



San Diego County Water Authority

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March 9, 2018

VIA U.S. Mail and Email

Jeffrey Kightlinger, General Manager
Marcia Scully, General Counsel
Metropolitan Water District of Southern California
P.O. Box 54153
Los Angeles, CA 90054

MEMBER AGENCIES

- Carlsbad Municipal Water District
- City of Del Mar
- City of Escondido
- City of National City
- City of Oceanside
- City of Poway
- City of San Diego
- Fallbrook Public Utility District
- Helix Water District
- Lakeside Water District
- Olivenhain Municipal Water District
- Otay Water District
- Padre Dam Municipal Water District
- Camp Pendleton Marine Corps Base
- Rainbow Municipal Water District
- Ramona Municipal Water District
- Rincon del Diablo Municipal Water District
- San Dieguito Water District
- Santa Fe Irrigation District
- South Bay Irrigation District
- Vallecitos Water District
- Valley Center Municipal Water District
- Vista Irrigation District
- Yuima Municipal Water District

Re: Board Agenda Item 10-1 - Review of the Policies, Procedures, and Governance of Metropolitan's Ethics Office [Evaluation of the performance of Ethics Office employees may be heard in closed session pursuant to Gov. Code §54957(b)]

Dear Mr. Kightlinger and Ms. Scully:

On behalf of the Water Authority, I wrote to you on September 14, 2017, regarding then rapidly evolving Metropolitan activities and issues related to the Ethics Office (copy of my letter attached). We have now reviewed the February 22, 2018, Report titled, *"A Review of the Policies, Procedures, and Governance Structure of the Ethics Office."* This letter is to provide the Water Authority's high-level comments regarding the recommendations contained in the Report, and to reconfirm its significant and continuing concern that the integrity and independence of the Ethics Office be maintained.

To our knowledge, Metropolitan did not take any of the six steps requested in our September 14 letter, including a request that MWD management, the Auditor, the General Counsel's office and the special counsel retained by them (collectively, "MWD management") not be granted access to the files of the Ethics Office, which should have remained under the control and view of the Ethics Office alone. Although it is unclear who exactly has had access to the investigative records of the Ethics Office, it is clear from the Report (footnote 1 and page 11) that MWD management's attorneys did review confidential investigative records. We are very concerned about the deleterious effect this disclosure may have had on MWD employee whistleblowers who believed information provided to the Ethics Officer would remain confidential. This could also have a chilling effect on any future reports of ethical violations by Metropolitan staff.

We note at the outset that Senate Bill 60, which created the MWD Ethics Office, states:

"SEC. 2. Section 126.7 is added to the Metropolitan Water District Act (Chapter 209 of the Statutes of 1969), to read: 126.7. (a) The Metropolitan Water District of Southern California shall establish and operate an Office of Ethics and adopt rules relating to internal disclosure, lobbying, conflicts of interest, contracts, campaign contributions, and ethics for application

OTHER REPRESENTATIVE

County of San Diego

to its board members, officers, and employees consistent with the intent and spirit of the laws and regulations of the Los Angeles City Ethics Commission, the Fair Political Practices Commission, and the Los Angeles County Metropolitan Transportation Authority." (Emphasis added.)

Given this statutory mandate, it is remarkable that the Report almost ignored these three entities - the very agencies the Legislature directed MWD to model its Ethics Office on. The following brief summary is provided so the MWD Board is made aware of how the practices at these other statutorily mandated entities compare and as a point of reference for further discussion and deliberation:

MTA:

- Ethics Officer reports directly to Board. Public Utilities Code section 130610.

LACEC:

- There is an independent City Ethics Commission that reports to the City Council. Los Angeles Charter and Administrative Code sections 700 *et seq.*
- The City Attorney provides legal services to the Commission; however, the Commission may employ or contract special counsel to give advice. *Id.*, section 708.

FPPC:

- Executive Director is appointed by the Commission. Political Reform Act, section 83107

While the Report contains a great deal of discussion and ideas that may have some merit, its usefulness is limited by its fundamental failure to identify or discuss the *conflicts of interest that are inherent* between the Ethics Office and the persons who govern MWD: MWD management (which includes the General Counsel's office) and the Board of Directors. MWD's governing authorities are the very individuals the Ethics Office has a statutory mandate to watch over. Rather than hiring a special counsel to represent *only* the Ethics Office and to make recommendations in support of that Ethics Office, instead MWD management engaged counsel to provide recommendations in accord with MWD management's concerns about the Ethics Office. MWD thus appears to be creating a new Ethics Office structure in which the "fox guards the hen house." Indeed, MWD's governing authorities appear to be exerting exactly the kind of political influence over the functions and operations of the Ethics Office that SB 60 was expressly intended to prevent.

A core problem at the heart of the new recommendations is to make the Ethics Office functionally subservient to the General Counsel's office. We believe this creates two key problems: (a) it removes the independence of the Ethics Office; and (b) it creates professional conflicts of interest for the attorneys in the General Counsel's office, who in many instances will be tasked by the rest of management to defend the actions of an MWD employee or Board member against the very Ethics Office that answers to that same counsel.

If adopted as currently proposed, we believe the Report recommendations would substantially erode if not destroy the independence of the Ethics Office and defeat the purpose and

statutory mandate of SB 60 under which it was created. Particularly troubling provisions include, but are not limited to:

- Proposed "oversight" of the Ethics Office, including detailed monitoring of the work, time and funds expended by the Ethics Office in a manner unlike any other Metropolitan department;
- Placing new limitations on access to records by the Ethics Office without the consent of the General Counsel;
- Placing new limitations on public access to Ethics Office investigations; and
- Proposed "governance" reform requiring the Ethics Officer to report to the General Counsel.

All of these concerns are exacerbated by the context within which these actions arose, namely, after a period of apparent disputes between MWD management and the Ethics Office involving investigations of MWD management by the Ethics Office.

Our concern over how the Ethics Office decision-making is being done at MWD is heightened by MWD continuing to combine as a single agenda item discussion of Ethics Office policy and procedure with alleged employee performance review, which is not properly done in closed session. Performance review of a current Department Head may be done by the board in closed session; discussions about a past department head or how the Ethics Office as a whole has performed or been run, may not.

In closing, we believe that there is much important content contained in the Report, and the Water Authority hopes that the MWD Board will continue public deliberations on the subject of the Ethics Office. However, we believe the Board should defer any action until the Ethics Office and public interest also have representation and may participate in open session discussions as to what is in the best interest of an independent Ethics Office, and what is ultimately best for MWD, its employees, all of its member agencies and the public.

Sincerely,



Mark J. Hattam
General Counsel

Attachment: Water Authority's Letter re Ethics Office Issues Dated September 14, 2017

cc: MWD Board of Directors
Water Authority Board of Directors
Maureen Stapleton, General Manager



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Fallbrook
Public Utility District

Helix Water District

Lakeside Water District

Olivenhain
Municipal Water District

Otay Water District

Padre Dam
Municipal Water District

Camp Pendleton
Marine Corps Base

Rainbow
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Ramona
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Rincon del Diabolo
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San Dieguito Water District

Santa Fe Irrigation District

South Bay Irrigation District

Vallejitos Water District

Valley Center
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Vista Irrigation District

Yuima
Municipal Water District

OTHER REPRESENTATIVE

County of San Diego

Jeffrey Kightlinger, General Manager
Marcia Scully, General Counsel
Metropolitan Water District of Southern California
P.O. Box 54153
Los Angeles, CA 90054

Re: Ethics Office Issues

Mr. Kightlinger and Ms. Scully:

At the MWD Board meeting on Tuesday, September 12, 2017, during a number of breaks of closed session meetings, various board actions were announced including: 1) acceptance of a resignation by Ethics Officer Deena Ghaly; 2) putting Ms. Ghaly on administrative leave, effective immediately; and 3) appointment of an interim Ethics Officer. Somewhere during this process, it is our understanding that MWD auditor Gerald Riss was appointed as interim Ethics Officer, effective immediately. All of these actions came after a period of apparent disputes between MWD management and the General Counsel, on the one hand, and the Ethics Office on the other hand, and involving various investigations by the Ethics Office.

The Water Authority does not know the details of what has happened, but it has significant concern that the integrity of the Ethics Office be maintained, and that legal violations not occur. As you are well aware, the Legislature enacted the Ethics Office, via SB 60 (Hayden, 1999), to keep watch over MWD in the context of improper activities by MWD designed to thwart the Imperial Irrigation District-Water Authority water conservation and transfer agreement. It appears that MWD management may now be attempting to interfere with the role of the Ethics Office by eliminating the Office's current staff and replacing them with individuals who will not be independent, but rather be direct representatives of, and conduits to, management. This would compromise and effectively eliminate protections that are afforded to complainants, some of whom, presumably, have lodged complaints against management, the General Counsel, or the Auditor. This would be completely unacceptable, and would destroy confidence among MWD staff and the public that MWD's Ethics Office is a neutral, unbiased and

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independent entity within MWD. It is of vital public interest that MWD's Ethics Office be independent, above reproach, and not be subject to dictates from MWD management – the very management it is statutorily charged to watch over.

Therefore, as a member agency of MWD, the Water Authority hereby makes demand on MWD as follows:

1. That MWD management, the Auditor, the General Counsel's office, or any special counsel (collectively, "MWD management") retained by them, not be granted access to the files of the Ethics Office, which should remain under the control and view of the Ethics Office alone.
2. That confidential investigatory information held by the Ethics Office not be shared with MWD management except as expressly allowed by statute.
3. That a completely independent Ethics Office be maintained in all respects, and that MWD management not interfere with the Ethics Office operations.
4. That MWD's General Counsel not involve its office in any manner in trying to represent both the Ethics Office and management in areas of conflict, which risks violating ethics rules of professional responsibility for attorneys.
5. That MWD immediately hire independent special counsel to represent the Ethics Office *only*, and not MWD or management, during this transition period, so as to assure that numbers 1 through 4 listed above are performed. MWD management should not have access to the confidential communications or work product of this independent special counsel, who should only report to the Ethics Officer.
6. Any interim Ethics Officer must be publicly informed in writing of the above items 1 through 5 so that he/she knows their duties.

The Water Authority has no interest in any further disputes with MWD. However, the Water Authority believes it is critical that the above steps be taken immediately so that the public's trust in the MWD Ethics Office can be maintained. We urge you to act as requested for the benefit of MWD, all its member agencies and the public.

Sincerely,

/s/ Mark J. Hattam

Mark J. Hattam
General Counsel

Cc: Water Authority Board of Directors
MWD Board of Directors
Ms. Maureen Stapleton