain high level meetings,
19 and now I'm not. Under the right factual
20 circumstances those types of actions could qualify as
21 adverse personal actions if they were taken in the
22 retaliation for reporting wrong doing. So, the—even
23 though we colloquially and in the media often refer—
24 use the term whistleblower for anyone who reports
25 wrong doing, the whistleblower within the meaning of

2 the statute you get protection once—when you have
3 suffered an adverse personal action, but I would just
4 mean I would echo what you said, Council Member
5 Kallos about the variety of ways that civilians and
6 city employees can report wrong doing to their
7 council member. I know many council members have the
8 same range of options that DOI has. We have an
9 online form. You can be anonymous if you want. We
10 have a hotline number. You can walk in off the street
11 to our offices at 180 Main to report wrongdoing, and
12 we assure people of confidentiality for as long as
13 we're able to.

14 COUNCIL MEMBER KALLOS: I guess one piece
15 I would just share personally based on our work
16 together and with our chairs just I in addition to
17 talking to DOI and the Council Member, I also found
18 that if somebody is part of a labor union engaging
19 that labor union's duty of fair representation. I
20 have found that with one person in particular who I
21 call a whistleblower but I guess does not necessarily
22 meet the name we actually just had a hearing with
23 Steven Warner a member of HPD blew the whistle on the
24 fact that he saw that he thought about 200,000 units
25 or more, units of affordable housing weren't getting

2 registered with the city, and that developers might
3 be upwards of a billion dollars in subsidies without
4 making those units available. We worked with the
5 organization of staff analysts to make sure that he
6 did not see any adverse employment actions, and I'm
7 proud to say he still has the same job he had for 30
8 years, and we've been able to move forward on that
9 issue. So thank you, and I would like to add my name
10 to Introduction 1770. I think that it would be
11 helpful to expand the coverage.

12 CHAIRPERSON TORRES: Do any of my
13 colleagues have any questions? Okay. I have a few
14 more questions, Commissioner. Do you know you
15 conduct briefings, trainings about the Whistleblower
16 Law. Do you conduct those trainings for contractors
17 and subcontractors?

18 COMMISSIONER GARNETT: Yes, we do.

19 CHAIRPERSON TORRES: Okay.

20 COMMISSIONER GARNETT: So, we have
21 conducted them and continue to offer that. I think as
22 I said in my testimony, one of the—an additional
23 benefit of ensuring that the duties and obligations
24 are extended to contractors as well as the
25 protections is that it would provide an opportunity

2 for the city to require that city agencies and
3 contractors affirmatively notify employees of their
4 duties and their protections much the way that now if
5 you go into any city agency, um, you'll see a poster
6 for OSHA, for EE—the EEO Rules, um, various
7 requirements and I think effective means of ensuring
8 that employees know about both their responsibilities
9 and the protections that are available to them. So
10 we are—we provide as I noted in my testimony we reach
11 thousands of city employees of contractors every
12 year, but it's not 100%. So, I think anything
13 addition that can be done to ensure that employees
14 that are working on city matters whoever their
15 employer is know about their duties as well as their,
16 um, protections would be of great benefit.

17 CHAIRPERSON TORRES: Does your training
18 or briefings include whistleblower rights and
19 responsibilities not only at the local level, but
20 also under state and federal law?

21 COMMISSIONER GARNETT: No, we focus on
22 the city's whistleblower laws, and so—and actually I
23 would extend invitations to the Council and their
24 staff if you haven't yet viewed our computer based
25

2 training for city employees, we'd be happy to arrange
3 a viewing. It's excellent I think.

4 CHAIRPERSON TORRES: Now, I applaud your
5 efforts to conduct outreach, but we're only touching
6 a small percentage of the overall workforce, right?
7 Out of 400,000 employees how many—how many city
8 workers underwent the training?

9 COMMISSIONER GARNETT: So, in the last
10 fiscal year a combination of in-person and online,
11 it's about 50,000.

12 CHAIRPERSON TORRES: Should we require
13 all city employees to take the online training? How
14 do we—how do we expand?

15 COMMISSIONER GARNETT: We are working
16 towards that with DCAS. So, we are actively, you
17 know, we—we offer in-person training any time an
18 agency asks us to do it because they think the in-
19 person trainings provide an important additional way
20 of reaching people, reaching city employees. Part of
21 the reason that the E-learning module was developed
22 is was to expand our ability to reach more city
23 employees. So, we have been working with DCAS along
24 with the Conflicts of Interest Board who has their
25 own annual training to put together a citywide module

2 of required training to try to increase that number.
3 So, we're actively working towards that.

4 CHAIRPERSON TORRES: And would you favor
5 expanding the scope of those trainings to include,
6 rights, responsibilities and remedies not only at the
7 local, but also at the state and federal level so
8 that people can be kept informed about the full range
9 of protections available to them as whistleblowers?

10 COMMISSIONER GARNETT: Um, you know, I
11 think I wouldn't inherently object to that. My only
12 concern would be it takes quite a bit of time to
13 develop a high quality training. I wouldn't want to
14 delay continuing to provide the existing training we
15 have, which focuses on DOI and the city's rules about
16 corruption and whistleblower protection. I wouldn't
17 want to delay that. We would probably need a little
18 bit of help to add state and federal protections, but
19 it's not impossible.

20 CHAIRPERSON TORRES: Yeah. So I feel like
21 you have—you and I have a—I think I would
22 characterize it as a fundamental disagreement because
23 for me the purpose of the Whistleblower Law is to
24 protect those who blow the whistle from retaliation.
25 For me, I only care about two things: Are you

2 reporting fraud, abuse and corruption, and did you
3 suffer retaliation, and if you meet those two
4 criteria you should be, you have a right to be
5 protected. You have a right to be made whole.
6 Whereas, it seems to me you are more concerned than I
7 am about the manner in which the whistle is blown or
8 the person to whom it is reported, right. I think you
9 object to expanding the universe of reporteers. I'm
10 wondering so just to Council Member Kallos' point,
11 what if--what if an employee instead of reporting it
12 to DOI a NYCHA employee leaked fraud, corruption to
13 Greg Smith and he wrote an article, which then
14 prompted a DOI investigation and the investigative
15 outcome is the same, why shouldn't that person be
16 protected under the law?

17 COMMISSIONER GARNETT: Because that
18 person has violated their duty to report those
19 matters to DOI. I-I-I do not believe that reporting
20 matters to the media should qualify for whistleblower
21 protection.

22 CHAIRPERSON TORRES: So, you would object
23 to removing those reported requirements that--

24 COMMISSIONER GARNETT: Yes.

2 CHAIRPERSON TORRES: Okay. So, I just
3 want to recap I think where we agree and disagree. As
4 far as I can tell you have not objections to
5 protecting prospective employees, former employees,
6 interns, those who are susceptible to blacklisting?

7 COMMISSIONER GARNETT: That's right.

8 CHAIRPERSON TORRES: Um, I sense you are
9 skeptical about the notion of granting presumptive or
10 provisional whistleblower status.

11 COMMISSIONER GARNETT: Right, because I
12 think in practice I don't—I conclude it's not
13 workable.

14 CHAIRPERSON TORRES: And your—you would
15 object to changing the forms of misconduct that are
16 presently covered under Whistleblower Law.

17 COMMISSIONER GARNETT: Right. I think the
18 present list is comprehensive.

19 CHAIRPERSON TORRES: And you would—you
20 would object to expanding the universe of recognized
21 reportees

22 COMMISSIONER GARNETT: Yes. I mean I
23 think your example of borough presidents strikes me
24 as in the spirit of vagueness to seamless. (sic)

25 CHAIRPERSON TORRES: But beyond that, no?

2 COMMISSIONER GARNETT: Correct.

3 CHAIRPERSON TORRES: Okay, and you would
4 object to any deadlines, a year, two years, three yes
5 any deadlines whatsoever?

6 COMMISSIONER GARNETT: Right, I-I just
7 don't think deadlines of that nature will produce the
8 result that you seem to want.

9 CHAIRPERSON TORRES: But you do support
10 or in principle have no objections in principle to a
11 private right of action for public employees
12 particularly in the event of an agency ignoring a DOI
13 recommendation?

14 COMMISSIONER GARNETT: Right, in
15 principle I-my principle is focused on would such a
16 measure inhibit reporting or inhibit effective
17 investigation, and I don't see how that would have an
18 negative effect on either of those. So, I don't-so I
19 don't have an objection on that basis.

20 CHAIRPERSON TORRES: We have some serious
21 differences. Those are going to be interesting
22 negotiations, but I-I appreciate your testimony,
23 Commissioner.

24 COMMISSIONER GARNETT: Okay

25 CHAIRPERSON TORRES: Thank you.

2 COMMISSIONER GARNETT: Thank you.

3 CHAIRPERSON TORRES: Who else is there.

4 Pat Russo. (background noise/pause)

5 PAT RUSSO: Good afternoon. My name is Pat
6 Russo. I am the President of Chef's Choice Food
7 Distributor in Brooklyn, New York. I currently, uh,
8 well I had since 2000 contracted to deliver food
9 services, food to New York City public schools and
10 I'd like to give you an example of whistleblower. I
11 actually should serve as a template for your
12 amendment to the Whistleblower Laws. In 2015 a New
13 York City Food Inspector/Food Supervisor an inspector
14 came to me and told me about mismanagement—gross
15 mismanagement, and tens of millions of dollars in
16 appropriate taxpayer money they had spent on food. I
17 think that would qualify as gross mismanagement. He
18 came to me with information on an inappropriate
19 relationship with executives from the Department of
20 Education Office of School Food, and certain
21 manufacturers of school—of products that were
22 delivered to the school and I went to the SEI. As a
23 now retired NYPD Sergeant I knew the parameters and I
24 previously had provided information to SEI that
25 resulted in a couple of executives in DOE School Food

2 being terminated in 2000. So that's the reason being
3 he came to me and he also came to me because English
4 is his second language and he didn't have the
5 confidence in his ability to articulate his
6 complaint, you know. So, he asked if I would call SEI
7 on his behalf. I did and, you know what? I'm—I'm
8 sorry for him that I did because his life has been
9 turned upside down since I reported and it's been
10 lead, it's been discovered that he was, in fact, the
11 whistleblower. He's been the subject of harassment
12 by his supervisors. He's been for the last three and
13 a half years he has zero job responsibilities. He's
14 in—in other words, he's in a rubber room sitting at
15 his desk with zero to do for eight hours a day. He
16 is seeing a psychiatrist where he's suicidal. He's
17 been the subject of corruption complaints, false
18 corruption complaints, false sexual harassment
19 complaints that have been orchestrated by his
20 supervisor, and his supervisor is still in a position
21 of authority at the New York City Department of
22 Education Office of School Food and Nutrition, and I
23 think it's something, it's an example of why the
24 Whistleblower Law needs to be amended.

2 CHAIRPERSON TORRES: If I understand the
3 situation correctly, he is ineligible for
4 whistleblower protection because he reported the
5 misconduct through you rather than directly? Is
6 that--?

7 PAT RUSSO: He--well we're currently
8 fighting that.

9 CHAIRPERSON TORRES: Okay.

10 PAT RUSSO: He was found ineligible to
11 receive it because I actually made the report, but
12 their timing in their letter is off.

13 CHAIRPERSON TORRES: And you agree with
14 me what should matter is not how you report it, but
15 what should matter is the fact that you reported it,
16 and that you suffered retaliation.

17 PAT RUSSO: Well, one million percent--

18 CHAIRPERSON TORRES: Yes.

19 PAT RUSSO: --and--and--and the
20 Commissioner had mentioned something about going to
21 the press, and we did go to the press when--when we
22 discovered that we believe the children were in
23 imminent danger because--because of their
24 inappropriate relationship they had failed to put
25 dangerous school food items that were being served to

2 the kids. They had failed to recall the product, and
3 you could Google it. The pizza with mold on it,
4 chicken with metal and bones and—and we felt that
5 that was an imminent danger, and I don't know if you
6 remember the incident of a fourth grader in the Bronx
7 in 2012 choked to death on a meat ball. I think
8 everybody would remember that. If you Google it you
9 could find a fourth grader in a school in the Bronx
10 choked to death on a meat ball. Does anybody know
11 that at the same exact time that that took place that
12 there were incidents of plastic being found in meat
13 balls in the same meat balls that he choked on? It
14 went into this report. It says School Food Inspectors
15 and that was completely covered up by the
16 Administrators, the School Food Administration. So I
17 believe we were appropriate when we went to the press
18 and reported that—that there was a possible danger to
19 the students.

20 CHAIRPERSON TORRES: Alright, thank you
21 for your testimony. Thank you. Okay. This is our
22 final panel so this hearing is adjourned. [gavel]

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C E R T I F I C A T E

World Wide Dictation certifies that the foregoing transcript is a true and accurate record of the proceedings. We further certify that there is no relation to any of the parties to this action by blood or marriage, and that there is interest in the outcome of this matter.



Date January 19, 2020