



Santa Clara Valley Water District

File No.: 18-0683

Agenda Date: 8/28/2018

Item No.: 10.1.

BOARD AGENDA MEMORANDUM

SUBJECT:

Consideration of Waiver of Attorney-Client Privilege as to Records Requested by Auditor for the Lower Silver Creek Flood Protection Project Audit.

RECOMMENDATION:

- A. Consider waiving the attorney-client privilege as to the April 2011 Memorandum from Senior Assistant District Counsel Leslie Orta to Marc Klemencic (former COO Watersheds); and
- B. Consider whether waiver of attorney-client privilege as to the 2015 fact-finding report related to contracting issues from Mike Moye, Esq, is appropriate and provide direction to staff.

SUMMARY:

The Santa Clara Valley Water District (District) retained PMA Consultants LLC (PMA) to perform auditing services of the Lower Silver Creek Flood Protection Project, Consultant Agreement (A32776) with [the former] RMC Water and Environment. On February 27, 2018, the District's Board of Directors considered and approved the Board Audit Committee's recommendation to expand the scope of the Lower Silver Creek Flood Protection Performance Audit (Audit) to include, among other things, a review of the media allegations in newspaper reports and video to ensure they have been addressed. The approved Audit specifically included review of the Firewall Process as a task.

Moving forward with the revised audit, PMA has formally requested the following records from the District Counsel's Office:

- (1) A copy of any 'Firewall Memorandum relating to Melanie Richardson; and
- (2) The report prepared by Mike Moye, Esq., formerly of the law firm Hanson Bridget regarding its investigation of allegations of ethical violations, conflict of interest, and corruption surrounding the District's dealings with RMC Water and Environment Incorporated (fact finding investigation).

Each of these records is subject to the Attorney-Client privilege.

'Firewall' Memorandum

The "Firewall Memorandum," was written as conflict of interest advice from Senior Assistant District Counsel Leslie Orta to former Chief Operating Officer, Watersheds, Marc Klemencic regarding

Melanie Richardson in her role as Deputy Operating Officer of the Watershed Capital Projects Division. This memorandum was issued in April 2011 as a confidential communication to a client with legal advice regarding conflict of interest issues, and the memorandum was designated as "Confidential Attorney/Client Communication."

Because the Board approved a contract with PMA that specifically included review of the Firewall Process as a task, it would appear consistent for the attorney-client privilege to be waived specially as to this matter. On that basis, this office recommends waiver of the attorney-client privilege and release of the April 2011 Orta memorandum to PMA.

Mike Moye/Hanson Bridgett Fact-finding Report

With regards to the second document, at the prior request of the Board, the District Counsel's Office retained outside counsel, Michael Moye (formerly of Hanson Bridgett), to conduct fact finding investigation. Mr. Moye was retained to use his legal expertise to conduct a fact-finding investigation that could be relied upon by the District Counsel's Office to provide advice to the Board of Directors. Mr. Moye's report was communicated to the District Counsel's Office as a confidential attorney-client communication, bore a prominent designation that it was a confidential attorney-client communication, and has not been disclosed to any third parties. At the Board's regular open public meeting of December 8, 2015, the District Counsel's Office reported the results of that fact-finding investigation.

The Moye report includes the names of witnesses, the accused, and the complainant. PMA has indicated that the District Counsel's Office may redact the identity of the complainant before disclosure, so his/her identity can be protected, and said redaction will not impede the auditor's ability to complete its task.

Unlike the so-called "Firewall Memorandum," the work performed by outside counsel was not specially included by the Board as an approved Audit task. Thus, it cannot be said that waiver of the attorney-client privilege would be consistent with prior Board direction. On that basis, this office cannot recommend waiver of the privilege.

The Board is the Holder of the Privilege

While the request for records was directed from PMA to the District Counsel's Office, the client, and not the attorney, is the holder of the attorney-client privilege. (Cal. Evidence Code sec. 953.) Legal counsel for a governmental entity such as the District represents the entity itself, acting through its highest officer, body, or constituent, with respect to the matter in question. (Cal. Rules of Prof. Conduct 3-600(A).) In this case, the highest body is the full Board of Directors, so it is the full Board that holds the privilege as client.

While the Board has retained PMA to conduct the audit, because the Orta memorandum and Moye report are subject to the attorney-client privilege, the District Counsel's Office can only provide them to PMA upon a formal waiver of the attorney-client privilege by the District's Board. Consequently, the Board is asked to consider whether or not to waive attorney-client privilege and allow the release

of one or both of the requested documents to PMA in its role as auditor for the Lower Silver Creek project.

FINANCIAL IMPACT:

There is no financial impact associated with this item.

CEQA:

The recommended action is a ministerial action and thus is not subject to the requirements of CEQA.

ATTACHMENTS:

None.

UNCLASSIFIED MANAGER:

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