

# MEMORANDUM

KENNEDY, ARCHER & GIFFEN

A Professional Corporation

---

**DATE:** October 8, 2015  
**TO:** Fort Ord Reuse Authority (“FORA”)  
**FROM:** Authority Counsel  
**RE:** Conflicts of Interest in Service on FORA and SCSD Boards

## I. ISSUE

Does simultaneously occupying the offices of board member of the Fort Ord Reuse Authority (“FORA”) and board member of the Seaside County Sanitation District (“SCSD”), or performing activities in those capacities, offend the Brown Act or California law which regulates incompatible activities, employment, enterprises, and offices?

*Short answer: No. The Brown Act expressly allows the attendance of board members (such as SCSD board members) at an open and noticed meeting of another board (such as FORA), provided that they only discuss openly, and not “among themselves,” business of a specific nature that is within the subject matter of the first board (SCSD.) Further, even assuming for the sake of argument that the activities and offices of the two boards are incompatible, the Fort Ord Reuse Authority Act expressly allows board members to engage in incompatible activities, employment, and enterprises, and implicitly allows board members to occupy incompatible offices. Finally, the Political Reform Act does not apply because there is no apparent personal financial benefit arising from the facts presented.*

## II. FACTS

### A. Concurrent Service of Board Members

Authority Counsel is informed that FORA Board Members Ralph Rubio and David Pendergrass also serve on the District Board for the SCSD. They are two of the three members comprising the SCSD District Board.<sup>1</sup>

### B. Relationship Between FORA, MCWD, and SCSD

The Fort Ord Reuse Authority Act (“FORA Act”)<sup>2</sup> authorizes certain local jurisdictions encompassing and surrounding the former Fort Ord to establish FORA. (Gov. Code, § 67656.)

---

<sup>1</sup> The third is Pat Lintel, who is not a FORA Board Member.

<sup>2</sup> Government Code section 67650, et seq.

Once established, FORA constituted “a public corporation of the State of California that is independent of the agencies from which its board is appointed.” (Gov. Code, § 67657.)

MCWD is a county water district and political subdivision of the State of California, organized under Division 12 of the Water Code, commencing at section 30000. It entered into a contract, the Water/Wastewater Facilities Agreement (“Facilities Agreement”), with FORA on March 13, 1998.

SCSD is a special district responsible for the maintenance and operation of the sanitary sewer collection system currently serving the Cities of Del Rey Oaks, Sand City, and Seaside.

**C. April 10, 2014 Email Exchange Between FORA’s Lena Spilman and MCWD’s Director Jan Shriner**

On April 10, 2014, Lena Spilman, FORA’s Deputy Clerk/Executive Assistant, sent an email to Jan Shriner, an MCWD director (“Director Shriner”). Ms. Spilman wrote:

You asked Executive Officer Houlemard whether the inclusion of a majority of one agency’s Board on the Board of another agency represents a violation of the Brown Act. He asked me to respond. In fact, the Brown Act specifically addresses this question and finds that as long as the meeting is appropriately open and noticed and the members constituting a quorum of the first agency do not conduct private discussions of that agency’s business during the proceedings, it is not a violation.

Ms. Spilman then quoted the relevant portion of the Brown Act. Government Code section 54952.2, subdivision (b)(1) provides that:

A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

(Gov. Code, § 54952.2, subd. (b)(1).)

However, subdivision (c) of that same section provides that:

Nothing in this section shall impose the requirements of this chapter upon any of the following:

...

- (4) The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided that a majority of the

members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(Gov. Code, § 54952.2, subd. (c).)

In response to Ms. Spilman's April 10, 2015 email, Director Shriner responded on the same day as follows:

Thank you for clarifying and it is well known Rubio and Pendergrass constitute a quorum of scsd, currently competing for service area of contractor (mcwd) of FORA. They're also holding up the annexation process so the contractor can't annex properly [sic] while allowing FORA board members who ask questions about annexation by mcwd to go unanswered.

Is there any interpretation of the Brown act that speaks to the ethical questions raised by the tolerance of this behavior?

Is it possible to let in some sunshine and fresh air to improve the health and growth of Ord?

Ms. Spilman responded that same day (April 10) that she would refer the question to FORA's Authority Counsel.

**D. Director Shriner's Comments at May 8, 2015 FORA Board of Directors Meeting**

At the May 8, 2015 FORA Board meeting, Director Shriner publicly commented as follows:<sup>3</sup>

[T]his contractor (MCWD) is struggling to meet with the competitor, called Seaside County Sanitation District who has a quorum of board members, also voting members of FORA, without anyone here talking about the appearance of impropriety or possible conflict of interest sitting amongst you[.] ... And, the Executive Officer of FORA teased [?] me about possible forum considerations here, while the Marina Coast Water District board of directors sit quietly.

I hear complaining about open [sic] and transparency and I'm hearing that from someone who has clearly not been open or transparent with me over the last four years[.]

---

<sup>3</sup> See 2:40:50 to 2:44:00 of May 8, 2015 FORA Board meeting, available at: <https://www.youtube.com/watch?v=h9Q8xHf2MJ8&feature=youtu.be>

So instead of criticizing the public water purveyor, perhaps the Peninsula representation would like to consider how many people are a little bit jealous that Marina has a public water purveyor [and] how much criticism and debilitation that public water purveyor has been suffering by people in your midst. And I'm sorry about that – that people in the midst of a regional governing board would feel free to belittle and criticize another public agency because they side with a large corporation.

**E. Director Shriner's May 12, 2015 Email to Ms. Spilman**

On May 12, 2015, Director Shriner wrote this email to Ms. Spilman:

You have answered the first question several times quite well. There is a second question that you are failing to address except for one email on April 10.

SCSD has a quorum and is fine to sit on the FORA Board according [to] the Brown Act. You have made that quite clear.

The second question is about the competition of SCSD with a contracted [sic] FORA/MCWD for the wastewater service area. While FORA considers options for their [sic] contract with MCWD, I see SCSD/FORA Board Members as having a conflict.

FORA may consider the FORA contract and options for the FORA contract with MCWD for both water and wastewater services. If SCSD Board Members are also FORA Board Members, they may be in conflict to vote on the contract while sitting with FORA. It would be simple for Rubio to ask his City Council to have someone else be their [sic] FORA representative and same for Mayor Pendergrass.

This is not a Brown Act question. You are ignoring the second question when you respond with reiterating the Brown Act information.

**III. ANALYSIS**

Director Shriner appears to be asking whether, other than the Brown Act, there is any other provision of law that regulates incompatible activities, employment, enterprise, and/or offices. Accordingly, the balance of this memorandum will address laws other than the Brown Act.

**A. Incompatible Employment, Activities, or Enterprises**

Government Code section 1126 provides, in part and with italics added:

[A] local agency officer or employee shall not engage in any *employment, activity, or enterprise* for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she was employed.

However, the FORA Act expressly creates an exception to Government Code section 1126's general proscription against incompatible employment, activities, or enterprises. The FORA Act provides, at section 67665:

Notwithstanding the provisions of Article 4.7 (commencing with Section 1125) of Chapter 1 of Division 4 of Title 1,<sup>[4]</sup> any member or ex officio member of the board who is also a member of another public agency, a county supervisor, or a city council person, and who has in that designated capacity voted or acted upon a particular matter, may vote or otherwise act upon or participate in the discussion of that matter as a member of the board.

(Gov. Code, § 67665.)

Accordingly, pursuant to the FORA Act, no vote or act in the capacity as a director for SCSD precludes any FORA director from voting on that same matter, as Government Code section 1126 et seq. may otherwise proscribe. Accordingly, Board Members Rubio and Pendergrass may vote on, act on, and discuss any matter before FORA, even if they have done or will do with same in fulfilling their duties for SCSD, without violating section 1126. (Gov. Code, § 67665.)

**B. Incompatible Offices**

**1. Government Code section 1099**

Section 1099 of the Government Code provides:

(a) A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible. Officers are incompatible when any of the following

---

<sup>4</sup> Title 1, Division 4, Chapter 1, Article 4.7 (Incompatible Activities) of the Government Code generally proscribes a local agency officer from engaging in any employment, activity, or enterprise for compensation which is inconsistent with the duties of the public office. (Gov. Code, § 1126.)

circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:

- (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.
  - (2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.
  - (3) Public body considerations make it improper for one person to hold both offices.
- (b) When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second. This provision is enforceable pursuant to Section 803 of the Code of Civil Procedure.
  - (c) This section does not apply to a position of employment, including a civil service position.
  - (d) This section shall not apply to a governmental body that has only advisory powers.
  - (e) For purposes of paragraph (1) of subdivision (a), a member of a multi-member body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office.
  - (f) This section codifies the common law rule prohibiting an individual from holding incompatible public offices.

(Gov. Code, § 1099 (underlining added).)

## **2. FORA Act's Government Code section 67665**

### **a. Argument that the FORA Act Expressly Allows a Person to Occupy Incompatible Offices, Employment, and Enterprises**

As discussed above in the context of “incompatible activities,” the FORA Act expressly permits “any member ... of the board who is also a member of another public agency ... and who has in that designated capacity voted or acted upon a particular matter” to “vote or otherwise act upon or participate in the discussion of that matter as a member of the board.” (Gov. Code, § 67665 (underlining added).) Such language appears to also encompass

“incompatible offices.” (Gov. Code, § 1099, subd. (a) [“unless simultaneous holding of the particular offices is expressly ... authorized by law”].) Indeed, the FORA Act’s Government Code section 67665 assumes that the member of the board engaged in the vote on, action on, or discussion of the particular matter is also “a member of another public agency” and has been “designated” in that “capacity.” It would be incongruous that the FORA Act, through section 67665, would expressly authorize “incompatible acts” by dual officers that section 1126 would otherwise regulate, but not authorize those dual officers from occupying offices deemed incompatible under section 1099. Further, Government Code section 1099 recognizes that if the “simultaneous holding of the particular offices is compelled or expressly authorized by law,” then the public offices are compatible. (Gov. Code, § 1099, subd. (a).)

Government Code section 67665 appears to provide not only an exception to section 1126’s proscription from incompatible activities, but also an exception to section 1099’s proscription of holding incompatible offices. There is, however, a contrary argument, as discussed next.

**b. Argument that the FORA Act Does Not Expressly Allow a Person to Occupy Incompatible Offices, Employment, and Enterprises**

Government Code section 67665 does not necessarily contemplate that the “[o]ther public agency” is an *incompatible* office. That is, a person may serve both FORA and another public agency and may even perform incompatible acts that section 1126 would otherwise prohibit, provided that the person serving or engaging in those acts does not occupy incompatible offices under section 1099. The fact that Government Code section 67775 expressly mentions section 1126 as not applying, but does not similarly mention section 1099, suggests that the Legislature may have intended for section 1099 to remain applicable. (*Dyna-Med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1391, fn. 13 [“the expression of certain things in a statute necessarily involves exclusion of other things not expressed”]; see also *United Farm Workers v. Agricultural Lab. Rel. Board* (1995) 41 Cal.App.4th 303, 316 [grant of power to commission to prosecute certain code violations impliedly excluded commission from prosecuting violation of other code sections].)

The effect of this would be that one may perform *acts* as a FORA official and as an official of another agency that would otherwise be incompatible, provided that those *offices* are not incompatible. However, as discussed next, it is the conclusion of Authority Counsel that this interpretation is unsound.

**C. Political Reform Act**

The Political Reform Act prohibits a public official from making, participating in, or in any way attempting to use their official position to influence a governmental decision in which the official has a financial interest. (Gov. Code, § 87100 et seq.; 2 Cal. Code Regs.) An official has a conflicting financial interest “if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effects on the public generally, on the official.

(Gov. Code, § 87103.) Here, there is no apparent financial benefit personally to those members who serve FORA and SCSD. The Political Reform Act does not appear to be applicable.

#### **IV. CONCLUSIONS**

By specifying that a FORA board member “*who is also a member of another public agency*” may engage in *activities* that would otherwise be considered “incompatible,” section 67665 also appears to apply to section 1099’s proscription against incompatible offices. Otherwise, section 67665 would have very little, if any, practical effect. Therefore, Authority Counsel concludes that, by operation of section 67665 of the FORA Act, officiating as a FORA board member and as a board member of SCSD is not incompatible.