


CITY OF LOS ANGELES
INTER-DEPARTMENTAL CORRESPONDENCE

Date: May 31, 2016

To: Honorable Council President Herb J. Wesson, Jr.
Rules, Elections, Intergovernmental Relations and Neighborhoods
Committee

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Subject: **DEPARTMENT OF WATER AND POWER – GOVERNANCE REFORM
(C.F. 16-0093) – REPORT ON THE ROLE OF THE OFFICE OF PUBLIC
ACCOUNTABILITY**

SUMMARY

On April 13, 2016, the Rules, Elections, Intergovernmental Relations, and Neighborhoods Committee (Committee) considered the City Administrative Officer (CAO)/Chief Legislative Analyst (CLA) report (C.F. 16-0093) on governance reform options for the Department of Water and Power (DWP) dated April 5, 2016. The Committee instructed the CAO and CLA to report on several issues presented in the April 5, 2016 report. To facilitate the discussion, the CAO and CLA have prepared a series of reports, organized to align with the chapters presented in the April 5, 2016 report. Where applicable, other departments have participated in the development of this report.

The Committee instructed the CAO and CLA to report on options for strengthening the Office of Public Accountability (OPA) as outlined in the April 5, 2016 report. The Committee also requested an outline of the general steps necessary for implementation of the proposed changes. Pursuant to a request from Councilmember Fuentes, the CAO and CLA were also instructed to provide an analysis of the option of instituting an ex-officio role for the Ratepayer Advocate (RPA) on the DWP Board of Commissioners (DWP Board). The Committee also instructed the OPA to provide recommendations for making the Office more effective and efficient. The CAO, CLA, and OPA worked jointly on the following report, incorporating recommendations and comments provided by our three Offices.

This report addresses the role of the OPA. Pursuant to the instructions provided by the Committee, this report groups the requested analysis under the three areas for reform provided in the April 5, 2016 report as follows: (1) access to information; (2) Office resources

and hiring; and (3) the adoption of a reappointment process for the Executive Director of the OPA/RPA. Recommendations for improvements in these three areas are provided below.

Access to Information

Since the inception of the Office in 2012, the OPA has faced challenges in receiving timely information from DWP. Currently, the OPA's information requests are made pursuant to a system established by the DWP for use during the rate review process. Now that this process has concluded, the OPA does not believe this system will always allow the Office to provide timely advice to the DWP Board. It is important to note that within the last year, more than 90 percent of the OPA's requests have been fulfilled in a timely manner. However, this has largely been accomplished through support from the current General Manager. To ensure the OPA's access to necessary departmental information in subsequent administrations, our Offices recommend the City Council adopt reinforced ordinance language favoring "books and records" access. This would not provide the OPA with unfettered access to DWP's records nor would it circumvent the attorney client and work product privileges. As discussed further below, it should be noted that the CAO and CLA do have a concern with this approach.

Office Resources and Hiring

Currently, the OPA is authorized for seven staff positions but has only filled four. The OPA has not increased filled positions for two reasons: (1) the current budget, set at the minimum required by Charter, only provides sufficient funding for the costs of the Office's currently filled positions, and (2) the OPA does not have authority to fill vacancies with civil service exempt positions. Therefore, the OPA proposes coupling increases in filled positions with increases to their budget. Also, providing the OPA with additional civil service exempt positions will provide the OPA with added flexibility in filling vacancies. Our Offices recommend that the OPA, with assistance from the CAO, be instructed to prepare a hiring plan and a request for additional civil service exempt positions. Finally, the CAO and CLA recommend the utilization of some civil service filled positions by the OPA as a means of ensuring institutional knowledge.

Reappointment of the Ratepayer Advocate (RPA)

Neither the Charter nor the Administrative Code provide a mechanism for reappointment of the RPA beyond one five-year term. The current one term limit raises the potential for disruptions to operational continuity. This point is especially salient in light of the performance metrics required by the new rate ordinances. Our Offices concur that further defining the term of the RPA and instituting a process for reappointment will avoid or reduce potential disruptions to the functions of the OPA and will further the vision embodied in the electorate's approval of Charter Amendment I. Our Offices recommend the establishment of two, five-year terms, as a limit for the RPA, and the adoption of a reappointment process initiating with those entities responsible for convening the citizens' commission.

Ex-Officio Status

Lastly, our Offices do not support the establishment of an ex-officio type role for the RPA on the DWP Board. The creation of such a position will threaten the OPA's obligation to provide independent analysis. Any effort to convert the OPA's advisory and reporting status to the role of a Board member risks creating ambiguity regarding the OPA's mission and the Office's independence.

DISCUSSION

In the report dated April 5, 2016, the CAO and CLA provided the City Council with an overview of three primary areas for reform of the OPA. Following the Committee's April 13, 2016 instructions, the CAO and CLA conferred with the OPA to jointly evaluate options within these areas of reform. The options presented below are aimed at providing stability, strength, and operational continuity to the OPA.

Regarding the challenges highlighted in the 2015 Industrial, Economic, and Administrative (IEA) Survey, the OPA disagrees with Navigant Consulting's assessment of the challenges facing the Office. As discussed in the previous CAO/CLA report, the 2015 IEA Survey identified the "ambiguous role" of the OPA as a governance challenge facing DWP. Navigant noted that while the City's intent was for the OPA to function in an independent advisory role, the OPA's reporting line weakens its independence. The OPA believes Navigant failed to consider the Office's implementing ordinance, Administrative Code Section 23.144, which gives specificity to the Office's responsibilities and reduces any ambiguity in the OPA's role. Further, the OPA has indicated it has never felt its independence to be compromised.

However, the OPA has identified challenges experienced by the Office and recommends improvements in two general areas (1) access to information and (2) office resources and hiring. The CAO and CLA concur with the OPA's recommended areas for reform and provided preliminary comments on reform in these areas in the earlier report to the Committee. The April 5, 2016 CAO/CLA report identified three areas for reform (1) access to information; (2) office resources and hiring; and (3) the adoption of a reappointment process for the Executive Director of the Office of Public Accountability/Ratepayer Advocate (RPA). Recommendations for improvements in these three areas are provided below. In addition, we have provided an analysis of the option of instituting an ex-officio role for the RPA on the DWP Board.

Areas for Reform

Access to Information

Pursuant to Administrative Code Section 23.144(c), the OPA provides reports/information to the DWP Board, the City Council, the Mayor, the Neighborhood Councils, and the public on (1) the reasonableness of rate actions and any modifications to them and (2) the development of DWP's long-term strategic plans (e.g., Integrated Resource Plan), the annual proposed DWP budget/policies, practices, programs, contracts, agreements, and other actions that may impact rates. The OPA has the discretion to provide recommendations on ways to improve the reasonableness and transparency of DWP's policies and rates. While the OPA must provide information and advice to the DWP Board, the Mayor, and Council, it does not make or constrain decisions, and cannot be directed by the decision-makers. Key to fulfilling the OPA's reporting and advising obligations is the Office's ability to obtain necessary information from DWP. Charter Section 683(e) states "the OPA shall have access to information to fulfill its responsibilities."

Since the inception of the Office, the OPA has faced challenges in receiving timely information from DWP. While the OPA acknowledges its access to information has improved over time, our Offices are in agreement that the OPA's credibility and the strength of its advising

obligations to the DWP Board, Mayor, City Council, Neighborhood Councils, and the public are best served by reducing barriers to access. Further, the OPA's role of providing industry specific advice and working to increase transparency could easily be undermined through limited access to information.

The OPA has indicated the Office is likely to receive information in one of five ways (1) unsolicited verbal information; (2) unsolicited documents; (3) informal discussions; (4) informal discussions which lead to the transmission of documents; and (5) written data requests. Based on discussions with the OPA, the Office has primarily faced challenges in category (5).

Currently, the OPA's information requests are made pursuant to a system established by DWP. In preparation for the July 2015 rate review process, DWP asked the OPA to work with a particular data request coordination process. This process required the OPA to submit requests to a series of primary coordinators. DWP designated primary coordinators for the Water System, Power System, CAO, Communications, Customer Service, Financial Services, and Sustainability. Following the rate review, DWP has indicated it would like to apply this data request coordination process to all information requests made by the OPA. The OPA does not believe this process will allow the Office to provide timely advice to the DWP Board. As noted above, the OPA's reporting and advising obligations extend beyond formal rate reviews. The OPA must also advise on rate impacts arising from plans, budgets, projects, programs, and contracts.

Further, the RPA also makes written data requests which are logged and tracked by the OPA's document custodian and posted on a server. The OPA has indicated that in the last year, more than 90 percent of these requests are now fulfilled in a timely manner. However, the success of the OPA's access depends, almost entirely, on the personal support of the current DWP General Manager. The remaining 10 percent of the OPA's requests present situations in which the OPA faces some barrier to access. In some instances, the RPA's requests require one or more clarifying conversations. Following such conversations, the Office often receives one of three results (1) an acceptable response that factors in burden, timing, and available information; (2) prolonged periods of no response; or (3) a good faith attempt that is non-responsive due to data access issues that can only be resolved by DWP's Controller. The OPA has also been denied access on grounds the request seeks customers' personal data. However, the Office indicates 100 percent of these requests have been resolved through the current ordinance language.

The OPA would like to ensure that they receive letters of agreement or similar material agreements with unions. There is no objection to providing them, however no routine process has been established in this area yet. Likewise, the OPA would like to ensure that the Office receives interdepartmental correspondence that may be addressed to or provided to the DWP Board, but may not be transmitted in a Board book. The OPA has been denied access on grounds of attorney client privilege, both for Board and non-Board documents. On these grounds, the OPA does not receive closed session material provided to the DWP Board. DWP has on occasion responded to requests by objecting on grounds of confidentiality, bolstered by concerns about public records requests. The OPA has indicated that all instances in which this objection has been raised, the matter has been resolved in favor of access. When public records requests are made, DWP responds to those requests seeking records sourced by

DWP. Further, the OPA has never found it necessary to disclose confidential information when performing its advising function.

Our Offices have explored several options for improving the OPA's access to necessary departmental information. The OPA would prefer a process whereby new programs or larger purchases provide early information, prior to agenda material, when possible. As for other Board transmissions, it underscores that it can best provide advice if it receives all information provided to the Board at the same time it is received by the Board. A practice of ensuring simultaneous electronic transmission to the Board and the Office, of the same information, is underway, but not much experience has been gained yet. Further, so long as executive session Board material is not reviewed by OPA, OPA will be unable to provide the Board with advice on the rate impacts of executive session decisions.

To address the OPA's concerns regarding continued use of the data request coordination process, the City Council may choose to adopt reinforced ordinance language favoring "books and records" access. The OPA does not support an ordinance detailing a formalized step by step process for requesting and obtaining information. Instead, the OPA favors an ordinance which levels the playing field for the OPA and leads to more discussions with DWP about how to provide information as opposed to whether specific information will be provided.

Books and records access serves to encourage cooperation where written requests have been made, and reasonable efforts at mediation exhausted. This allows the requesting entity to inspect business records on business premises during business hours. Books and records access does not permit the requesting entity to engage in a fishing expedition, as access is limited to business records. Site visits are generally pre-arranged and scheduled to avoid disruption to operations, comply with other rules and regulations concerning data security and privacy, and are utilized as a last resort. Thus, were the City Council to adopt an ordinance clarifying existing charter language to include books and records access, these measures would only be utilized when all other means have failed. Further, any disagreements regarding the scope and use of confidential and privileged information would continue to be resolved with assistance from the City Attorney.

Should the City Council choose to pursue an ordinance providing the OPA with books and records access, it should instruct the City Attorney, along with the CLA and OPA, to prepare an ordinance clarifying the existing Charter language so that it includes books and records access as a last resort. By "last resort," the OPA intends that the use of books and records should occur after a consultation with at least one of the General Manager, General Counsel, or Chair of the DWP Board. It should be noted that the CAO and CLA do have a concern with this approach as there is no final arbiter on whether the requested information is necessary for the OPA to fulfill their responsibilities. Therefore, should the City Council wish to pursue this option, it should instruct the CAO, CLA, and City Attorney to address the respective authority of the DWP Board and the OPA in determining the scope of a books and records ordinance. Further, any ordinance should specify a process for appealing access disputes and clearly identify an entity responsible for arbitrating such disputes. The OPA would respectfully request that the OPA and DWP General Manager also be engaged in the ordinance drafting, as well as obtaining input from the DWP Board.

Office Resources/Flexibility in Hiring

Our Offices are in agreement that reform is necessary with regard to (1) the OPA's level of staffing and budget and (2) the OPA's ability to hire exempt staff. The OPA has indicated that the Office's current staffing authorization makes it difficult to balance a review of rates with the other matters the Office is expected to analyze. Further, the OPA anticipates that the increased regular performance reporting established by the new water and power rate ordinances may require increased staffing. Providing the OPA with the necessary staff and budget will strengthen the Office's ability to fulfill its mission of seeking to improve DWP's performance through a review of rates, long term strategic planning documents, and other policies, procedures, decisions, contracts, and proposals.

Currently, the OPA is authorized for seven positions: three supervisory positions, one assistant position, and three staff positions. One of the supervisory positions (Utility Rates & Policy Specialist III) and two of the staff positions (Utility Rates & Policy Specialist I and II) are vacant. The Utility Rates & Policy Specialist I position is currently being held vacant through June 30, 2016 to offset the salary cost for a substitute position within the OPA. To increase the Office's effectiveness, the OPA could hire to capacity. The OPA has indicated that in the near future, the Office will likely grow to 7 employees to meet its reporting obligations. The OPA envisions a slow ramping up process with regard to hiring. In the short term, the OPA's primary focus is on expanding to between 6 and 8 employees, as the performance benchmarking and reporting evolves. Flexible staffing will allow the OPA to adjust as this new, ordinance-specified reporting matures.

While the Office's annual personnel authorization covers 7 employees, the OPA has not expanded to this number for two reasons: (1) the current minimum budget only provides funding for the costs of the Office's current employees and (2) the OPA does not have authorization for the desired number of exempt positions. Charter Section 683(g) provides that the OPA's budget "shall be set by ordinance at a level not less than 0.025 percent" of the DWP's annual revenues from the sale of water and power from the previous fiscal year. Administrative Code Section 23.144(d)(5) states that the OPA's budget "shall be set at a level not less than 0.025" percent of DWP's revenues from the previous fiscal year. Each year, the RPA must submit the OPA's proposed budget to the CAO (Administrative Code Section 23.144(d)(5)). The CAO then reviews the budget and submits it, with recommendations, to the Mayor and City Council. The approved budget is then forwarded to DWP to fund the OPA. For FY '15 - '16, the OPA's budget is \$2,316,836, plus \$750,000 for benchmarking and rate studies.

The OPA supports coupling increases in staffing with an increase in the authorized minimum budget from 0.025 percent to 0.05 percent of the Department's gross revenues. This level will support the costs associated with increasing the Office to between 6 and 8 employees. The primary goal in increasing the Office's minimum budget is to avoid subjecting wages to the regular budgetary process. During years requiring higher expenditures, such as those years in which rate reviews will occur, the OPA would seek additional funding through the budget process.

An increase to the OPA's minimum budget may be accomplished through a modification to Administrative Code Section 23.144(d)(5). However, the City Council may also choose to increase the threshold by modifying Charter Section 683. Increasing the minimum budget in both the Charter and Administrative Code will secure the OPA's minimum budget and reduce the possibility of the budget being diminished through future ordinance changes. Assuming the City Council prefers not to pursue Charter these changes, the OPA may address its additional needs through the City's annual budget process. While the OPA is a General Fund budget, its budget is fully reimbursed by DWP. Thus, an increase in the OPA's budget has no impact to the General Fund should the City continue to receive reimbursement from the DWP.

Further, as the Office prepares to expand, the OPA has also expressed a preference that all OPA employees be granted exempt status. In reviewing other City offices composed entirely of exempt staff – e.g. the City Attorney's Office and the Ethics Commission – the OPA believes its role of independence is similarly situated, thus supporting additional exempt positions. Of the OPA's seven authorized positions, four are exempt. Two of these exemptions are pursuant to Charter Section 1001(a)(4), and the remaining were obtained through Mayoral and City Council authorization, pursuant to Charter Section 1001(b). The CAO and CLA are in support of providing the OPA with more exempt positions while retaining some civil service classifications to ensure institutional knowledge is retained. Allowing for exempt hiring will provide flexibility and allow for liberal staff turnover when necessary. For example, an incoming Executive Director may choose to hire his or her own staff. Additionally, as the utility industry changes, the ability to hire exempt staff will allow the OPA to modify the Office's staff to obtain the necessary knowledge and expertise.

Should the City Council agree with the option of providing the OPA with more exempt positions, it should instruct the CAO to assist the OPA in the preparation of a flexible staffing plan and a request for exempt positions. This will ensure that the OPA adequately prepares for expansion with input from the CAO and the Personnel Department.

It should be noted that an increase in exempt positions in the OPA would go towards the current citywide maximum of 200 positions under Charter Section 1001(b). Additionally, as discussed in a separate report addressing hiring and exemptions, DWP is also requesting an increase in overall exempt positions.

Reappointment Process for the RPA

The City Council may also choose to adopt a method for reappointing the RPA. The OPA is headed by an exempt Executive Director/ RPA. The RPA is appointed by a citizens committee, subject to confirmation by the Council and Mayor, to a five-year term (Charter Section 683(b)). The first RPA was appointed to a five-year term in February 2012.

Charter Section 638(b) provides that, by ordinance, the City Council is to provide for removal of the Executive Director in a manner similar to that established for removal of the Chief of Police in Charter Section 575(e). Additionally, the length of the term in Charter Section 575(b) for the Chief of Police is the same as the term in Charter Section 683 for the RPA. However, the Charter and Administrative Code are silent on the number of terms which may be served by the RPA and do not provide a process for reappointment.

Charter Section 575(b) provides that the Chief of Police may be appointed to a second five-year term and no person shall serve as Chief of Police for more than 10 years. However, reappointment is not automatic. If the Chief of Police wishes to be considered for appointment to a second term, he or she may apply to the Board of Police Commissioners at least 180 days prior to the expiration of their current term. (Charter Section 575(c).) The Board of Police Commissioners then has the discretion to respond, at least 90 days prior to expiration of the Chief's term, affirmatively or negatively. The Board's response is subject to the City Council's assertion of jurisdiction pursuant to Charter Section 245. Where the Board fails to respond to the Chief's application, the Mayor shall, at least 60 days prior to the expiration of the first term, act in lieu of the Board. Within 30 days, the City Council may, by a two-thirds vote, override the Mayor's action. The City Council's action to override the Mayor's decision would then be the final decision.

Due to the similarities between Administrative Code Section 23.145 and Charter Section 575, our Offices recommend the establishment of a two five-year term limit for the RPA and adoption of a reappointment process. The reappointment process would only be available to an incumbent RPA appointed by the citizens committee, with the confirmation of the City Council and Mayor. Pursuant to this process, an incumbent RPA who wishes to be considered for reappointment may submit an application. . Support for adoption of a reappointment process is not intended to signal that an application for reappointment submitted by the incumbent will be considered favorably.

Our Offices concur that further defining the term of the RPA and instituting a process for reappointment will avoid or reduce potential disruptions to the functions of the OPA and further the vision embodied in the electorate's approval of Charter Amendment I. In accordance with its mission, the OPA provides analysis of the complex operations and long-term financial transactions inherent to DWP. Providing a clear mechanism for reappointment will provide stability within the Office, allowing for the sustained presence of an RPA dedicated to fostering accountability and reasonableness in DWP's actions. Further, permitting the Mayor and City Council to consider an application for reappointment would provide the Mayor and City Council with the opportunity to review the RPA's efforts and vision for the future of the Office. From a fiscal standpoint, instituting a reappointment process will also avoid costs related to the future recruitment and appointment of an RPA. Considering these issues and the increased performance reporting required by the new water and power rate ordinances, we believe authorizing a second five-year term allows for operational continuity and the stability of the OPA where the RPA has performed satisfactorily.

In considering a process for reappointment, the City Council may choose to institute a procedure which mirrors the appointment and removal process established for the RPA. Due to the differences in the appointment process for the Chief of Police, a procedure directly following the model provided by Charter Section 575(c) would be inappropriate.

The RPA is initially nominated by a five member citizens' commission. The members of the commission are selected as follows: two members are chosen by the Mayor, two are chosen by the Council President, and one is selected by the Chairperson of the Energy and Environment Committee. Rather than reconvening the citizens' commissions, reappointment authority may be vested in those individuals who assembled the commission. Under this

model, the RPA would submit his or her application for reappointment to the Council President, who would then refer the matter to the Energy and Environment Committee. The Committee would then be required to consider the application at least 90 days prior to the expiration of the RPA's first term. This would permit the Committee, which has regular interaction with the RPA and the Office's work through the Committee's consideration of DWP matters, to evaluate the RPA's job performance and provide an informed recommendation to the Council. The full Council would then consider the application within 30 days. The full Council would then vote on the issue of reappointment; and upon Council action, the matter would be submitted to the Mayor for concurrence.

Should the City Council choose to adopt a process for reappointment, it should instruct the CAO and CLA to work with the City Attorney to determine the best method for reappointment and to draft an ordinance establishing the necessary procedures.

Ex-Officio Role for RPA

In his comments during the April 13, 2016 Committee meeting, Councilmember Fuentes requested that our Offices be instructed to report on the possibility of the RPA serving in an ex-officio like role on the DWP Board. Regardless of whether the City Council chooses to expand the size of the Board, it may choose to add a seat for the RPA. As an ex-officio member, the RPA would serve as a member of the Board by virtue of his or her role as the RPA. Rather than being subject to the term limits imposed on Board members, an individual RPA's position as the RPA would ensure his or her seat on the Board.

Our Offices do not recommend creating an ex-officio role for the RPA. Charter Section 683 establishes the OPA's role as "provid[ing] public independent analysis of department actions as they relate to water and electricity rates." The OPA functions independently of DWP and its management structure and reports to the DWP Board but is not instructed by the Board. Currently, the RPA attends Board meetings and sits adjacent to the Board, in his capacity as an independent advisor to the Board. Formalizing the RPA's presence by conferring ex-officio member status may have the unintended effect of creating ambiguity regarding the mission of the OPA and may raise concerns regarding the Office's independence. Even where the position is established as non-voting, the RPA would be serving as a member of the Board, obscuring the OPA's independence.

Our Offices are in agreement that the only potential benefit to establishing an ex-officio role would be the RPA's increased access to information. As discussed previously in this report, the RPA does not receive all information transmitted to the Board by the Department and the RPA is not included in closed sessions. However, the access challenges faced by the OPA can be addressed effectively through alternate channels.

Assuming the City Council wishes to establish an ex-officio role for the RPA, the position should contain the following features: (1) the seat should be non-voting; (2) the RPA's status as an independent advisor should be maintained; (3) the RPA should be ensured access to all information transmitted to the Board by the Department; (4) the RPA should be included in closed sessions; and (5) the RPA should be permitted to designate a replacement should he or she be unable to attend a Board meeting.

Generally, the privileges and duties of ex-officio members are specified in the relevant body's bylaws. However, the Charter does not require City Council approval of the DWP Board's bylaws or rules and the City Council may not direct the Board of Commissioners to revise their bylaws to establish a seat for the RPA. As the Charter details the composition of the DWP Board, a Charter amendment clearly specifying the creation of an ex-officio seat for the RPA and delineating the rights and responsibilities afforded that seat is likely the appropriate avenue for implementing this change, if the City Council wishes to pursue this option.