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December 30, 2013

To: Board of Directors, Marina Coast Water District

From: _____
Jeanine DeBacker, Special Counsel

Subject: The Brown Act and Board Procedures Manual Requirements and Potential Legal Consequences for Disclosing Publicly Board Discussions Occurring in Closed Session.

This memorandum is to provide a brief overview of each Board member's obligations under both the Brown Act and the Board Procedures Manual to maintain the confidentiality of closed session discussions. At your meeting, Special Legal Counsel will present additional information regarding applicable California law and the Board Procedures Manual.

**Limited Scope of Closed Sessions**

The primary intent of California's Brown Act is that the deliberations and actions of government bodies be conducted openly for the benefit of the public. Closed sessions are an exception to the open meeting requirements and the authority for such sessions is narrowly construed. Closed sessions require three types of notice: a listing in the agenda, a pre-closed session announcement, and a post-closed session report of action taken. All closed sessions must be conducted pursuant to expressly authorized statutory exceptions. The permitted reasons for a closed session are generally limited to the following: the personnel exception; pending litigation and the attorney-client privilege; real estate negotiations; labor negotiations; and public security. (Gov. Code §54962)

The discussions, deliberations and actions of the Board in closed session must not range beyond the limited scope and purpose of the closed session. Only information that is pertinent to the purpose of the closed session can be discussed in closed session. Moreover, if specific legal authorization for a closed session does not exist, the matter must be conducted in public regardless of whether the matter is sensitive, embarrassing or controversial.

**Closed Session Confidentiality Requirements**

The Brown Act provides that a person may not disclose confidential information that ***has been acquired by being present in closed session unless authorized by the governing board.*** Except for meeting the reporting-out requirements for closed sessions, there are important legal and practical reasons for public agencies to preserve the confidentiality of closed session matters – to preserve the board's negotiating position, for example. (Gov. Code §54963.)

Confidential information means "a communication made in a closed session that is specifically related to the basis for meeting lawfully in closed session." Information shared or discussed in closed session which extends beyond the subject matter which forms the legal basis for the closed session is not considered confidential information. Generally, the Brown Act does not permit discussions and deliberations in closed session to range beyond the proper scope of the closed session. If discussions by a board in closed session do go beyond the authorized basis for being in closed session, such information does not have the protection of confidentiality provided by the Brown Act. (Gov. Code §54963)

**Exceptions to Confidentiality Requirements**

It is not considered a violation of the confidentiality requirement when a person does the following:

- Makes a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law and discloses facts necessary to establish the illegality of an action taken by a governing body, or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by the body. However, this exception does not likely protect a person who discloses information from closed session that does not establish illegality.

- Expresses an opinion concerning the propriety or legality of actions taken by a governing body in closed session including disclosure of the nature and extent of the illegal or potentially illegal action. However, this exception does not likely protect a person who discloses information that does not amount to illegal action.

- Discloses information acquired by being present in a closed session that is not confidential information as defined in the statute. This would include information that was discussed that is not specifically related to the subject of the closed session.

- Disclosures under various "whistleblower" statutes (generally, those contained in Labor Code § 1102.5 or Government Code § 53296).

**The District's Board Procedures Manual**

Section 26 of the Board Procedures Manual provides as follows:

> Meetings of the Board are either open or closed. The Brown Act strongly favors open meetings; private discussions among a majority of a legislative body are prohibited, unless expressly authorized under the Brown Act. The most common purpose of a closed session is to avoid revealing confidential information that may, in specified circumstances, prejudice the legal or negotiating position of the Board or compromise the privacy interests of employees. Closed meetings should involve only directors, plus any additional support staff required, legal counsel, a supervisor involved in a disciplinary matter, consultants, a labor negotiator or any witnesses in the case where the Board is hearing complaints and charges against an employee. Specific authority must be used in agendizing a closed session. **Directors have a fiduciary duty to protect the confidentiality of closed session discussions.** The California Attorney General has issued an opinion that includes sanctions that could apply to a person who discloses closed session information. For more detailed information on closed sessions see the California Attorney General's web site and publications. (Emphasis added).

Section 26 is not included in the listing of sections in Section 42 regarding a Director's breach of any policies and the potential censure of a director. Instead, potential violations of the confidentiality provisions of the Brown Act are to be addressed using the sanctions set forth in the Act itself.

**Violations of the Brown Act's Confidentiality Provisions**

Under the Brown Act, if a Board member violates the confidentiality requirement by disclosing confidential information is violated, the District may seek injunctive relief to prevent the disclosure of confidential information and may refer any Board member who willfully disclosed confidential information to the grand jury. (Gov. Code §54963).

(If a District employee willfully disclosed confidential information in violation of this prohibition, he or she may be disciplined. Of note, Board members are specifically not employees of the District.)

Further, a Board member who discloses confidential closed session information regarding an employee can be sued for slander, and one court found that the director's free speech rights did not outweigh the disclosure of confidential private information.

**Confidentiality Requirement Not a Shield for Illegal Action**

The Brown Act's confidentiality requirement may not be used to protect a board from legal consequences for discussions or actions it conducts in closed session that fail to adhere strictly to Brown Act closed session requirements and restrictions. Conversely, a governing body which adheres carefully to closed session requirements will be able to preserve the confidentiality of closed session information,

and will be able to prevent an employee or individual board member from violating the confidentiality requirements.

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I hope this information is helpful. I will be available to discuss this memorandum at your January 6, 2014 meeting.