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December 30, 2013

To: Board of Directors, Marina Coast Water District

From: 
Roger K. Masuda, Legal Counsel

Subject: Complaint by Director Gustafson as to an Alleged Attempt in Closed Session to Appoint Director Peter Le as Interim General Manager and the Board's Options regarding such Complaint

By email dated December 19, 2013, from Director Howard Gustafson to Paula Riso, Director Gustafson requested the following:

"I would like to place on the agenda action relating to the attempt by Peter Le, Tom Moore and Jan Shriner to hire Mr. Le as the General manager of MCWD. There was no agenda for the closed session action and a vote was attempted. We need to send this the FPPC and the District Attorney. There are specific dates that will be addressed in the item description."

Director Gustafson did not provide any specific dates. The following gives the chronology for the appointment of Brian Lee as Interim General Manager and the Board approval of his Employment Agreement:

June 17, 2013 – Vice President Shriner moved to appoint Brian Lee as the Interim General Manager, seconded by Director Gustafson, passed 3-1 (Dir. Bill Lee). President Moore moved to appoint Director Gustafson as the Labor Negotiator for negotiating the terms of Brian Lee's Interim GM employment agreement, seconded by Director Gustafson, passed 3-1 (Dir. Lee). Director Peter Le was absent.

July 15, 2013 – Board went into closed session at 6:46 PM; Directors Moore, Shriner, Gustafson, and Lee were present. One closed session item was to confer with Labor Negotiator Howard Gustafson regarding salary and benefits for the Interim General Manager, an Unrepresented Employee, pursuant to Government Code Section 54957.6. Director Le arrived at the Board chambers at 7:02 PM and did not participate in the closed session. The Board ended the closed session at 7:12 PM. No reportable action was taken.

August 5, 2013 – After the closed session items and in open session, President Moore moved to direct Special Legal Counsel Jeanine DeBacker to prepare an Interim General Manager employment agreement with Brian Lee with an annual compensation of \$190,000, plus a \$500 monthly car allowance and the other terms agreed upon in a proposed draft contract, for approval at the August 19th Board meeting. Passed 3-1 (Dir. Lee). Director Le was present and participated in the closed session and in open session voted in favor of the employment agreement terms for Brian Lee. Director Gustafson was absent. Jeanine DeBacker was present.

August 19, 2013 – Board in open session adopted Resolution No. 2013-44 approving an Employment Agreement with Brian Lee for the Position of Interim GM. Passed 4-1 (Dir. Bill Lee). Both Director Le and Director Gustafson voted in favor of the Employment Agreement. Jeanine DeBacker was present.

Director Gustafson made a presentation to the Marina City Council at the Council's December 17 meeting, which included his version of what transpired during a MCWD Board closed session. Based upon his public comments and his December 19 email, Director Gustafson appears to be referring to the July 15, 2013 closed session at which he was present.

Closed session deliberations are confidential and protected against disclosure by the attorney-client and deliberative legal privileges and by Board Procedures Manual (BPM) Sections 14.Q, 26, and 43. The Board may vote to waive those privileges and the BPM. MCWD Special Legal Counsel Jeanine DeBacker will have a separate presentation to the Board on the legal requirements and potential legal consequences for disclosing publicly Board discussion occurring in closed sessions. That separate issue will not be addressed in this memorandum.

Upon review of the posted agendas and minutes of the above Board meetings, the Board agenda items, including closed sessions, pertaining to the position and employment agreement of the Interim General Manager were properly noticed and held.

In particular, the July 15 closed session was properly noticed and held to discuss a salary and benefits package for the Interim General Manager and to provide negotiation instructions to Director Gustafson as the designated Labor Negotiator. Director Gustafson himself admits that no vote was taken in closed session to appoint Director Peter Le as Interim General Manager. No such vote would have been proper since appointment of Peter Le as Interim General Manager was not the noticed subject of the closed session. In addition, three different rules of law prohibit Director Peter Le from serving as MCWD's interim or permanent General Manager while remaining a MCWD Director.

First and foremost, the County Water District Law, Water Code Section 30541 states, "A director shall not be the general manager, secretary, treasurer, or auditor."

Second, holding both positions would appear to violate Government Code Section 1090 violation. The first sentence of Government Code Section 1090 states, "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or

board of which they are members.” Whether or not Peter Le received any salary or benefits from the District while acting as General Manager, he would still be entering into a contract of employment with the Board of Directors of which he would be a member.

Third, the common law doctrine of incompatible offices would require that Peter Le forfeit his position as Director upon accepting appointment as General Manager. Under the common law doctrine of incompatible offices, which is part of California law, the same person may not hold two public offices where there is any significant clash of duties or loyalties between the offices, if the dual office holding would be improper for reasons of public policy, or if either officer exercises a supervisory, auditory, or removal power over the other. The consequences of holding incompatible offices is that the person is deemed to have forfeited the first office upon accepting the second.

The Board has the following options:

1. Find that the closed session held on July 15, 2013, to confer with Labor Negotiator Howard Gustafson regarding salary and benefits for the Interim General Manager, an Unrepresented Employee, pursuant to Government Code Section 54957.6, was properly noticed and held in accordance with the Brown Act and determine that no further action need be taken.
2. Specifically waive the Board’s attorney-client and deliberative legal privileges and applicable Board Procedures Manual sections and determine that Director Gustafson’s allegations concerning the closed session held on July 15, 2013, to confer with Labor Negotiator Howard Gustafson regarding salary and benefits for the Interim General Manager, an Unrepresented Employee, pursuant to Government Code Section 54957.6, should be investigated further by the Board, including, but not limited to, by retaining an independent investigator, and to bring the results of any such investigation back to the Board for further consideration by a date certain.

[end of memorandum]