

Admin.

March 30, 2011

Memorandum 2011-11

Open Government Laws

At the Commission's February 2010 meeting, the Commission directed the staff to present an annual memorandum identifying and briefly summarizing the "open government" statutes applicable to the Commission. See Minutes (February 2010), p. 4.

This is the first such memorandum. It discusses the open meeting, conflict of interest, and public records laws that relate to Commission activities.

BAGLEY-KEENE OPEN MEETING ACT (GOV'T CODE §§ 11120-11132)

The Bagley-Keene Open Meeting Act (hereafter, "Bagley-Keene Act") requires generally that "the proceedings of public agencies be conducted openly so that the public may remain informed." Gov't Code § 11120. A summary of the provisions of the act most relevant to Commission operations follow.

Definitional Provisions

An understanding of two basic definitional provisions is important to an understanding of the Bagley-Keene Act as a whole.

"State Body"

The specific provisions of the Bagley-Keene Act govern "state bodies" as defined. Gov't Code § 11121. The Commission is a state body. Gov't Code § 8280.

"Meeting"

For purposes of the Bagley-Keene Act, a "meeting" includes "any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains." Gov't Code § 11122.5(a).

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.

Conduct of Meeting

The Bagley-Keene Act requires generally that all state body meetings be open and public, and that all members of the public be permitted to attend such meetings. Gov't Code § 11123(a). These meetings are also subject to the following more specific provisions:

Public Participation

At a meeting, members of the public must be provided a reasonable opportunity to directly address the state body on each matter described in the agenda, before or during the body's consideration of the matter. Gov't Code § 11125.7(a).

Accessibility

All meetings governed by the Bagley-Keene Act must comply with Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132) and implementing regulations. Gov't Code § 11123.1. Section 202 provides generally that disabled individuals may not be excluded from participation in the activities of a public entity, or be subjected to discrimination by any such entity, by reason of their disability.

Conditions for Attendance

No member of the public attending a meeting governed by the Bagley-Keene Act shall be required to provide any information, or fulfill any condition, as a prerequisite to attendance. A sign-in sheet may be posted at the meeting, but it must state clearly that signing or providing any information is voluntary, and is not a prerequisite to attendance. Gov't Code § 11124.

Audio or Video Recording

Any person attending a meeting governed by the Bagley-Keene Act may make an audio or video recording of the proceedings, in the absence of a finding by the state body that such recording would constitute a "persistent disruption" of the proceedings. Gov't Code § 11124.1(a).

Consideration of Non-Agenda Items

The Bagley-Keene Act requires the publication of a notice containing an agenda for any regular meeting governed by the Bagley-Keene Act, at least 10 days prior to the meeting. Gov't Code § 11125(a).

The agenda must include a "brief general description" of each item that is to be discussed at the meeting. Gov't Code § 11125(b).

As a general rule, no item may be added to the agenda after the agenda is published. Gov't Code § 11125(b).

At a meeting, the state body may not make a collective decision, commit or promise to make a decision, or vote on any matter that is not described in the published agenda for that meeting, except in the following circumstances:

- A work stoppage, disaster, or other activity exists that severely impairs public health or safety, as determined by a majority vote of the state body.
- A need to take immediate action exists that came to the attention of the state body only after the publication of the agenda, as determined by a vote of two-thirds of the body, or if less than two-thirds of the members are present, a unanimous vote of those present.

Gov't Code §§ 11122, 11125.3(a), 11125.5(b).

Disclosable Documents

The meeting agenda and any other writings distributed to a majority of the members of a state body in connection with matter subject to discussion or consideration at a meeting of the body are, subject to specified exceptions, disclosable public records under the California Public Records Act. Gov't Code § 11125.1(a).

When such writings are prepared by the state body or a member of the state body, they must be made available for public inspection at the meeting. Gov't Code § 11125.1(b). If prepared by some other person, the writings must be made available after the meeting. *Id.*

Special Meetings

The 10-day notice and agenda requirements do not apply to a special meeting, called by the state body to consider specified matters. Gov't Code § 11125.4(a). To hold such a meeting, the state body must make one of the following findings, by a specified supermajority vote:

- Compliance with the 10-day notice requirement of Section 11125 would impose substantial hardship on the body.
- Immediate action is required to protect the public interest.

Gov't Code § 11125.4(a), (c).

Closed Sessions

A state body may conduct a portion of a meeting in closed session to consider specified personnel matters, but only after disclosing in both the agenda and in open session the general nature of the matter to be discussed, and citing authority for the closed session. Gov't Code §§ 11125(b), 11126(a)(1), 11126.3(a), 11128, 11132.

Teleconferencing

A meeting governed by the Bagley-Keene Act may be conducted via an audio or video "teleconference" (defined as a meeting at which participating members are at different locations, connected by electronic means), provided specified procedural requirements are met. Gov't Code § 11123(b).

Adjournment

The state body may adjourn any meeting to another place and time, or may continue the meeting to another time, provided that specified notice of the adjournment or continuance is thereafter provided. Such adjournment or continuance may be declared by the body whether or not a quorum is present. Gov't Code §§ 11128.5, 11129.

Prohibited Communications Outside Noticed Meeting

The intent of the Bagley-Keene Act is to require that the business of state bodies be conducted openly. To that end, the act contains a series of provisions

allowing the general public reasonable access to and participation in the meetings of state bodies, where such business is likely to be conducted.

In order to preclude a state body from conducting its business *outside* a noticed public meeting, the act also prohibits certain communication among members outside such meetings. Specifically, the act provides:

A majority of the members of a state body shall not, outside of a meeting authorized by [the Bagley-Keene Act], 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 of the state body.

Gov't Code § 11122.5(b)(1).

The “communications” contemplated by Section 11122.5(b)(1) would appear to include in-person contact, telephone calls, or emails, or any other similar contact. *Wolfe v. City of Fremont*, 144 Cal. App. 4th 533, 50 Cal. Rptr. 3d 524 (2006), *Stockton Newspapers, Inc. v. Redevelopment Agency*, 171 Cal. App. 3d 95, 214 Cal. Rptr. 561 (1985) (both construing similar provisions of the Ralph M. Brown Act (Gov't Code § 54950 et seq.), a counterpart to the Bagley-Keene Act applicable to local government bodies).

Individual Contacts

The act expressly allows communication between a member of the public and a member of a state body, unless such communication violates Section 11122.5(b)(1). Gov't Code § 11122.5(c)(1).

Legislative Contacts

The act does not prohibit contact by one or more members of a state body with members of a legislative body for the purpose of discussing a matter within the subject matter jurisdiction of the state body, provided the member does not communicate to the legislative body the comments or position of any other member of the state body. Gov't Code § 11122.5(b)(2).

Attendance at Other Functions

The prohibition on communication outside of a meeting does not preclude participation in specified types of public events, so long as the members of the

state body do not use the opportunity to discuss business within the subject matter jurisdiction of the state body. Gov't Code § 11122.5(c)(2)-(5).

CONFLICT OF INTEREST PROVISIONS

Commissioners are also subject to various conflict of interest provisions.

Political Reform Act of 1974 (Gov't Code §§ 81000-91014)

Government Code Section 87100 provides that

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

The term "public official" includes both Commissioners and the staff of the Commission. Gov't Code §§ 82003, 82048.

Whether or not a public official has a material "financial interest" in a governmental decision is a complex subject, generally addressed by Government Code Section 87103.

The application of Sections 87100 and 87103 to specific fact patterns is beyond the scope of this memorandum. However, further information concerning the Political Reform Act of 1974 is available on the website of the Fair Political Practices Commission, at <www.fppc.ca.gov>, or by calling the Fair Political Practices Commission at 1-866-ASK-FPPC (1-866-275-3772).

Common Law Doctrine Against Conflicts of Interest

Independent of statutory conflict of interest provisions, there also exists a long-standing common law doctrine against conflicts of interest that is likely applicable to Commissioners. Although this doctrine has rarely been cited in recent appellate opinions, the Attorney General's office advises that the doctrine remains viable authority. 67 Ops. Cal. Att'y Gen. 369, 381 (1984).

This court-made doctrine extends to noneconomic conflicts of interest as well, providing that "A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for

the benefit of the public" *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, at 1170, 56 Cal. Rptr. 2d 223 (1996).

Alternatively stated, the doctrine generally requires public officers "to avoid placing themselves in a position in which personal interest may come into conflict with their duty to the public." 70 Ops. Cal. Att'y Gen. 45, 47 (1987).

CALIFORNIA PUBLIC RECORDS ACT (GOV'T CODE §§ 6250-6276.48)

As a state agency, the Commission is subject to the California Public Records Act. Gov't Code §§ 6252(e),6252(f). As a result, members of the public are generally entitled to inspect and copy Commission records, to the extent and in the manner provided by the Public Records Act. Gov't Code § 6253 et seq.

Public record requests of the Commission are rare. When they are received, the staff handles them administratively, after refreshing on the requirements of the Public Records Act.

In addition, as a matter of voluntary practice, the Commission posts all of its staff memoranda, reports, and recommendations to its website, <www.clrc.ca.gov>, where all documents are available for public downloading.

Respectfully submitted,

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