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Board of Directors
Fort Ord Reuse Authority
902 2nd Avenue, Suite A
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Re: Authority Counsel Responses to Questions Posed Regarding Brown Act,
Conflicts of Interest, etc.

Honorable Members of the Board of Directors:

Authority Counsel was asked to opine on the following issues:

1. In restricting MCWD from funding litigations involving the failed regional desalination project does the FORA Board want MCWD to pay Monterey County and Cal Am and not provide any defense against the lawsuits from Monterey County and Cal Am?
2. Did the Monterey County Supervisors potentially violate the Brown Act and conflict of interest laws in voting to restrict MCWD legal defense of the failed regional desalination project, and subsequently also voted to sue MCWD on the failed regional desalination project?
3. Do the FORA Board members who also make up the Seaside County Sanitation District Board have to recuse themselves when the issue of annexation of the Fort Ord Community by MCWD comes before the FORA Board?

The first issue does not present a legal issue and Authority Counsel does not comment or express an opinion.

Authority Counsel addresses the second and third issues in the attached memoranda, respectively labeled "Conflicts of Interest in Service on FORA and Monterey County Board of Supervisors" and "Conflicts of Interest in Service on FORA and SCSD Boards."

Authority Counsel also takes this opportunity to add a friendly reminder about the Brown Act. (Gov. Code § 54950 et seq.) Authority Counsel understands that the above questions were presented via e-mail on September 10, 2015 by ex officio member Peter Le sent to all members of the FORA Board. Government Code Section 54952.2 prohibits any majority of the members of a legislative body from using communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business (other than at a properly noticed meeting under the Brown Act). With regard to the use of e-mail, the California Attorney General concluded that a majority of a body would violate the Brown Act if they e-mailed each other regarding current issues under the legislative body's jurisdiction even if the e-mails were also sent to the secretary and chairperson of the agency, the e-mails were posted on the agency's Internet Web site, and a printed version of each e-mail was reported at the next public meeting of the body (finding that these safeguards were not sufficient to satisfy either the express wording of the Brown Act or some of its purposes). Specifically, such e-mail communications would not be available to persons who do not have Internet access and even if a person had Internet access, the deliberations on a particular issue could be completed before an interested person had an opportunity to comment. (See 84 Ops.Cal.Atty.Gen. 30 (2001).)

The principal purpose behind the open meeting requirement is to assure that decisions made by local agency boards are considered, debated and made in public and not as a result of private meetings or communications designed to develop a collective concurrence on action to be taken. If it can be demonstrated that the communications in question were not used to develop a concurrence as to any action to be taken, one can argue that the communications do not constitute a "meeting" and the Brown Act is not applicable. However, it is likely that any substantive conversations or communications among members concerning an agenda item prior to a public meeting would be viewed as contributing to the development of a concurrence as to the ultimate action to be taken. E-mails which advance or clarify a member's understanding of an issue, facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, could all be considered examples of communications which contribute to the development of a concurrence as to action to be taken by the legislative body. For that reason, it is prudent for each member to refrain from communicating outside the context of a public meeting with any majority of the other members unless the communication is covered by a clear exception to the open meeting requirement. Even when the first member communicates with less than a majority, there is a danger that other members may in turn continue the chain of communications with the result that more than a majority eventually becomes included in the series of e-mails (creating a "serial meeting" violation for which all participants may be held to account).

Although Mr. Le is not a voting member of the FORA Board (and his presence at a meeting does not count for the purposes of establishing a quorum), the provisions of the Brown Act may nevertheless apply to his communications. Unlike a member of the general public (who may freely communicate with any or all of the FORA Board members outside a meeting, even with respect to FORA business), Mr. Le is engaged in the deliberative process of FORA's Board. He receives information and communications which are not all necessarily disseminated to the general public,

his opportunity to comment on a matter coming before the FORA Board is not limited to any public comment period, he has the ability to raise questions and engage in substantive dialog with other Board members at FORA meetings, etc. For these reasons, it would not be safe to assume that his ex-officio status alone would be sufficient to remove communications from Mr. Le from the prohibitions of the Brown Act against private communications between Board members regarding FORA business.

Should the members of the Board have any questions or comments regarding the opinions expressed in the attached memoranda or this letter, Authority Counsel looks forward to discussing them.

Very truly yours,

KENNEDY, ARCHER & GIFFEN



Jon R. Giffen