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May 14, 2014

To: Board of Directors, Marina Coast Water District

From: Jeanine DeBacker, Special Legal Counsel

Subject: The Brown Act

At the May 5, 2014 Board meeting, Board members asked questions regarding the application of the Brown Act to various communication and meeting scenarios. This memorandum is intended to provide answers to those questions.

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1. Meetings between individual directors and District staff are permitted.

Individual directors may meet with staff, including the Interim General Manager. Such meetings do not violate the Brown Act.

However, while the Brown Act does not apply to District staff, staff may facilitate a violation by acting as a conduit for discussion, deliberation or action by the body. Thus, staff must be prudent in communicating information, taking care not to communicate to Directors the comments or position of any other Director.

2. Closed Session discussions among Directors must take place during the Closed Session portion of the Board meeting (not via email or other communication).

Closed sessions must take place as an agenda item of a scheduled public meeting. Thus, it cannot be outside of that time period – and thus not via email, or other serial meeting mechanism.

The agenda listing for a closed session must include specific citation to statutory authority under which closed session is held. Only items on the closed session agenda may be discussed in closed

session even if no action is taken. And discussion of an item not on the agenda in closed session is an unlawful meeting.

Members of the public have the right and opportunity to comment on closed session items before the board goes into closed session. The public has a right to criticize the policies, procedures, programs, and services of the District. Public comments or testimony must be allowed on all agenda items before the board takes action, including on closed session items. Below, the issue of information from the District's attorneys is discussed. Generally, it is permissible for District legal counsel to send emails and other information to Directors, individually or to the entire board. However, Director's comments, questions, and responses to such information should not be sent back (so no "reply all") and should be addressed during the properly agendized closed session.

3. Directors can receive one-way communications from members of the public and from District staff, including email, on agenda matters.

Members of the public and District staff may communicate in writing with individual Directors about Board business. A unilateral communication that involves no interaction or communication by and between Directors is not a meeting subject to the Brown Act. As a general rule, such communications should remain unilateral. Two-way communications, including replies to email, give rise to "serial meeting" questions.

Keep in mind that written communications that are distributed to a majority of Directors become public records pursuant to the Act. Such communications are required to be disclosed upon request by a member of the public, unless the writings concern a proper closed session matter.

4. A District lawyer may use the attorney-client privilege to communicate in writing to individual board members.

A District lawyer may provide confidential opinions or advice to the Board in writing, including email. Such communication is not a meeting within the meaning of the Brown Act, the requirements of which are intended to apply to collective action of local governing boards and not to the passive receipt by individuals of their mail. The Act does not supersede or negate the attorney-client privilege, which is also preserved in the Public Records Act.

5. A Director may confer with constituents, advocates, consultants, local agency staff or another Director.

While a Director may confer with constituents, advocates, consultants, local agency staff or another Director, the Director should avoid any discussions that reveal the respective views or positions of other Directors, or any attempt to develop a collective concurrence among Directors.

During the May 5, 2014 meeting, one Director posed a scenario where an individual contacted a Director with the intent of lobbying for approval of a project. If the individual tells the Director how other Directors may be likely to vote, the lobbyist did not violate the Brown Act, but is facilitating a violation. The Director may have violated the Brown Act by hearing about the positions of other

Directors. The prudent course is to avoid such leading conversations and to caution lobbyists, staff, and news media against revealing such positions of other directors.

6. A Director may contact other Directors for purposes of scheduling District matters.

Communications regarding scheduling Board and District matters are permitted, so long as the merits of the agenda items are not discussed.

7. In certain, specific, circumstances, Directors may meet, and/or be at the same event, without the event falling within the rules of the Brown Act.

The Brown Act is limited to meetings among a majority of the Directors when the subject relates to the District's business. It does not apply to independent conduct of individual Directors. However, each Director must be mindful of their communications. The Brown Act does not constrain directors from expressing their views regarding matters facing the District. Each Director must be (a) clear it is personal view, not that of the District and (b) not disclose confidential information disclosed in closed session.

The Brown Act does not apply to social, ceremonial, educational, and other gatherings as long as a majority of the Directors do not discuss issues related to the District's business:

- **An <u>individual contact</u> between a Director and any other person is an exception to the Brown Act's definition of a "meeting."** The Brown Act does not limit a Director acting on his or her own. This exception recognizes the right to confer with constituents, advocates, consultants, news reporters, local agency staff or a colleague. Individual contacts, however, cannot be used to attempt or accomplish in stages what would be prohibited in one step. For example, a series of individual contacts that leads to discussion, deliberation, or action among a majority of the Directors is prohibited as a serial meeting.

- **A <u>conference</u> is an exception to the Brown Act's definition of a "meeting."** A majority of Directors may attend a conference or similar gathering open to the public that addresses issues of general interest to the public or other public agencies of the type represented by the District.

- **A <u>community meeting</u> is an exception to the Brown Act's definition of a "meeting."** A majority of Directors may attend an open and publicized meeting held by another organization to address a topic of local community concern. Further, a majority of directors may speak at such a meeting. A majority cannot discuss among themselves, other than as a part of the scheduled program, business of a specific nature that is within the District's subject matter jurisdiction.

- **A <u>meeting of another legislative body</u> is an exception to the Brown Act's definition of a "meeting**." A majority of the Directors may attend an open and publicized meeting of (1) another body of the District and (2) a legislative body of another local agency. The majority cannot discuss among themselves business of a specific nature that is within their local agency's subject matter jurisdiction. This exception allows, for example, a majority of the Board to attend a controversial meeting of another body. Nothing in the Brown Act prevents the majority of

Directors from sitting together at such a meeting. They may choose not to, however, to preclude any possibility of improperly discussing local agency business and to avoid the appearance of a Brown Act violation.

- **A social or ceremonial event is an exception to the Brown Act's definition of a "meeting."** A majority of the Directors may attend a purely social or ceremonial occasion. The majority cannot discuss among themselves, business of a specific nature that is within District's subject matter jurisdiction.

8. A majority of Directors may attend an open and noticed meeting of a Standing Committee of the District, provided that the Directors who are not members of the Standing Committee attend only as observers.

The attendance of a majority of Directors at an open and noticed meeting of a Standing Committee of the Board could convert the committee meeting into a meeting of the full Board. To prevent the meeting from converting into a meeting of the full Board (to which the notice requirements of a full Board meeting would apply, among all the other rules), the "observing" Directors may not participate in discussions among themselves or with the Standing Committee at the meeting, ask questions, provide information or make statements. An observing Director is on the honor system not to discuss agency business with any other Director.

If appropriate, a meeting of a Standing Committee can be noticed as a Board meeting so Directors can participate in the committee meeting.

9. All members of a Standing Committee may attend a Board meeting.

At the May 5, 2014 Board meeting, a concern was raised about the attendance of some members of the Water Conservation Committee. Such attendance is permitted. In fact, an entire committee may attend an open and noticed meeting of the District.

10. Standing Committees of the District must comply with the Brown Act.

Open meeting requirements apply to any commission, committee, board or other subsidiary body, whether permanent or temporary, decision-making or advisory, which is created by action of the governing body of a local agency. This rule includes citizen volunteer groups, task forces, and "blue ribbon committees."

Created standing committees, whether advisory or otherwise, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action of the governing body are also subject to the Brown Act.

As a general rule, the prudent presumption is than an advisory committee or task force is subject to the Brown Act. Even if one clearly is not, it may want to comply with the Brown Act. Public meetings may reduce the possibility of misunderstandings and controversy.

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I hope this information is helpful. I will be available at your May 19, 2014 meeting to discuss this information.