
State Water Resources Control Board

January 8, 2018

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Dear Mr. Brodsky:

I am writing in response to your letter of December 28, 2017, to Mr. Michael Lauffer, following upon the request for public records in the files of the State Water Resources Control Board (State Water Board) made by Mr. Patrick Porgans on August 31, 2017. This letter first addresses your request for public records, and secondly, responds to your concerns regarding *ex parte* communications.

1. Response to Mr. Porgans' Request for Public Records.

The State Water Board received the request from Mr. Patrick Porgans for public records in the files of the State Water Board, pursuant to Government Code § 6250 et seq., on September 1, 2017. Mr. Porgans requested the following categories of documents:

1. *Ex parte* correspondence, since the Change Petition [for the WaterFix Project] was submitted on August 26, 2015, between the Department of Water Resources and [State Water] Board staff about modeling for the [State Water] Board for determination of 'appropriate Delta flow criteria' under Water Code section 85086. -
2. Any *ex parte* correspondence since the Change Petition [for the WaterFix Project] was submitted on August 26, 2015, between the Department of Water Resources and [State Water] Board staff about the Boundary 1 and Boundary 2 scenarios that were introduced by the Department of Water Resources in modeling for Part 1 of the WaterFix hearing.
3. Any *ex parte* correspondence, since the Change Petition [for the WaterFix Project] was submitted on August 26, 2015, regarding scheduling of Part 1 or Part 2 of the WaterFix Change Petition hearing.

The State Water Board conducted searches in response to Mr. Porgans' request and provided an initial response to Mr. Porgans on September 11, 2017. State Water Board staff construed Mr. Porgans' request for "ex parte correspondence" to include all correspondence between the Department of Water Resources (DWR) and the State Water Board concerning the WaterFix Project since August 26, 2015, that were not copied to the service list for the hearing on the

water right petition for the WaterFix Project, regardless of whether the correspondence fit within the legal definition of ex parte communications under the Administrative Procedures Act (APA).

Board staff conducted a search for correspondence in the possession of the Board using the following criteria: (1) sent since August 26, 2015; (2) related to the WaterFix proceeding; (3) not sent to the service list for the proceeding; and (4) a staff person from DWR appears in the "to" field and a staff person or board member from the State Water Board appears in the "from" field, or a staff person from DWR appears in the "from" field and a staff person or board member from the State Water Board appears in the "to" field. I advised Mr. Porgans of the parameters of the search in my letter dated October 18, 2017, and invited Mr. Porgans to contact me if he had questions or needed any additional information. Board staff identified e-mail that fit the criteria, but did not identify any hard copy documents or other electronic documents that constituted correspondence. On October 18, 2017, the State Water Board provided Mr. Porgans with all e-mail identified in a search of the State Water Board's Outlook 365 email archives using these criteria.

I subsequently learned that the e-mail search of the State Water Board's Outlook 365 email archives conducted in response to Mr. Porgans' request may not have produced a complete set of responsive documents due to the migration of the Board's e-mail archives from a previous service provider to Outlook 365. The migration of the archives was not completed until November 1, 2017. Upon learning this information, I conducted a second search of the complete State Water Board e-mail archives using the same search parameters. On December 18, 2017, State Water Board staff produced responsive documents based on the second search that were not previously produced to Mr. Porgans.

All documents were produced by the Board to Mr. Porgans in native file format, except documents provided in .pdf format to allow redaction of phone numbers and passcodes that were not responsive to Mr. Porgan's request and subject to exemption pursuant to the balancing test under Government Code section 6255. The State Water Board did not withhold email attachments or any other information based on an assertion of privilege.

2. Additional Requests for Public Records, Categories A through D.

Your letter requests documents that you have described in four categories: A, B, C, and D, which are addressed in turn.

Category A:

Documents requested in Category A are documents referenced in e-mail produced by the Board to Mr. Porgans, including documents attached to the produced e-mail. I responded to your requests for these documents by e-mail dated January 4, 2018. As described in my January 4 e-mail, the State Water Board had already provided two of the attachments that you specifically requested as Category A, Nos. 1 and 5, in the production of documents to Mr. Porgans on December 18, 2017. I attached to the January 4 e-mail the zip-file productions that were made to Mr. Porgans on October 18, 2017, and December 18, 2017, respectively, which include the requested documents. I also attached to the January 4 e-mail, an e-mail dated September 21, 2016, that I located in a search conducted in response to your request under Category A, No. 2. The September 21 e-mail fits the search criteria that I used in responding to Mr. Porgans' initial request. Because the recipient of the original e-mail was subject to a 90-day e-mail retention policy, however, this e-mail was only preserved because it had been forwarded to another staff person subject to a longer retention period. Because the forwarded e-mail was an internal

communication, the September 21 e-mail was not identified by the first two searches that I conducted. Attached to the September 21 e-mail is the document that you requested as Category A, No. 2. By e-mail dated January 5, 2018, you requested that this document be provided to you in Word format with track changes by author available. The State Water Board is not in possession of the document that you requested as Category A, No. 2, in Word format. To my knowledge based on the searches that I have conducted, the Board's only copy of this document is in PDF format as attached to the September 21 e-mail.

With the exception of the September 21 e-mail, which was not included in the prior productions due to e-mail search limitations, the State Water Board has provided a timely and complete response to Mr. Porgans' request for "ex parte" correspondence between DWR and the State Water Board. Contrary to your assertion, any additional Category A documents that may be in the State Water Board's possession have not been improperly withheld and are not overdue.

In Category A, Nos. 3 and 4 you request "visuals" referenced in a June 21, 2016 e-mail and "modeling or any other graphics, written materials, visual or audio materials, or other representations that were presented at this [June 10, 2016] meeting or as a follow up to the meeting." (Letter from Mr. Brodsky, December 28, 2017, pp. 6-7.) I have identified one document that is responsive to this portion of your request, attached with this letter. Passcode information has been redacted pursuant to the balancing test under Government Code section 6255. I have determined that redaction of this information outweighs the public's interest in disclosure by protecting confidential teleconference passcodes that are not probative to the substance of the communication and are in addition to other unique meeting identifiers. I am in the process of confirming that there are no additional documents in the possession of the State Water Board that are responsive to this portion of your request.

Category B:

Documents requested in Category B are documents exchanged with "Petitioner" after October 30, 2015 in relation to "ex parte meetings." You have defined "Petitioner" to include "any employee, contractor, or individual or entity acting on behalf of or at the behest of USBR, the Department of the Interior, any other agency or instrumentality of the United States, DWR, the California Resources Agency, or any other agency or instrumentality of the State of California, or any state or federal water contractor." State Water Board staff will construe "ex parte meetings" for purposes of your request to include any meeting between State Water Board members or staff and any of the parties or entities within your definition of "Petitioner" that was related to the WaterFix Project and that was conducted without notice to all hearing participants.

I am in the process of searching hard copy and electronic files for documents that are responsive to this request. To the extent that you have requested notes taken by State Water Board legal staff, some of those notes may be subject to exemption from disclosure pursuant to the privilege for attorney work product. A determination as to applicable privileges will be made upon review of particular documents in the course of the search by State Water Board staff, and you will be notified if any documents are withheld based on the assertion of any privilege.

Category C:

Documents requested in Category C are described as "any and all material exchanged ex parte after October 30, 2015, between Hearing Team members or other Board personnel and Petitioner in connection with the WaterFix change petition or WaterFix Project." State Water Board staff will construe "ex parte meetings" for purposes of your request to include any

meeting between State Water Board members or staff and any of the parties or entities within your definition of "Petitioner" that was related to the WaterFix Project and that was conducted without notice to all hearing participants.

Category C documents present a particular challenge to identify because of the broad scope of the request. Your definition of Petitioner includes a large number of entities (there are more than 250 federal water contractors, for example). For purposes of conducting an e-mail archive search that is reasonable in scope and can be conducted within a reasonable period of time, I propose that we identify particular domain names that will be searched for in the "To" and "From" fields.

Category D:

In Category D you request documents that contain identifying information for web-based or phone-based conferences with Petitioners, as you have defined the term, about the WaterFix Project after October 30, 2015; documents that indicate whether or not these conferences were recorded; and any audio, video, or transcript recordings of these or any in-person meetings.

I have located documents that may be responsive to the first portion of your request, including identifying conference numbers that were redacted from the documents disclosed to Mr. Porgans. Based on my search to date, I have not located any audio or visual recordings, or transcripts, of meetings with Petitioners, as you have defined the term, about the WaterFix Project after October 30, 2015.

3. State Water Board's Production of Documents

You have asked that the State Water Board's response to your request for documents be expedited given the impending January 18, 2018 start of Part 2 of the hearing. The State Water Board intends to disclose documents to you on a rolling basis so as to expedite the production. Board staff will prioritize the production of responsive documents that have not previously been produced and that can be identified at this time, and will produce those documents to you by January 15, 2018, while simultaneously conferring with you regarding search parameters for an e-mail archive search. I will provide an estimate to you of the time to complete production of documents from the e-mail search based on the number of "hits" returned from the search. If a large number of documents are returned, and the search cannot be further narrowed, the State Water Board will provide responsive documents on a rolling basis as necessary until the production is complete.

4. Ex Parte Concerns Regarding CEQA Meetings with DWR.

In your letter, you allege that meetings occurred between State Water Board staff and staff or consultants of DWR that constituted ex parte communications prohibited by the APA. These meetings between State Water Board staff and DWR were solely related to the adequacy of the Environmental Impact Report (EIR) for the WaterFix Project for which the State Water Board is a responsible agency under the California Environmental Quality Act (CEQA). Under CEQA, the Board is obligated to ensure that the environmental documentation prepared for any project for which the Board is a responsible agency fully discloses potential environmental impacts to resources within the Board's jurisdiction and is otherwise adequate to support the State Water Board's decision regarding the project. The subject matter of these meetings was restricted to factual and legal matters related to the EIR. To the extent that any underlying factual information discussed during the meetings may be related to any controversial matter within the

scope of the hearing for the change petition for the WaterFix Project, State Water Board staff did not share this information with any member of the State Water Board.

California Environmental Quality Act:

CEQA requires environmental analysis of discretionary projects proposed to be carried out or approved by public agencies. (Pub. Resources Code, § 21080, subd. (a); *City of Sacramento v. State Water Res. Control Bd.*, 2 Cal.App.4th 960, 969–70, as modified (Feb. 14, 1992).) The underlying purpose of the act is “to compel government at all levels to make decisions with environmental consequences in mind.” (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.)

The lead agency under CEQA must consult with responsible agencies in preparing the required environmental documentation. (See, e.g., § 15086.) A responsible agency must advise the lead agency of any significant environmental effects that it has identified, “to assist the lead agency in preparing adequate environmental documents for the project. By this means, the responsible agency will ensure that the documents it will use will comply with CEQA.” (*Id.*; 15096) If a responsible agency believes that the final EIR prepared by the lead agency is not adequate for use by the responsible agency, the responsible agency must either take the issue to court, be deemed to have waived any objection to the adequacy of the EIR, prepare a subsequent EIR if permissible, or assume the lead agency role. (14 Cal. Code Regs. § 15096, subd. (e).)

State Water Board staff commented by letter dated July 29, 2014, on the draft EIR for the WaterFix Project, recommending to DWR that the scenarios in the draft EIR include a broader range of Delta outflows because of the “significant information supporting the need for more Delta outflow for the protection of aquatic resources ...” (SWRCB Comment Letter, July 29, 2014, Comment No. 10.) In its comment letter on the recirculated draft EIR dated October 30, 2015, State Water Board staff reiterated their request for evaluation of a scenario in the EIR that increases Delta outflows without impacting cold water pools. Because of the limited time for scenario analysis, this scenario was not optimized or developed into an alternative in the recirculated draft EIR. (SWRCB Comment Letter, October 30, 2015, p. 2.) If DWR had left this matter unaddressed, the lack of an increased Delta outflow scenario may have required the Board to take court action or assume the lead agency role for failure of the project proponents to prepare adequate environmental documentation. Instead, the DWR opted to continue the consultation process with the State Water Board, and “coordinated with SWRCB staff to include additional analysis that is relevant to the Water Board considerations of the proposed project ... see Appendix 5E of the Final EIR/EIS.” (Response to Comments, 1741-1.)

State Water Board staff met with representatives of DWR after October 30, 2015, solely for the purpose of developing an increased Delta outflow scenario to ensure that an adequate high outflow scenario was included in the environmental documentation for the project. This type of iterative consultation and comment amongst agencies is precisely the process contemplated by CEQA to develop a thorough analysis of environmental impacts to inform discretionary decision-making. Furthermore, the content and adequacy of the EIR is not at issue in the hearing on the petitions for change for the WaterFix Project. (See, e.g., Procedural Ruling Letter, August 31, 2017.) To the extent that these meetings involved discussions about the adequacy of the scenarios analyzed in the EIR for purposes of CEQA, or the parameters of a higher outflow scenario necessary to satisfy the requirements of CEQA, the legal issues are not within the scope of the hearing.

Administrative Procedures Act

The APA prohibits direct or indirect communications to the hearing officer or other State Water Board members regarding any substantive or controversial procedural issues in an adjudicative proceeding without notice and opportunity for all parties to participate in the communication. Staff who advise the board are not generally subject to the prohibition. (See Question 17, Ex Parte Questions and Answers, April 25, 2013; Gov. Code § 11425.40; *Porter County Chap., Izaak Walton League v. Nuclear Regulatory Comm.*, (1979) 606 F.2d 1363, 1371.) Staff may not, however, function as an indirect conduit for ex parte communications by passing along information obtained from a communication that would have been an ex parte communication under the APA if a board member had been present. For this reason, it is the usual practice of the State Water Board to avoid any communications between parties and staff advising the Board that would constitute ex parte communications if a board member were present. This approach ensures that staff do not inadvertently relay information to Board Members that is outside of the record for the adjudicative proceeding. This precaution is not, however, legally required.

In this instance, State Water Board staff participated in meetings with representatives from DWR for the limited purpose of addressing gaps in the environmental documentation. The limited scope of the meetings is evidenced in the documents that were produced to Mr. Porgans. As you noted in your letter, in an e-mail dated April 11, 2016, from Mr. John Gerlach to staff of DWR, Mr. Gerlach questions the modelling that Petitioners will rely on for their case-in-chief. In response to Mr. Gerlach's request, Ms. Dana Heinrich, senior staff counsel for the State Water Board, sets the clear boundary that "we should limit our discussion to the modeling for the CEQA analysis." (E-mail from D. Heinrich, April 11, 2016.) State Water Board staff were not aware until DWR submitted its written testimony in Part 1A of the hearing, that DWR had defined a higher outflow end-point of the operational range to be presented to the Board (Boundary 2) based in part on an operational scenario requested by State Water Board staff to be included in the EIR (Scenario 2). State Water Board staff did not advise DWR to include Boundary 2 in its case-in-chief, nor did staff advise DWR in any other respect regarding the presentation of evidence during the hearing. State Water Board staff also did not advise DWR to revise Appendix 5E of the EIR to include Boundary 1 and Boundary 2; in fact, State Water Board staff requested that DWR edit Appendix 5E to clarify that Boundary 1 and Boundary 2 are operational scenarios developed by DWR that are distinct from State Water Board staff's request for modelling and analysis of Scenario 2.

The Office of Chief Counsel will continue to monitor whether any of the documents identified and produced in response to your request for public records indicate that any unlawful ex parte communication has occurred. Based on statements of State Water Board staff who participated in these meetings and the documents produced to date, it is my conclusion that staff have exercised due care to avoid inadvertent indirect ex parte communications as a result of the meetings, which were conducted for the sole purpose of producing an adequate environmental impact analysis, and there is no evidence that any ex parte communication with a member of the State Water Board has actually occurred.

If you have any questions in the meantime or require further information, please contact me at (916) 322-4142 or at nicole.kuenzi@waterboards.ca.gov.

Best Regards,

/s/ Nicole L. Kuenzi

Nicole L. Kuenzi
Attorney
State Water Resources Control Board