

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3
 4 DEREK KERR,

No. C 10-5733 CW

5 Plaintiff,

ORDER GRANTING IN
 PART AND DENYING
 IN PART MOTION FOR
 SUMMARY JUDGMENT
 (Docket No. 40)
 AND GRANTING
 MOTION TO SEAL
 (Docket No. 61)

6 v.

7 THE CITY AND COUNTY OF SAN
 8 FRANCISCO; MITCHELL H. KATZ;
 MIVIC HIROSE; and COLLEEN RILEY,

9 Defendants.

10 _____/

11 Defendants City and County of San Francisco (the City),
 12 Mitchell H. Katz, Mivic Hirose and Colleen Riley move for summary
 13 judgment on the claims asserted against them by Plaintiff Derek
 14 Kerr in this action claiming termination of employment in
 15 retaliation. Plaintiff opposes their motion in part. Having
 16 considered the papers filed by the parties and their arguments at
 17 the hearing, the Court GRANTS Defendants' motion in part and
 18 DENIES it in part. The Court also GRANTS Plaintiff's motion to
 19 seal.

20 BACKGROUND

21 The following summary presents any disputed facts in the
 22 light most favorable to Plaintiff, as the non-moving party.¹

23
 24
 25 _____
 26 ¹ To the extent that the Court relies on any evidence to
 27 which Defendants object, the Court rules on the objection prior to
 28 considering the evidence. Where necessary, such rulings are
 discussed below. To the extent that the Court decides the motion
 without considering evidence to which Defendants have objected,
 Defendants' objections are OVERRULED as moot.

1 Plaintiff graduated from Harvard Medical School in 1975.
2 Kerr Depo. 32:20-21. After finishing his internship, residency
3 and senior residency at the Harlem Medical Center, Plaintiff
4 completed two fellowships at Memorial Sloan-Kettering Cancer
5 Center. Id. at 32:22-33:17. He then practiced oncology and
6 palliative care at Fairmont Hospital in San Leandro, California
7 for six years. Id. at 33:18-22. Starting in 1989 and for the
8 next twenty-one years, Plaintiff was employed by the City as a
9 hospice and palliative care physician at Laguna Honda Hospital
10 (LHH) until he was terminated in June 2010. Id. at 33:24-34:4.
11 The parties agree that Plaintiff was an excellent doctor and
12 brought acclaim to the hospice program at LHH during the time that
13 he was there. See, e.g., Hirose Depo. 25:3-13. At the time of
14 his termination, he held the position of Senior Physician
15 Specialist, Civil Service Classification 2232. Hirose Decl. ¶ 1;
16 Kerr Depo. 72:16-20.

17 At the time relevant to this case, Dr. Mitchell Katz was the
18 Director of Health in charge of the San Francisco Department of
19 Public Health (DPH). Katz Decl. ¶ 1. He is now the Director of
20 Health Services for the County of Los Angeles. Id. In March
21 2009, Dr. Katz appointed Mivic Hirose to be Executive Director for
22 LHH, and she remains in that position at the present time. Hirose
23 Decl. ¶ 1; Katz Decl. ¶ 8. In consultation with Dr. Katz, Ms.
24 Hirose appointed Dr. Colleen Riley to the position of Medical
25 Director of LHH, and she assumed that position on December 26,
26 2009. Riley Decl. ¶¶ 1, 3; Katz Decl. ¶ 8. Prior to that time,
27 Dr. Riley was a Senior Physician Specialist, Civil Service
28 Classification 2232, at LHH. Riley Decl. ¶ 1.

1 Since about 1998, Plaintiff has been in a long-term
2 relationship with another doctor at LHH, Dr. Maria Rivero. Kerr
3 Depo. 25:1-27:3. At all times relevant to this action, Dr. Katz,
4 Dr. Riley and Ms. Hirose were aware that Plaintiff and Dr. Rivero
5 were a couple. Katz Depo. 33:14-20; Riley Depo. 65:9-66:1; Hirose
6 Depo. 300:13-301:3. It was Ms. Hirose's experience that Plaintiff
7 and Dr. Rivero often jointly raised issues at LHH, and she
8 understood that if one of them was expressing a concern, it "was
9 likely shared by the other." Hirose Depo. 44:18-45:7, 301:4-14.

10 In August 2009, Davis Ja & Associates, a consulting firm
11 hired by the City to assess behavioral health services at LHH,
12 issued a report (the Ja Report). Riley Decl. ¶ 4; Kerr Depo.
13 55:13-14. The Ja Report recommended, among other things, that the
14 City replace some primary care physicians with mental health
15 professionals. Riley Decl. ¶ 4; Kerr Depo. 274:18-22. Many of
16 the physicians at LHH were upset by this recommendation, in part
17 because the number of physicians at the facility had been
18 gradually decreased over the years. Riley Decl. ¶ 4.

19 In mid-August 2009, at a staff meeting, Plaintiff expressed
20 concerns about the Ja Report to Ms. Hirose. Kerr Depo. 58:2-16.
21 After the meeting, Ms. Hirose issued a brochure that stated that
22 the medical executive committee at LHH had approved the Ja Report.
23 Id. at 59:5-23. Plaintiff later spoke to the members of the
24 medical executive committee and they each told him that they had
25 not voted to approve the report. Id. at 60:2-22. See also
26 Thompson Depo. 138:2-24 (recalling "controversy" that "it's true
27 that the med exec members had been involved in discussion related
28

1 to that report," but that "med exec committee had not acted in any
2 way on that report").

3 After the release of the report, there were several meetings
4 of medical staff members interested in drafting a resolution in
5 response to it. Rivero Depo. 159:23-160:9. Plaintiff and Dr.
6 Rivero wrote a petition based on the staff's consensus views. Id.
7 The petition, entitled "Resolution of the LHH Medicine Service,"
8 stated in part that, "because of concerns related to bias,
9 inadequate data, flawed methodology, and lack of professional
10 qualifications to assess physician services," they disputed the Ja
11 Report's recommendation related to the replacement of physicians
12 with nurses, social workers and psychologists. Stephenson Decl.,
13 Ex. E. Plaintiff's petition also stated, "It is our professional
14 opinion that this recommendation is invalid, inappropriate,
15 unethical and potentially harmful to our patients, as well as to
16 their safe discharge to more integrated settings." Id. Plaintiff
17 and Dr. Rivero circulated the petition, and it was signed by
18 almost all of the physicians at LHH, including Dr. Riley. Rivero
19 Depo. 160:15-25; Riley Decl. ¶ 5.

20 Plaintiff and Dr. Rivero also drafted a twenty-five page
21 critical analysis of the Ja Report, entitled "The Ja Report: A Job
22 Half Done." Stephenson Decl., Ex. F. In their critique, they
23 expressed a number of concerns about the methodology and
24 recommendations of the Ja Report, including an allegation that Dr.
25 Ja had not disclosed his potential biases, because he co-owned
26 property and shared a residential address with a high level
27 manager in the Community Behavioral Health Services (CBHS) of the
28 DPH, the agency that had contracted with Davis Ja & Associates to

1 conduct the study.² Id. at 13. Plaintiff's critique did not
2 disclose the person's name. Id. On September 15 and 16, 2009,
3 Plaintiff emailed a copy of his critique to a number of
4 individuals, including Dr. Riley, Dr. Katz and Ms. Hirose.
5 Stephenson Decl., Ex. G. See also Katz Decl. ¶ 17 (acknowledging
6 that he received and "skimmed" the critique of the Ja Report
7 prepared by Plaintiff and Dr. Rivero).

8 On September 18, 2009, Plaintiff and Dr. Rivero also filed a
9 complaint with the City's Ethics Commission and the Controller's
10 Whistle Blower program regarding the alleged conflict of interest,
11 and named Deborah Sherwood as the high-level CBHS manager who
12 shared a personal relationship with Ja. Compl. ¶ 9; Kerr Depo.
13 44:20-47:23; Kerr Depo., Ex. 2, PL00001-7. Dr. Riley, Dr. Katz
14 and Ms. Hirose did not learn that Plaintiff and Dr. Rivero had
15 filed this formal complaint until late 2010 or thereafter. Hirose
16 Decl. ¶ 13; Riley Decl. ¶ 5; Kerr Decl. ¶ 18.

17 While Plaintiff was researching the Ja Report, he also
18 learned that Dr. Katz was a paid consultant for Health Management
19 Associates (HMA). Kerr Depo. 84:9-85:8; Katz Decl. ¶ 22. On
20 September 21, 2009, Plaintiff and Dr. Rivero filed a second
21 complaint with the City's Ethics Commission and the Controller's
22 Whistle Blower program, alleging that HMA had an ongoing contract
23 _____

24 ² Defendants state that Plaintiff's critique "did not raise
25 any allegation of a conflict of interest relating to" this
26 individual, and that the allegation was first raised in the March
27 2010 whistleblower complaint. Reply at 4 n.5. However, Plaintiff
28 and Dr. Rivero alleged that this conflict of interest resulted in
potential bias in the "A Job Half Done" critique, see Stephenson
Decl., Ex. F, 13, and raised the issue in the September 18, 2009
whistleblower complaint filed by Plaintiff and Dr. Rivero, see
Kerr Depo., Ex. 2, PL00001.

1 with the City Controller to provide advisory services to both the
2 DPH and the City Controller, and that Dr. Katz's financial
3 relationship with HMA created various concerns, including that HMA
4 may have received favorable treatment in being awarded the
5 contract with the City. Kerr Depo., Ex. 3.³ Drs. Riley and Katz
6 did not learn of the formal complaint regarding Dr. Katz's
7 relationship with HMA until Plaintiff initiated the instant
8 lawsuit. Riley Decl. ¶ 25; Kerr Decl. ¶ 22.

9 Several weeks before filing the complaint about HMA and Dr.
10 Katz, Plaintiff discussed the purported conflict with several
11 people, including Dr. Debra Brown, who did not work at LHH, but he
12 did not discuss it with doctors at LHH, except Dr. Rivero. Kerr
13 Depo. 85:15-87:2. Dr. Brown and Plaintiff both served as stewards
14 for their respective facilities in their union, the Union of
15 American Physicians and Dentists (UAPD). Id. On September 8,
16 2009, Dr. Brown sent an email that referenced the alleged conflict
17 involving HMA and Dr. Katz to a number of people at LHH or
18 otherwise in the UAPD, including Dr. Riley. Stephenson Decl., Ex.
19 H.⁴ Dr. Brown sent this email as a reply to an email circulated
20 by Plaintiff and included the text of Plaintiff's email at the
21 _____

22 ³ Plaintiff stated in his opposition brief that the contract
23 between the DPH and HMA was approved by Dr. Katz. Opp. at 2.
24 However, he did not make this allegation in his deposition or in
25 the formal complaint lodged with the Ethics Commission and the
26 Whistle Blower program. Instead, he attached documents to that
complaint showing that the contract was signed by other city
officials and was approved by members of the Health Commission
Finance Committee, not Dr. Katz. Kerr Depo., Ex. 3.

27 ⁴ In his deposition testimony, Plaintiff identifies Dr. Brown
28 as the sender of the email. Kerr Depo. 85:18-86:24. The email
was sent by "Doctorbeth" and was signed by "Deb." Stephenson
Decl., Ex. H.

1 bottom of her email. Id. Plaintiff's email had discussed the
2 purported Ja conflict of interest and did not mention the conflict
3 of interest involving HMA and Dr. Katz. Id. In her email, Dr.
4 Brown summarized Plaintiff's allegations about Ja and Sherwood,
5 and then stated,

6 And then Mitch Katz was taking money and travel funds in
7 2009 to consult for HMA, which got \$300,000 from the
8 city in 2005 to review the medical services model at
Laguna Honda.

9 How much more creepy conflict of interest behavior are
we likely to uncover during all this?

10 Id. One person who may have received this email, Dr. Steven
11 Thompson, the Chief of Staff, testified that this was the type of
12 email that he might have forwarded it to Ms. Hirose.⁵

13 At around the same time, Dr. Rivero noticed that certain
14 patient activities were being cut because of a purported lack of
15 funds in the LHH Gift Fund. Specifically, she noticed that bus
16 trips for patients to restaurants were decreased from once per
17 month to once per quarter. Rivero Depo. 271:6-272:24. She also

19
20 ⁵ There is no email address on Dr. Brown's email itself that
21 appears to correspond to Dr. Thompson. Dr. Thompson did not
22 testify that he received it and testified instead that he
23 "probably" saw the e-mail before. Thompson Depo. 289:5-290:6.
Sometime in 2011, Dr. Thompson deleted all of the emails on his
personal computer related to LHH, and does not have any records of
this. Id. at 232:1-234.

24 Ms. Hirose testified that Dr. Thompson on occasion forwarded
25 her emails that he thought were inflammatory. Hirose Depo.
26 295:16-23. Neither party cites any testimony or other evidence
27 showing that Ms. Hirose did or did not receive a forward from Dr.
28 Thompson containing this or any other particular email from
Plaintiff or anyone else. Defendants represent that "LHH
preserved and produced all relevant LHH email files, including Dr.
Hirose's received mail containing the e-mails Thomas [sic] sent
her." Reply at 6 n.8. Plaintiff has not offered any emails from
Ms. Hirose's email box that were sent by Dr. Thompson.

1 was denied money for tacos for patients on one occasion and was
2 told that the "gift fund was bankrupt." Rivero Depo. 174:15-23;
3 271:6-272:24; Kerr Depo. 118:23-119:2. Dr. Rivero and Plaintiff
4 wanted to find out if the fund was actually bankrupt and where the
5 money had gone. Rivero Depo. 174:13-175:21; Kerr Depo. 118:23-
6 120:1.

7 On October 31, 2009, Dr. Rivero sent a public records request
8 to LHH, asking for all documents showing, among other things, the
9 quarterly balance of the Gift Fund, each payment into the Gift
10 Fund, and each withdrawal or payment from the Gift Fund. Rivero
11 Depo. 171:10-172:13, Ex. 34. She sent the request to several
12 individuals at LHH, including Ms. Hirose's assistant. Id.
13 Plaintiff's name did not appear on the records request, and he was
14 blind carbon copied on the email. Rivero Depo. 171:10-172:25, Ex.
15 34. On November 10, 2009, at the hospital executive committee
16 meeting, Tess Navarro, the Chief Financial Officer for LHH,
17 informed the committee of Dr. Rivero's document request, because
18 it was a large request, to which a lot of staff time would be
19 required to respond. Navarro Depo. 79:10-82:17. At some point
20 between September and November 2009, Ms. Navarro had brought to
21 Ms. Hirose's attention that they needed to revise the policies for
22 the Gift Fund to match the procedures that they were practicing.
23 Hirose Depo. 81:4-82:19, 95:10-96:5.

24 In the fall of 2009, the Mayor instructed DPH and all other
25 City departments to submit proposals for mid-year budget cuts.
26 Katz Decl. ¶ 9. The Mayor was seeking to cut thirteen million
27 dollars from the DPH budget that had been set in June 2009, and
28 asked that departments find savings in the current and future

1 fiscal years. Id. During this time, LHH was also preparing for
2 an upcoming move in late 2010 to a new, smaller facility. Katz
3 Decl. ¶ 5. In the old facility, the residents were housed in
4 thirty-bed units, whereas in the new facility, residents live in
5 sixty-bed "neighborhoods." Riley Decl. ¶ 2. In the transition,
6 the twenty-five bed hospice unit would merge with thirty-five
7 other residents requiring palliative care and enhanced support to
8 form a single neighborhood. Id.

9 Dr. Katz and Ms. Hirose discussed the proposed mid-year
10 budget cuts for LHH shortly before DPH submitted its proposal to
11 the Mayor's office in December 2009. Katz Decl. ¶ 11; Hirose
12 Decl. ¶ 7. One way to reduce the LHH budget that they identified
13 was to reduce physician staffing by a .55 full time equivalent
14 (FTE) position. Katz Decl. ¶ 11. Under this proposal, LHH would
15 eliminate two Civil Service Classification 2232, Senior Physician
16 Specialists positions at 1.55 FTE and use some of the savings to
17 employ a 1.0 FTE Civil Service Classification 2230 Physician
18 Specialist, who is compensated at a lower rate than a 2232
19 position, to continue to provide enough coverage for night and
20 weekend shifts. Hirose Decl. ¶ 7; Katz Decl. ¶ 11. Ms. Hirose
21 proposed eliminating the 2232 positions held by Plaintiff, funded
22 at .75 FTE, and by Dr. Denis Bouvier, funded at .80 FTE. Hirose
23 Decl. ¶ 7. DPH submitted the mid-year budget cut proposal to the
24 Mayor's office in December 2009. Katz Decl. ¶ 15. It also
25 submitted the proposal to the Health Commission without
26 identifying the specific employees who would be affected. Id.

27 In her declaration, Ms. Hirose states that she proposed to
28 eliminate Plaintiff's position, in part because she had noted that

1 while many other doctors were already caring for about sixty
2 residents, Plaintiff had at all times maintained a caseload of
3 approximately twenty-five residents and insisted on providing care
4 only to residents of his hospice unit, unlike all other hospital
5 doctors, who routinely assisted in the treatment and care of
6 residents in their ward and elsewhere.⁶ Hirose Decl. ¶¶ 5, 9.
7 Ms. Hirose believed that this made him less suited than other
8 doctors for the new sixty-resident neighborhood model, which would
9 generally require each doctor to be responsible for that number of
10 patients. Id. at ¶¶ 4-5, 9. At that time, Ms. Hirose knew only
11 that Plaintiff had twenty-five patients, but did not know if he
12 would be willing to take on additional patients. Hirose Depo.
13 15:21-16:14. However, Ms. Hirose also admitted during her
14 deposition that, in certain wards with a high number of
15 admissions, such as the hospice ward on which Plaintiff worked,
16 she assigns a lower than average patient load to each doctor
17 because of the extra responsibilities associated with admissions.
18 Hirose Depo. 168:1-170:14.

19 Dr. Katz testified that he agreed with the recommendation to
20 eliminate Plaintiff's position "on the basis of patients and
21 hours." Katz Depo. 216:9-15. While he believed that Plaintiff
22 did not cover other wards, he was unable to state any reason for
23 this belief, and he stated that this belief was not the reason
24 that he agreed with the recommendation. Id. at 216:1-19.

25
26
27 ⁶ Plaintiff asserts that Ms. Hirose admitted that she had no
28 personal knowledge of whether he covered his share of wards. Opp.
at 18. However, he cites no testimony or other evidence in which
Ms. Hirose made any such admission.

1 On December 24, 2009 and January 20, 2010, Dr. Rivero made
2 two additional public records requests for documents related to
3 the Gift Fund. Exs. 112, 113. Plaintiff's name did not appear on
4 either of these subsequent requests. Id. In the requests, Dr.
5 Rivero did not state why she sought this information, and the LHH
6 officials did not ask her why she made these requests. Rivero
7 Depo. 173:10-175:7.

8 After Dr. Riley assumed the Medical Director position in late
9 December 2009, she questioned whether Plaintiff would agree to
10 perform new or different duties outside of the hospice unit, as
11 would be required of all doctors at the new facility. Riley Decl.
12 ¶ 10. Her concerns were based on (1) her own observation that,
13 for the time she worked at LHH, the only unit regularly under
14 Plaintiff's supervision was the hospice, which had twenty-five
15 patients, (2) documents in his personnel file that indicated that
16 he was unwilling to take on duties beyond hospice and would do so
17 reluctantly only after a great deal of prodding by previous
18 Medical Directors, (3) the fact that he did not regularly cover
19 units when another physician was on his or her regular day off,
20 and (4) conversations with other employees, including a former
21 Medical Director, about Plaintiff's unwillingness to work outside
22 of the hospice. Id.

23 Other doctors had similar experiences with Plaintiff, but did
24 not believe his preferences to be out of the ordinary for doctors
25 at LHH. Dr. Banchemo-Hasson, the Chief of Medicine from 2006
26 through the present, who was responsible for scheduling and
27 handling staff absences, testified that Plaintiff took on more
28 coverage assignments during the time that she was in that

1 position. Banchemo-Hassan Depo. 17:7-21, 44:14-18. In the
2 beginning, Plaintiff would not do coverage for other people or
3 other units. Id. at 44:14-16. Over the years, he increased his
4 coverage, and took beeper assignments that were equivalent to
5 other physicians. Id. at 44:16-45:10. He did not do the same
6 volume of ward coverage as other physicians, because Dr. Banchemo-
7 Hasson was aware that his preference was being in the hospice and
8 she used someone more willing to cover the rest of the hospital
9 than Plaintiff was. Id. at 46:3-14. When Dr. Banchemo-Hasson
10 asked him to cover certain things, he did not refuse her requests
11 but would sometimes negotiate and ask to do other things. Id. at
12 46:15-47:5. In her experience, other doctors also resisted doing
13 coverage. Id. at 152:1-11. Other doctors also had certain
14 preferences, such as not working with male patients or on the
15 chronic wards. Id. at 43:1-12. Dr. Banchemo-Hasson tried to
16 accommodate what each doctor wanted to do when making their
17 assignments. Id. at 45:12-19.

18 On February 4, 2010, to address her concerns, Dr. Riley met
19 with Plaintiff to ask him to provide regular coverage one day a
20 week for a part-time physician. Riley Decl. ¶ 11. There is no
21 evidence that she told him that failure to do so would jeopardize
22 his job. Plaintiff declined to do so and wrote her an email
23 explaining why he could not increase his workload to cover another
24 physician. Riley Decl. ¶ 11, Ex. D. Plaintiff stated that he
25 "simply cannot do more clinical coverage." Id. He explained that
26 the hospice unit was an intensive and highly taxing unit on which
27 to work, that he regularly committed extra time to the LHH in ways
28 that were not considered "work," such as serving as the UAPD

1 steward, and that he often stayed late or came in on weekends on
2 unpaid time. Id. He also stated that he had been hired to
3 provide specialist care in the hospice, not general internal
4 medicine, and that “[r]egularly covering a General Medical ward
5 would be excessive and unprecedented in my case.” Id. Instead of
6 regularly covering the other ward, Plaintiff offered to take on
7 other types of additional duties to save work for other
8 physicians, and suggested that Dr. Riley ask certain other doctors
9 who had expressed willingness to increase their hours to provide
10 the coverage. Id. Dr. Riley subsequently told Ms. Hirose of this
11 exchange.

12 Dr. Riley acknowledged that there was a policy at LHH about
13 how to address physicians who exhibited performance issues. Riley
14 Depo. 291:1-20. First, the physician would be counseled on the
15 issue. Id. at 291:1-11. If the issue came up a second time, they
16 would generally have a second counseling, this time documented.
17 Id. at 291:12-15. If the issue came up a third time, further
18 steps beyond a documented warning could happen. Id. at 291:16-20.
19 While she acknowledged that refusal to take on other clinical
20 assignments would be a performance issue that would normally be
21 addressed first through the counseling process, Dr. Riley did not
22 counsel Plaintiff and testified that she had “no reason” for
23 failing to do so. Id. at 291:25-293:10.

24 On March 2, 2010, Plaintiff and Dr. Rivero sent the Ethics
25 Commission and the Controller’s Whistleblower Program a third
26 complaint, this one entitled “Statement of Concern--Laguna Honda
27 Hospital Gift Fund.” Kerr Depo. 121:25-122:17, Ex. 109. In this
28 document, they stated that, under the San Francisco Administrative

1 Code, the Gift Fund was established "for the general benefit and
2 comfort of patients," and that the LHH policy on the Gift Fund
3 states that it was a "restricted" fund "available neither to
4 support the minimum obligations of the City to operate the
5 Hospital nor to fund routine City expenditures," but rather that
6 it was to be used to "benefit residents in general to enhance the
7 quality of life of residents beyond the basic care provided by the
8 City at the Hospital." Ex. 109 at PL00080. They alleged that,
9 among other things, the funds were being improperly spent on
10 catered meals, travel expenses and training for staff, while
11 amenities and activities for residents were cut. Id. at PL00080-
12 88.⁷ Dr. Katz first learned of this formal complaint in late 2010
13 after the filing of this lawsuit. Katz Decl. ¶ 22.

14 Plaintiff was notified in a letter dated March 5, 2010 that
15 he would be terminated effective May 8, 2010. Stephenson Decl.,
16 Ex. M. His termination date was later pushed back to June 11,
17 2010. Several 2232 positions were posted after Plaintiff received
18 his layoff notice. Riley Decl. ¶ 24. Most or all of these
19 positions became available because of the retirement of other
20 _____

21 ⁷ Plaintiff states that, during this period, Ms. Hirose also
22 had "been involved in correspondence and discussion about a number
23 of procedural and fiscal irregularities involving the Gift Fund."
24 Opp. at 2. However, the single email that he cites in support of
25 this statement does not appear related to the allegations in his
26 complaints. In the email, Ms. Hirose was asked about expenditures
27 on the annual report for the Gift Fund, which showed that the
28 expenditures were larger than the amount received into the fund.
Stephenson Decl., Ex. I. Ms. Hirose explained what LHH was doing
to resolve the issue. Id. She stated that they had realized that
they were spending more than they were receiving, that they had
determined what they were spending the excess amount on and were
seeking alternative funding sources for some of those items, and
that they asked the director of therapeutic activities at LHH to
make a budget projection and reduce spending. Id.

1 members of the LHH medical staff, including Dr. Rivero. Id.
2 Plaintiff was eligible to apply for these positions, but did not.
3 Id. Drs. Katz and Riley did not consider moving Plaintiff into
4 one of the vacant positions and having him perform one of those
5 jobs without an application from him, although they had the
6 authority to do so. Katz Depo. 247:4-23.

7 On March 13, 2010, Plaintiff filed a fourth formal complaint
8 with the Ethics Commission alleging that his termination had been
9 in retaliation for his earlier complaints related to the Gift
10 Fund, the Ja Report and the HMA conflict of interest. Kerr Depo.
11 259:1-14, Ex. 110.

12 After Plaintiff received his termination notice, other staff
13 members expressed to Dr. Riley that they were upset that he was
14 fired. Riley Decl. ¶ 19. In mid-March, the hospice staff gave
15 Dr. Riley a petition praising Plaintiff at length, expressing
16 concern that his termination would negatively impact the patients
17 and asking about the future development of the LHH hospice and
18 palliative care program. Riley Decl. ¶ 19, Ex. F. On March 27,
19 2010, a number of physicians gave Dr. Riley a petition expressing
20 concerns about the proposed layoffs of Dr. Bouvier and Plaintiff
21 from the 2232 positions and stated that these actions would have
22 various adverse impacts on the provision of medical care at LHH.
23 Riley Decl. ¶ 22, Ex. G.

24 On April 16, 2010, Drs. Thompson and Riley met with Plaintiff
25 to transition his patients to Dr. Bouvier, who was selected to
26 become the temporary hospice physician in addition to performing
27 other duties. Riley Decl. ¶ 21; Riley Depo. 174:3-13. Although
28 Dr. Bouvier held the other 2232 position that was to be

1 eliminated, he also held an alternate position as a 2230 Physician
2 Specialist at the LHH. Riley Decl. ¶ 7. After the elimination of
3 his 2232 position, Dr. Bouvier continued to work night and weekend
4 shifts at LHH in the 2230 position. Id. at ¶ 8. Dr. Riley held
5 the meeting in order to have overlap of Plaintiff and Dr.
6 Bouvier's care for the patients in the hospice ward. Id. at ¶ 21.

7 In late May 2010, the ABC7 News I-Team at the television
8 station KGO, the local ABC affiliate, aired multiple investigative
9 reports featuring Plaintiff and Dr. Rivero detailing their
10 allegations of the mismanagement of the Gift Fund. Stephenson
11 Decl., Exs. N, EE.⁸ Ms. Hirose, Dr. Riley and Dr. Katz claim that
12 they first learned that Plaintiff and Dr. Rivero were complaining
13 about the Gift Fund through the production and airing of these
14 news reports. Hirose Decl. ¶ 15; Riley Decl. ¶ 16; Katz Decl.

15 _____
16 ⁸ Defendants object to these exhibits, stating that "this
17 evidence is not relevant, lacks foundation, and is hearsay."
18 Reply at 2 n.2. Defendants make identical, conclusory objections
19 to a number of Plaintiff's exhibits. Defendants' objections are
20 vague and provide no explanation as to why they believe any
21 particular exhibit is objectionable. All of their evidentiary
22 objections are overruled for their vagueness. See, e.g.,
23 Californians for Disability Rights, Inc. v. Cal. DOT, 249 F.R.D.
24 334, 350 (N.D. Cal. 2008) (declining "to analyze objections that
25 defendants did not themselves bother to analyze" and overruling
26 their objections as unduly vague); Cmtys. Actively Living Indep. &
27 Free v. City of Los Angeles, 2011 U.S. Dist. LEXIS 118364, at
28 *27-28 (C.D. Cal.) ("It is not the Court's responsibility to
attempt to discern the City's grounds for objecting to evidence
submitted by Plaintiffs where the City merely repeats the same
categorical objections but provides little to no explanation as to
why the subject evidence is objectionable.").

Further, these objections are baseless. The evidence of the
news reports is clearly relevant. Plaintiff claims in part that
Defendants terminated him because of these reports. Multiple
witnesses, including each of the individual Defendants, testified
that they saw or were aware of these reports. Further, the
reports are not offered to prove the truth of the matter asserted
therein and are therefore not hearsay.

1 ¶ 19. The news reports did not disclose that Plaintiff and Dr.
2 Rivero had filed formal complaints with the Ethics Commission and
3 the Controller's Whistleblower Program. Stephenson Decl., Exs. N,
4 EE.

5 At any point until Plaintiff's termination was effective on
6 June 11, 2010, Dr. Katz could have revoked his termination notice.
7 Katz Depo. 124:9-14. Until that time, Dr. Riley or Ms. Hirose
8 also could have moved Plaintiff into one of the open 2232
9 positions. Hirose Depo. 278:10-16, 289:7-290:20. One of those
10 positions was filled by Dr. Emily Lee, who was a personal friend
11 of Ms. Hirose before she began work at the LHH. Id. at
12 291:6-292:8.

13 On September 2, 2010, Dr. Katz issued a press release
14 responding to the ABC7 news story. Stephenson Decl., Ex. O. In
15 it, he described records requests submitted by "two former Laguna
16 Honda employees" related to the Gift Fund. Id. He stated that,
17 in reviewing documents, LHH had found two checks that should have
18 been deposited into the patient fund and were instead put into the
19 staff development fund, and that the errors had been corrected.
20 Id. He also asserted that "there have been inaccurate statements
21 made and broadcast about the patient gift fund," that he expected
22 "these false statements to continue," and that he believed "our
23 detractors will cite these two errors as proof that their
24 allegations were correct, even though these two errors in no way
25 influenced the amount of money available for patient activities."
26 Id. Finally, he stated that LHH had asked the Controller's Office
27 to conduct an audit of the Gift Fund accounting practices. Id.
28

1 On November 12, 2010, Plaintiff initiated the instant case in
2 San Francisco Superior Court. Defendants thereafter removed it to
3 federal court.

4 Sometime in the fall of 2010, the District Attorney's office
5 contacted Dr. Katz regarding his relationship with HMA. Katz
6 Decl. ¶ 22. The investigator told him that someone had alleged
7 that he had a conflict of interest because he had done work for
8 HMA, which had a contract with the City. Id. The investigator
9 did not tell him who made the allegations. Id. Sometime after
10 that, Dr. Katz also spoke with an investigator from the Ethics
11 Commission. Id.

12 On November 22, 2010, the Controller's Office, City Services
13 Auditor issued an audit report finding a variety of issues with
14 the LHH's Gift Fund. Stephenson Decl., Ex. J.⁹ Among other
15 things, the audit found that "Laguna Honda incorrectly recorded a
16 total of \$151,739 in donations, operations income, and interest to
17 the Gift Fund's staff development subaccounts instead of to the
18 patient subaccounts and operating income." Id. at 13.

19 At the time that LHH moved to the new facility in December
20 2010, the neighborhood that included the hospice was assigned to
21 two physicians, Dr. Bouvier and Dr. Williams, although the plan
22 _____

23 ⁹ As discussed above, Defendants make a conclusory objection
24 to this report, stating that it "is not relevant, lacks
25 foundation, and is hearsay." However, this report is clearly
26 relevant to Plaintiff's claims. The fact that the City's own
27 Auditor found later that there had in fact been misuse of the Gift
28 Fund is probative of Defendants' motives in terminating Plaintiff.
Defendants do not dispute the authenticity of this or any other
exhibit. Finally, this report was issued by the City and is a
public record, and is therefore either non-hearsay or subject to a
hearsay exception. See Federal Rules of Evidence 801(d)(2) and
803(8).

1 had originally been to assign only one physician to this
2 neighborhood. Riley Decl. ¶ 15. Both Dr. Bouvier and Dr.
3 Williams also had other duties. Id. Dr. Williams was assigned
4 about thirty-three palliative care residents, covered other units,
5 was on-call, did consults and was in charge of developing
6 hospital-wide palliative care and consultation programs. Riley
7 Decl. ¶ 15; Williams Depo. 79:13-20. Dr. Bouvier was the primary
8 physician for approximately twenty-seven to twenty-nine hospice
9 residents, along with thirty to sixty residents in another ward,
10 because another physician had unexpectedly departed. Id.;
11 Williams Depo. 81:14-23; 84:2-7. At some point in late 2010, Dr.
12 Bouvier was given a 2232 appointment again. Riley Depo. 174:8-25.

13 On July 29, 2011, the Controller's Office terminated its
14 contract with the Ja firm. In the termination letter, it stated
15 in part, "In responding to a Sunshine request submitted by a
16 member of the public, I recently became aware of irregularities in
17 the solicitation and negotiation processes that led to the award
18 of the contract. In light of these issues, I have determined that
19 it is in the City's interests to terminate the contract as soon as
20 possible." Stephenson Decl., Ex. P.

21 In Plaintiff's complaint in the instant case, he asserts
22 claims under 42 U.S.C. § 1983 for deprivation of his First
23 Amendment freedom of speech rights and deprivation of due process
24 under the Fourteenth Amendment, and claims for violation of
25 California Government Code section 53298, California Health and
26 Safety Code section 1432 and California Labor Code section
27 1102.5(b).
28

1 Defendants filed their motion for summary judgment on May 31,
2 2012 on all of Plaintiff's claims. Docket No. 40.

3 On July 16, 2012, the parties filed a stipulation withdrawing
4 a motion to file under seal and stating that Plaintiff would not
5 be opposing the motion for summary judgment as it relates to his
6 due process claim and that he consented to the Court entering an
7 order against him in connection with that cause of action. Docket
8 No. 55. The Court granted the stipulation on July 17, 2012.
9 Docket No. 58.

10 Plaintiff filed his opposition to Defendants' motion for
11 summary judgment on July 19, 2012 and re-filed it on July 20,
12 2012. In it, he stated that he does not oppose the motion as to
13 "his second and third causes of action for deprivation of his
14 fourteenth amendment due process rights and violation of
15 California Government Code §53298." Opp. at 4. Plaintiff opposed
16 the motion as to the other three causes of action only. Id.

17 DISCUSSION

18 I. Motion for summary judgment

19 A. Legal standard

20 Summary judgment is properly granted when no genuine and
21 disputed issues of material fact remain, and when, viewing the
22 evidence most favorably to the non-moving party, the movant is
23 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
24 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
25 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
26 1987).

27 The moving party bears the burden of showing that there is no
28 material factual dispute. Therefore, the court must regard as

1 true the opposing party's evidence, if supported by affidavits or
2 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
3 815 F.2d at 1289. The court must draw all reasonable inferences
4 in favor of the party against whom summary judgment is sought.
5 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
6 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
7 F.2d 1551, 1558 (9th Cir. 1991).

8 Material facts which would preclude entry of summary judgment
9 are those which, under applicable substantive law, may affect the
10 outcome of the case. The substantive law will identify which
11 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
12 242, 248 (1986).

13 Where the moving party does not bear the burden of proof on
14 an issue at trial, the moving party may discharge its burden of
15 production by either of two methods:

16 The moving party may produce evidence negating
17 an essential element of the nonmoving party's
18 case, or, after suitable discovery, the moving
19 party may show that the nonmoving party does not
20 have enough evidence of an essential element of
21 its claim or defense to carry its ultimate
22 burden of persuasion at trial.

23 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
24 1099, 1106 (9th Cir. 2000).

25 If the moving party discharges its burden by showing an
26 absence of evidence to support an essential element of a claim or
27 defense, it is not required to produce evidence showing the
28 absence of a material fact on such issues, or to support its
29 motion with evidence negating the non-moving party's claim. Id.;
30 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);
31 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If

1 the moving party shows an absence of evidence to support the non-
2 moving party's case, the burden then shifts to the non-moving
3 party to produce "specific evidence, through affidavits or
4 admissible discovery material, to show that the dispute exists."
5 Bhan, 929 F.2d at 1409.

6 If the moving party discharges its burden by negating an
7 essential element of the non-moving party's claim or defense, it
8 must produce affirmative evidence of such negation. Nissan, 210
9 F.3d at 1105. If the moving party produces such evidence, the
10 burden then shifts to the non-moving party to produce specific
11 evidence to show that a dispute of material fact exists. Id.

12 If the moving party does not meet its initial burden of
13 production by either method, the non-moving party is under no
14 obligation to offer any evidence in support of its opposition.
15 Id. This is true even though the non-moving party bears the
16 ultimate burden of persuasion at trial. Id. at 1107.

17 B. Section 1983 free speech claim

18 Plaintiff asserts that his termination was in retaliation for
19 complaining about the Ja Report, expressing concerns about Dr.
20 Katz's potential conflict of interest with HMA, inquiring into and
21 bringing attention to the Gift Fund and filing formal complaints
22 regarding these three topics.

23 "In order to state a claim against a government employer for
24 violation of the First Amendment, an employee must show (1) that
25 he or she engaged in protected speech; (2) that the employer took
26 'adverse employment action'; and (3) that his or her speech was a
27 'substantial or motivating' factor for the adverse employment
28 action." Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir.

1 2003) (citations omitted). Defendants do not dispute that
2 Plaintiff's termination constituted an adverse employment action.
3 They contend that Plaintiff cannot show that he engaged in
4 protected speech that was a motivating factor for his termination.

5 1. Protected speech

6 Defendants do not dispute that Plaintiff's formal complaints
7 constituted protected speech. However, they argue that his public
8 discussion of the Ja Report and the open records requests related
9 to the Gift Fund did not constitute protected speech. They also
10 contend that, other than his formal complaints, he did not engage
11 in public speech about Dr. Katz's purported conflict of interest
12 with HMA.

13 a. The Ja Report

14 "An employee's speech is protected under the First Amendment
15 if it addresses 'a matter of legitimate public concern.'" Coszalter,
16 320 F.3d at 973 (quoting Pickering v. Bd. of Educ., 391
17 U.S. 563, 571 (1968)). "Speech that concerns issues about which
18 information is needed or appropriate to enable the members of
19 society to make informed decisions about the operation of their
20 government merits the highest degree of first amendment
21 protection." Id. (internal quotations and formatting omitted).
22 "On the other hand, speech that deals with 'individual personnel
23 disputes and grievances' and that would be of 'no relevance to the
24 public's evaluation of the performance of governmental agencies'
25 is generally not of 'public concern.'" Id. (quoting McKinley v.
26 City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)). See also Roe
27 v. City & Cnty. of San Francisco, 109 F.3d 578, 585 (9th Cir.
28 1997) ("the content of the communication must be of broader

1 societal concern. The focus must be upon whether the public or
2 community is likely to be truly interested in the particular
3 expression, or whether it is more properly viewed as essentially a
4 private grievance."). "The determination of whether an employee's
5 speech deals with an issue of public concern is to be made with
6 reference to the content, form, and context of the speech."

7 Coszalter, 320 F.3d at 973-74 (internal quotations omitted).

8 Defendants contend that the petition circulated by Plaintiff
9 and Dr. Rivero and the "A Job Half Done" critique of the Ja Report
10 were not matters of public concern because they addressed only
11 personnel disputes and grievances. They do not dispute that
12 Defendants knew about the petition and critique.

13 The Court disagrees. In Ulrich v. City & County of San
14 Francisco, 308 F.3d 968 (2002), the Ninth Circuit found that the
15 district court erred when it concluded that a former doctor's
16 speech about the layoff of physicians at LHH was not protected.
17 The Ninth Circuit concluded that, because the doctor's speech had
18 "touched on the ability of the hospital to care adequately for
19 patients," it involved a matter of public concern. Id. at 978-79.
20 Similarly, here, in the petition, Plaintiff and the other doctors
21 expressed concern that the replacement of physicians with nursing
22 staff, social workers and psychologists would be "potentially
23 harmful to our patients, as well as to their safe discharge to more
24 integrated settings." Stephenson Decl., Ex. E. In the "A Job
25 Half Done" critique, Plaintiff and Dr. Rivero discussed at length
26 their concerns regarding the impact that the Ja Report's
27 recommendations would have on patient care. Further, in that
28 critique, Plaintiff and Dr. Rivero also highlighted the conflict

1 of interest between Sherwood and Ja, which could have introduced
2 bias into the Ja Report.

3 Although Defendants suggest that the speech was not protected
4 because it would not reach the public at large, the fact that
5 Plaintiff brought these allegations openly within the institution
6 in multiple forums indicates "that he spoke order to bring
7 wrongdoing to light, not merely to further some purely private
8 interest." Ulrich, 308 F.3d at 979. "Where speech is so
9 directed, the public employee does not forfeit protection against
10 governmental retaliation because he chose to press his cause
11 internally." Id.

12 Defendants also argue that Plaintiff acted within his duties
13 as a City employee and union representative and that therefore his
14 speech is not protected. Mot. at 16 (citing Garcetti v. Ceballos,
15 547 U.S. 410, 421 (2006) (holding that "when public employees make
16 statements pursuant to their official duties, the employees are
17 not speaking as citizens for First Amendment purposes, and the
18 Constitution does not insulate their communications from employer
19 discipline")). "[S]tatements are made in the speaker's capacity
20 as citizen if the speaker had no official duty to make the
21 questioned statements, or if the speech was not the product of
22 performing the tasks the employee was paid to perform." Dahlia v.
23 Rodriguez, 2012 WL 3185693, at *5 (9th Cir.) (quoting Posey v.
24 Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1127 n.2 (9th
25 Cir. 2008)) (formatting in original). Plaintiff's complaints here
26 were not encompassed within his official duties as a hospice
27 physician and he was not paid to make these criticisms.
28 Defendants also offer no evidence or authority for the proposition

1 that Plaintiff's statements in his capacity as a union
2 representative are encompassed in his official physician duties as
3 a public employee or even that Plaintiff performed the activities
4 at issue here in his role as a union representative. Notably,
5 Plaintiff and Dr. Rivero clearly stated in the "A Job Half Done"
6 critique that its content consisted of their own personal views.
7 Accordingly, the Court concludes that the petition and "A Job Half
8 Done" critique were protected speech.

9 b. Dr. Katz's alleged conflict of interest with
10 HMA

11 Defendants argue that Plaintiff can offer no evidence that he
12 engaged in any earlier protected speech, other than the formal
13 complaint, regarding Dr. Katz's purported conflict of interest
14 based on his relationship with HMA. In his response, Plaintiff
15 states that he "first expressed concern about Katz' potential
16 conflict in early September 2009 in group emails that circulated
17 among all LHH physicians and other UAPD members." Opp. at 9. At
18 the hearing, Plaintiff acknowledged that the only email that
19 discussed the Katz conflict of interest was a September 8, 2009
20 email that was sent by Dr. Brown, not Plaintiff. Stephenson
21 Decl., Ex. H. Although it was sent as a reply to a prior email
22 sent by Plaintiff, Plaintiff's email did not mention this conflict
23 of interest and Dr. Brown did not present the suspicions about Dr.
24 Katz as held by Plaintiff rather than herself. Accordingly, the
25 Court finds that there is no evidence that, other than through his
26 formal complaint, Plaintiff engaged in protected speech related to
27 Dr. Katz's purported conflict of interest.
28

1 c. Gift Fund

2 Defendants do not dispute that the ABC7 news report on
3 Plaintiff's Gift Fund allegations constituted protected speech.
4 Defendants argue that the Sunshine public records requests did not
5 constitute protected speech for two reasons: first, that Dr.
6 Rivero, not Plaintiff, submitted these requests; and second, that
7 the requests were not expressive speech.

8 The Court finds that there is a material dispute of fact as
9 to both of these points. As to the first, although Dr. Rivero
10 submitted the public records requests, Plaintiff has offered
11 evidence that she did so in collaboration with him. Further, each
12 of the individual Defendants testified that, at the time of the
13 relevant events, they knew that Plaintiff and Dr. Rivero were a
14 couple, and Ms. Hirose understood that complaints submitted by one
15 of them likely came from both. Katz Depo. 33:14-20; Riley Depo.
16 65:9-66:1; Hirose Depo. 44:18-45:7, 300:13-14. See Toronyi v.
17 Barrington Cmty. Unit Sch. Dist. 220, 2005 U.S. Dist. LEXIS 3065,
18 at *19-20 (N.D. Ill.) ("standing by" a spouse's speech found to
19 constitute protected expressive conduct).

20 As to whether the requests were expressive speech, under the
21 circumstances presented here, a reasonable factfinder could infer
22 Dr. Rivero and Plaintiff intended to convey a message that they
23 suspected that the Gift Fund was being managed and used
24 improperly. "Conduct is expressive when 'an intent to convey a
25 particularized message was present, and in the surrounding
26 circumstances the likelihood was great that the message would be
27 understood by those who viewed it.'" Thomas v. City of Beaverton,
28 379 F.3d 802, 810 (9th Cir. 2004) (quoting Spence v. Washington,

1 418 U.S. 405, 410-11 (1974)). "A 'narrow, succinctly articulable
2 message' is not required." Kaahumanu v. Hawaii, 682 F.3d 789, 798
3 (9th Cir. 2012) (quoting Hurley v. Irish-American Gay, 515 U.S.
4 557, 569 (1995)). The records requests were made at a time when
5 the couple was widely known within LHH to be criticizing publicly
6 other alleged misconduct and to be engaged in thorough analysis in
7 support of that criticism. A person who received the broad
8 information requests related to the Gift Fund could reasonably
9 have inferred that Plaintiff and Dr. Rivero were similarly
10 investigating the use of the Gift Fund.

11 2. Substantial or motivating factor

12 To prove that his expressive conduct was a substantial or
13 motivating factor for his termination, a plaintiff can
14 "(1) introduce evidence that the speech and adverse action were
15 proximate in time, such that a jury could infer that the action
16 took place in retaliation for the speech; (2) introduce evidence
17 that the employer expressed opposition to the speech; or
18 (3) introduce evidence that the proffered explanations for the
19 adverse action were false and pretextual." Anthoine v. North
20 Central Counties Consortium, 605 F.3d 740, 750 (9th Cir. 2010)
21 (citing Coszalter, 320 F.3d at 975).

22 a. The formal complaints

23 In order to retaliate on the basis of speech, "an employer
24 must be aware of that speech." Allen v. Iranon, 283 F.3d 1070,
25 1077 (9th Cir. 2002).

26 Plaintiff has offered no evidence that Dr. Katz, Ms. Hirose
27 and Dr. Riley knew of Plaintiff's four formal complaints before
28

1 his final day at LHH, and the individual Defendants testified that
2 they did not.

3 Plaintiff argues that the Court should nevertheless infer
4 that Dr. Katz knew about the complaint involving the HMA conflict
5 of interest. Opp. at 10-11. He contends that, because Dr. Katz
6 testified that, on November 10, 2009, he realized that he had
7 signed one of the HMA contracts and contacted the City Attorney to
8 discuss the issue, the Court should infer that Dr. Katz knew at
9 that time that someone had raised a conflict of interest issue.
10 Plaintiff further urges the Court to infer that Dr. Katz would
11 have assumed that Plaintiff was the complainant, because he had
12 raised allegations of another unrelated conflict of interest in
13 response to the Ja Report. However, "mere allegation and
14 speculation do not create a factual dispute for purposes of
15 summary judgment." Nelson v. Pima Community College, 83 F.3d
16 1075, 1081-1082 (9th Cir. 1996) (citing Witherow v. Paff, 52 F.3d
17 264, 266 (9th Cir. 1995)).

18 Similarly, Plaintiff asks the Court to infer that the
19 Whistleblower Program contacted Dr. Katz and told him of the
20 complaint, although he offers no evidence that it did so and
21 relies on speculation. Further, the record includes testimony
22 from a representative of the Whistleblower Program that it did not
23 notify DPH of the complaints lodged with it by Plaintiff and Dr.
24 Rivero. Lediju Depo. 103:4-108:3.

25 Accordingly, the Court finds that there is no evidence that
26 Defendants were aware of the four formal complaints, and thus that
27 they could not have retaliated against Plaintiff based on this
28 speech.

1 b. Ja Report

2 Defendants contend that Plaintiff cannot establish that his
3 responses to the Ja Report were a substantial or motivating factor
4 for his termination, because these criticisms took place "almost a
5 year before his layoff" and because others, including Defendant
6 Dr. Riley, joined his criticism of the report. Mot. at 17.

7 The evidence establishes that Dr. Katz and Ms. Hirose first
8 proposed to cut Plaintiff's position in early December 2009.
9 Plaintiff and Dr. Rivero circulated the petition and their
10 critique of the Ja Report in August and September of 2009. This
11 time frame of three to four months is close enough to support an
12 inference of causation based on temporal proximity. See Yartzoff
13 v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

14 It is true that Dr. Riley joined the petition criticizing the
15 Ja Report, although there is no evidence that she agreed with
16 Plaintiff's longer written critique. However, Dr. Riley was
17 subsequently appointed to a management role by Ms. Hirose and Dr.
18 Katz, and there is evidence that Ms. Hirose publicly expressed
19 opposition to Plaintiff's speech. Specifically, Plaintiff has
20 offered testimony that Ms. Hirose defended the Ja Report publicly
21 against his criticism by stating that the medical executive
22 committee supported the Ja Report, although members of the medical
23 executive committee denied this. The Court finds that a
24 reasonable factfinder could conclude that Dr. Riley did in fact
25 participate in retaliation against Plaintiff for his speech,
26 despite her initial agreement with it, after she was moved into a
27 management position by higher-level managers who were openly
28 critical of the speech.

1 Finally, there is a material dispute of fact as to whether
2 the non-retaliatory reasons proffered by Defendants to select
3 Plaintiff's position for termination were false. Defendants state
4 that he was less flexible than other doctors at the facility about
5 covering other wards and that he was responsible for fewer
6 patients than other doctors were. However, Plaintiff has offered
7 evidence that other doctors were similarly resistant to covering
8 other wards and had preferences for the type of work that they
9 did, and that he worked on an admitting ward where doctors were
10 expected to care for fewer patients than on non-admitting wards.
11 Further, although Defendants state that they were required to
12 eliminate Plaintiff's 2232 position in the hospice ward for
13 budgetary reasons, Dr. Bouvier, the only other doctor affected by
14 the budget cuts, was given a 2232 position in the hospice less
15 than seven months after Plaintiff was terminated and that 2232
16 position was purportedly eliminated.

17 Accordingly, Plaintiff has introduced evidence sufficient to
18 create a material dispute of fact as to whether his responses to
19 the Ja Report were a substantial or motivating factor for his
20 termination.

21 c. ABC7 news reports

22 Plaintiff also contends that Defendants retaliated against
23 him for the ABC7 news reports, in which he publicly spoke out
24 against the alleged mismanagement of the Gift Fund. His
25 termination went into effect just a few weeks after the airing of
26 the reports. His termination was not rescinded when it could have
27 been, and he was not transferred to the other open positions.
28

1 It is clear that Plaintiff's participation in these news
2 reports was protected speech. Plaintiff has also offered evidence
3 that each of the individual Defendants was aware of the ABC7
4 reports and had the authority either to revoke his termination or
5 to offer him one of the several open 2232 positions within LHH at
6 the time. They did not, despite their testimony that they would
7 normally use any available means not to terminate a physician.
8 Dr. Katz acknowledged that they could have put him into one of the
9 positions without the necessity of waiting for him to apply, but
10 stated that he did not want to do so. Defendants provided no
11 explanation why they did not move to the hospice ward one of the
12 2232 positions open at the time of Plaintiff's termination in
13 order to retain him. Finally, as previously noted, Dr. Riley
14 testified that, when Plaintiff was terminated, Dr. Bouvier was
15 assigned to the hospice ward in his stead in a 2230 position and
16 was ultimately given a 2232 position in the hospice, less than
17 seven months after Plaintiff's termination.

18 Accordingly, the Court finds that Plaintiff has established a
19 material dispute of fact as to whether his termination was carried
20 out in retaliation for the ABC7 news reports.

21 C. Section 1983 claims against the City

22 The City contends that it is entitled to summary judgment on
23 Plaintiff's § 1983 claim, because he has not established that Dr.
24 Katz was a "final policymaker." Plaintiff's § 1983 claim against
25 the City can only be brought in accordance with Monell v. Dep't of
26 Soc. Servs., 436 U.S. 658, 690-91 (1978). Although a city may not
27 be held vicariously liable for the unconstitutional acts of its
28 employees on the basis of an employer-employee relationship with

1 the tortfeasor, it may be held liable under Monell when a
2 municipal policy or custom causes an employee to violate another's
3 constitutional right. Id. at 691-92.

4 The Ninth Circuit has held that municipal liability under
5 Monell may be established in one of three ways: (1) "the plaintiff
6 may prove that a city employee committed the alleged
7 constitutional violation pursuant to a formal governmental policy
8 or a longstanding practice or custom which constitutes the
9 standard operating procedure of the local governmental entity;"
10 (2) "the plaintiff may establish that the individual who committed
11 the constitutional tort was an official with final policy-making
12 authority and that the challenged action itself thus constituted
13 an act of official governmental policy;" or (3) "the plaintiff may
14 prove that an official with final policy-making authority ratified
15 a subordinate's unconstitutional decision or action and the basis
16 for it." Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir.
17 1992). See also Hyland v. Wonder, 117 F.3d 405, 414 (9th Cir.
18 1997) ("a plaintiff may show that an official policymaker either
19 delegated policymaking authority to a subordinate or ratified a
20 subordinate's decision, approving the decision and the basis for
21 it") (internal quotation marks omitted).

22 Plaintiff contends that Dr. Katz had final policymaking
23 authority over the decision to terminate him, that he delegated
24 this authority to Ms. Hirose and that he ratified her decision.
25 Although Defendants admit that Dr. Katz participated in the
26 decision to terminate Plaintiff, Defendants contend that the Civil
27 Service Commission (CSC), not Dr. Katz, is the final policymaker
28 with respect to employment and personnel matters.

1 To determine if Dr. Katz was acting as the final policymaker
2 for the City, the Court must first "identify the particular area
3 or issue for which the official is alleged to be the final
4 policymaker," and second, "analyze state law to discern the
5 official's actual function with respect to that particular area or
6 issue." Cortez v. Cnty. of Los Angeles, 294 F.3d 1186, 1189 (9th
7 Cir. 2002) (citing McMillan v. Monroe Co., 520 U.S. 781, 785-86
8 (1997)). "By reviewing state law, we seek to ascertain to what
9 degree the municipality has control over the official's
10 performance of the particular function and, thus, whether the
11 municipality can be held liable for the official's actions." Id.
12 The parties agree that "a city's Charter determines municipal
13 affairs such as personnel matters." Hyland, 117 F.3d at 414. See
14 Mot. at 18; Opp. at 23.

15 Here, Plaintiff contends that Dr. Katz was the final
16 policymaker regarding the termination of exempt employees within
17 the DPH. Defendants are correct that "under the Charter of the
18 City and County of San Francisco . . . , the CSC is generally 'the
19 final policymaker with respect to employment matters.'" Molex v.
20 City & Cnty. of San Francisco, 2012 U.S. Dist. LEXIS 103890, at
21 *43 (N.D. Cal.) (quoting Schiff v. City & Cnty. of San Francisco,
22 816 F. Supp. 2d 798, 812-13 (N.D. Cal. 2011); Harris v. City &
23 Cnty. of San Francisco, 2009 U.S. Dist. LEXIS 69186, at *14 (N.D.
24 Cal.)). The Charter provides that the CSC "shall adopt rules,
25 policies and procedures to carry out the civil service merit
26 system provisions of this charter and, except as otherwise
27 provided in this Charter, such rules shall govern" a specific list
28 of employment matters, including "lay-offs or reduction in force,

1 both permanent and temporary, due to lack of work or funds,
2 retrenchment or completion of work." S.F. Charter § 10.101.

3 However, the Charter also provides that certain positions
4 "shall be exempt from competitive civil service selection,
5 appointment and removal procedures, and the person serving in the
6 position shall serve at the pleasure of the appointing authority."
7 S.F. Charter § 10.104. This includes "physicians and dentists
8 serving in their professional capacity (except those physicians
9 and dentists whose duties are significantly administrative or
10 supervisory)." S.F. Charter § 10.104(13). Here, there is no
11 dispute that Plaintiff was an exempt employee. See, e.g., Jacobi
12 Depo. 36:7-15.

13 Further, Defendants admit that, pursuant to San Francisco
14 Administrative Code section 2A.30, Dr. Katz was the appointing
15 officer for employees within the DPH. Reply at 11. Under this
16 provision, the "department head shall act as the 'appointing
17 officer' under the civil service provisions of the Charter for the
18 appointing, disciplining and removal of such officers, assistants
19 and employees as may be authorized." S.F. Admin. Code § 2A.30.
20 This section also provides, "Non-civil service appointments and
21 any temporary appointments in any department or subdivision
22 thereof, and all removals therefrom shall be made by the
23 department head, bureau head or other subdivision head designated
24 as the appointing officer." Id.

25 Defendants contend that the Charter removes exempt employees
26 from supervision by the CSC only for limited purposes, and that
27 exempt employees are otherwise still subject to CSC rules.
28 However, even if this were true, the portions of the Charter and

1 Administrative Code cited above specifically exclude exempt
2 employees from the authority of the CSC for removal procedures,
3 state that they shall serve at the pleasure of the appointing
4 officer and allow that appointing officer to make all removals
5 from these positions. See Hyland v. Wonder, 117 F.3d 405, 416
6 (9th Cir. 1997) (rejecting an argument by San Francisco defendants
7 "that the CSC had the final policymaking authority over personnel
8 decisions" as "irrelevant, as the positions for which Hyland
9 applied were civil service exempt").

10 Defendants also argue that the mere fact that Dr. Katz had
11 discretion to select which employee would be removed is not enough
12 to make him a final policymaker. "If the mere exercise of
13 discretion by an employee could give rise to a constitutional
14 violation, the result would be indistinguishable from respondeat
15 superior liability." City of St. Louis v. Praprotnik, 485 U.S.
16 112, 126 (1988). "When an official's discretionary decisions are
17 constrained by policies not of that official's making, those
18 policies, rather than the subordinate's departures from them, are
19 the act of the municipality." Id. at 127. "Similarly, when a
20 subordinate's decision is subject to review by the municipality's
21 authorized policymakers, they have retained the authority to
22 measure the official's conduct for conformance with their
23 policies." Id. Thus, the "authority to exercise discretion while
24 performing certain functions does not make the official a final
25 policymaker unless the decisions are final, unreviewable, and not
26 constrained by the official policies of supervisors." Zografos v.
27 City of San Francisco, 2006 U.S. Dist. LEXIS 90101, at *46 (N.D.
28 Cal.).

1 Defendants argue that there are a number of other CSC rules
2 that apply to exempt employees and that constrained Dr. Katz's
3 ability to terminate Plaintiff. They point specifically to Rule
4 103, which addresses Equal Employment Opportunity. See S.F. Civ.
5 Serv. Comm'n Rule 103. This provision states, in relevant part,

6 It is the policy of the Civil Service Commission of the
7 City and County of San Francisco that all persons shall
8 have equal opportunity in employment; that selection of
9 employees to positions in the City and County be made on
10 the basis of merit; and that continuing programs be
11 maintained to afford equal employment opportunities at
12 all levels. Vigorous enforcement of the laws against
13 discrimination shall be carried out at every level of
14 each department. All persons shall have equal access to
15 employment within the City and County, limited only by
16 their ability to do the job. . . .

17 No person shall be appointed, reduced, removed, or in
18 any way favored or discriminated against in employment
19 or opportunity for employment because of race, color,
20 sex, sexual orientation, gender identity, political
21 affiliation, age, religion, creed, national origin,
22 disability, ancestry, marital status, parental status,
23 domestic partner status, medical condition (cancer-
24 related), ethnicity or the conditions Acquired Immune
25 Deficiency Syndrome (AIDS), HIV, and AIDS-related
26 conditions or other non-merit factors or any other
27 category provided by ordinance.

28 S.F. Civ. Serv. Comm'n Rule 103.1.1-2. The City's Rule 30(b)(6)
witness testified that, in general, no one reviews the decision of
the director of health as to which exempt physician is subject to
a layoff and that no one has "the authority to overrule the
director of health's decision, either himself or through his
delegated representative, the executive administrator of Laguna
Honda, who to make subject to layoff among the exempt physicians
at Laguna Honda." Jacobi July 11, 2012 Depo. at 45:7-23. This
was subject only to the limitation that the director's "decision
can't be prohibited by law," meaning that if someone alleges that
"it was discrimination," the decision would be subject to review

1 to resolve the allegations of discrimination by the City's Human
2 Resources Director, whose decision can be appealed to the CSC.
3 Id. at 45:23-47:1. The Human Resources Director does not review
4 layoff decisions if the complaint is that someone was retaliated
5 against on the basis of whistle-blowing. Id. at 47:13-18. Thus,
6 by the City's own admission, this rule did not constrain Dr.
7 Katz's decisionmaking or provide for review in any way applicable
8 to the case at hand.

9 Defendants also point to San Francisco Campaign and
10 Government Conduct Code section 4.115, which provides, "No City
11 officer or employee may terminate, demote, suspend or take other
12 similar adverse employment action against any City officer or
13 employee because the officer or employee has in good faith" filed
14 a complaint with the Ethics Commission, the Controller's
15 Whistleblower Program or cooperated with any such investigation.
16 S.F. Campaign & Gov't Conduct Code § 4.115(a). At the hearing,
17 Defendants also relied on a provision in the Sunshine Ordinance,
18 which provides,

19 Public employees shall not be discouraged from or
20 disciplined for the expression of their personal
21 opinions on any matter of public concern while not on
22 duty, so long as the opinion (1) is not represented as
23 that of the department and does not misrepresent the
24 department position; and (2) does not disrupt coworker
25 relations, impair discipline or control by superiors,
26 erode a close working relationship premised on personal
27 loyalty and confidentiality, interfere with the
28 employee's performance of his or her duties or obstruct
the routine operation of the office in a manner that
outweighs the employee's interests in expressing that
opinion. In adopting this subdivision, the Board of
Supervisors intends merely to restate and affirm court
decisions recognizing the First Amendment rights enjoyed
by public employees. Nothing in this section shall be
construed to provide rights to City employees beyond
those recognized by courts, now or in the future, under

1 the First Amendment, or to create any new private cause
of action or defense to disciplinary action.

2 S.F. Admin. Code § 67.22(d). They argue that these sections
3 constrained Dr. Katz's power when deciding to terminate Plaintiff
4 here.

5 However, the Ninth Circuit has held that a "general
6 statement" that a person to whom decision-making power is
7 delegated "is not authorized to violate the law" is not sufficient
8 to insulate a governmental entity from liability "without more."
9 Lytle v. Carl, 382 F.3d 978, 985 (9th Cir. 2004). In that case,
10 the Ninth Circuit found that a school superintendent and assistant
11 superintendent were final policymakers with respect to employee
12 discipline where their decisions were unreviewable by any school
13 district official, even though the Board of Trustees had delegated
14 them this power to be exercised in accordance with "applicable
15 negotiated agreements, laws, board policies, and regulations."
16 Id. at 984-85. As explained more recently in a non-precedential
17 Ninth Circuit case, Uhl v. Lake Havasu City, 2010 U.S. App. LEXIS
18 241 (9th Cir.), in which, like here, employees served at the
19 purported policymaker's "pleasure," it "is not sufficient that a
20 city personnel rule in theory" bound the decisionmaker "to comply
21 with the law," where his or her decision was ultimately
22 unreviewable. Id. at *8-9.

23 Similarly, here, the rules that Defendants cite do not
24 provide for review of the actual termination decision and instead
25 simply require that Dr. Katz comply with the law in making such
26 decisions. As quoted above, the City clearly states that section
27 67.22(d) of the Administrative Code is meant "merely to restate
28 and affirm court decisions recognizing the First Amendment rights

1 enjoyed by public employees." Although Defendants argued at the
2 hearing that this limitation can be reviewed and enforced through
3 CSC Rule 103, their Rule 30(b)(6) witness disclaimed that
4 whistleblower retaliation claims were subject to this process, as
5 previously discussed. Although section 4.115 of the Campaign and
6 Government Conduct Code allows for the sanctioning of an officer
7 or employee who engages in retaliation, S.F. Campaign & Gov't
8 Conduct Code § 4.115(c), it does not appear to provide for review
9 or reversal of the unlawful decision itself, and Defendants did
10 not argue to the contrary at the hearing. Further, by its terms,
11 section 4.115 only sets forth a policy against retaliation for the
12 filing of formal complaints and participating in formal
13 investigations, not retaliation for any protected First Amendment
14 speech, such as Plaintiff's critique of the Ja Report or his
15 speaking with reporters for the ABC7 news story. S.F. Campaign &
16 Gov't Conduct Code § 4.115(a).

17 Accordingly, here, Dr. Katz held final policymaking authority
18 in deciding to terminate Plaintiff. Thus, the Court finds that
19 Plaintiff has presented evidence of Monell liability against the
20 City, and DENIES Defendants' motion for summary judgment on the
21 § 1983 claim against the City.

22 D. State law claims

23 1. Health and Safety Code section 1432

24 Plaintiff brings a claim against Defendants for violation of
25 California Health and Safety Code section 1432, which, among other
26 things, prohibits retaliation against an employee at a long-term
27 health care facility "on the basis or for the reason" that the
28 employee "presented a grievance or complaint, or has initiated or

1 cooperated in any investigation or proceeding of any governmental
2 entity relating to care, services, or conditions at that
3 facility." Cal. Health & Safety Code § 1432(a).

4 Defendants argue that section 1432 does not create a private
5 cause of action for enforcement. Section 1432 states, "A licensee
6 who violates this section is subject to a civil penalty of no more
7 than ten thousand dollars (\$10,000), to be assessed by the
8 director and collected in the manner provided in Section 1430."
9 Cal. Health & Safety Code § 1432(a).

10 Plaintiff responds that California Health and Safety Code
11 section 1430(a) creates a private cause of action for a violation
12 of section 1432(a). Section 1430(a) states,

13 Except where the state department has taken action and
14 the violations have been corrected to its satisfaction,
15 a licensee who commits a class "A" or "B" violation may
16 be enjoined from permitting the violation to continue or
17 may be sued for civil damages within a court of
18 competent jurisdiction. An action for injunction or
19 civil damages, or both, may be prosecuted by the
20 Attorney General in the name of the people of the State
21 of California upon his or her own complaint or upon the
22 complaint of a board, officer, person, corporation, or
23 association, or by a person acting for the interests of
24 itself, its members, or the general public. The amount
25 of civil damages that may be recovered in an action
26 brought pursuant to this section may not exceed the
27 maximum amount of civil penalties that could be assessed
28 on account of the violation or violations.

Cal. Health & Safety Code § 1430(a). This section thus creates a
private cause of action to prosecute what it describes as class A
and class B violations. The definitions of such violations are
set forth in section 1424. That section defines class A
violations as

violations which the state department determines present
either (1) imminent danger that death or serious harm to
the patients or residents of the long-term health care
facility would result therefrom, or (2) substantial
probability that death or serious physical harm to

1 patients or residents of the long-term health care
2 facility would result therefrom.
3 Cal. Health & Safety Code § 1424(d). It defines class B
4 violations as "violations that the state department determines
5 have a direct or immediate relationship to the health, safety, or
6 security of long-term health care facility patients or residents,"
7 including "any violation of a patient's rights as set forth in
8 Sections 72527 and 73523 of Title 22 of the California Code of
9 Regulations, that is determined by the state department to cause
10 or under circumstances likely to cause significant humiliation,
11 indignity, anxiety, or other emotional trauma to a patient." Id.
12 at § 1424(e).

13 Plaintiff has presented no argument or evidence that his
14 claims qualify as either class A or class B violations, or that
15 the relevant state agency has made a determination that they do.
16 Accordingly, the Court GRANTS Defendants' motion for summary
17 judgment on his section 1432 claim.

18 2. Labor Code section 1102.5(b)

19 Under section 1102.5(b), an "employer may not retaliate
20 against an employee for disclosing information to a government or
21 law enforcement agency, where the employee has reasonable cause to
22 believe that the information discloses a violation of state or
23 federal statute, or a violation or noncompliance with a state or
24 federal rule or regulation." Cal. Lab. Code § 1102.5(b). "A
25 report made by an employee of a government agency to his or her
26 employer is a disclosure of information to a government or law
27 enforcement agency pursuant to subdivisions (a) and (b)." Cal.
28 Lab. Code § 1102.5(e).

1 To survive summary judgment, a plaintiff must first establish
2 a prima facie case of retaliation, which requires him or her to
3 "show (1) she engaged in a protected activity, (2) her employer
4 subjected her to an adverse employment action, and (3) there is a
5 causal link between the two." Patten v. Grant Joint Union High
6 Sch. Dist., 134 Cal. App. 4th 1378, 1384 (2005). If a plaintiff
7 establishes a prima facie case of retaliation, the burden shifts
8 to the defendant to "provide a legitimate, nonretaliatory
9 explanation for its acts." Id. at 1384. If the defendant does
10 so, the plaintiff must "show this explanation is merely a pretext
11 for the retaliation." Id.

12 Defendants argue that Plaintiff did not engage in protected
13 activity, because he did not reasonably believe that his
14 complaints disclosed any alleged violation of federal or state
15 law. The separate conflicts of interest involving Drs. Katz and
16 Ja that Plaintiff described in his complaints could have violated
17 several state laws. See Cal. Govt. Code § 87100 ("No public
18 official at any level of state or local government shall make,
19 participate in making or in any way attempt to use his official
20 position to influence a governmental decision in which he knows or
21 has reason to know he has a financial interest."); Cal. Govt. Code
22 § 1090 ("Members of the Legislature, state, county, district,
23 judicial district, and city officers or employees shall not be
24 financially interested in any contract made by them in their
25 official capacity, or by any body or board of which they are
26 members."). His media and formal complaints about the
27 mismanagement and misuse of the Gift Fund also implicated several
28 state laws. See, e.g., Cal. Bus. & Prof. Code §§ 17510.8

1 (creating a fiduciary relationship between a charity and the
2 person from whom a charitable contribution is solicited), 17510.5
3 (record keeping requirements for soliciting organizations); see
4 also People v. Orange County Charitable Services, 73 Cal. App. 4th
5 1054, 1075 (1999) (fraudulent charitable solicitation). However,
6 the public records requests related to the Gift Fund did not show
7 any reasonable belief on Plaintiff's part that he was disclosing
8 alleged violations of these sections. The media reports about the
9 Gift Fund were not complaints directed to a government or law
10 enforcement agency, as required to come under the protection of
11 section 1102.5(b).

12 As discussed above, because the individual Defendants did not
13 learn of Plaintiff's formal complaints until after his last day at
14 LHH, Plaintiff has not established a causal link between them and
15 his termination. Further, outside of his formal complaints,
16 Plaintiff has not offered evidence that he made a protected
17 complaint about Dr. Katz's alleged conflict of interest. However,
18 Plaintiff has offered sufficient evidence that he disclosed to his
19 government employer possible violations of state or federal law
20 based on the conflicts of interest involving Dr. Ja and Ms.
21 Sherwood in the "A Job Half Done" critique, and that this was
22 causally connected to his termination.

23 Accordingly, the Court GRANTS Defendants' motion for summary
24 judgment on the Labor Code section 1102.5(b) claim to the extent
25 Plaintiff alleges retaliation for his four formal complaints and
26 the records requests and media reports about the Gift Fund, and
27 DENIES it to the extent Plaintiff alleges retaliation for the
28 petition and critique of the Ja Report.

1 II. Motion to seal

2 Plaintiff moves to seal Exhibit W to the declaration of
3 Mathew Stephenson submitted in opposition to Defendants' motion
4 for summary judgment. Plaintiff represents that Defendants have
5 designated this exhibit as confidential. Defendants have filed a
6 declaration in support of Plaintiff's motion. See Docket No. 68.

7 Plaintiff's filings are connected to a dispositive motion.
8 Because Defendants designated the document at issue as
9 confidential, they must file a declaration establishing that the
10 document is sealable. Civil Local Rule 79-5(d). To do so,
11 Defendants "must overcome a strong presumption of access by
12 showing that 'compelling reasons supported by specific factual
13 findings . . . outweigh the general history of access and the
14 public policies favoring disclosure.'" Pintos v. Pac. Creditors
15 Ass'n, 605 F.3d 665, 679 (9th Cir. 2010) (citation omitted). This
16 cannot be established simply by showing that the document is
17 subject to a protective order or by stating in general terms that
18 the material is considered to be confidential, but rather must be
19 supported by a sworn declaration demonstrating with particularity
20 the need to file each document under seal. Civil Local Rule
21 79-5(a).

22 Defendants attest that Exhibit W contains a draft policy
23 document related to the City's Whistleblower Program. They
24 represent that public disclosure of this document would "divulge
25 information regarding the Whistleblower Program's investigative
26 and deliberative process." Rolnick Decl. ¶ 10. They also state
27 that, "because it is not an official policy or procedure,
28 disclosure might create the public preception [sic] that this is,

1 in fact, the office's policy and thereby compromise the Program's
2 work or make it more difficult." Id.

3 Having reviewed the contents of Exhibit W, the Court finds
4 that Defendants have established that it is sealable.

5 Accordingly, Plaintiff's motion to file under seal is GRANTED.

6 CONCLUSION

7 For the reasons set forth above, the Court GRANTS in part
8 Defendants' motion for summary judgment and DENIES it in part
9 (Docket No. 40). The Court grants Defendants' motion as unopposed
10 as to Plaintiff's claims for deprivation of his Fourteenth
11 Amendment due process rights and for violation of California
12 Government Code section 53298. The Court also grants Defendants
13 summary judgment on Plaintiff's Health and Safety Code section
14 1432 claim for retaliation against a long-term health care
15 facility employee because there is no private right of action
16 given the lack of evidence that he complained of class A or class
17 B violations. The Court further grants Defendants summary
18 judgment on Plaintiff's § 1983 free speech claim to the extent he
19 alleges retaliation based on the filing of his formal complaints
20 and otherwise expressing concern about Dr. Katz's alleged conflict
21 of interest. There is no evidence of causation as to the formal
22 complaints and no evidence of other protected speech on that
23 subject. However, the Court denies summary judgment on this claim
24 to the extent it is based on the petition, the "A Job Half Done"
25 critique, the public records requests related to the Gift Fund and
26 participation in the ABC7 news reports. Finally, the Court grants
27 Defendants summary judgment on Plaintiff's Labor Code section
28 1102.5 claim to the extent that it is based on the formal

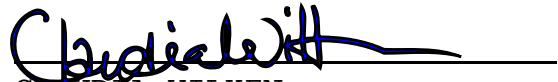
1 complaints, expressing concern about Dr. Katz's alleged conflict
2 of interest, and the media reports and public records requests
3 related to the Gift Fund, but denies Defendants summary judgment
4 on this claim to the extent it is based on the petition and "A Job
5 Half Done" critique of the Ja Report.

6 The Court GRANTS Plaintiff's motion to file Exhibit W to the
7 Stephenson declaration under seal (Docket No. 61). Within four
8 days of the date of this Order, Plaintiff shall file this document
9 under seal.

10 The final pretrial conference set for October 31, 2012 at
11 2:00 p.m. and ten-day jury trial set to begin on November 13, 2012
12 at 8:30 a.m. are MAINTAINED.

13 IT IS SO ORDERED.

14
15 Dated: 9/6/2012


CLAUDIA WILKEN
United States District Judge