Study G-200 March 24, 2010

Memorandum 2010-17

Charter Schools and the Government Claims Act: Quasi-Public Entities

This memorandum continues the Commission's study on the legal and policy implications of treating a charter school as a public entity for the purposes of the Government Claims Act. See 2009 Cal. Stat. res. ch. 98 (ACR 49 (Evans)).

The crux of the issue seems to be the fact that a charter school can be formed as a private entity, yet still possess many important characteristics of a public entity. This "quasi-public" character makes it unclear whether a privately organized and operated charter school should be deemed to be a public entity for the purposes of the Government Claims Act.

Similar issues have arisen in connection with other statutes and other types of quasi-public entities. This memorandum provides a brief survey of some of the more important statutes that regulate government operations in California, with discussion of how those statutes have been applied to quasi-public entities.

THE POLITICAL REFORM ACT OF 1974

The Political Reform Act of 1974 (Gov't Code §§ 81000-91015) regulates political campaigns, lobbying, and economic conflicts of interest in government decisionmaking. The Act also creates a state agency, the Fair Political Practices Commission ("FPPC"), to administer and enforce its provisions.

The FPPC is expressly authorized to issue written opinions and advice, interpreting the Act. Gov't Code § 83114.

Shortly after the Act took effect, a city attorney requested an opinion on the application of the Act to a "quasi-public entity" — a nonprofit corporation created on the impetus of the city to handle the initial financing and operation of a municipal water system. See *In re Siegel*, 3 FPPC Ops 62 (1977).

In its opinion, the FPPC stated the following criteria for determining when the Political Reform Act applies to a quasi-public entity:

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

> In analyzing this question we believe several criteria should be considered, and that the true nature of the entity, not merely its stated purpose, should be analyzed in determining whether the entity is public or private within the meaning of the Act. These criteria include:
>
> (1) Whether the impetus for formation of the corporation originated with a government agency;
>
> (2) Whether it is substantially funded by, or its primary source of funds is, a government agency;
>
> (3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
>
> (4) Whether the Corporation is treated as a public entity by other statutory provisions.

Id. at 3-4.

These criteria makes sense, given the broad regulatory purpose of the Political Reform Act. The Act regulates the conduct of all public decisionmakers, which should probably include decisions by private entities that are exercising delegated public authority.

The criteria stated in the *Siegel* opinion have been applied in subsequent FPPC advice letters discussing the specific issue of whether a charter school created as a nonprofit public benefit corporation is a public entity for the purposes of the Political Reform Act. See *Walsh* Advice Letter, No. A-98-234 (1998); *Fadely* Advice Letter, No. A-02-223 (2002).

In each instance the FPPC advised that such charter schools are public entities for the purposes of the Political Reform Act, because:

> (1) A charter school is formed with express legislative authorization and with the specific approval of the chartering public entity. *Walsh* at 4; *Fadely* at 3.
>
> (2) Charter schools rely on public funds. *Id*.
>
> (3) Charter schools provide the same type of public education services that local school districts are authorized to provide and typically do provide. *Walsh* at 4-5; *Fadely* at 4.
>
> (4) Education Code Section 47615(a)(1) provides that charter schools are part of the public school system for the purposes of certain provisions of the California Constitution. Thus, other laws recognize that charters schools are public entities. *Walsh* at 4-5; *Fadely* at 4.

Two California statutes require that meetings of public entities be open to the public. One governs local public entities. See Gov't Code § 54950 *et seq.* ("Brown Act"). The other governs state agencies. See Gov't Code § 11120 *et seq.* ("Bagley-Keene Act").

The Brown Act states the importance of open public meetings:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Gov't Code § 54950.

The Brown Act

The Brown Act applies to the meetings of a "legislative body" of a "local public entity" (which includes a school district). Gov't Code § 54951. The term "legislative body" generally means the governing body of a local public entity, but it can also encompass the board of a *private* entity, if that entity:

> Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation, limited liability company, or other entity.

Gov't Code § 54952(c)(1)(A). See, e.g., *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.*, 87 Cal. App. 4th 862, 104 Cal. Rptr. 2d 857 (2000) (Brown Act applies to private property owners association to which city delegated certain public functions).

The Brown Act's standard for application of the Act to a quasi-public entity would seem to encompass a charter school that is approved by a local school district. Such a charter school is created by an elected legislative body (the local school board) to exercise lawfully delegated authority of the school board (the operation of a public school).

While the staff's understanding is that most charter schools are approved by a local public entity (usually the local school board), it is possible for a charter school to be approved by the State Board of Education. See Educ. Code § 47605.8. A charter school formed in that way would *not* appear to be governed by the Brown Act, because it would not have been created by a local legislative body.

Although the staff could not find any appellate case or Attorney General opinion addressing the application of the Brown Act to charter schools, it appears that at least one trial court has held that the Brown Act applies to charter schools. See Garretson, *Charter Board in Violation of Meeting Act, Judge Sends Directors Back to School*, Marin Ind. J., July 10, 2001, at 1J. According to that article, the court ordered the board of a charter school to conduct its meetings in compliance with the Brown Act. The article is silent on whether the charter school had been approved by the local school board or by the State Board of Education.

The Bagley-Keene Act

The Bagley-Keene Act applies, *inter alia*, to every "multimember body of the state that is created by statute or required by law to conduct official meetings." Gov't Code § 11121(a).

With respect to quasi-public entities, the Act applies to a private multimember body if (1) a member of a state body *serves on the private body* in his or her official capacity as a representative of the state body, and (2) the private body is supported at least in part by funds provided by the state body. Gov't Code § 11121(d).

The Bagley-Keene Act would seem to have little direct relevance to charter schools, which operate as local, rather than statewide, entities.

THE PUBLIC RECORDS ACT

The California Public Records Act ("CPRA") requires that the records of a public entity be subject to public inspection and copying. That general requirement is subject to a lengthy list of specific exceptions, many of which are designed to preserve the privacy of personal information in public records. See generally Gov't Code §§ 6250-6276.48.

Government Code Section 6250 declares the policy served by the CPRA:

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information

> concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

Given that broad emphasis on transparency in conducting "the people's business," one would expect the CPRA to apply broadly to quasi-public entities exercising public authority. In fact, the application of the CPRA to quasi-public entities is oddly constrained.

The application of the CPRA to *local* quasi-public entities is coextensive with the application of the Brown Act (it expressly incorporates the Brown Act's definition of "legislative body.") See Gov't Code § 6252(a).

In sharp contrast, the CPRA appears to have no application to *state* level quasi-public entities, not even to those quasi-public entities that are governed by the Bagley-Keene Act.

For example, the CPRA was held not to apply to a private "auxiliary corporation" established to fund, construct, and operate a sports arena for the California State University at Fresno. *California State Univ. v. Super. Ct.*, 90 Cal. App. 4th 810, 108 Cal. Rptr. 2d 870 (2001). Even though the private nonprofit corporation at issue in the case was created pursuant to statute (Educ. Code § 89901) to benefit its CSU-affiliate by performing a function that might otherwise be performed by CSU (construction and operation of a CSU sports arena), the court held that it was not subject to the CPRA. The court acknowledged that its decision seemed at odds with the policy purpose of the CPRA, but that it was bound by the literal text of the CPRA: "The words 'state body' and 'state agency' simply do not include a non-governmental organization." *California State Univ. v. Super. Ct.*, 90 Cal. App. 4th at 829-31.

The staff can see no good policy reason for that treatment of state level quasi-public entities. If such an entity is performing a public function, it is "doing the people's work" as much as a similarly situated local entity.

That issue aside, if the staff is correct in concluding that the Brown Act applies to a charter school that is approved by a local school board, *then the CPRA would also apply to such a charter school.* As noted earlier, in the apparently rare case that a charter school is approved by the State Board of Education, rather than by a local entity, the Brown Act (and therefore the CPRA) would probably not apply.

THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act ("APA") provides procedures and standards to be used by state agencies in conducting adjudicative proceedings. See Gov't Code §§ 11400-11529. Those provisions guarantee due process rights for those who are subject to agency adjudication and enhance efficiency by providing standardized procedures statewide.

The administrative adjudication provisions of the APA are narrower in scope than the statutes discussed above, as the APA only regulates specific types of public action (i.e., administrative adjudication). Despite that narrow scope, the APA is worth discussing in this memorandum because much of the modern APA was drafted by the Commission (see *Administrative Adjudication by State Agencies*, 25 Cal. L. Revision Comm'n Reports 55 (1995)) and the Commission expressly considered the extent to which the APA adjudication provisions should apply to a quasi-public entity. See *Administrative Adjudication by Quasi-Public Entities*, 26 Cal. L. Revision Comm'n Reports 277 (1996).

The Commission's report is helpful because it includes some discussion of the policy considerations involved in determining the extent to which the APA should apply to a quasi-public entity. The Commission focused on the importance of effectuating the regulatory purpose of the APA, regardless of the form of entity conducting an adjudicative proceeding:

> A person's right to fundamental due process and public policy protections should not depend on whether the adjudication is done by a state agency or by a quasi-public entity to which the agency's authority is delegated.

Id. at 284.

The Commission also noted the efficiency benefit of applying standardized procedures broadly:

> Application of the state procedural protections to quasi-public entity adjudication will also promote uniformity of administrative procedure, to the ultimate benefit of the regulated public.

Id.

Finally, the Commission stressed the importance of a clear and narrowly drawn standard for application of the APA to a quasi-public entity. Many private entities perform functions that might be characterized as public. It is essential

that such an entity (and the public) know whether the entity is governed by the APA.

The Commission recommended that the APA be applied to the adjudicative proceedings of a private entity if all of the following conditions are met:

> (1) The entity is a creature of statute.
> (2) The entity is administering a state function.
> (3) The entity is engaged in making an adjudicative decision that determines the legal rights or other legal interests of a particular individual or entity.
> (4) The entity is constitutionally or statutorily required to formulate its decision pursuant to an evidentiary hearing for determination of facts.
> (5) The entity's decision is not subject to administrative review in a proceeding to which the administrative adjudication protections of the Administrative Procedure Act apply.

Id. at 284-85.

Government Code Section 11410.60(a) defines the term "quasi-public entity" for purposes of application of the APA adjudication requirements, using the first two criteria recommended by the Commission:

> As used in this section, "quasi-public entity" means an entity, other than a governmental agency, whether characterized by statute as a public corporation, public instrumentality, or otherwise, that is expressly created by statute for the purpose of administration of a state function.

Once it is determined that an entity is a quasi-public entity, Section 11410.60(b) then asks whether the quasi-public entity conducts adjudicative proceedings of the type that are governed by the APA. If so, those proceedings are subject to the APA.

Under the definition set out in Section 11410.60(a), a charter school would appear to be a "quasi-public entity." Charter schools are created pursuant to statutory authorization for the express purpose of administering a state function (operating a public school). However, the staff is not yet sufficiently familiar with the law governing charter schools to know whether charter schools are ever authorized to conduct the type of adjudicative proceedings that are governed by the APA.

As noted in Memorandum 2009-52, it has been held that the Government Claims Act does not apply to a charter school that is formed as a nonprofit corporation. See *Knapp v. Palisades Charter High School*, 146 Cal. App. 4th 708, 53 Cal. Rptr. 3d 182 (2007). (The holding in *Knapp* was expressly conditioned on the fact that the charter school at issue was formed as a nonprofit corporation. *Id.* at 717-18. Further information about the alternative ways in which charter schools can be formed, and the policy implications of those different forms, will be presented in a future memorandum.)

The staff could not find any cases discussing the application of the Government Claims Act to other types of quasi-public entities. However, as discussed below, there is a statutory provision in the Government Claims Act that applies certain of its provisions to a privately owned "public land trust."

Public Land Trust

Under the Government Claims Act, a public entity is not liable for "an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." Gov't Code § 831.2. See also Gov't Code §§ 831.21 (unimproved public beach), 831.25 (public entity immune from liability for harm from naturally caused "land failure" in unimproved public property), 831.4 (public entity immune from liability for harm from condition of unpaved public road, trail, or easement to natural areas), 831.7 (public entity immune from liability for "hazardous recreational activity" on public land).

Government Code Section 831.5 extends the immunities described above to a private land trust that is (1) formed as a nonprofit, (2) has the stated charitable purposes of "conservation of land for public access, agricultural, scientific, historical, educational, recreational, scenic, or open-space opportunities," and (3) has entered into an agreement with a specified state conservation agency. The section extends the same immunity to the employees of a public land trust.

Section 831.5(a) explains the purpose of that special treatment:

> The Legislature declares that innovative public access programs, such as agreements with public land trusts, can provide effective and responsible alternatives to costly public acquisition programs. The Legislature therefore declares that it is beneficial to the people of this state to *encourage* private nonprofit entities such as public land trusts to carry out programs that preserve open

> space or increase opportunities for the public to enjoy access to and use of natural resources if the programs are consistent (1) with public safety, (2) with the protection of the resources, and (3) with public and private rights.

(Emphasis added.)

At its base, this rule seems to be similar to the other rules governing quasi-public entities discussed earlier in this memorandum. In order for the Government Claims Act immunities to apply to a privately organized public land trust, (1) the land trust must have been created with input from a public entity (i.e., pursuant to an enabling agreement with a state conservation agency), and (2) it must have been created to perform a function that the state is also authorized to perform and historically has performed (i.e., the conservation of undeveloped lands for public use).

However, there appears to be an additional policy consideration at issue in this provision. Section 831.5 is intended to *encourage* private entities to voluntarily preserve wild lands for use by the public. If not for Section 831.5, the potential liability for injuries to visitors could deter that kind of philanthropy.

This suggests another policy reason to extend governmental immunity to quasi-public entities: to encourage private actors to undertake beneficial public functions by reducing the liability that might otherwise result from doing so.

DISCUSSION

This memorandum is not intended as a comprehensive review of the treatment of quasi-public entities under California law. Rather, it is intended as a survey of some of the main statutes regulating public entities, to provide general background on how those laws have treated quasi-public entities.

The staff believes that the following useful points can be drawn from that survey:

Prevailing Treatment of Quasi-Public Entities

There is ample precedent for the application of statutory law to quasi-public entities. The issue has been addressed to varying degrees for all of the statutes discussed in this memorandum.

Furthermore, it appears that the main "good government" laws in California may already apply to charter schools. As noted above, the FPPC believes that the Political Reform Act applies to charter schools. The Brown Act also seems to

apply to a charter school that is formed by a local school board (based on the statutory definition of "legislative body" used in defining the Brown Act's scope of application). If so, then the Public Record Act also applies to such a charter school (because the CPRA expressly incorporates the Brown Act's definition of "legislative body" in defining its own scope of application).

The Administrative Procedure Act may also apply to a charter school, if a charter school is authorized to conduct the type of adjudicative proceedings that are governed by the APA.

Definition of "Quasi-Public Entity"

For the most part, the statutes discussed in this memorandum adopt the same basic standard for application of the statute to a quasi-public entity. For the statute to apply, the private entity must have been created with government involvement, for the express purpose of exercising public authority or performing a public function.

A charter school would seem to fall within that general definition. Charter schools are authorized by statute and specifically approved by a public entity, and are expressly created to perform a public function.

Other relevant factors used in defining a quasi-public entity are the extent to which the quasi-public entity relies on public funds and the extent to which other laws treat the quasi-public entity as a public entity. Charter schools are almost entirely dependent on public funds. The results of the analysis set out in this memorandum suggest that charter schools are treated as public entities under the Political Reform Act, the Brown Act, and the Public Records Act.

Possible Policy Distinction

Most of the statutes discussed in this memorandum are *regulatory*. They impose procedural burdens on public entities for the protection or benefit of the public.

It makes sense to apply such statutes broadly to any quasi-public entity performing a regulated public function. Otherwise, a public entity might circumvent regulation simply by delegating the regulated function.

The Government Claims Act does not regulate public entities. Rather than imposing *burdens* on public entities, for the protection of the public, it confers *benefits* on public entities, for the protection of the public entity (i.e., to protect the public fisc and provide latitude for government to govern).

While quasi-public entities are likely to *resist* the application of regulatory statutes, they are likely to *embrace* the application of the Government Claims Act.

This suggests that the policy considerations at issue when determining the application of a regulatory statute, may not be squarely relevant when considering the application of the Government Claims Act. In other words, the fact that the Political Reform Act, Brown Act, and Public Records Act appear to apply to most charter schools is useful information for our purposes, but is not determinative. The Commission will still need to carefully consider whether the policies underlying the Government Claims Act are best served by extension of that Act to charter schools.

Grant of Immunity to Encourage Good Works

As noted above, the Government Claims Act extends some tort immunities to privately owned "public land trusts," with the express purpose of "encouraging" the formation of such trusts.

This suggests that it may sometimes be appropriate to extend governmental immunity to a quasi-public entity to encourage private performance of an important public function.

With that point in mind, it would be interesting to know whether the decision in *Knapp v. Palisades Charter High School* (holding that a charter school formed as a nonprofit corporation is not subject to the Government Claims Act), has had any empirically verifiable deterrent effect on the formation or continued operation of charter schools in California. **The staff invites public comment on that issue.**

Respectfully submitted,

Brian Hebert
Executive Secretary