

A grayscale topographic map of Erie County, New York, showing county boundaries and terrain. The text 'Authorities Budget Office' is overlaid in large, bold, black letters on the right side of the map.

# Authorities Budget Office

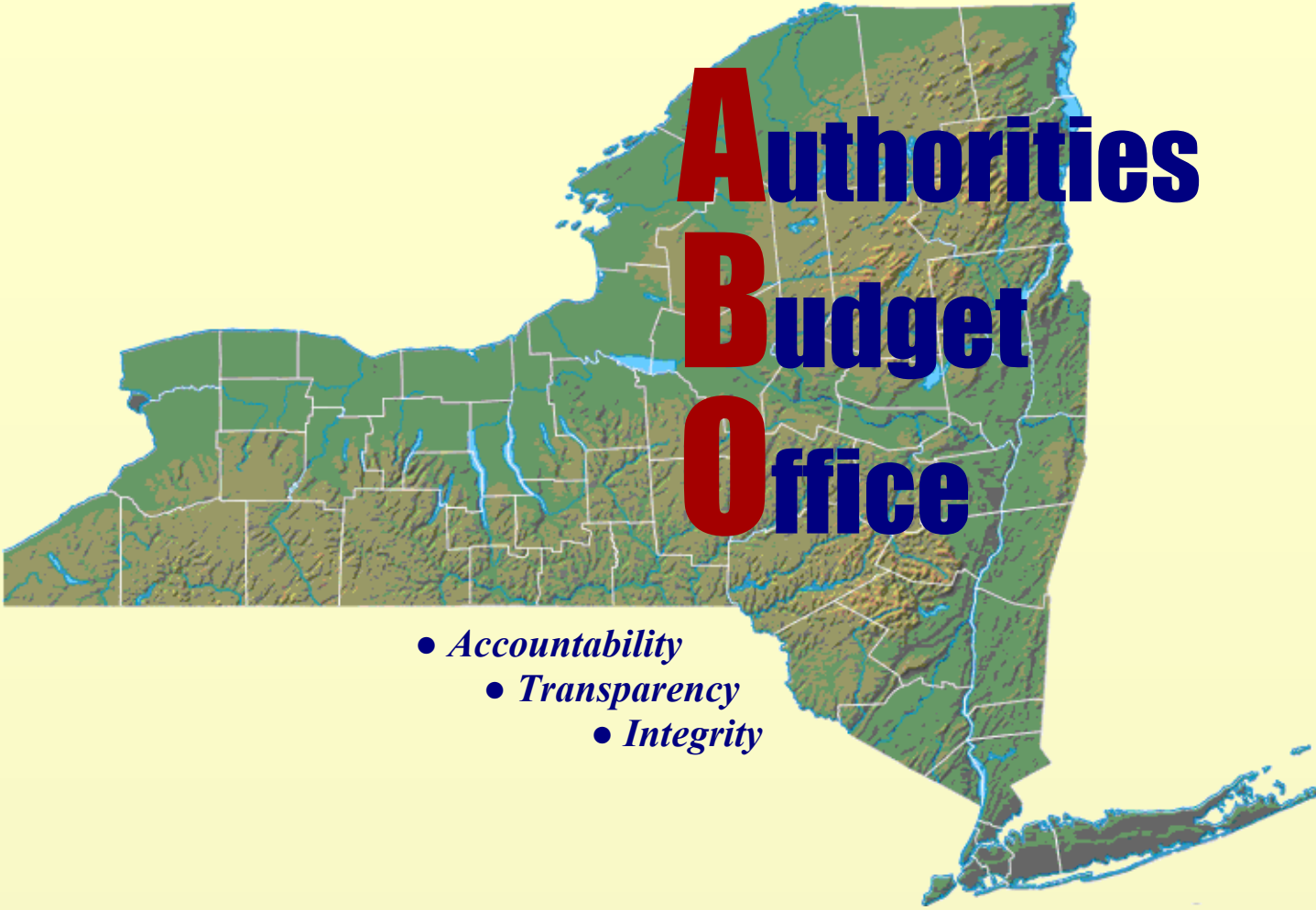
- *Accountability*
- *Transparency*
- *Integrity*

## Operational Review

# Erie County Water Authority

**June 8, 2018**

**OR-2017-02**



# **A**uthorities **B**udget **O**ffice

- *Accountability*
- *Transparency*
- *Integrity*

## **Operational Review**

# **Erie County Water Authority**

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## Executive Summary

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**Purpose and Authority:**

The Authorities Budget Office (ABO) is authorized by Title 2 of Public Authorities Law to review and analyze the operations, practices and reports of public authorities. We reviewed the transparency of the Erie County Water Authority's (Authority) operations. Our review was performed from November 2017 to March 2018 and was conducted in accordance with our statutory authority and compliance review protocols which are based on generally accepted professional standards. The purpose of our review was to provide an objective determination of the extent of the Agency's statutory compliance, make necessary recommendations to promote accountability and transparency of Authority operations, and improve Authority business practices.

**Background Information:**

The Erie County Water Authority (Authority) was established in 1949 pursuant to Article 5, Title 3 of Public Authorities Law to finance, construct, operate and maintain a water supply and distribution system to the benefit of the residents of Erie County. The Authority is governed by a three-member board; each board member is compensated \$22,500 annually as allowed by its enabling statute. The Authority's operations are managed by an Executive Director and a Secretary, both of whom report directly to the board.

The primary source of revenue for the Authority is from the sale of water and an infrastructure investment charge. For the year ended December 31, 2017, the Authority received \$73.3 million in revenue (80 percent from water sales), and had expenses of \$59.6 million. As of December 31, 2017, the Authority had \$47.2 million of outstanding debt.

**Results:**

Authority officials refused to provide us with certain documents and records we requested. Therefore, we are unable to fully assess the extent to which the Authority complied with required procedures in responding to Freedom of Information Law (FOIL) requests.

Authority board members are not meeting their fiduciary duty and have failed to act independently and with the duty of loyalty and care to the organization required by Public Authorities Law. Board members routinely approve resolutions and transactions without having adequate

information upon which to base their decisions. Board members should be receiving and reviewing board meeting packets prior to every meeting in order to be able to engage fully in the board's decision-making process. Board meeting packets provide documents and records that will be discussed or reviewed as part of the board meetings, and should provide board members with sufficient information to make well-informed decisions. Of the 45 board meetings held in 2016 and 2017, the board was provided with meeting packets in advance of only 29 meetings; on average those packets were provided less than two days prior to the meeting. For the other 16 meetings, either no information was provided to the board or the material was not provided until the meeting. Yet board members routinely voted to approve various matters without sufficient information upon which to make a decision.

For example, in April 2017 the board approved an employment agreement for the Deputy Director without information showing that the agreement provided an overall 36 percent increase in salary and without any evaluation of the individual's performance. In December 2016 the board approved the declaration of an emergency and the hiring of a local law firm without any information describing the nature of the emergency or establishing payment limits for the contract. The Authority paid a total of \$143,887 for this contract yet there have been no legal actions related to this contract of which we are aware.

As required by Public Authorities Law, the authority's governance committee should be keeping the board apprised of governance practices, including transparency, independence, accountability, fiduciary responsibilities, and management oversight.

Board members failed to sign an acknowledgement of fiduciary duty upon their appointment, although each board member had attended training that notified them of this requirement. The board also authorized Authority staff to inaccurately certify in the Authority's 2016 and 2017 annual reports that the acknowledgements were signed.

We also found the board is not conducting the business of the Authority in an open and public manner, which is in violation of Public Officers Law. For example, the board approved its 2018 annual budget at its November 13, 2017 board meeting. However, there was no budget information presented and no discussion regarding the budget during the meeting. Board members told us that budget discussions were conducted

instead in private meetings. We also found the board entered executive session to discuss issues which should be discussed in open meetings, not in executive session.

The Authority lacks transparency in its operations by failing to provide its customers with appropriate information regarding planned rate increases. For example, the Authority increased the Infrastructure Investment Charge by 27 percent for all customers in 2016, but did not notify customers until they received their first bill in 2016. The Authority also hired a consultant in 2015 to evaluate and recommend water rates needed to meet bond repayment provisions. The consultant's recommendations have been largely implemented by the Authority, and will result in increases to customers' water rates and Infrastructure Investment Charge into 2019. Yet the Authority has not disclosed this information to its customers.

Our review also found that the Authority fails to provide all documents and records requested in accordance with Freedom of Information Law (FOIL) requirements. We identified instances where the Authority did not provide the information that was requested, provided incomplete information and provided inaccurate information in response to FOIL requests. Further, the board denied appeals of FOIL decisions without reviewing any information to support or explain the reason for the decisions. Instead, the board simply upheld the decisions of Authority staff.

Based on the facts outlined in this report and by the authority provided to it under Public Authorities Law, the Authorities Budget Office censures the Erie County Water Authority commissioners that served during 2016 and 2017. Further, it is the position of the Authorities Budget Office that any commissioner who served during 2016 and 2017 and remains on the Erie County Water Authority board be replaced by the County Legislature. We believe that the Authority would be best served by new leadership that is more cognizant of its responsibilities, appropriately performs its board duties, implements and enforces its policies and fosters an environment of transparency.

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## Introduction and Background

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The Erie County Water Authority (Authority) was established in 1949 pursuant to Article 5, Title 3 of Public Authorities Law to finance, construct, operate and maintain a water supply and distribution system to the benefit of the residents of Erie County. The Authority's mission is to provide its customers with safe, high quality and affordable drinking water through a reliable infrastructure.

The Authority is governed by a three-member Board of Commissioners. Board members are appointed by the Erie County Legislature for three-year staggered terms. The officers of the Authority consist of a Chairman, Vice Chairman and Treasurer, who are board members, and a Secretary, who is not a board member.

According to its enabling legislation, board members of the Authority are to be compensated and the amount of compensation is to be fixed by the Erie County Board of Supervisors, which has subsequently been replaced by the County Legislature. The majority of public authority boards in New York State are voluntary in nature and most board members serve without compensation. The Authority is one of a very limited number of public authorities that compensate its board members. Some county-wide water authorities provide no compensation for board members (Orange County; Saratoga County), while other county-wide water authorities provide limited compensation for board members (Monroe County - \$7,000; Onondaga County - \$7,000; Suffolk County - \$18,500). The amount of compensation established by the Erie County Legislature for the Authority board members is the highest of all county-wide water authorities: each board member receives \$22,500 annually to serve on the board. This amount was set by the Erie County Legislature in 1981, but there was no indication as to how this amount was determined, other than to indicate that it was an increase from the amount set in 1973. The County Legislature has the power to change the compensation for the board at any time.

The board has established a dual management structure for the Authority. The Authority's Executive Director oversees many of the day-to-day operations while the Authority's Secretary is responsible for overseeing legal and public information aspects of the Authority. Both positions report directly to the Board. The current Executive Director was hired in May 2017, and previously served as the Authority's Chairman from April 2015 to April 2017. The Secretary serves as the Authority's Personnel Officer, Records Management Officer and Freedom of Information Law (FOIL) Officer, oversees the Legal Department and is responsible for ensuring the board and senior management have adequate information to make decisions. Additional executive positions consist of a Deputy Director, a Director of Administration, and an Executive Engineer. For 2017 the Authority reported a total of 271 employees.

The Authority operates on a calendar fiscal year. For 2017, the Authority had total revenues of \$73.3 million and total expenses of \$59.6 million. Water revenues are comprised primarily of water sales (\$58.5 million) and an infrastructure investment charge assessed to all customers (\$14.2 million). The infrastructure investment charge was implemented in 2011 to help fund the Authority's annual system-wide capital program. The Authority also issues debt to finance additional capital improvements. As of December 31, 2017, the Authority had \$47.2 million in bonds outstanding.

The Authority has three types of customers: small meter (residential), large meter (commercial) and bulk. Bulk customers consist of 16 municipalities and authorities that purchase water from the Authority to then sell to its own customers. The Authority charges customers based on the amount of water used. For 2017 the rates per 1,000 gallons were \$3.17 for residential, \$2.84 for commercial and \$2.48 for bulk customers.

### ***Compliance Review Objectives***

The Authorities Budget Office (ABO) is authorized by Title 2 of the Public Authorities Law to review and analyze the operations, practices and reports of public authorities, to assess compliance with various provisions of Public Authorities Law and other relevant State statutes, and to make recommendations concerning the reformation and structure of public authorities. Our operational review was conducted to assess the accountability and transparency of the Authority's operations.

### ***Compliance Review Scope and Methodology***

Our compliance review was conducted between November 2017 and March 2018. The review assessed the accountability and transparency of select Authority operations and finances for the period January 1, 2016 through March 31, 2018. To perform our review, we relied on the following documentation and data sources:

- Board meeting minutes
- Board packets
- Policies and procedures indicative of good governance practices
- FOIL requests and related records
- Annual reports required by the Public Authorities Law
- Authority professional service contracts
- Authority financial records
- Information posted on the Authority's website

In addition to reviewing documents and records, we attended board meetings, interviewed Authority employees and board members, and performed other testing we considered necessary to achieve our objectives. Our report contains recommendations to ensure compliance, promote good governance practices and improve the transparency and accountability of Authority operations.



### ***Scope Limitation – Refusal to Provide Requested Information***

The Authorities Budget Office has the authority under Section 6(2) of Public Authorities Law to request and receive from any state or local authority such assistance, personnel, information, books, records, other documentation and cooperation as may be necessary to perform its duties. Accordingly, the Erie County Water Authority is required to provide access to all information and documentation that the ABO deems relevant to its review objectives. We conducted our review in accordance with our statutory authority and compliance review protocols which are based on generally accepted professional standards. These standards require that we disclose in our reports any limitations or scope impairments, including denials or excessive delays in access to records.

The Authority did not provide all documents and records that we requested as part of our review. Specifically, the Authority did not provide the ABO with appropriate access to Freedom of Information Law (FOIL) requests that were made during 2016 and 2017 and the related responses to those requests. Therefore, we are unable to fully assess the extent to which the Authority complied with required procedures in responding to FOIL requests, and readers should consider the effect of this scope limitation on the conclusions presented in this report.

As part of our review, we requested the Authority provide all FOIL requests submitted during 2016 and 2017 and all records and documents comprising the Authority's responses to those requests. The Authority provided a total of 70 FOIL requests, but did not provide all records related to these 70 requests. Although we made numerous attempts to obtain this information, the Authority refused to provide all the requested information.

For example, a FOIL request was submitted to the Authority on March 3, 2017 (Muck Rock), requesting all communications between the Authority and its public relations firm. The Authority provided us with its April 26, 2017 response indicating that all requested information was provided. However, the Authority refused to provide us with any of the actual correspondence or related records that were responsive to the FOIL request. As such, we were unable to determine whether the Authority was responsive to the request. We were subsequently able to determine that these records were provided by the Authority to the requester because the material was posted on the requester's website.

Another FOIL request was submitted to the Authority on June 2, 2016 (Telvock – Investigative Post), requesting lead and copper testing results for the last four testing periods, the location of lead service lines, and communications from the Authority to its customers regarding the Flint, Michigan lead contamination. The Authority provided us with only its July 26, 2016 response indicating that all information responsive to the request was provided. However, the Authority did not provide us with the testing results, lead service line locations or copies of communications that it indicated had been provided to the requester.

A FOIL request submitted to the Authority on August 29, 2016, (WKBW) requested various records including correspondence between board members, Authority staff and the Authority's public relations firm regarding water main breaks between July 20 and July 26, 2016. The Authority provided us with only its September 28, 2016 response indicating all documents requested were provided. Despite repeated attempts to obtain the information, the Authority did not provide us with any of the requested correspondence.

In addition to not providing certain FOIL records, the Authority inappropriately withheld (redacted) information we requested. The Authority's procurement guidelines allow for emergency purchases to be made in situations that present a danger or threat of harm to life, health, safety or the environment. A detailed description of the situation is required to be documented and presented to the board for approval. We reviewed an emergency procurement that was authorized in November 2016, and requested the justification describing the emergency. However, Authority officials redacted the description of the emergency and refused to explain to us the need and purpose of the procurement.

The Authority also provided us with a copy of the letter from the law firm that was hired under the emergency contract. This letter outlined some of the services to be provided and the costs of those services. However, this letter also had some portions redacted. It appears that some of the redactions were not justified. For example, the Authority provided us with a copy of the letter on November 28, 2017 that had the subject line redacted. On January 16, 2018 the Authority provided a second copy of the letter that also had some portions redacted. However, this second copy did not have the subject line redacted, indicating that the letter was regarding the "Investigative Post Matter". The Secretary stated that all redacted information was confidential under attorney-client privilege, yet this is not correct since the subject of the letter is not privileged information nor does it disclose legal advice. The Authority continued to withhold information from us regarding the contract with this law firm throughout our review under the guise of attorney-client privilege.

### ***Authority Response***

A draft version of this report was shared with Authority officials for review and comment. The Authority did not disagree with the content or recommendations of the report. Authority officials indicate that they have begun to make changes to improve the accountability and transparency of the Authority's operations. The Authority's response is appended to this report.

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## Review Results

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Our review found the board members of the Erie County Water Authority (Authority) are failing to meet their fiduciary duty to the Authority and the public the Authority was created to serve. Although members have attended required training that discusses board member duties and responsibilities, Authority board members failed to sign an acknowledgement of fiduciary duty at the time of appointment and are not acting independently and with the appropriate degree of loyalty and care required by Public Authorities Law. Board members routinely approve resolutions and transactions without having adequate information on which to base their decisions and the board violates Public Officers Law by not conducting the business of the Authority in an open and public manner. We also found the Authority is not operating transparently by not adequately disclosing expected rate increases to its customers and does not appropriately respond to Freedom of Information requests as required by law.

Since the completion of our review, two of the Authority board members have left the board. Based on the facts outlined in this report, it is the position of the Authorities Budget Office that the remaining board member should be replaced by the County Legislature. We believe the Authority would be best served by new leadership that is more cognizant of its responsibilities, appropriately performs its board duties, implements and enforces its policies and fosters an environment of transparency.

### The Board Is Failing Its Fiduciary Duty

**Board members did not sign an acknowledgement of fiduciary duty upon appointment.** Section 2824 of Public Authorities Law requires all board members to sign a written acknowledgement of fiduciary duty within sixty days of taking an oath of office. Board members are to acknowledge that they understand their fiduciary obligation to perform their duties and responsibilities in good faith and with proper diligence and care consistent with the Authority's mission, by-laws and the laws of New York State. See Appendix B for the Acknowledgement of Fiduciary Duty form. Board members are also required to participate in State approved board member training regarding their legal, fiduciary, financial and ethical responsibilities.

We found that the Authority board members all attended the required board member training sessions. These training sessions address the requirement for board members to acknowledge their fiduciary duty and indicate where the fiduciary duty acknowledgment form can be obtained. The training also addresses the duties of board members to provide adequate oversight of management and establish appropriate policies and procedures, and instructs board members of their responsibilities to review and approve annual reports that are submitted to the State. However, although all board members attended the training sessions, none of the board members signed an acknowledgment of fiduciary duty. Board

members seemed to be unaware of this requirement, and did not sign the acknowledgement of fiduciary duty until we requested copies of the acknowledgements as part of our review. Even though board responsibilities are thoroughly addressed in the training sessions, board members told us that they rely on Authority staff to keep them compliant with the Law, and that staff did not provide the acknowledgement form for signature at the time of the members' appointments to the Authority board. Section 2824 of PAL requires authorities to establish a Governance Committee to keep the board informed of governance principles, and the Governance Committee should have kept the board apprised of signing the acknowledgement of fiduciary duty.

Further, although the training addresses board member responsibility to review and approve annual reports before submitting the reports to the State, the reports submitted by the Authority for 2015 and 2016 were incorrect. Both the 2015 and 2016 annual reports certified that each board member had signed their acknowledgement of fiduciary duty. The board had authorized these reports for submission on March 24, 2016 and March 23, 2017, respectively, but it does not appear that board members had ever reviewed the reports prior to approval.

**The board is not receiving information in advance of board meetings to make informed decisions.** Board meeting packets are supposed to be prepared and distributed to board members prior to each board meeting. These meeting packets are to provide documents and records that will be discussed or reviewed as part of the board meetings, and should provide board members sufficient information to enable them to make well-informed decisions. It is recommended that board meeting packets are distributed to board members a minimum of one week prior to the corresponding board meeting to provide adequate time for review and comprehension.

However, we found that Authority board members are not receiving board meeting packets sufficiently in advance of board meetings to make informed decisions. The board generally meets every two weeks. Of the 45 meetings held during the period of our review, the board was provided with meeting material in advance of only 29 board meetings (64 percent). For 16 meetings either no information was provided to board members or the material was provided at the board meeting. Further, for the 29 meetings when a board meeting packet was provided, it was provided on average less than two days prior to the meeting. Board members told us that they sometimes have insufficient time to prepare for board meetings to be able to make informed decisions.

When board meeting packets are provided to board members, the information is often incomplete and does not include material related to the topics scheduled for discussion at the board meeting. We compared the information provided in board meeting packets to the corresponding board meeting minutes. We found that approximately 30 percent of board meeting minutes included issues and information that were not included in the board packet. As such, board members

are not able to be adequately prepared to discuss those items and take appropriate action.

**Board members are not making independent or informed decisions.** Section 2824 of Public Authorities Law requires board members to perform their duties as board members in good faith and with that degree of diligence, care and skill which an ordinarily prudent person in like position would use under similar circumstances, and to apply independent judgment in the best interest of the Authority, its mission and the public. The board Chair told us that he has attempted to get better information from staff to prepare for board meetings. He provided us with a July 20, 2017 email to the Authority Secretary requesting that the Secretary provide him with the board agenda and meeting material on the Monday before regularly scheduled Thursday board meetings. However, the email request does not appear to have been effective, since no board packets were provided to the board in advance of board meetings held in August and September 2017. And the October and November 2017 board packets were provided to board members no more than two days in advance of the board meetings.

It is the board's responsibility to provide adequate oversight and effective monitoring of management, which includes ensuring that appropriate information is provided to the board with adequate time to review. However, of more significance is that the board has continuously approved actions that are being proposed by Authority staff, without having sufficient information to make informed decisions. The board has routinely approved all requested actions even though board members have admitted that they did not have adequate information upon which to base a decision. Further, certain board members told us they will often vote to approve measures with which they disagree, because they believe that they will be out-voted by the other board members. This attitude clearly illustrates that the individual board members are not acting independently or in what they believe to be the best interest of the Authority.

We identified numerous examples of the board approving transactions and staff recommendations without having adequate information on which to base an informed decision.

- At the April 6, 2017 board meeting, the board approved an employment agreement for the Authority's Deputy Director. This agreement was for a three-year term, retroactive to February 6, 2017, and through April 3, 2020. The agreement increased the Deputy Director's base compensation to \$191,425 for 2017, an increase of 23 percent from the 2016 salary. Additional salary increases for 2018 through 2020 raises the compensation to \$212,286 for 2020. Prior to this agreement, the individual had been Deputy Director of the Authority since 2007 but had served at the pleasure of the board without an employment agreement. The last performance evaluation for the Deputy Director was completed by the board chair in

2015. There were no evaluations completed for the Deputy Director in 2016 or 2017.

There was no board packet provided to the board in advance of this board meeting, and there was no information provided to board members regarding the terms or content of the employment agreement. The April 6, 2017 board meeting minutes do not reflect any discussion by board members regarding the employment agreement, nor was there any other material supporting the decision in the meeting minutes. The only information regarding the employment agreement is the board resolution to authorize the employment agreement. There was no indication the board members had ever seen the agreement or were aware of its terms. Yet the board unanimously approved the employment agreement.

We questioned the board members about their decision to approve the employment agreement and requested the justification for the significant salary increase. Board members stated that they relied on the recommendation of the Secretary to approve the Deputy Director's employment agreement.

- The Authority's Purchasing Guidelines and Procedures (Purchasing Guidelines) allows for emergency purchases when goods or service are needed due to an unavoidable situation where there is a danger or threat of harm to life, health, safety, environment or property. An Emergency Declaration form must include a detailed description of the emergency condition and must be referred to the Board for approval. On November 16, 2016, Authority staff declared an emergency existed to justify the hiring of a local law firm. The Emergency Declaration form did not appear to provide a detailed description of the emergency, and did not indicate that the situation involved a danger or threat to life, health, safety, environment or property that requires immediate action.

At the December 1, 2016 board meeting the board approved the emergency declaration and the contract with the law firm. The board packet was provided to board members the day before the board meeting and the agenda indicated that the declaration of an emergency and authorization to enter a contract with the law firm would be discussed. However, there was no Emergency Declaration form, no information on the type, nature or severity of the emergency, no proposed or draft contract with the law firm indicating the services to be provided and potential costs and no proposed resolution for the board to consider included in the board packet. The board meeting minutes indicate only that the resolution was passed by the board members, and do not indicate that there was any discussion or questions by the board members as to the nature of the emergency. Yet the board unanimously approved the declaration of emergency and the contract with the law firm.

- At the May 25, 2017 board meeting the board appointed a new Executive Director. The board packet was provided to board members only two days prior, on May 23, 2017. The board packet had no information regarding any of the potential candidates for the position, there was no proposed resolution for the appointment and there was no agenda item regarding the Executive Director position. Although no information regarding the potential candidate, the candidate's qualifications or potential salary was provided to the board, the board approved the appointment. Board members told us that they were aware of the upcoming hiring of the Executive Director, but there were no prior meetings where this hiring was discussed and no records were provided to the board regarding this hiring. It appears that the board had no detailed information regarding the background and experience of the individual, yet the board unanimously approved the appointment of the Executive Director.
- At the January 11, 2018 board meeting, the board approved an employment agreement for the Authority's Executive Director. This agreement was for a three-year term, expiring on December 31, 2020 and increased the Executive Director's base compensation to \$153,593 for 2018, an increase of 5.8 percent from the 2017 salary, with additional salary increases for 2019 through 2020 resulting in an 11.6 percent increase over the 2017 salary. Prior to this agreement, the individual had been Executive Director of the Authority since May 2017 and had served at the pleasure of the board without an employment agreement. The agreement established the Executive Director's start of service with the Authority as May 2011 for computing benefits and leave credits, effectively adding six years to the Executive Director's length of service. In addition, the Executive Director was given an additional ten days of vacation time.

The board packet provided to the board in advance of this board meeting had an agenda indicating that an employment agreement was to be discussed, and included a proposed resolution to approve the employment agreement for the Executive Director. However, there was no information provided to board members regarding the terms or content of the employment agreement. We attended the January 11, 2018 board meeting and observed no discussion by board members regarding the employment agreement. Meeting minutes indicate that the matter was discussed in executive session during the December 21, 2017 board meeting; however, we did not observe this comment being made during the meeting we attended. The only information regarding the employment agreement is the board resolution to authorize the employment agreement although there was no indication the board members had ever seen the agreement or were aware of its terms. Yet the board approved the employment agreement.

- At the January 14, 2016 board meeting, the board authorized an employee severance agreement. The board packet was provided to board members on January 13, the day before the meeting. The board packet included an agenda which indicated that the severance agreement would be discussed and a proposed resolution to authorize the severance agreement, but provided no information or details regarding the content of the proposed severance agreement. Although there was no information provided to the board in advance for the board members to make an informed decision, the board unanimously approved the severance agreement.
- At the July 13, 2016 board meeting, the board authorized a contract for underwriting services. The board packet was provided to board members July 12, the day before the board meeting. The agenda indicated that the underwriting contract would be discussed and a proposed resolution to approve the contract was included in the packet. However, although the resolution indicated that a request for proposals had been issued and several firms responded, there was no indication as to what each firm had proposed, there was no analysis to support that the selected vendor had the best proposal and there was no copy of the proposed contract. Although there was no information provided to the board in advance for the board members to make an informed decision, the board unanimously approved the contract.
- The Authority's Vacation Policy provides annual vacation time with pay to full time employees on a calendar year basis based on the number of years of service, from 10 days for the first three years up to 25 days of vacation after 22 years of service. Employees must use a minimum of two weeks of vacation each year and can carry over up to 30 unused vacation days each year. According to the policy, accumulated unused vacation days are paid to employees upon the end of their employment. Between December 2016 and November 2017, the board approved exceptions to its Vacation Policy on five occasions. On December 15, 2016 the board authorized the Deputy Director, the Director of Administration and the Chief Water Plant Operator to carry their entire 2016 vacation accruals over to 2017, rather than restrict the amount of the carry over to the maximum 30 days stipulated in the policy. However, there was no information included in the board resolution to explain or justify these exceptions, or to indicate the amount of vacation accruals being carried over in excess of the amount stipulated in the policy. On July 13, 2017, the board approved providing the Executive Director with an additional 10 vacation days, providing him with 20 vacation days rather than the 10 days allowed by the policy. And on November 30, 2017 the board approved additional vacation day accruals for two attorneys. Each of these employees had been with the Authority less than three years, entitling them to 10 vacation days each. There was no justification provided



for why any of the additional vacation days were needed, yet the board approved these exceptions to the policy in every instance.

We also note that as a result of the employment agreement approved by the board in January 2018 for the Executive Director, this individual was approved to accrue a total of 30 vacation days for the first eight months in the position (May 2017 to January 2018). The Authority's Vacation Policy limits employees to 10 vacation days during the first year of employment.

- The board does not review prior board meeting minutes for accuracy and completeness. Although the review of prior meeting minutes is included on the agenda for every meeting, the board does not receive draft meeting minutes in its board packet. Further, at each meeting the board waives the reading of the prior meeting minutes, yet approves those meeting minutes without any discussion or comment by board members.

**The board does not ensure that Authority Procurement Guidelines are being followed.** Once a good or service has been approved for acquisition, the Authority's Procurement Guidelines and Procedures (Guidelines) require the board to establish a master purchase order, which provides the maximum amount approved to pay for the good or service. Individual purchase orders and payments can then be made, up to the established maximum amount. The Guidelines also require all purchases to be approved by the board. In absence of the board, the Guidelines allow the Executive Director and Deputy Director to approve purchase orders and payments. These approvals are then required to be presented to the board at the next scheduled meeting. We found that the controls established by the Guidelines are routinely being ignored.

For example, the board approved an emergency declaration and authorized a retainer agreement with a local law firm on December 1, 2016. However, the board did not establish a master purchase order for the procurement. Rather, the Authority's Deputy Director set the master purchase order for \$25,000 on December 21, 2016, without board approval. The board approved a payment of \$19,413 to the law firm on December 29, 2016. However, there was no question or discussion by the board regarding the established master purchase order that was set without board approval, in violation of the Authority's Guidelines.

On January 23, 2017, the law firm submitted a second invoice to the Authority in the amount of \$22,781. This amount exceeded the existing master purchase order limit by \$17,194. On February 9, 2017 the board approved a revised master purchase order for \$125,000 for this contract, but did not approve payment for the second invoice. Rather, on February 16, 2017 the Deputy Administrative Director and Comptroller approved the payment for the second invoice. This approved payment was not presented to the board at subsequent meetings, in violation of the Guidelines.

Additional payments to the law firm were also approved in July 2017 although the payments exceeded the \$125,000 board approved master purchase order. However, on July 3, 2017 the master purchase order was increased to \$150,000 by the Comptroller. There was no indication that this change was presented to the board. At the next board meeting, the board approved a payment to the law firm of \$6,774, bringing the total amount paid under the contract to \$129,508. There was no information provided to the board in advance of the meeting to show that the master purchase order had been increased to justify the payment made beyond the board approved master purchase order.

Total payments by the Authority to the local law firm in 2016 and 2017 were \$143,887. Although this is within the \$150,000 master purchase order, in October 2017 the board approved a revised master purchase order to increase the limit to \$165,000. We note that the law firm was hired under an emergency declaration, which meant that there was danger or threat of harm to life, health, safety, environment or property. The agreement with the law firm indicates that the law firm is to represent the Authority regarding potential environmental issues. However, through February 2018 there have been no legal actions related to emergency environmental issues that we have been made aware of.

#### The Board Does Not Operate Transparently

**The Authority does not provide the public with adequate information in advance of board meetings.** Section 103 of Public Officers Law requires the Authority to provide public access to all records and proposed resolutions that are scheduled to be discussed by the board during public board meetings. As indicated, these records are to be included in the board packet. However, the Authority does not post the board packets on its web site prior to board meetings. For example, for the December 21, 2017 board meeting, the agenda and related materials were not posted on the Authority's web site until the day of the meeting. And for the January 25, 2018 board meeting, the agenda and related materials were not posted on the Authority's web site until after the meeting. As a result, the Authority deprives the public of the ability to decide whether to attend meetings and remain informed on the actions to be taken by the board.

Section 104 of Public Officers Law requires public notice of the time and place of board meetings. This notice is to be conspicuously posted in one or more designated public locations, posted on the Authority's web site, and provided to the news media 72 hours prior to scheduled meetings. We found that, while the authority appears to post notices of board meetings at its facilities and on its web site, it does not provide notice of public meetings to local media outlets for broader publication.

**The board does not conduct business in open meetings.** Public Officers Law Section 100 requires public authorities to conduct business in an open and public manner. Business should be conducted in open meetings where the public may attend and observe the performance of public officials and listen to the

deliberations and decision making. However, the board appears to be conducting its deliberations and making decisions in non-public meetings, contrary to the requirements of Public Officers Law.

One of the agenda items for the November 13, 2017 board meeting was to approve the Authority's annual operating and capital budgets for 2018. We attended this meeting and observed that there was no budget included in the board packet that was provided for the meeting, and no presentation or discussion of the budget as part of the meeting. There was no discussion or information presented in previous board meeting minutes regarding the budget. Yet the board unanimously approved the budget during the November 13 meeting.

Authority staff and board members told us that the board had a separate meeting on October 18, 2017 where Authority staff presented the board with the 2018 budget and members had the opportunity to ask questions. This meeting was not publicized and not open to the public and there is no record of who attended or what was discussed. Further, board members also told us they routinely meet to have discussions and reach decisions other than during the public board meeting. This practice is a direct violation of Public Officers Law.

**The board uses executive sessions inappropriately.** As indicated, Public Officers Law requires that public business be conducted in an open and public manner and all meetings of a public body must be open to the general public. However, for specific situations enumerated in Section 105 of Public Officers Law, business may be conducted in executive session. Generally, these situations are limited to matters that if disclosed to the public could have a detrimental impact on the Authority, another governmental office such as law enforcement, or constitute an unwarranted invasion of personal privacy.

During 2016 and 2017, the board entered executive session ten times, only one of which fell under the exemptions listed in Public Officers Law. Three of the instances were for situations that clearly do not fit the exemptions and should be discussed during open meetings. For example, the board indicated that executive sessions were needed to discuss legislative matters, to discuss amendments to an existing professional services contract and to discuss an update on the legal status of a customer. The justification for executive session for the other six instances may have been appropriate, but the board did not adequately describe how the content fell within the exemptions listed in Public Officers Law. For example, on five occasions the board stated that executive session was necessary to discuss "contract negotiations", but did not indicate whether this was part of collective bargaining negotiations or routine procurement contract negotiations. On the other occasion the board stated that executive session was necessary to discuss "litigation matters," but did not indicate the specific litigation that was being discussed.

**Board meeting minutes do not reflect the information presented to the board.** Board meeting minutes should be sufficiently descriptive to enable the public to

understand the decisions that were made and the reasons the decisions were made, and should include any discussion or debate that took place surrounding matters before the board, along with reports and documents introduced.

The board's meeting minutes do not always reflect what occurred at the board meeting and often fail to include copies of reports or documents presented to the board. Authority executive staff report to the board regularly on various issues, such as finances, contracts and capital projects, yet none of the staff reports are included in the board meeting minutes. For example, at the November 30, 2017 meeting, Authority staff presented investment information, month and year-to-date financial statements, and upcoming capital projects to the board. However, none of this information was included in the corresponding board meeting minutes.

**The Authority does not provide notice to its customers of planned rate increases.** The Authority receives funds for its operations primarily from water sales and an infrastructure investment charge assessed to all customers. The infrastructure investment charge was instituted in 2011 and was initially a fixed amount charged to all customers. Since 2017 the amount has been based on the size of a customer's water meter. All small meter customers (residential) pay \$19.65 per quarterly bill. Large meter (commercial) and bulk customers pay between \$25.38 and \$583.50 quarterly. According to the Authority's web site, the infrastructure investment charge is used to help fund the Authority's annual system-wide capital program, which averages \$17 million a year.

Between 2011 and 2017 the infrastructure investment charge increased a total of 555 percent. However, the Authority has not been transparent in disclosing planned increases to its customers. For example, changes to the infrastructure investment charge are approved by the board in November each year as part of the adoption of the subsequent year's budget. From 2012 to 2014 approved increases in the infrastructure investment charge were included in an Authority press release announcing the budget approval. However, the Authority did not issue a press release when it approved the 2015 and 2016 budgets. Therefore, the public was not made aware of the increase in the charge until they received their first water bill in those years.

Beginning in 2017 the Authority began assessing the infrastructure investment charge to commercial and bulk customers based on the meter size, but made no change to the infrastructure investment charge for residential customers. This resulted in increasing the quarterly rate charged to commercial and bulk customers to between \$25.38 and \$583.50, depending on meter size. Yet the November 2016 press release only indicated that commercial and bulk customers would see rates change based on the size of their meter, without disclosing what that impact would be. As such, these customers were not aware of the actual amount of the increase until they received their first bill in 2017.

Infrastructure Investment Charge Fees		
Year	Residential Customers	Commercial and Bulk Customers
2011	\$3.00	\$3.00
2012	\$6.00	\$6.00
2013	\$9.00	\$9.00
2014	\$12.00	\$12.00
2015	\$15.45	\$15.45
2016	\$19.65	\$19.65
2017	\$19.65	\$25.38 - \$583.50
2018	\$19.65	\$50.75 - \$1,166.97

In 2015, the Authority hired a consultant to conduct a water rate and cost of service study. As part of the study, the consultant recommended specific water rates that the Authority would need to charge to maintain adequate revenues to support its bond repayment requirements. The study forecast Authority revenues through 2021 and indicated that the forecasts were based on no changes in the number of Authority customers. This study was provided to the board in December 2016, but has not been posted on the Authority's web site.

The study recommended that the infrastructure investment charge for 2017 remain the same for residential customers, but that the infrastructure investment charge be increased for commercial and bulk customers. The Authority implemented these recommendations.

The study also recommended that the water rates for 2017 remain the same for all customers. These rates are based on 1,000 gallons of usage and are \$3.17 for residential customers, \$2.84 for commercial customers and \$2.48 for bulk customers. The Authority implemented these recommendations.

The study forecast that revenues for both metered revenue and the infrastructure investment charge would need to increase for 2018. The board subsequently approved increases in the 2018 water usage rates for residential customers (\$3.23), commercial customers (\$2.89) and bulk customers (\$2.53) and increases in the 2018 infrastructure investment charge for commercial and bulk customers. The water usage rate increases were made public by the Authority in November 2017; however, the increases in the infrastructure investment charge for commercial and bulk customers were not included in this notice.

The study also shows that water use rates and the infrastructure investment charge would need to increase for 2019. The study recommends that the infrastructure investment charge remain the same for residential customers in 2019, but that the charge be increased to between \$76.89 and \$1,768.14 quarterly for commercial and bulk customers, based on meter size. The Authority's budget documents prepared for the board in October 2017 show that the Authority will also increase the 2019 water usage rates to \$3.30 per 1,000 gallons for residential customers, \$2.95 per 1,000 gallons for commercial customers and \$2.58 per 1,000 for bulk customers. Yet the board has not disclosed these expected increases to its customers.

Type of Customer	Water Usage Rate per 1,000 Gallons			2017-19 Increase
	2017	2018	2019	
Residential	\$3.17	\$3.23	\$3.30	4.1%
Commercial	\$2.84	\$2.89	\$2.95	3.8%
Bulk	\$2.48	\$2.53	\$2.58	4.0%

Authority officials told us that making this information public prior to the formal board approval to increase rates will likely cause significant resistance from its customers. However, given that the consultant study was done in part to determine the revenues needed to comply with bond covenants and shows that rate increases are needed, and the board has implemented all rate increases recommended by the study to date, the board should be transparent to the public in disclosing the anticipated rate increases.

#### Failure to Appropriately Respond to FOIL Requests

**The Authority fails to provide all requested documents and records.** Article 6 of Public Officers Law, otherwise known as the Freedom of Information Law (FOIL), requires public entities to make available any document, record, file or folder requested as long as it does not interfere with official business or endanger the well-being of an individual or corporation. For 2016 and 2017, the Authority received a total of 70 requests for various documents and records submitted under FOIL, but did not respond to all of these requests in accordance with the provisions and intent outlined in Public Officers Law.

Of the 70 FOIL requests received, there was no indication the Authority responded to 22 requests. The Authority provided us with the requests, but did not provide any records or documents indicating that a response was made or that the requested information was provided.

We also identified FOIL requests in which the Authority did not provide information that was requested, provided incomplete information or provided inaccurate information in response to FOIL requests.

- On March 22, 2017 a FOIL request was submitted for bid documents, payments and payroll information for a contract to replace an Authority system (International Brotherhood of Electrical Workers). On March 31, 2017, the Authority provided the bid documents, but stated that no work had yet begun on the contract and therefore could not provide the requested payment and payroll records. However, the Authority paid the contractor a total of \$142,732 during 2016 for the project, which indicates that work had begun. The Authority avoided providing the requested information by stating that no work had begun on the project.
- On April 27, 2017 a FOIL request was submitted for records of payments, board approval reports, and records outlining the relationship between the

Authority and a contractor that conducts employee background checks (Daniela Porat – Investigative Post). The request was for all such records from January 2013 to the date of the request. On May 25, 2017, the Authority provided bid documents, an approved \$2,000 purchase order from April 2012, accounts payable invoices and purchase orders for payments from February 2013 through September 2015 and an invoice from the vendor dated August 5, 2015. The Authority also provided information that was not requested, such as a May 2, 2017 Board Approval Report for various payments, none of which were to the contractor providing background checks. However, the Authority did not provide other records covered by the request, such as revised master purchase orders that increased the contract total from \$2,000 to \$3,025 for April 2013 to September 2014 and then again to \$5,000 for September 2014 to August 2015.

- On March 7, 2016, a request was submitted for a complete vendor/bidder list for the Authority, including vendor name, contact person, contact email, telephone, address, category/subcategory and product code for each company (Glenn Oliver). On March 14, 2016, the Authority told the requester that the information could be found on the Authority's web site within its 2015 annual procurement report. This report consists of a list of vendors paid more than \$5,000 by the Authority during the year, the amount paid and a brief description of the good or service being purchased. This was not responsive to the request.
- On March 2, 2016, a request was submitted for contracts, work orders, and other documents pertaining to a water main break in the Town of Lancaster, the Authority's procedures for responding to breaks and whether the Authority requested the Town to replace the water line (Cunningham & Lindsey). On March 17, 2016, the Authority provided work orders for the repair, but did not provide procedures or copies of communications stating that the Authority did not request the Town to replace the line.

**The board does not respond to appeals of FOIL denials as required.** Section 89(4)(b) of Public Officers Law provides any person denied access to a record the right to appeal the denial to the head, chief executive or governing body of the entity. A response is then required within ten business days of the appeal, either providing access to the record being sought or fully explaining the reasons for the denial. The Authority's policy designates the board as being responsible for reviewing and responding to appeals of denied FOIL requests.

Of the FOIL requests received during 2016 and 2017, there were a total of six appeals of the Authority's decision to not provide the requested records. However, we found that only three appeals were reviewed by the board. There was no indication that the Authority responded at all to one appeal, and the other two appeals were responded to by the Secretary, who is designated as the FOIL

officer. These appeals were denied by the Secretary without presenting the information to the board for review.

Two FOIL requests were submitted on February 10, 2017 by a law firm (Lipsitz, Green, Scime, Cambria, LLC). One requested payroll information for an Authority contractor. The second requested unredacted payroll records, the Uniform Contractor Questionnaire prepared by the contractor, the NYS Vendor Responsibility Questionnaire with attachments, Clerk of Works/Inspector logs, proof of worker's compensation and liability insurance and the Occupational Safety and Health Administration certification for another contractor. On March 2, 2017, the Authority provided payroll records for the first contractor that had select personal information redacted, such as home address, telephone number and social security number. On March 17, 2017, the Authority provided a copy of the worker's compensation insurance certificate. On March 20, 2017 the requester submitted appeals disputing both Authority responses. However, rather than present the information to the board, the Secretary responded to both requests on April 4, 2017 stating that the board denied the appeals on March 30, 2017. However, there is no indication that the board met on this date or that the board reviewed this appeal.

Of the three appeals that were sent to the board for review, the board did not receive any information regarding the records requested or the reason for denying access to the requested records. Yet the board denied all three appeals.

For example, a FOIL request (Investigative Post) was submitted on October 28, 2016 for records related to the Authority's rule for testing lead and copper water lines and email communications between the Authority and its public relations firm from January 2016 to October 2016. On December 1, 2016 the Authority provided information on the lead and copper rule, but did not provide the email communications, and responded that more information was needed regarding the email communications. On December 6, 2016, the individual submitted an appeal to the board regarding the decision to not provide the emails. At the December 15, 2016 board meeting the board voted to deny the appeal. There was no board packet provided to board members prior to the meeting, no information provided regarding what information was requested or an explanation as to why the request was denied, and no indication of any discussion by board members. Despite the lack of information provided prior to the meeting, the board voted unanimously to deny the appeal. We note that a FOIL request from a different requester submitted on March 3, 2017 (three months later) also requested all communications between the Authority and its public relations firm regarding social media accounts. This information, consisting of 152 pages of email correspondence, was provided to the requester on April 26, 2017.

Another FOIL request (Buffalo News) was submitted on December 22, 2016 for documentation and supporting records approved by the Authority board relating to the declaration of an emergency and retainer agreement with a local law firm. On January 19, 2017, the Authority denied the request and the requester submitted



an appeal of this denial on January 27, 2017. At the February 9, 2017 board meeting the board voted to deny the appeal. The board packet for this meeting was provided to board members on February 8, the day before the meeting, but did not include any information regarding the FOIL request, an explanation as to why the request was denied, or the appeal. Further, the board agenda included in the board packet did not indicate that the appeal was being considered. Despite the lack of information, the board voted unanimously to deny the appeal.

**The Authority does not always respond to FOIL requests timely.** Section 89(3) of Public Officers Law requires authorities to acknowledge receipt of a FOIL request within five business days. Of the 70 FOIL requests received by the Authority during 2016 and 2017, we determined that the Authority did not respond within the five-day time requirement for six requests. Responses for these six requests were 2 to 98 days beyond the five-day timeframe.

Requester's Name	Date of 1st Request	Date of 2nd Request	Date First Response Provided	Business Days Elapsed From 1st Request	Days Beyond Required Timeframe
Muck Rock	7/29/15	8/13/15	1/4/16	103 days	98 days
Investigative Post - Jim Heaney	11/8/16	12/23/16	12/27/16	34 days	29 days
International Brotherhood of Electrical Workers	3/22/17		3/31/17	7 days	2 days
Village of East Aurora	4/13/17	5/26/17	5/30/17	34 days	29 days
Amherst Democratic Club	5/24/17	7/26/17	8/2/17	49 days	44 days
Investigative Post - Dan Telvock	6/2/16		6/13/16	9 days	4 days

For example, on April 13, 2017, a request was submitted to the Authority from the Village of East Aurora to obtain the final report of the Cost of Service and Rate Structure Review prepared by the Authority's consultant. On May 26, 2017, after no response from the Authority, the Village re-sent the request. On May 30, 2017 the Authority provided the requested report.

Additional Information Should be Posted on the Authority's Web Site

Section 2800 of Public Authorities Law requires public authorities to make documents pertaining to their mission, current activities, annual financial reports, budgets and independent audit reports accessible to the public on the authority's official or shared web site. To assist state and local authorities meet their disclosure and reporting obligations, the ABO has issued Policy Guidance No. 10-03: "Posting and Maintaining Reports on Public Authority Web Sites". This guidance provides a checklist of policies, reports and other information that the Authority should maintain online in accordance with the Law.

We reviewed the Authority's web site between November 6 and November 9, 2017, and again on April 10 and April 11, 2018 to determine if the required information is posted on the Authority's web site. We found that the Authority needs to make additional required information available to ensure compliance. In general,

records and documents that provide historical information are posted, but the Authority's web site is less useful for obtaining current information. For example, as mentioned in this report, the Authority does not post board meeting agendas and board meeting packets prior to board meetings. We also found that while the Authority has posted a Procurement Policy, the document posted does not fully represent the Authority's policy, which is detailed in the Authority's Purchasing Guidelines and Procedures.

We note that some information that is available on the Authority's web site is difficult to locate. For example, a listing of the Authority's outstanding debt is found on page 66 of an 80-page document. This information would be easier to locate if it was posted separately by the Authority. We also note that the Authority has additional information which could be posted on its web site to improve transparency, such as annual operating and capital budgets approved by the board.

The full web site review can be found in Appendix A.

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## Conclusions and Recommendations

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### **Actions of the Authorities Budget Office:**

Based upon the facts identified in this report, the Authorities Budget Office censures the members of the Erie County Water Authority Board of Commissioners that served on the board during 2016 and 2017 (Commissioner Earl Jann, Commissioner Robert Anderson, Commissioner Karl Simmeth, and Commissioner Jerome Schad).

### **Recommendation to the Erie County Legislature:**

Based on the facts outlined in this report, it is the position of the Authorities Budget Office that the remaining board member (Commissioner Jerome Schad) of the Erie County Water Authority should be replaced by the County Legislature. We believe that the Authority would be best served by new leadership, one that will be more cognizant of its responsibilities and perform its board duties, and implement and enforce those policies.

### **Recommendations to the Authority:**

1. Board members must acknowledge their fiduciary duty at the time of appointment and re-appointment in accordance with Section 2824 of Public Authorities Law.
2. The board should establish appropriate procedures to verify that all information reported in the Public Authorities Reporting Information System (PARIS) is complete and accurate.
3. Board members must perform their duties and responsibilities in good faith and with proper diligence and care. Board members are to act in the best interest of the Authority and the people it serves, and exercise independent judgement on all matters.
4. Board members should receive board meeting packets a minimum of one week prior to the corresponding board meeting.
5. Board members should independently review the necessary information to make informed decisions.
6. The board should ensure that a justification is provided for all emergency contracts prior to authorization.
7. The board should ensure that all procurements and contract payments comply with the requirements contained in the adopted Purchasing Guidelines and Procedures. This includes ensuring that all master purchase

orders are approved by the board and limits established by master purchase orders are not exceeded.

8. The board should ensure that it reviews all payments approved by the Executive Director and Deputy Director in accordance with its Purchasing Guidelines and Procedures.
9. The Authority should ensure that all records and proposed resolutions to be considered by the board are available to the public prior to the board meetings.
10. The Authority should provide notice of public meetings to the media at least 72 hours prior to scheduled meeting in accordance with Section 104 of Public Officers Law.
11. The board should affirmatively seek training from the Committee on Open Government.
12. The board must ensure that all meetings and discussions are open to the public in accordance with Section 100 of Public Officers Law.
13. The board should use executive session only for those purposes set forth in Section 105 of Public Officers Law.
14. The board should ensure that motions to enter executive session provide the necessary details to support the exclusion from the public meeting in accordance with Public Officers Law. This includes citing the specific exemption to the Open Meetings Law as well as identifying the specific issue to be discussed.
15. The board must ensure that meeting minutes accurately reflect information and reports discussed during the board meeting, including any staff reports that are presented.
16. The Authority should provide adequate disclosure of its decisions and appropriately notify all customers of the impact of those decisions, including anticipated rate changes.
17. The Authority should comply with all requirements of Article 6 of Public Officers Law regarding Freedom of Information requests, including providing accurate information and providing all information requested. Appropriate explanations should be provided in those situations where the requested information is not provided.

18. The board should review all appeals of decisions to deny access to requested information, and provide detailed explanations as to why information is not being provided.
19. The Authority should respond to all FOIL requests within five days of receipt, as required by Public Officers Law.
20. The Authority should improve accountability and transparency by posting all required information on its web site and making information easier to locate.

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# Erie County Water Authority Response to Draft Report

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## Erie County Water Authority

295 Main Street, Rm. 350 • Buffalo, NY 14203-2494  
716-849-8484 • Fax 716-849-8467

May 31, 2018

**VIA EMAIL ([info@abo.ny.gov](mailto:info@abo.ny.gov))  
And REGULAR MAIL**

Jeffrey Pearlman, Director  
State of New York  
Authorities Budget Office  
PO Box 2076  
Albany, New York 12220-0076

RE: Response to Operational Review of the Erie County Water Authority

Dear Mr. Pearlman:

You and your team should be commended for the professional, courteous, and dedicated manner the Authorities Budget Office (the "ABO") conducted its recent operational review of the Erie County Water Authority (the "Authority"). Your five-months of labor have produced a thorough, well-written, draft report, which now becomes the Authority's "blueprint for change."

Since the ABO completed its investigation, there had been some recent developments that should be brought to your attention. On May 3, 2018, a newly constituted Board held its first meeting, with attorney Mark S. Carney, as its newest Commissioner. Mr. Carney replaces the Board's former Chair Robert Anderson whose term expired. Commissioner Jerome Schad now serves as the Board's new chair.

The Board has also appointed a new Secretary, Terrence McCracken, a former Erie County Legislator, who will now act as a liaison for the Authority with the County Executive and County Legislature. As the Authority's Secretary, Mr. McCracken will monitor the day-to-day operations of the Authority's executive staff to ensure the Board's policies are being carried out, and that matters are being properly reported to the Board for its review, consideration and/or approval. Mr. McCracken will also attend and participate in weekly staff meetings.



On May 17, 2018, Commissioner Karl J. Simmeth, Jr. unexpectedly announced his decision to retire and resign his Board seat. He made this announcement at the conclusion of all board and committee business conducted on that day. Commissioner Simmeth had served one year of a three-year term and had been appointed as the Authority's treasurer. The Erie County Legislature is expected to appoint an individual to fill out the remaining term within the next month or two.

As the Legislature considers candidates to replace Commissioner Simmeth, the Board will continue to operate with its two remaining Commissioners. Both commissioners will share the role of treasurer until the appointment of a new commissioner. Certain items and resolutions may need to be tabled if they do not have the approval of both commissioners. Other items, involving major policy changes and initiatives, may have to be delayed while the County Legislature selects a third commissioner whose views should be solicited and considered as part of the deliberative process of decision-making. Building on the old English proverb that two heads are better than one, the Board will act in the interim with the mind that three heads can govern more effectively and deliberatively than just two.

In March, the Buffalo and Niagara Coalition for Open Government (the "Coalition") reviewed the websites of every public authority within Erie and Niagara County. The Coalition identified eight key areas and issued reports cards for each website. The Coalition gave failing scores to all, but one, of the websites. The Authority's website received a ranking of 6 out of 14.

Immediately after the new Board took office, the following changes were made to the Authority's website: (1) meeting notices are now posted on the Authority's home page and are emailed to media outlets one-week in advance of any meeting; (2) board and committee agendas, along with complete board and committee packets, containing staff reports, resolutions, proposed contracts or other information distributed to board and committee members are being posted one-week in advance of any meeting; (3) draft and final minutes are being posted on the Authority's website, (4) all board and committee postings are being sent by email to anyone who signs-up for such notifications on the Authority's website, and (5) a copy of the Acknowledgement of Fiduciary Duties and Responsibilities signed by each commissioner is now posted on the webpage, along with the commissioner's oath card. You will also notice a change to the board and committee minutes. Minutes now capture a summary of the information and discussions offered during these public meetings.

At the May 17, 2018 board meeting, Commissioner Simmeth joined Commissioners Schad and Carney in approving three items of business, touching upon the issues of governance, transparency and management oversight.

First, the Board reviewed a draft request for proposal, along with a list of local website developers and designers from whom proposals will be solicited for the re-design of the Authority's website, along with its Facebook and twitter pages. With the assistance of a web developer/designer, the Authority will then begin to record and post its board and committee meetings on its website.

Along with the development of its website, the Board will solicit the assistance of a professional public relations firm to produce informational videos to be posted on Facebook, and Twitter, as well as the Authority's website. The following are topics that are being discussed as possible informational videos: (1) reviewing and explaining the Authority's billing statement, (2) any changes to its billing structure or rates, (3) how to initiate or terminate services when selling or purchasing a house, (4) instructions on how to participate in the Authority's water quality testing program, and (5) the service method used by the Authority for the delivery of safe, potable water within Erie County.

Second, the Board has begun to re-examine its management structure. In particular, the Board has already taken steps to re-structure the office of the Secretary. As noted in the draft report, the former Secretary served as the Authority's Personnel Officer, its Records Management Officer, its Freedom of Information (FOIL) Officer, the head of its Legal Department and the conduit for senior management to place items and information on the Board's agenda. This structure created a bottle neck, allowing too much power to rest with just one person, and restricting the flow of information to the Board.

As a first step, the Board has decided to restore the position of "Attorney" and to remove the Secretary as the head of the Authority's Legal Department. The "Attorney" will serve as the Authority's chief legal counsel, reporting directly to the Board and will be responsible for overseeing, monitoring, assessing and reporting on whether the Authority is in compliance with those powers entrusted to the Authority by its enabling statute, as well as other applicable provisions of law governing public authorities. The Board will select a new counsel at its regular meeting, scheduled for June 28, 2018.



Third, the Board has adopted a resolution, appointing the Secretary and Attorney, as ex officio members to its Governance Committee. The Board added these ex officio members to assist in implementing the changes recommended by the ABO in its draft report. The Governance Committee and senior staff members have been provided with a red binder entitled the "Best Practice Guide for Public Authorities," consisting of the ABO Policy Guidance and Recommended Practices. These binders will be updated, as needed, and distributed to new commissioners and new members of the executive staff. These policy guidelines and recommended practices provide a wealth of information on the best practices for board governance, transparency and management oversight.

The Governance Committee will have a full agenda in the next few months. First on the committee's agenda will be a legal audit of the Authority's FOIL files. The audit is being conducted for purposes of revising its FOIL policy. It was disturbing to read that certain "Authority officials refused to provide [you] with certain documents and records" relating to information requested under FOIL. We hope you will allow us the opportunity to remedy this situation, by providing whatever documents you were previously denied.

Note 1

As an entity created by the laws of the State of New York, the Authority will endeavor to become a model of openness, embracing the standards set forth by the State Legislature in the following provision of the Open Meeting Law:

It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.

In this spirit, we respectfully request the ABO delay scheduling its final exit conference with the Authority, so the yet-to-be-appointed, commissioner may also be present at this final conference. The Authority would like to discuss, at this final conference, its efforts to address and remedy the issues raised in your draft report and to seek further feedback from your investigative team. Before the ABO issues its final report, the Authority would request the opportunity to prove, not by words, but by action, that its newly constituted Board has the leadership to recognize and

Note 2

Authorities Budget Office  
May 31, 2018  
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carry out its duties and responsibility, to make informed decisions in an open and transparent manner, and to provide adequate oversight of management by establishing policies and procedures which are uniformly and consistently enforced. We hope the Board's recent action, as outlined in this letter, demonstrates its good faith and commitment to move the Authority forward in a positive direction.

As you have noted in your draft report, your staff has only performed an operational review relating to the governance, transparency and management oversight. We would like to close this letter by focusing your attention on a positive note. The Authority employs approximately 230 dedicated public servants and employees who, on a daily basis, provide not only safe, affordable potable water to the residents of Erie County, but also sets the gold standard for customer service. As the Board moves to create "an environment of transparency," the Authority hopes this new ray of light will shine on the accomplishments of these hardworking men and women who toil to provide and deliver the quality of service, which they, as residents and taxpayers of Erie County, would expect to receive. We look forward to working with the ABO to make this goal a reality.

Very truly yours,

THE ERIE COUNTY WATER AUTHORITY



Jerome D. Schad, Chair



Mark S. Carney, Vice Chair

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## Authorities Budget Office Comments

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1. We do not believe that obtaining the additional documents that were withheld during the course of our review would have any significant impact on the results or conclusions of the report, but would merely require additional time and resources to compile and evaluate.
2. The primary purpose of the exit conference is to discuss the changes made to the report as a result of the Authority's response to the draft report. Since the Authority did not disagree with any of the issues in the report and the Authority's response did not address the content of the draft report, the only revisions made to the report are to acknowledge the Authority's response to the draft report. As such, we determined that an exit conference was not necessary for this review.

## Appendix A

### Review of Erie County Water Authority's Web Site

Information to be Posted on Public Authority's Web Site	Posted on Web site (Yes/No)
Authority Mission Statement	Yes
Authority Enabling Statute	Yes
Authority By-laws	Yes
Authority Code of Ethics	Yes
Authority Organization Chart – posting, at a minimum, the Authority's executive structure and major organizational units.	Yes
Report on Operations and Accomplishments - Description of the Authority's operations, completed and active projects, as well as any material changes in Authority operations and programs	Yes
Subsidiaries, Affiliates, and Major Authority Units and required subsidiary reports per statute	N/A
List of Authority Board Members, including appointing entity, appointment dates, term and professional experience, background and qualifications of each member and officer	Yes
Executive Management Team (making more than \$100,000 in annual salary) - including professional background, experience and qualifications	No, not all executive staff are posted
Authority Performance Measures	No, the document posted does not meet the requirement
Authority Performance Measures Report	No
Authority Schedule of Debt	Yes, but not easy to locate
Management's Assessment of the Authority's Internal Control Structure and Procedures - including a description of operating and financial risks	Yes
Board meeting agendas and meeting minutes	Yes, but not in advance of the meeting
Schedule and notices of all board meetings	Yes
List of Committees and Committee Members	Yes
Committee meeting notices and agendas	Yes, but not in advance of the meeting
Committee meeting minutes and webcasts	Yes
Annual Budget Report and details of 4-year financial plan	Yes
Annual Independent Certified Financial Audit	Yes
Independent Auditor's Report on Internal Controls Over Financial Reporting	Yes
Independent audit management letter	Yes
List of Real Property owned by the Authority	Yes
Property Acquisition and Disposition Policies	No
Personal and Real Property Transactions	Yes
Policies for the procurement of all goods and services	No, adopted Purchasing Guidelines and Procedures not posted

Annual Procurement Report - post the reports generated from the PARIS Procurement Report, and include name of the Authority's Procurement Officer	Yes
Investment Policies	Yes
Annual Investment Report, including the investment audit results and management letter, record of investment income of the authority and a list of fees paid for investment services	No, the documents posted are not sufficient
Fee Schedules (if applicable) - list of any service or administrative fees charged	Yes
Current Year Official Statements (for those authorities issuing debt)	No

Review conducted by Authorities Budget Office on November 6-9, 2017 and April 10-11, 2018

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## Appendix B

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### *Acknowledgement of Fiduciary Duties and Responsibilities*

As a member of the Authority's board of directors, I understand that I have a fiduciary obligation to perform my duties and responsibilities to the best of my abilities, in good faith and with proper diligence and care, consistent with the enabling statute, mission, and by-laws of the Authority and the laws of New York State. The requirements set forth in this acknowledgement are based on the provisions of New York State law, including but not limited to the Public Authorities Reform Act of 2009, Public Officers Law, and General Municipal Law. As a member of the board of directors:

I. Mission Statement

I have read and understand the mission of the Authority; and the mission is designed to achieve a public purpose on behalf of the State of New York. I further understand that my fiduciary duty to this Authority is derived from and governed by its mission.

I agree that I have an obligation to become knowledgeable about the mission, purpose, functions, responsibilities, and statutory duties of the Authority and, when I believe it necessary, to make reasonable inquiry of management and others with knowledge and expertise so as to inform my decisions.

II. Deliberation

I understand that my obligation is to act in the best interests of the Authority and the People of the State of New York whom the Authority serves.

I agree that I will exercise independent judgment on all matters before the board.

I understand that any interested party may comment on any matter or proposed resolution that comes before the board of directors consistent with the laws governing procurement policy and practice, be it the general public, an affected party, a party potentially impacted by such matter or an elected or appointed public official. However, I understand that the ultimate decision is mine and will be consistent with the mission of the Authority and my fiduciary duties as a member of the Authority's board of directors.

I will participate in training sessions, attend board and committee meetings, and engage fully in the board's and committee's decision-making process.

III. Confidentiality

I agree that I will not divulge confidential discussions and confidential matters that come before the board for consideration or action.

IV. Conflict of Interest

I agree to disclose to the board any conflicts, or the appearance of a conflict, of a personal, financial, ethical, or professional nature that could inhibit me from performing my duties in good faith and with due diligence and care.

I do not have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of my duties in the public interest.

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

Authority Name: \_\_\_\_\_

Date: \_\_\_\_\_