California Underground Facilities Safe Excavation Board
("Dig Safe Board")

November 8, 2018

Agenda Item No. 6 (Information Item) – Staff Report

Discussion on Confidential/Anonymous Reporting

Presenter(s)
Tony Marino, Executive Officer

Background

During the October 15-16 meeting, the Board discussed a proposed enforcement philosophy. Influenced by the Federal Aviation Administration's (FAA) Compliance Philosophy, the premise of the proposed enforcement philosophy was that, for the most part, people come to work wanting to be safe and comply with the law, and therefore the best way to address error is to develop corrective action to prevent a person or entity from making similar errors in the future. Punishment for error, on the other hand, undermines a safety culture by making people not want to admit error and instead cover it up, robbing an organization of the opportunity to learn from the error.

While the Board may adopt this philosophy, entities regulated by the Board may not. Even an organization that espouses the values of free and open communication about safety issues may not perfectly execute those values, and acculturation of those values into an existing culture is challenging enough to be in the realm of management gurus. The Board should expect to, on occasion, receive safety-related complaints from persons who do not feel that their concerns are understood or would be well-received by their employer.

Statute allows the Board to take and investigate complaints "from affected parties and members of the public." (Gov. Code § 4216.19.) The Board has discretion to determine how to accept and investigate complaints based on safety concerns, including how to address safety-based complaints about one's own organization.

The Board may seek public response to the following questions:

1. Do you discuss safe excavation practices with your supervisor?
2. How can the Dig Safe Board help your organization understand and implement safe excavation practices?
3. What do you think the role of the Dig Safe Board should be in complaints given the existing Cal/OSHA complaint process?

The Board may consider and seek public response to the following:

1. How should staff accept safety complaints from persons who wish to keep their identities confidential? What are the complications in keeping their identities confidential from their employers?

2. Is the public aware, and do they have experience in using, Cal/OSHA's workplace safety complaints?
3. What are the complications arising from investigating anonymous reports? What are the challenges in maintaining confidentiality of a complainant who does not report anonymously but wishes to remain confidential?

Discussion

Confidential vs. Anonymous

"Confidential" reporting and "anonymous" reporting are not synonymous, and each has benefits and drawbacks. Anonymous reporting allows the reporter confidence that he or she will not be identified and thus not subject to ostracism or retaliation, but such reports are difficult to pursue, as an investigator cannot reach the reporter to ask follow-up or clarifying questions. Confidential reporting, on the other hand, allows an investigator to follow up, but a public agency must develop internal procedures to protect reporter identities from discovery to the extent permitted by law.

Dig Safe Board Ability to Maintain Confidentiality

While the Public Records Act has a broad reach—defining "public records" as

> *"any writing containing information relating to the conduct of the public's business prepared, owned, or retained by any state agency regardless of physical form or characteristics,"*[1]

there are limited exemptions a public agency may choose to exercise to withhold records from disclosure. Government Code § 6254(f) allows public agencies to withhold investigation files from disclosure, and § 6255—the so-called "balancing test"—allows a state agency to withhold disclosure of a record that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Release of their identities may create a chilling effect that discourages anyone from making a complaint.

Confidentiality may not, however, be maintained if an investigation leads to an enforcement action and the complainant acts as a witness. If Board investigators have sufficient evidence to bring forward an enforcement action without needing to use the complainant as a witness, however, the complainant's confidentiality may be maintained. In practice, this means that a complainant wishing to remain confidential must provide investigators with enough independently-verifiable information for the investigator to perform an independent investigation. If a Board investigator does not have sufficient evidence to propose enforcement without the testimony of a complainant who wishes confidentiality, the investigator will not be able to pursue the case.

Cal/OSHA Workplace Safety Complaints

Cal/OSHA offers confidential complaint-filing by workers regarding workplace safety and health hazards. The service is available by telephone and by email.[2] Labor Code § 6310 provides that no person shall discriminate against any employee because the employee has filed a Cal/OSHA complaint, and Labor Code § 6311 provides limited protection for workers who refuse to work because of an unsafe condition if 1) a worker refuses to perform work because of a violation of a Labor Code section or a safety order in Title 8 of the Code of California Regulations and 2) the violation would create a real and apparent hazard to the worker or his or her fellow workers.

[1] Government Code § 6252 (e).
[2] https://www.dir.ca.gov/dosh/Complaint.htm

Other State Agency Confidential/Anonymous Complaint Handling

Many state agencies have addressed confidential reporting. Board investigative staff reviewed the processes of the Contractors State License Board, the Public Utilities Commission, and the Department of Insurance and found that each accepts whistleblower/anonymous complaints via email, telephone, and online submission. Each agency reports minimal success in completing investigations that lead to enforcement because in most cases a witness is needed and the only witness to the violation available is the confidential reporter.

Alternative to Whistleblowing: NASA's Confidential Aviation Safety Reporting System

While many reporting systems have their roots in whistleblower laws—alerting the government of a violation so that the illegal activity may be stopped and, in many case, prosecuted—the FAA developed a confidential reporting program, run by the National Aeronautics and Space Administration (NASA) as a third party, designed to collect hazard information and propose safety improvements at a policy level. This system, discussed briefly at the Board's October meeting, was implemented after a TWA flight in 1974 hit the side of a mountain, killing all aboard. The cause—a misunderstanding of responsibilities between the flight crew and air traffic control—had almost caused a United Airlines flight to suffer the same fate a week earlier (and likely to other flights in the past), but information about the problem wasn't broadly shared.[3]

NASA staff takes information provided by aviation personnel and produce anonymized reports. These reports are then posted on a publicly-available database.[4] As the purpose of this type of reporting is to identify aviation hazards and industry-wide improvements, NASA never tells the FAA either who the reporter is or what company is being discussed, and the information is never used in an enforcement action and reporters are given immunity from FAA enforcement.[5]

While the Aviation Safety Reporting System offers safety benefits that investigation of traditional whistleblower complaints do not, the cost of contracting with a third party can be significant for a uncertain amount of participation. The Aviation Safety Reporting System was in place for many years before it was widely accepted and used by the regulated community.

[3] National Transportation Safety Board, NTSB-AAR-75-16, November 26, 1975.
[4] https://asrs.arc.nasa.gov/search/database.html
[5] Immunity has its limits, and isn't granted for deliberate or criminal acts.