February 22, 2017

Dear Senator Candelaria,

I am writing regarding Senate Bill 299. I have now reviewed your proposed bill (the version posted as of February 21) and have numerous concerns about it that I would like to bring to your attention.

As I mentioned in my previous letter to you, before moving to New Mexico I worked for the nation's leading whistleblower protection and advocacy organization, the Government Accountability Project (GAP), for nearly a decade. GAP is a non-partisan public-interest group that litigates whistleblower cases on the federal level, helps expose wrongdoing to the public, and actively promotes government and corporate accountability. Since 1977, GAP has helped over 6,000 whistleblowers.

My overall impression of your bill is that it is intended to weaken whistleblower protections in the state of New Mexico. Therefore, before presenting my analysis, I would like to provide some background on the tremendous difference that whistleblowers make in promoting accountability, so it will be clear what exactly is at stake if their rights are weakened.

Supreme Court Justice Louis Brandeis once claimed that sunlight is the best disinfectant. Whistleblowers – employees who disclose information about waste, fraud, abuse of power, or dangers to public health and safety – expose the truth to sunlight. In doing so, they often save taxpayers money. As I mentioned in a previous email to you, a study by PricewaterhouseCoopers of 5,400 companies worldwide found that whistleblowers detected more fraud than corporate security, audits, rotation of personnel, fraud risk management and law enforcement *combined*.[1]

On the federal level, U.S. whistleblowers have saved taxpayers billions of dollars. For example, since 2011, the U.S. Securities and Exchange Commission has issued more than $584 million in monetary sanctions thanks to whistleblower tips and the protections included in the Dodd-Frank Act.[2] Similarly, in fiscal year 2015 alone the U.S. government recovered $2.8 billion thanks to whistleblower claims brought under the False Claims Act. It should be noted – given your original proposal to remove protections for contractors – that many of these recoveries were made against government

[1] This figure includes disclosures made through a company's whistleblower hotline as well as internal and external tips. Pricewaterhouse Coopers and Martin Luther University Economy and Crime Research Center, *Economic Crime: People, Culture and Controls: The 4th Biennial Global Economic Crime Survey,* (2007), *http://www.pwc.com/en_GX/gx/economic-crime-survey/pdf/pwc_2007gecs.pdf*, 12 March 2013, p. 10.

[2] "Singerman, Eduardo and Paul Hugel. "The Tremendous Impact of the Dodd-Frank Whistleblower Program in 2016." Accounting Today (Dec. 28, 2016), http://www.accountingtoday.com/news/the-tremendous-impact-of-the-dodd-frank-whistleblower-program-in-2016.

contractors. In FY 2015 alone, $1.1 billion was recovered from government contractors under the False Claims Act.[3]

In my previous letter to you I mentioned that research shows it's rare for whistleblowers to be motivated primarily by financial rewards. Since you claim that the WPA is being used by some people to "chase a payday," I think it's important for me to reiterate this research and provide additional information. But first, I want to draw your attention to section 10-16C-4 D of the current law, which states, "Nothing in the Whistleblower Protection Act precludes civil actions or criminal sanctions for libel, slander or other civil or criminal claims against a person who files a false claim under that act." This provision should be sufficient to prevent frivolous claims; therefore there really is no need to revise the WPA to prevent them.

As I previously mentioned, the Ethics Resource Center concluded, based on survey data, that "only about 5% of individuals would be motivated to report because of a monetary award."[4] Similarly, a study by Dr. Aaron Kesselheim and his colleagues, in which they interviewed 26 whistleblowers in the pharmaceutical sector, found that the "compulsion to do the right thing and not money is the primary motivation when drug company employees report fraudulent activity to the government." He found that none of the whistleblowers said money was their primary motive for coming forward. Rather "they seemed to want to right a wrong, or bring to light something that was ethically compromised."[5] Moreover, when GAP conducted an online survey in which we asked 1,366 whistleblowers why they decided to come forward with their disclosures, the majority chose, "I felt like it was the right thing to do" as their first reason. The lowest ranked reason was: "I was motivated by the possibility of receiving a substantial monetary award for being the first to report misconduct."[6]

Unfortunately, whistleblowing is a risky endeavor. GAP has observed that rather than address the problems raised by whistleblowers, many organizations try to shoot the messenger. According to former financial professional Jos Leys and University of Greenwich Business School Professor Wim Vandekerckhove, "frequent consequences of blowing the whistle are … loss of job, loss of health, loss of financial assets – hence, one has to think twice before blowing the whistle even if it's one duty."[7] Reprisal may also

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[3] The United States Department of Justice. "Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015." (Dec. 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015

[4] Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey, Ethics Resource Center, (2012), http://www.kkc.com/wp-content/uploads/2014/08/ERC_Inside-The-Mind-Of-AWhistleblower.pdf , 15-16.

[5] Emery, Gene. "Money Not Major Incentive for Whistle-blowers." Reuters (May 12, 2010), http://www.reuters.com/article/fraud-whistleblowers-idUSN1221530120100512 .

[6] Why Whistleblowers Wait: *Recommendations to Improve the Dodd-Frank Law's SEC Whistleblower Awards Program,* https://www.whistleblower.org/sites/default/files/GAP_Report_Why_Whistleblowers_Wait.pdf, p. 24.

[7] Leys, Jos, and Wim Vandekerckhove. "Whistleblowing Duties." International Handbook on Whistleblowing Research. Ed. Brown, A.J., et al. Northampton: Edward Elgar Publishing Limited (2014). 115-132. 119.

involve negative performance reviews, denials of promotions or bonuses, demotion, assault, harassment, increased scrutiny, investigations into the whistleblower's background, transfers, threats, termination and blacklisting, among other tactics. As Jennifer Pacella, an assistant professor of law at Baruch College, noted, "The threat of reprisal itself is a major deterrent to blowing the whistle, causing potential whistleblowers to carefully weigh the possible costs and benefits of reporting wrongful acts."[8] As one GAP survey respondent noted, "The level of reprisal common to whistleblowers is enough to give many people pause. To think a reward is enough to compel someone to report an issue if it leads to years of mistreatment is ridiculous."[9]

Since whistleblowers tend to save taxpayers money, it is surprising that the New Mexico legislature would introduce a bill to weaken their rights at a time when the state faces an $80 million deficit. This should be a time to strengthen good governance measures, not weaken them. I believe that a better use of the legislature's time would be to either strengthen the WPA to address several deficits identified by Public Employees for Environmental Responsibility (PEER) in its Accountability Report Card for New Mexico,[10] or to introduce a bill allowing *qui tam* or false claim actions for recovery of bounties in cases of fraud against the state.[11]

Comments on Senate Bill 299

Please find below my line-by-line comments on your proposed bill.

§ 10-16C-2(B): You have indicated publicly that you intend to add back in the existing contractor language that is currently deleted here. I hope that you will do so. As I noted in my previous letter to you, according to the International Best Practices for Whistleblower Policies, which is based on whistleblower laws throughout the world (see https://www.whistleblower.org/international-best-practices-whistleblower-policies), the best practice is to cover "all citizens with disclosures relevant to the public service mission," including contractors.

§ 10-16C-2(D) – The words "that results in a tangible or significant change in the public employee's" should be deleted. According to best practice standard 7, "The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against

[8] Pacella, Jennifer. "Inside or Out? The Dodd-Frank Whistleblower Program's Anti-Retaliation Protections for Internal Reporting." Temple Law Review 86. 4 (2014): 721-761, 755, citing Mayer, David et. al. "Encouraging Employees to Report Unethical Conduct Internally: It Takes a Village." 121 Organizational Behavior and Human Decision Processes (2013): 755.
[9] Why Whistleblowers Wait, 26.
[10] See https://www.peer.org/assets/docs/wbp/nm.pdf.
[11] New Mexico has a Medicaid False Claims Act (N. M. S. A. 1978, § 27-14-9) but, to the best of my knowledge, does not have a broader False Claims Act.

managers who "don't want to know" why subordinates have targeted employees for an action."

Also, the term "public employee's" should be deleted, as contractors and other citizens with disclosures relevant to the public service mission should be covered.

§ 10-16C-E(2) – The term "An abuse of authority" should not be deleted. According to GAP's best practices document, "whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, *abuse of authority,* substantial and specific danger to public health or safety and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties." *(emphasis added)* This abuse of authority provision is one of the factors that PEER considers when it rates state whistleblower laws. New Mexico's "Accountability Report Card" score would go down if this provision were removed.

§ **10-16C-3:** The change to "an individual or entity in a position to further the public interest," has the potential to be problematic, as it is vague. It should be made clear that this includes communications to the employer and public disclosures. The best practice is that there be no loopholes for audience, "unless release of the information is specifically prohibited by statute. In that circumstance, disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices. The key criterion is that public freedom of expression be protected if necessary as the only way to prevent or address serious misconduct." As PEER notes in its report card, state whistleblower laws should protect disclosures "to any person or organization, including public media." PEER awarded New Mexico a perfect score on this standard, based on the provision that said that disclosures could be made to the "public employer or any third party." The proposed language in this bill is unlikely to meet PEER's standard and could potentially result in a reduced "Accountability Report Card" score.

§ 10-16C-4 (A): The new language should be deleted and the old language should be reinserted. According to standard 14 of the best practices document, "If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal." This means that the whistleblower must have the option of being reinstated, whether or not s/he was a supervisor and whether or not s/he holds a classified position. One of PEER's standards is whether or not the policy provides for such "make whole" remedies.

According to a study that analyzed the outcomes of over 27,000 Occupational Safety and Health Administration (OSHA) whistleblower complaints, the "vast majority of whistleblowers struggle to find new employment and have considerable financial difficulties." Approximately "83% found it was extremely difficult to impossible to find a new job in the same field," and approximately "78% endured moderate to severe financial difficulties in the first 60 months after blowing the whistle."[12] Therefore, if

[12] 39 Welch, David. "Letter to Assistant Secretary of Labor David Michaels." Voices for Corporate Responsibility (May 7,

whistleblowers are not guaranteed reinstatement when they prevail, they essentially lose even when they win.

§ 10-16C-4 (B): "The" should be changed back to "a" to make it more in keeping with best practice burden of proof standards. According to best practice standard 12, the "emerging global standard is that a whistleblower establishes a prima facie case of violation by establishing through a preponderance of the evidence that protected *conduct was a 'contributing factor' in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur "because of" the whistleblowing.* Once a prima facie case is made, the burden of proof shifts to the organization to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons *in the absence of protected activity*. *(emphasis added)* Changing the word "a" to "the" essentially removes the contributing factor standard, lowers the employer's burden of proof and makes it easier for them to retaliate against whistleblowers.

10-16C-6 (B): As I noted in my previous letter to you, administrative grievance mechanisms can sometimes be hostile forums for whistleblowers. As my colleague, Tom Devine, notes in the International Best Practices for Whistleblower Policies document, "The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and reality."

I asked Mr. Devine to review the grievance mechanism that you have proposed. He is currently working on a more detailed analysis, but his initial reaction based on a cursory review is that "exhausting administrative remedies here seems to institutionalize a year delay, which can be fatal on its face for a whistleblower who needs interim relief to keep from going under. There needs to be a credible provision for interim relief at the administrative level or option to seek it in court while awaiting administrative action/immediate interlocutory appeal to court if there is administrative denial of interim relief. Also, under all the federal laws there's an equivalent concept of constructive denial, which allows a whistleblower to 'kick-out; and start with clean slate in federal court if there is no ruling in 180 or 210 days. A year is too long to wait if an administrative agency is sitting on a case."

I agree with Mr. Devine's comments and the concerns about this provision raised by Professor John P. LaVelle in his letter to you. As he noted:

> What is alarming about this proposed additional language is that Section 28-1-10 sets out an administrative grievance procedure for filing complaints with the Human Rights Commission regarding only one category of wrongdoing, i.e, "unlawful discriminatory practice[s]…The existing Whistleblower Protection Act, on the other hand, defines "unlawful or improper act" broadly, thereby shielding a

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2010), https://dl.dropboxusercontent.com/u/7253576/mehriskalet/62311/Welch_letter_May_10.pdf .

> "whistleblower" employee from retaliation when the employee reports any "practice, procedure, action or failure to act on the part of public employer that (1) violates a federal law, a federal regulation, a state law, a state administrative rule or a law of any political subdivision of the state; (2) constitutes malfeasance in public office; or (3) constitutes gross mismanagement, a waste of funds, an abuse of authority or a substantial and specific danger to the public." NMSA 1978, § 10-16C-2.
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> In short, it appears that Senate Bill 299 would, in effect, limit remedies available under the Whistleblower Protection Act to remedies for claims of *discrimination* by public employers. This would effectively strip the existing Act of its usefulness in helping to protect the people of New Mexico against many kinds of public corruption and other forms of wrongdoing.

According to GAP's International Best Practices document, "whistleblower rights should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties." It appears the grievance mechanism, as envisioned, would fail to meet this standard.

It's also worth noting that the New Mexico WPA currently fails to provide for the option of trial by jury. PEER deducted points from its New Mexico Accountability Index Report card because of this. The legislature may want to fix this issue as it considers potential changes to the WPA.

Deletions: I share the concerns that Professor LaVelle previously raised with you regarding sections of the WPA that appear to be omitted in your bill that have not been marked as deleted. As LaVelle noted, the version you introduced, "which purports to show all the proposed additions and deletions, in fact fails to show that Section 5 ("Posting of Law and Information") and Section 7 ("Applicability") of the existing Act have been omitted."

I share LaVelle's concerns about the deletion of Section 5, which provides that "Every public employer shall keep posted in a conspicuous place on the public employer's premises notices prepared by the employer that set forth the provisions of the Whistleblower Protection Act." Posting is a standard in both PEER's Accountability Report Card and GAP's International Best Practices document, which states: "whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace… Secret reforms are an oxymoron."

In conclusion, I agree with Professor LaVelle's request that you withdraw this bill from further consideration. I believe this bill, in its current form, will significantly weaken whistleblower protections in New Mexico and make it more difficult for truthtellers to report wrongdoing without sacrificing their careers. Without effective protection for

those who report corruption, funds may be diverted and problems that endanger the jobs and health of New Mexicans may be concealed. As a result, I believe your proposed bill will ultimately reduce accountability and good governance in this state, something that no politician wants to be known for.

Thank you for your consideration of these comments. Please let me know if you have any questions or would like additional information.

Warmest Regards,

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cc: the Honorable Members of the Senate Public Affairs Committee
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