

February 11, 2014

Mary Casey, General Counsel  
Marin Municipal Water District  
220 Nellen Avenue  
Corte Madera, CA 94925-1169

Re: Your Request for Informal Assistance  
**Our File No. I-14-007**

Dear Ms. Casey:

This letter responds to your request for advice regarding conflict of interest restrictions that may apply to Marin Municipal Water District (“MMWD”) Director Cynthia Koehler relating to her duties as MMWD Director and her private employment as a consultant to the Trust for Conservation Innovation (“TCI”).

Please note that we only provide advice under the Political Reform Act (the “Act”)<sup>1</sup> and, effective January 1, 2014, Section 1090. We do not provide advice on other conflict of interest restrictions, if any, that may apply, including common law conflicts of interest.

Since you ask only general questions about potential government decisions that could pose conflict of interest issues under the Act and Section 1090, we offer only informal assistance. For purposes of the Act, informal assistance does not provide the requestor with the immunity set forth in Sections 83114(a) or (b). (See Regulation 18329(b)(8)(C) and (c)(1) and (3).) Also, for purposes of Section 1090, because your request does not provide specific information regarding a government contract and Director Koehler’s possible financial interest in the contract, we do not deem this letter to meet the requirements for showing good faith conduct to permit the requester to offer the letter into evidence in a Commission enforcement proceeding or criminal prosecution regarding Section 1090. (See Section 1097.1(c)(5).)

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## QUESTIONS

1. If the MMWD becomes a partner in TCI's WaterNow Project ("Project"), may Director Koehler participate in any aspects of the Project?
2. Alternatively, what, if any, limitations apply to Director Koehler?

## CONCLUSIONS

1. and 2. As explained in detail below, for purposes of the Act in Section 87100, Director Koehler has an interest in TCI if it is a source of income to her of \$500 or more during the 12 months before she participates in a government decision. Thus, under Section 87100, in those circumstances she may not make, participate in making, or use her official position to influence that government decision if it will have a reasonably foreseeable material financial effect on TCI. Since your questions do not involve specific government decisions at this point and therefore do not provide sufficient facts for us to make these determinations, we only provide you with general analytical guidelines Director Koehler must follow in the event it becomes possible that a government decision in which she may participate will have a reasonably foreseeable material financial effect on TCI.

As also explained below, Section 1090 generally prohibits a public official from participating in making a government contract in which he or she is financially interested. In addition, unless a "noninterest" or "remote interest" exception under Section 1090 applies, when an official who is financially interested in a contract is a member of a government body that is making the contract, the entire body is prohibited from making that contract even if the financially interested member disqualifies himself or herself from participation in the contract process. However, since there are no government contracts pending before the MMWD at this time that are pertinent to your questions, as with the Act's conflict of interest analysis above, we can only provide you with general information that Director Koehler can follow to determine whether she is financially interested in a contract and her, as well as MMWD's, duties if she is.

## FACTS

You are the General Counsel for the MMWD and ask for advice on the authority of Director Koehler. The MMWD is a government agency and Director Koehler is a member of the MMWD board, which consists of a total of five members representing specified geographical areas within the MMWD's jurisdiction.

Director Koehler is also a consultant with TCI, a California nonprofit public benefit corporation. She acts as a consultant to TCI for the WaterNow Project, and TCI is a source of income to her. TCI is a nonprofit organization that helps environmental leaders fulfill their visions by providing nonprofit status and fiscal sponsorship services for innovative conservation projects. In exchange for tax-exempt nonprofit status and access to TCI's financial, administrative, grant management and human resources services, projects pay TCI 8% of the

revenue they generate (12% of revenue from government or international sources). In 2013, TCI's annual revenue was approximately \$5.7 million.

TCI's WaterNow Project (Project) has a number of objectives, including but not limited to the (1) promotion of sustainable water projects leading to a resilient and secure water future in the face of climate change, (2) demonstration of the viability of the benefits of urban water reuse, including but not limited to the installation of graywater systems, (3) design and implementation of pilot programs at the community level that leverage federal, state and other resources for sustainable water solutions and (4) development of these pilot efforts to provide measurable and replicable results in collaboration with business, water utilities and community leaders. The Project is working with multiple public agencies in Marin County, including but not limited to, the County of Marin, local cities and other special districts to help promote water conserving technologies. Public agency partnerships with the Project could include agreements on joint pilot programs, direct funding of contributions for pilot programs, commitments of staff time and resources to pursue and obtain outside funding sources for joint projects, promotion of the Project on agency websites and staff participation in joint projects.

In light of Director Koehler's position on the MMWD Board, TCI has not, and does not plan to, seek or accept funding from MMWD for the Project. It is not anticipated that MMWD's involvement in the Project would require MMWD Board action other than in limited circumstances. Nevertheless Director Koehler intends to recuse herself should an occasion for such action arises. At the same time, MMWD is a logical partner for the Project's efforts in Marin County in light of its commitment to conserving water and its interest in graywater and other conservation projects. A question arises as to whether and how Director Koehler can participate in the Project in keeping with the requirements of the Act and Section 1090 if MMWD becomes one of the Project partners in Marin County. Director Koehler is interested in understanding the parameters of her ability to participate in work on the Project if MMWD becomes involved as a Project partner engaged in the activities described above. Alternatively, she is interested in knowing what, if any, limitations there are on the types of activities in which MMWD could participate as part of the Project, in light of her dual roles on the MMWD Board and as a TCI consultant.

## **ANALYSIS**

### **Conflicts of Interest under the Act**

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has an interest specified in Section 87103. A public official has a "financial interest" in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given government decision. (See Regulations 18700 - 18709.) Below, we apply each of these steps to

the general facts provided on behalf of Director Koehler and, where there are insufficient facts to provide an analysis, provide general guidance on issues that may arise for her.

**Step 1 - Is the individual a public official? (Section 87100; Regulation 18700(b)(1).)**

The MMWD is a local government agency (see Sections 82003 and 82041) and, as a board member for the MMWD, Director Koehler is a public official (see Section 82048(a)) and thus subject to the Act's conflict of interest provisions in Section 87100.

**Step 2 - Will the public official be making, participating in making, or using his or her official position to attempt to influence a government decision? (Section 87100; Regulation 18700(b)(2).)**

As stated above, a public official is subject to the Act's conflict of interest rule in Section 87100 if he or she makes, participates in making, or uses his or her official position to attempt to influence a government decision.

Under Regulation 18702.1, an official "makes" a government decision when he or she, among other things, votes on a matter, enters into a contract on behalf of his or her agency, or obligates or commits his or her agency to any course of action. (Regulation 18702.1(a).) Under Regulation 18702.2, an official "participates" in a government decision when, generally, he or she negotiates, without significant substantive review, regarding a government decision, or advises or makes recommendations to the decisionmaker directly or without significant substantive review. (Regulation 18702.1(a) and (b).) Under Regulation 18702.3, an official "uses his or her official position to influence" a government decision when he or she contacts, appears before or otherwise attempts to influence a member, officer, employee or consultant of the official's own agency or, when appearing before another government agency, the official acts or purports to act on behalf of his or her own agency. (Regulation 18702.3(a) and (b).)

You indicate the following regarding whether the MMWD, or Director Koehler in her official capacity, may in the future be presented with issues relating to TCI: (1) That TCI has not, and does not plan to, seek or accept funding from the MMWD for the Project; (2) That it is not anticipated that the MMWD involvement in the Project would require the MMWD Board action other than in limited circumstances; (3) That the MMWD is a logical partner for the Project's efforts in Marin County in light of its commitment to conserving water and its interest in graywater and other conservation projects; and (4) That Director Koehler intends to recuse herself should an occasion for board action arise. Thus, although it appears that issues relating to TCI could come before the MMWD board, Director Koehler would recuse herself from participating in such a matter.

Assuming that Director Koehler would disqualify herself from making, participating in making, or attempting to influence decisions having a reasonably foreseeable material financial effect on TCI before not only the MMWD board but also before the MMWD staff or other government agencies as described in Regulations 18702.1 – 18702.3, she would not have a

conflict of interest under the Act. However, below we continue an explanation of the additional steps in the conflict analysis so that she is able to determine whether a particular government decision would have a “reasonably foreseeable material financial effect” on TCI.

**Step 3 – Identify the public official’s interests that may be affected by the government decision. (Sections 87100 and 87103; Regulation 18700(b)(3).)**

Section 87103 sets forth several types of interests held by a public official that, when affected by a government decision, may expose the official to a possible conflict of interest. As pertinent to the facts you present, the interest at issue would be that TCI is a source of income to Director Koehler. Specifically, Section 87103(c) provides that, for purposes of Section 87100, an official has an interest in any source of income of \$500 or more provided or promised to, or received by the official during any 12-month period prior to the official’s participation in a government decision. Since TCI presumably would be a source of income to Director Koehler of \$500 or more in any 12-month period, TCI would be an interest for her under Section 87100.<sup>2</sup>

**Steps 4, 5 and 6 – Is the public official’s interest directly or indirectly involved in the government decision (Sections 87100 and 87103; Regulation 18700(b)(4)) and is it reasonably foreseeable that the decision will have a material financial effect on that interest (Sections 87100 and 87103; Regulation 18700(b)(4), (5) and (6)).**

As mentioned above, an official does not have a conflict of interest under the Act unless the government decision in which he or she participates has a “reasonably foreseeable material financial effect” on his or her interests. (Sections 87100 and 87103.) Steps 4, 5, and 6 assist in making this determination by first classifying the government decision in issue as “directly” or “indirectly” involving the official’s interest and, based on that classification, determining whether it is “reasonably foreseeable” that the decision’s financial effect on the official’s interest is “material.”

Under Regulation 18704.1, when the public official’s interest is a source of income, such as TCI, the source is deemed “directly” involved in the government decision when it either initiates a proceeding before the agency by filing an application, claim, appeal, or similar request or is a named party or the subject of the decision. (See Regulation 18704.1(a).) For example, if TCI initiated or was the subject of a contract with the government agency, TCI would be “directly” involved in the government decision and the analysis in Step 5 below would be the level of “materiality” the government decision must have for directly involved entities.

However, under Regulation 18704(a), when an official’s interest is not “directly” involved in the decision it is deemed “indirectly” involved and the analysis under Step 5 below would be the level of “materiality” the government decision must have for indirectly involved entities. For example, if TCI is not directly involved in a particular agency decision but it is

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<sup>2</sup> Five other types of financial interests that could expose a public official to a conflict of interest under Section 87100 are set forth in Section 87103 and explained in more detail in Regulations 18703 – 18703.5. Since none of these other interests are raised by your question, we do not address them here.

foreseeable (see discussion of Step 6) that it will financially benefit from the agency's decision, the indirect analysis for "materiality" will apply.

Under Step 5, when an official's source of income is "directly" involved in a government decision, the decision is deemed to have a "material" financial effect when it is reasonably foreseeable that the decision will have any financial effect on that source. (Regulations 18705(a)(3) and 18705.3(a).) Thus, even a one-penny effect on a "directly" involved source of income is "material" for purposes of this analysis. If, however, the source of income is "indirectly" involved in the government decision and the source of income, like TCI, is a nonprofit entity, whether the decision's effect is "material" depends on the annual gross receipts of the entity and the effect of the government decision on those receipts, the entity's expenses, or the value of the entity's assets or liabilities. (See Regulation 18705.3(b)(2).) You indicate that, for 2013, TCIs annual revenue was \$5.7 million. Therefore, we would apply the materiality standard in our regulations applicable when a nonprofit entity's annual gross receipts are more than \$1,000,000 and up to \$10,000,000. (Regulation 18705.3(b)(2)(D).) Under those provisions, the government decision is only considered "material" if it affects (favorably or unfavorably) the entity's fiscal year gross receipts by \$100,000 or more, the entity's fiscal year expenses by \$25,000 or more, or the value of the entity's assets or liabilities by \$100,000 or more. (Regulation 18705.3(b)(2)(D).)

If it is determined that a government decision may, based on the discussion above, have a "material" financial effect on TCI, the next step in the analysis (Step 6) is to determine whether that effect is "reasonably foreseeable." (Regulation 18700(b)(6).) For a government decision to have a "reasonably foreseeable" material financial effect on an official's interest, the effect need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.) Obviously, since, as mentioned above, there is no government decision pending at this point, we cannot make this determination.

**Steps 7 and 8 -- "Public Generally" and "Legally Required Participation" (Regulation 18700(b)(7) and (8)).**

These last two parts of the conflict of interest analysis under the Act are essentially exceptions that would be analyzed if it is found that Director Koehler has a conflict of interest. If, in the future, she believes she may have a conflict of interest, you can, of course, write for additional advice and we can determine whether either of these exceptions applies.

**Manner of Disqualification**

Section 87105, as interpreted in Regulation 18702.5, sets forth the manner in which a public official who sits on a public body whose members file Statements of Economic Interests under Section 87200 and who has a Section 87100 conflict of interest must disqualify him or herself when the matter comes before the official at a public meeting of the body held pursuant to either the Bagley-Keene Act (Section 11120 et seq.) or Brown Act (Section 54950 et seq.).

These provisions require the official to publicly identify his or her financial interest, disqualify him- or herself from participating in the matter, and leave the room during any discussion of the matter.

Although members of the MMWD are not specifically listed in Section 87200, that section does include “other public officials who manage public investments.” Regulation 18701(b)(1)(A) states:

“(b) For purposes of Government Code section 87200, the following definitions apply:

“(1) “Other public officials who manage public investments” means:

“(A) Members of boards and commissions, including pension and retirement boards and commissions, or committees thereof, who exercise responsibility for the management of public investments;”

Regulation 18701 (b)(2) provides that “‘public investments’ means the investment of public moneys in real estate, securities, or other economic interests for the production of revenue or other financial return.”

Therefore, to the extent that directors of the MMWD meet the definition of “other public officials who manage public investments” and thus are required to file their Statements of Economic Interests under Section 87200, Director Koehler must follow the disqualification rules set forth in Section 87105 and Regulation 18702.5 if she has a conflict of interest under Section 87100 in a matter that comes before the MMWD at a public meeting subject to the Brown Act (Section 54950 et seq.).

### **Conclusion – Political Reform Act Conflicts**

For purposes of the Act, Director Koehler has an interest in TCI if it is a source of income to her of \$500 or more during the 12 months before she participates in any type of government decision. In those circumstances she may not make, participate in making, or use her official position to influence that government decision if it will have a reasonably foreseeable material financial effect on TCI, as explained above. If she is required to disqualify herself at a public meeting of the MMWD, she must follow the procedures set forth under “Manner of Disqualification” above.

### **Application of Section 1090**

As stated above, since there are no government contracts pending at this time before the MMWD or other government agencies in which Director Koehler may have a financial interest, we can only provide you with general information that Director Koehler can follow to determine whether she has an issue under Section 1090 and her, as well as MMWD’s, duties if she does.

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Although Section 1090 nowhere specifically defines the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call, supra*, 38 Cal.3d at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Furthermore, Section 1090 applies to officials who participate in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft, supra* at p. 569.) Notably in relation to a public body such as the MMWD, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen 49 (2006).)

Thus, if a particular contract comes before the MMWD, or if a contract is before some other government agency, in which TCI is involved, Director Koehler will have to seek advice on whether she has a financial interest in the contract and to what extent, if any, she can participate in the making of the contract. Also, on contracts before the MMWD, unless an exception applies (see “noninterest” exceptions (Section 1091.5) and “remote interest” exceptions (Section 1091)), if Director Koehler is financially interested in a contract, the entire body is prohibited from making the contract regardless of whether Director Koehler disqualifies herself from participation in making the contract.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Scott Hallabrin  
Counsel, Legal Division

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