

Admin.

January 24, 2019

Memorandum 2019-2

Open Government Laws

The Commission has directed the staff to present an annual memorandum¹ identifying and briefly summarizing the “open government” statutes applicable to the Commission.²

This is the memorandum for 2019. Like last year’s memorandum,³ this memorandum discusses open meeting, conflict of interest, and public records laws that relate to Commission activities.

The staff has not located any new developments relating to these statutes over the past calendar year that would appear to have significant relevance to the work of the Commission.

Except as otherwise indicated, all statutory references in this memorandum are to the Government Code.

BAGLEY-KEENE OPEN MEETING ACT

The Bagley-Keene Open Meeting Act (hereafter, “Bagley-Keene Act”)⁴ requires generally that “the proceedings of public agencies be conducted openly so that the public may remain informed.”⁵ A summary of the provisions of the act most relevant to Commission operations follows.

Definitional Provisions

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

1. 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. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Minutes (February 2010), p. 4.

3. Memorandum 2018-3.

4. Sections 11120-11132.

5. Section 11120.

“State Body”

The specific provisions of the Bagley-Keene Act govern “state bodies” as defined.⁶ The Commission is a state body.⁷

“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.”⁸

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.⁹ 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.¹⁰

A state body may adopt reasonable regulations limiting the total amount of time allocated for public comment on particular issues and for each individual speaker.¹¹ To date, the Commission has not adopted such regulations.

Accessibility

All meetings governed by the Bagley-Keene Act must comply with Section 202 of the Americans with Disabilities Act of 1990¹² and implementing regulations.¹³ 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.

6. Section 11121.
7. Section 8280.
8. Section 11122.5(a).
9. Section 11123(a).
10. Section 11125.7(a).
11. Section 11125.7(b).
12. 42 U.S.C. § 12132.
13. Section 11123.1.

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.¹⁴

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.¹⁵

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.¹⁶

The agenda must include a “brief general description” of each item that is to be discussed at the meeting.¹⁷

As a general rule, no item may be added to the agenda after the agenda is published.¹⁸

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.¹⁹

14. Section 11124.

15. Section 11124.1(a).

16. Section 11125(a).

17. Section 11125(b).

18. *Id.*

19. Sections 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.²⁰

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.²¹ If prepared by some other person, the writings must be made available after the meeting.²²

Reporting of Action Taken and Individual Votes

State bodies are required to publicly report all actions taken at meetings, as well as the vote or abstention on each action by each member present.²³ “Action taken” means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action.²⁴ It is important to note that “action taken” is not limited to a formal vote. The Commission sometimes takes action through collective assent, without a motion or vote. This is most common when the Commission is giving direction to staff on how to proceed with interim work on a study.

The Commission complies with the reporting requirement described above through its meeting Minutes. The Minutes state that, unless otherwise indicated, all reported actions were approved by all Commissioners present at the meeting. The Minutes then specifically note any “no” votes, abstentions, or temporary absences when an action was taken.²⁵ **Because of that approach, it is critical that Commissioners expressly state when they oppose or are abstaining from approving a particular action.**

Special Meetings

The 10-day notice and agenda requirements do not apply to a special

20. Section 11125.1(a).

21. Section 11125.1(b).

22. *Id.*

23. Section 11123(c).

24. Section 11122.

25. Commission’s Handbook of Practices and Procedures, Rule 2.4.5.

meeting, called by the state body to consider specified matters.²⁶ 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.²⁷

Closed Sessions

A state body may conduct a portion of a meeting in closed session to consider certain matters, including specified matters relating to personnel or pending litigation, 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.²⁸

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.²⁹

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.³⁰

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.

26. Section 11125.4(a).

27. Section 11125.4(a), (c).

28. Sections 11125(b), 11126(a)(1), 11126(c), 11126(e), 11126.3(a), 11128, 11132.

29. Section 11123(b).

30. Sections 11128.5, 11129.

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.³¹

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.³²

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).³³

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.³⁴

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.³⁵

31. Section 11122.5(b)(1).

32. See *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).

33. Section 11122.5(c)(1).

34. Section 11122.5(b)(2).

35. Section 11122.5(c)(2)-(5).

CONFLICT OF INTEREST PROVISIONS

Commissioners are also subject to various conflict of interest provisions.

Political Reform Act of 1974

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.³⁶

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

The application of Section 87100 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).

Financial Interest in Contract Made by State Agency

Section 1090 prohibits officers or employees of the state and other governmental entities from being “financially interested” in any contract that is either (1) made by the officer or employee in their official capacity, or (2) made by any body or board of which they are members.

Commissioners are officers of the state for purposes of Section 1090.³⁷

Commission Contracts

In general, the Commission makes three types of contracts — personnel contracts, facilities leases, and contracts for goods and services.

Commissioners are often directly involved in making the first two types of contracts. The Commission approves contracts with research consultants and

36. Sections 82003, 82048.

37. See *People v. Elliott*, 115 Cal. App. 2d 410, 415, 252 P.2d 661 (1953).

must approve some hiring decisions.³⁸ The Commission is also involved in choosing office locations.³⁹

Commissioners typically have no direct involvement in making contracts for goods and services. Nevertheless, regardless of whether a Commissioner is actually involved in making a contracting decision, there are circumstances in which such participation may be conclusively presumed. Courts have held that when a member of a board or commission has the *power* to execute a contract, he or she is conclusively presumed to be involved in the making of that contract, regardless of actual participation.⁴⁰

As a result, *any* contract entered into by the Commission could theoretically implicate Section 1090.

Given the harsh penalties that attach to a violation of Section 1090, it would be prudent for Commissioners to take a very cautious stance with regard to potential contracting conflicts. If any Commissioner has a “financial interest” (discussed more fully below) in a person or entity that might conceivably be affected by a Commission contract, the Commissioner should raise the matter with the Executive Director. For example, if a Commissioner has a “financial interest” in a company that sells office supplies or computers or that provides business services, it would be prudent to alert the Executive Director.

Nature of Financial Interest

The “financial interest” referenced in Section 1090 is not to be construed in a restricted and technical manner.⁴¹ It has also been noted that Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.”⁴² In a recent decision interpreting Section 1090, the Supreme Court explained that “the defining characteristic of a prohibited financial interest is whether it has the potential to divide an official’s loyalties and compromise the undivided representation of the public interests the official is charged with protecting.”⁴³

38. CLRC Handbook of Practices and Procedures § 8.3.1.

39. CLRC Handbook of Practices and Procedures § 8.5.

40. See *Thomson v. Call*, 38 Cal. 3d 633, 649-50, 699 P.2d 316, 214 Cal. Rptr. 139 (1985); *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 211-212, 137 Cal. Rptr. 118 (1977).

41. *People v. Honig*, 48 Cal. App. 4th 289, 315, 55 Cal. Rptr. 2d 555 (1996).

42. *City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, 197, 162 Cal. Rptr. 664 (1980).

43. *Lexin v. Superior Court*, 47 Cal. 4th 1050, 1075, 222 P.3d 214, 103 Cal. Rptr. 3d 767 (2010) (internal quotations and citations omitted).

Although this language is somewhat abstract, more concrete guidance can be found by examining the statutory exceptions to the meaning of “financial interest.” The most relevant of those exceptions are discussed below.

Minimal Financial Interest

Section 1090 does not apply to “minimal” financial interests, as specified in Section 1091.5. The types of minimal interests that are most likely to be relevant to Commissioners are as follows:

- A Commissioner’s interest in a contracting party who is a client of the Commissioner’s law firm, if (1) the Commissioner has less than a 10% ownership interest in the firm, and (2) the Commissioner has not and will not receive remuneration, consideration, or a commission as a result of the contract.⁴⁴
- A Commissioner’s interest in a for-profit corporation that is affected by the contract (even if the corporation is not the contracting party), if (1) the Commissioner owns less than three percent of the shares of the corporation, (2) the Commissioner’s total annual dividend income from the corporation, including the value of stock dividends, does not exceed five percent of the Commissioner’s annual income, and (3) any other payments to the Commissioner from the corporation do not exceed five percent of the Commissioner’s annual income.⁴⁵
- A Commissioner’s interest in reimbursement for actual and necessary expenses incurred in the performance of official duties.⁴⁶

Remote Financial Interest

Section 1090 also does not apply to a “remote” financial interest, as defined in Section 1091, but *only* if all of the following procedural requirements are satisfied:

- (1) The interest is in a contract made by a body or board of which an officer is a member (as opposed to a contract made directly by the officer).
- (2) The interest is disclosed to the body or board.
- (3) The interest is noted in the official records of the body or board.
- (4) The body or board thereafter authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for

44. Section 1091.5(a)(10).

45. Section 1091.5(a)(1); see also *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 217, 137 Cal. Rptr. 118 (1977).

46. Section 1091.5(a)(2).

that purpose without counting the vote or votes of the officer with the remote interest.

- (5) The officer does not influence or attempt to influence another member of the body or board to enter into the contract.⁴⁷

“Remote” interests that are likely most relevant to Commissioners include the following:

- A Commissioner’s interest in a contracting party who is a client of the Commissioner’s law firm (regardless of the Commissioner’s ownership interest in the firm), if the Commissioner has not and will not receive remuneration, consideration, or a commission as a result of the contract.⁴⁸
- A Commissioner’s interest in a contracting party that is a for-profit corporation in which a Commissioner has an ownership interest, if (1) the Commissioner owns less than three percent of the shares of the corporation, and (2) the ownership of those shares was derived from the Commissioner’s employment with the corporation.⁴⁹

Inferences Based on Sections 1091 and 1091.5

Because Sections 1091 and 1091.5 establish exceptions for certain types of financial interests, so long as the interests are sufficiently “minimal” or “remote,” one can infer that those same types of interests *would* violate Section 1090, if they do not meet the de minimis or remoteness standards specified in Sections 1091 or 1091.5.⁵⁰

For example, if a Commissioner owns more than a “minimal” percentage of a for profit corporation, that ownership interest is probably a “financial interest” for the purposes of Section 1090.⁵¹

Severe Consequences for Violation

A contract made in violation of any of the provisions of Section 1090 may be avoided by any party to the contract except the interested officer.⁵²

47. Section 1091(a), (c).

48. Section 1091(b)(6).

49. Section 1091(b)(14).

50. See *Honig*, 48 Cal. App. 4th at 317 (“[A] significant indication of legislative intent with respect to the scope of Section 1090 can be derived by reference to Sections 1091 and 1091.5”); Office of the Attorney General, *Conflicts of Interest* 62 (2010) (exceptions provided in Sections 1091 and 1091.5 should be consulted for guidance to determine what falls within the scope of the term “financial interest” as used in Section 1090).

51. See, e.g., *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 218, 137 Cal. Rptr. 118 (1977) (county supervisor’s 40% ownership of insurance broker exceeded allowed percentage specified in Section 1091.5(a)(1), resulted in finding “as a matter of law” that supervisor had financial interest in insurance contract for purposes of Section 1090).

52. Section 1092.

In addition, the law provides for severe penalties for the interested officer or employee, or for aiding or abetting a person subject to those sections in violating the section.⁵³

An officer or employee who is found to have willfully violated Section 1090 is punishable by a fine or imprisonment in state prison, and permanent disqualification from the holding of any state office.⁵⁴ The term “willful” has been defined to mean that the officer or employee knows of “a reasonable likelihood that the contract may result in a personal financial benefit” to the officer or employee.⁵⁵

A non-willful violation of the section may also result in civil consequences, depending on the circumstances presented.⁵⁶

Other Financial Relationship with State

Under Public Contract Code Section 10410, appointed officials and employees of the state are prohibited from engaging in outside employment or other activity generating a financial interest that is sponsored or funded by a contract with a state agency, unless required to do so as a condition of their state employment.

Section 10410 also bars any state officer or employee from independently contracting with any state agency to provide goods or services on his or her own behalf.

The section provides in full:

10410. No officer or employee in the state civil service or other appointed state official shall engage in any employment, activity, or enterprise from which the officer or employee receives compensation or in which the officer or employee has a financial interest and which is sponsored or funded, or sponsored and funded, by any state agency or department through or by a state contract unless the employment, activity, or enterprise is required as a condition of the officer’s or employee’s regular state employment. No officer or employee in the state civil service shall contract on his or her own individual behalf as an independent contractor with any state agency to provide services or goods.

The precise application of this section is somewhat unclear, as it appears the section has yet to be construed in any reported appellate opinion. Two advisory

53. See Section 1097.

54. Section 1097.

55. *Honig*, 48 Cal. App. 4th at 338.

56. See *Thomson v. Call*, 38 Cal. 3d 633, 699 P.2d 316, 214 Cal. Rptr. 139 (1985).

opinions from the Attorney General's office have addressed peripheral aspects of the section.⁵⁷

Post-Employment Financial Relationship

Public Contract Code Section 10411 prohibits state officials and employees from entering into specified contracts for a limited period of time after separation from state service.

Section 10411(a) prohibits state officials and employees, for a period of two years after service, from entering into any contract in which the official or employee had specified involvement prior to separation.

Section 10411(b) prohibits state officials and employees, for a period of one year after service, from entering into any contract with the agency with whom the official or employee served. A limited exception is provided for the continuation of an attorney's services on a matter in which the attorney was involved prior to leaving state service.

Violation of either provision renders the contract at issue void, unless the violation is "technical or nonsubstantive."⁵⁸ A violation can also subject the state official or employee to civil and criminal sanctions.⁵⁹

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.⁶⁰

This court-made doctrine extends to both economic and noneconomic conflicts of interest. It provides 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...."⁶¹

57. See 88 Ops. Cal. Atty. Gen. 56 (2005) (financial grant from state does not violate section); 84 Ops. Cal. Atty. Gen. 131 (2001) (no violation of Section 10410 based on spouse of state employee contracting with state, if employee does not participate in making of contract or in the spouse's business).

58. Pub. Cont. Code § 10420.

59. Pub. Cont. Code §§ 10421-10425.

60. 67 Ops. Cal. Att'y Gen. 369, 381 (1984).

61. 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.”⁶²

CALIFORNIA PUBLIC RECORDS ACT⁶³

As a state agency, the Commission is subject to the California Public Records Act (hereafter, “CPRA”).⁶⁴ 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 CPRA.⁶⁵ The Commission rarely receives public record requests. When it does, the staff handles them administratively, after refreshing on the requirements of the CPRA. In addition, as a matter of voluntary practice, the Commission posts all of its staff memoranda, reports, and recommendations on its website, <www.clrc.ca.gov>, where all documents are available for public downloading.

If a Commissioner or member of the staff uses a personal electronic communication account to conduct Commission business, those writings may be subject to disclosure under the CPRA.⁶⁶ In order to minimize the difficulties presented by that rule, the Commission adopted the following policy to regulate its own use of electronic communications for Commission business:

Electronic communications

(a) Commissioners and members of the staff shall not use text messaging or social media to send or receive a message that relates to the conduct of the Commission’s business.

(b) Members of the staff should only use an official account to send or receive email messages that relate to the conduct of the Commission’s business. In the event that a staff member uses a personal account for such a purpose, the staff member shall forward a copy of the message to an official account.

(c) If a Commissioner uses a personal account to send or receive an email message that relates to the conduct of the Commission’s business, the Commissioner shall store the message in a location that is used exclusively for that purpose. When a Commissioner’s term of service ends, the Commissioner shall forward all such messages to the Executive Director for retention.

62. 70 Ops. Cal. Att’y Gen. 45, 47 (1987).

63. Sections 6250-6276.48.

64. Sections 6252(e), 6252(f).

65. Section 6253 *et seq.*

66. *City of San Jose v. Superior Court*, 2 Cal. 5th 608, 389 P.3d 848, 214 Cal. Rptr. 3d 274 (2017).

(d) For the purposes of this section, “official account” means an email account within the domain “clrc.ca.gov.” “Personal account” means any email account that is not an official account.

(e) The Commission’s annual memorandum discussing “Open Government Laws” shall reiterate these practices.⁶⁷

Respectfully submitted,

Steve Cohen
Staff Counsel

⁶⁷. See Minutes (Aug. 2017), p. 4; Minutes (Sept. 2017), p. 3; see also Memorandum 2017-40, pp. 2-3.