



# United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Southwest Region

2800 Cottage Way

Room E-1712

Sacramento, California 95825-1890

IN REPLY  
REFER TO:

August 9, 2007

## MEMORANDUM

To: Robert McCarthy, Field Solicitor, Palm Springs Field Office

From: Daniel G. Shillito, Regional Solicitor, Pacific Southwest Region

Subject: Proposed Removal of Robert McCarthy

This is official notification that I propose to remove you from your position of Palm Springs Field Solicitor, GS-0905-15, Pacific Southwest Region, Office of the Solicitor, Department of the Interior and from Federal service. You are charged with violation of the Trade Secrets Act and unauthorized use of non public information. This action is proposed in accordance with Part 752 of Title 5 of the Code of Federal Regulations for such cause as will promote the efficiency of the Service. Such action, if sustained, will be effected no sooner than 30 days from your receipt of this notice.

### **Background**

In April 2007, I was informed by the BIA Regional Director and his Associate of an article in the Desert Sun newspaper, dated April 11, 2007, entitled, "Probe: Local Indian Affairs office troubled."

The Desert Sun is the daily newspaper serving the Palm Springs community. The article described that the Bureau of Indian Affairs (Bureau or BIA), continues to experience problems with management of commercial leases for Indian trust lands identified in a 1992 audit report by the Department of the Interior, Office of the Inspector General (OIG). The article quoted a letter from Earl Devaney, DOI Inspector General, to a U.S. Senator, stating that BIA's Palm Springs Office in particular had not yet implemented all of the recommendations made in the 1992 audit report. Also, various quotes -- prominently displayed in the article -- were attributed to you directly as the "Attorney for the Palm Springs office of the Bureau of Indian Affairs".

After reviewing the newspaper article, the Deputy Regional Solicitor, Temi Berger,

contacted you by telephone on April 16, 2007, and requested that you provide all documents and verbatim accounts of communications that you provided to the Desert Sun or other entities. Initially, you told Ms. Berger that you did not have to provide the content of any discussion or disclose any documents that you had provided. Following Ms. Berger's discussion with you, she sent you a written memorandum by facsimile dated April 16, 2007. Ms. Berger also prepared a memorandum to file, dated April 17, 2007, recalling her telephone conversation with you of the previous day. In her memorandum to you, Ms. Berger noted her concern that information had been improperly disclosed in violation of Cobell v. Kempthorne, and *in* violation of your professional responsibility as an attorney for the Secretary and the BIA client within the Department.

On April 23, 2007, Ms. Berger received a memorandum from you dated April 20, 2007, that served as your response to the April 16th verbal and written requests for a copy of all documents and verbatim record of any conversations that you engaged in with the Desert Sun or other entity. Among those documents provided by you were: (1) a memorandum dated June 28, 2005, titled "Whistleblower Disclosures Regarding the Bureau of Indian Affairs", which you had previously sent to the OIG requesting they investigate your allegations against BIA; and (2) an internal e-mail message from a BIA employee to the Palm Springs Superintendent, entitled "TAAMS Opportunity Area". In your written response to Ms. Berger, you acknowledged that you had provided these memos (and other items) to the Desert Sun reporter but asserted that, as to the OIG memo, you had redacted the Palm Springs Office case number and file name from the document. The document that you provided to Ms. Berger contained these redactions. At this time, Ms. Berger and I commenced research into the content of the article, as well as the information you admittedly provided to the Desert Sun reporter to ascertain whether your conduct/disclosures amounted to a violation or violations of your professional responsibilities.

The publication of the article, which appeared to concern the apparent unauthorized disclosure of confidential information, strained the already difficult relationship that you had with the PSA. As a result, the BIA Regional Director demanded through the Regional Solicitor's office that you cease all work on behalf of the BIA Palm Springs Field Office. This request was later confirmed in writing by the Director, Bureau of Indian Affairs. In his memorandum, the Director demanded that the long standing arrangement by the BIA's Palm Springs office allowing you to occupy an office and have access to a law library and other office amenities cease immediately. The Director demanded that you be removed from the office permanently because, based on your contributions to the article and other inappropriate examples of conduct leading up to the article's release, the Bureau could no longer trust you as their attorney, especially when confidential trust information was being made public by its legal counsel.

In sum both this office and the client agree that your decision to provide Indian Trust and confidential commercial or financial information to a newspaper reporter, as detailed in this proposal, was a deliberate and harmful act by an Interior attorney who knew or should have known the consequences of such an act.

## **Charge 1: Violation of the Trade Secrets Act**

The Trade Secrets Act provides as follows:

### **18 U.S.C. § 1905. Disclosure of confidential information generally**

Whoever, being an . . . employee of the United States or any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties. . . which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditure of any person, firm, partnership, corporation, or association. . . shall be fined no more than \$1000, or imprisoned not more than one year or both; and shall be removed from office of employment.

On or about April 2007, you provided information to Diana Marrero, a Desert Sun Reporter. The Desert Sun is the principal newspaper serving the Palm Springs, California area. While we are not certain as to all of the information you provided, you have acknowledged providing to her a memorandum dated June 28, 2005, titled "Whistleblower Disclosures Regarding the Bureau of Indian Affairs," which you had sent previously to the Department of the Interior, Office of Inspector General, requesting that they investigate allegations against the Bureau of Indian Affairs (BIA). In the memo to the IG, you identify "specific examples" of leases that you assert have been improperly administered by the BIA, Palm Springs Agency. The original letter contains Palm Springs Lease (PLS) numbers and even the names of lessees before each of the "specific examples." While you represented to this office that you had redacted the lease numbers and names, and provided a copy to us with these purported redactions, the memorandum that you provided to Ms. Marrero still contained information sufficient to form a basis for identifying certain leases. Further, and more importantly, your memo to the OIG disclosed confidential commercial or financial Indian Trust information.

As provided in the below specifications, you provided the following confidential commercial or financial information to Ms. Marrero, information likely to impair the government's ability to obtain necessary information in the future, information likely to impair compliance and program effectiveness, and/or information likely to impair the competitive position of the person from whom the information was obtained:

Specification 1: In the paragraph at the bottom of page 2, ending on page 3 and beginning with "Following purchase of this lease . . .", you provide information sufficient to identify the property and parties to include the way in which the lease was purchased, the year it was purchased, the commercial nature of the property, that the property lacked an on-site monitoring function, financial information regarding a recent remodeling and the location of the property in blocks from the Palm Springs Agency.

Moreover, the information provided consists of commercial or financial information, such as a specific period of arrears and the specific dollar amount of the arrears and the specific dollar amount of a remodel. This disclosure of confidential commercial or financial information violates the Trade Secrets Act.

Specification 2: In the first full paragraph on page 3 and beginning with “The lessee stopped . . .”, you provide information sufficient to identify the property, to include the kind of business, that it is currently “abandoned” and has received certain citations for specifically stated violations. Moreover, the information provided consists of commercial or financial information, such as the nature of the leasehold agreement, and a relationship of the lease to market rentals. This disclosure of confidential commercial or financial information violates the Trade Secrets Act.

Specification 3: In the third full paragraph on page 3, and beginning with “Indian landowners requested PSA . . .”, you provide information sufficient to identify the property and parties, to include the nature of the business of the leased property, the municipality name of the lessee, an adjacent specifically identified property and a description of a specific large dollar amount in improvements that the lessee made to the “adjacent” specifically identified property. Moreover, the information provided consists of commercial or financial information, such as certain terms of the lease, a request by the lessor to compile certain data, the specific amount (in millions) that the lessee paid in improvements to the adjacent property, and information that the lessee has negotiated for a sale of property. This disclosure of confidential commercial or financial information violates the Trade Secrets Act.

Specification 4: In the last paragraph on page 3, continuing to the top of page 4 and beginning with “Thirty years ago . . .”, you provide information sufficient to identify the property and parties, to include that the leases have resulted in certain specified protests. Moreover, the information provided consists of commercial or financial information, such as information as to certain terms of leases. This disclosure of confidential commercial or financial information violates the Trade Secrets Act.

Specification 5: In the last paragraph on page 4, continuing to the top of page 5 and beginning with “PSA has delayed . . .”, you provide information sufficient to identify the property and parties, to include the identity of each of the proposed municipal lessees, the nature of part of the proposed transaction, that the lease may lack cost adjusting factor to increase the rents, the specific numbers of land parcels involved, the specific number of proposed lessors, and, the large dollar size of the proposed sale. Moreover, the information provided consists of commercial or financial information, such as the specific proposed terms and conditions of the lease. This disclosure of confidential commercial or financial information violates the Trade Secrets Act.

Specification 6: In the first full paragraph on page 5 and beginning with “Lessee proposed a . . .”, you provide information sufficient to identify the property and the parties, to include the specific number of units on the property, how the PSA uses

appraisals, below market rents, and the nature of the use of the property by your failure to completely redact the property description. Moreover, the information provided consists of commercial or financial information, such as the lessee's estimate of specific projected additional revenue from a specifically identified number of new units, a negotiating position, certain conditions of the lease, a condition for an extension of the lease and the status of payments under the lease. This disclosure of confidential commercial or financial information violates the Trade Secrets Act.

Specification 7: In the second full paragraph on page 5 and beginning with "PSA and PRO . . .", you provide information sufficient to identify the property and the parties, to include the specific size of an approved lease in acres, that it was part of a specifically identified large dollar amount development, that it was adjacent to a specific acreage of land, and that the lessee had previously assumed the specific amount of defaulted public improvement bonds by an earlier lessee. Moreover, the information provided consists of commercial or financial information, such as certain specific lease terms and negotiations of lease terms. This disclosure of confidential commercial or financial information violates the Trade Secrets Act.

Based on the above specifications, I believe that this charge alone supports your removal from federal service.

## **Charge 2: Unauthorized use of non public information**

In your position, you are a representative of the Department of the Interior and the Bureau of Indian Affairs, and have an obligation not to disclose unauthorized information. You violated that responsibility by providing Ms. Marrero, a reporter for the Desert Sun newspaper, non public information, as follows:

Specification 1: You have acknowledged that you provided an internal BIA memo to Ms. Marrero, dated September 12, 2006, concerning TAAMS, which describes the internal working problems of the automated financial management tool about to be implemented by the Bureau. That internal agency e-mail memo of September 12, 2006, which was not addressed to you, contained information concerning an agency trust management tool which disclosed how the BIA's new system is to manage the receipt, investment, disbursement of funds, etc., generated by Indian leasing assets.

Specification 2: You have acknowledged that on or about April 2007, you provided to Ms. Marrero a memorandum dated June 28, 2005, titled "Whistleblower Disclosures Regarding the Bureau of Indian Affairs," which you had sent previously to the Department of the Interior, Office of Inspector General, requesting that they investigate allegations against the Bureau of Indian Affairs (BIA). The non-public information contained in that memorandum included the terms of leases, proposals for leases, bargaining positions, how an agency uses appraisals, possible business and financial losses, competitive leasing terms and the internal management tools to be implemented by the agency to protect such trust assets.

Based on the above specifications, I believe that this charge alone supports your removal from federal service.

### Penalty

In proposing a removal penalty, I have considered the following factors as identified in Douglas v. Veterans Administration, 5 MSPR 280 (1981).

Nature and Seriousness of Offense, Employee's Job, and Clarity of Notice. I note that you hold the position of Palm Springs Field Solicitor, GS-0905-15. Particularly aggravating to me in my evaluation of your misconduct is that you are not an inexperienced attorney but rather you hold the title of Field Solicitor -- a senior level position within the Office of the Solicitor -- with an extensive Indian law background. Moreover, the Palm Spring Field Solicitor is a unique position, created to assist the Department of the Interior's largest Indian leasing program with significant large commercial leases, generating million dollar revenues annually. In that position, you are responsible for providing legal counsel and assistance to an office, which you have rightly recognized as one that is unique among BIA offices because of its high volume of commercial and residential Indian land leases, which are managed on behalf of the Agua Caliente Band of Cahuilla tribe and its allotted members. Regional managers at the client agency have reviewed your disclosures and have expressed to me shock and frustration at the release of such highly sensitive and confidential information. They view these unauthorized disclosures as a volatile act, harmful to the agency, and likely to impair the competitive position of the person from whom the information was obtained.

You are in a unique position, where you bear considerable fiduciary and other responsibilities and work independently. The offenses committed by you are extremely serious, either individually or together so that either would warrant this removal proposal. The Trade Secrets misconduct is a violation of law and your actions, and your disclosure of commercial and financial information, goes to the core of your job as an attorney in this unique office. Likewise, your unauthorized release of non public information undermines a key responsibility of someone in your position and represents conduct adverse to your clients and others. The misconduct was egregious and not inadvertent. The offenses are rendered even more serious by the nature of your job, an attorney, expected to protect information and maintain confidences. There is also no question that these violations were knowing and intentional insofar as you have been previously published on this very issue in your Law Review Article entitled, THE BUREAU OF INDIAN AFFAIRS AND THE FEDERAL TRUST OBLIGATION TO AMERICAN INDIANS, Vol. 19 BYU, Journal of Public Law, 1, 31-33, (2004), wherein you discuss the Bureau's record keeping policy and the trustee's duty to "the [Indian] beneficiary not to disclose to a third person, information which [was] acquired as trustee where he should know that the effects of such disclosure would be detrimental to the interest of the beneficiary." Id. at 32. I have considered that you have brought harm to the client and to this agency insofar as your admitted disclosures to the Desert Sun reporter have, in effect, usurped the disclosure authority of the client and agency without permission. As

such, I perceive your unauthorized waiver of privilege as a most serious transgression for any attorney, particularly a senior Interior attorney.

Disciplinary Record and Work Record. I have also weighed mitigating factors such as your tenure and, until recently, your acceptable performance, and the fact that you have no prior record of formal discipline. Nonetheless, these factors pale in comparison to the substantial aggravating factors described in this proposal.

I have also considered your inability to get along with BIA members of the Palm Springs Agency. This is evidenced by my in-person meeting with you in Palm Springs in June 2005 (also attended by attorney Karen Glasgow of the Oakland Field Office), at which time I counseled you about your misplaced demand for access to files that were exclusively maintained by and belonging to the BIA, and my concerns over your pattern of disrespectful and condescending actions toward your client.

I have also considered my issuance to you of a letter of counseling dated December 26, 2006, in which I cautioned you about the disrespectful tone of your memoranda dated November 17, and 26, 2006, addressed to the Palm Springs Superintendent and your treatment of him, as though he was your subordinate and not your client. Moreover, when I inquired about a leasing issue, you likewise responded with a discourteous memo back to me. Your combative response was another example of your failure to take responsibility for your actions. Consequently, in my memo to you dated November 29, 2006, I was compelled, again, to counsel you on your inappropriate admonishment of my attempts to supervise your actions.

Effect on Future Performance, and Notoriety and Impact. I have also considered that your relationship with that office degenerated to the point that on June 14, 2007, the Director of the Bureau of Indian Affairs, citing the lack of a "workable attorney/client relationship," requested that you no longer service the Bureau of Indian Affairs. I have also considered your potential for fostering a positive relationship with a client other than BIA. As Regional Solicitor for the Pacific Southwest Region, my uppermost concern is that my staff and senior attorneys strive to maintain an excellent working and trusting relationship with their client agencies. They are expected to foster such a relationship while operating on a daily basis with great autonomy and discretion. In the aftermath of your remarkable efforts to betray that fundamental tenet, I cannot, with any measure of confidence, expose another client within this region to your demonstrated reckless indifference. In essence, your decision to release confidential and highly sensitive information to the Desert Sun, and the potential for considerable impairment to the BIA, Department, and allottees previously addressed in this proposal, have resulted in significant embarrassment and notoriety to the Office of Solicitor.

Potential for Rehabilitation, Mitigating Circumstances, and Availability of Alternative Sanctions. Prior to coming to the decision to propose this action, I considered the serious nature of the charges and also your potential for successful rehabilitation. However, your history of difficulties in the PSA office, along with your failure to recognize that you did

anything wrong, despite my and Ms. Berger's persistent attempts to counsel you, leads me to conclude that you are not a good candidate for rehabilitation. I also considered the sufficiency of imposing a lesser penalty. Based upon the seriousness of the behavior exhibited, the poor potential for rehabilitation and the fact that you have collaterally damaged your opportunity to work with other clients, I do not believe that proposing a lesser penalty will change your behavior or is appropriate in light of the considerable misconduct.

Consistency with Other Penalties. I consider your decision as an Interior attorney to disclose the aforementioned information to the Desert Sun reporter to be unprecedented as it relates to this Region and as to the sum of my experience and years as a supervising Interior attorney, particularly since your conduct has potential criminal implications. As such, I do not feel that this Douglas factor is relevant to a penalty determination in this instance due to the absence of comparative misconduct.

Consistency with Table of Penalties. I have considered that the penalty for a violation of the Trade Secrets Act contemplates a fine, imprisonment, and removal from federal employment, and that the penalty for similar misconduct in the Department's Table of Penalties allows for a 5-day suspension to removal for a first offense. I also note that the penalty for unauthorized use of non public information ranges from written reprimand to removal for a first time offense. Considering the above factors, and the seriousness of the offenses, removal is within the allowed range of penalties for these offenses and is reasonable.

Consequently, it is my decision to propose your removal for such cause as will promote the efficiency of the Service.

You may answer this proposed action orally or in writing, or both, to the reply official, Mr. Larry Jensen, Deputy Solicitor. You may furnish affidavits and other documentary evidence in support of your reply. If you wish to make an oral reply, you may contact Mr. Jensen's office at (202) 208-4423 to arrange for such a reply. In this event, your travel to and from Mr. Jensen's office will be coded as official time, and your travel, lodging, and per diem will be at government expense in accordance with official government travel regulations. Travel arrangements for an oral reply can be made with Ms. Carolyn Brooks at (916) 978-5672. You will be allowed fourteen (14) calendar days from the date of your receipt of this letter to reply. If you wish to make a request for an extension of time, you may do so in writing to Mr. Jensen, stating your reasons for additional time needed and consideration will be given to extending the time limit. You will be given a total of eight hours of official time to respond to this proposal, which must be requested and approved in advance. Regardless of the manner in which you reply, full consideration will be given to any answer you submit. If you believe the proposed action is unwarranted, it is important that your reply state completely all the facts and contain all the documentary evidence supporting your reasons why the proposed action should not be taken. You will be retained in an active duty status during this period.

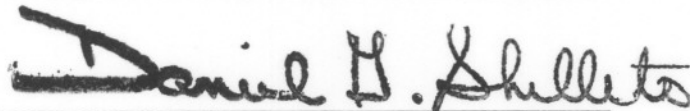


You have the right to be represented by an attorney or other representative, provided your choice does not constitute a conflict of interest or position. If you wish to be represented, please advise Mr. Jensen of the name, address, and telephone number of your representative.

You have the right to review all evidence used to support this proposed action. If you wish to review the background material, you may contact Ms. Kristine Smith, Human Resources Specialist, Minerals Management Service, at (202) 208-6448. Copies will be provided to you or your designated representative upon request. If you do not understand the reason for this proposed action, you may contact Ms. Smith for further explanation at the phone number listed above.

A written decision will be issued to you by Mr. Jensen as soon as practicable after your response is received and given full consideration, or after the expiration of the time limit provided for your response, if you do not respond.

You are requested to sign and date the acknowledgment copy of this memorandum as evidence that you have received it and return your signed acknowledgment via facsimile or overnight mail. Return postage for overnight mail, pre-paid, is included with this proposal for your convenience. By signing and dating the acknowledgment copy, you will not forfeit any of the rights mentioned in this memorandum. Your signature does not mean that you agree or disagree with the contents of this memorandum. Failure to sign will not void the contents of this memorandum.



Daniel G. Shillito  
Regional Solicitor  
Pacific Southwest Region

AUG 08 2007

Date

I acknowledge receipt of this memorandum:

\_\_\_\_\_  
Robert McCarthy

\_\_\_\_\_  
Date