

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



August 11, 2014

VIA E-MAIL

Ms. Carole D'Elia
Executive Director
Little Hoover Commission
925 L Street, Suite 805
Sacramento, CA 95814

RE: Bagley-Keene Open Meeting Act

Dear Ms. D'Elia:

This letter is the written testimony of the California Public Utilities Commission's ("Commission") Legal Division, in response to the Little Hoover Commission letter to President Michael Peevey dated July 17, 2014.

The Legal Division welcomes this opportunity to discuss Bagley-Keene and its interplay with the Commission's decision-making processes.

First, and foremost, the Legal Division strongly supports the goals of Bagley-Keene open, transparent government, and the public's ability to monitor and participate in the decision-making process. It is the role of the Legal Division to assist the Commission in advancing these goals and performing its processes in a manner compliant with the law.

A few years back, the law changed. In 2009, Assembly Bill 1494 amended Section 11122.5 of the Government Code. The relevant subsection was amended:

From 11122.5(b) *Except as authorized pursuant to Section 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body is prohibited.*

To 11122.5(b) (1) *A majority of the members of a state body shall not, outside of 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 of the state body.*

(2) *Paragraph (1) shall not be construed to prevent an employee or official of a state agency from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the state agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.*

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The bill repealed the prohibition against the use of certain types of communication to develop a “collective concurrence” and instead enacted a broader prohibition against a series of communications of any kind to “discuss, deliberate, or take action” on any relevant item of business.

Effective January 1, 2010, the Bagley-Keene Open Meeting Act prohibited so-called “serial meetings” or “serial discussions” among the majority of the members of a state decisional body about an item of business before the state body. These requirements are applicable to all decision-makers on state bodies, including this Commission’s Commissioners.

The term “serial meetings” refers to a series of private, one-on-one consultations whereby a majority of the members of the decisional body, outside of a publicly noticed meeting, communicate with each other, whether directly or through intermediaries, to discuss, deliberate, or take any action about an item of business before the body.

Under the prior version of the statute, some courts had signaled a tolerance for serial discussions among decision-makers, provided the decision-makers did not actually reach any consensus through such discussions. The Legislature now has amended the statute to overrule this more relaxed view of the open meeting requirements. By the 2010 amendment, the Legislature outlawed *any* substantive discussion among a majority of the decision-makers on state boards, or their intermediaries, outside of a noticed meeting about an item that may come before the board, regardless of whether the discussion results in any agreement or consensus among the members.

The Bagley-Keene Act has always been understood to prohibit the members of a decisional body from using private consultations to take action on a matter of business. As amended, the statute now prohibits deliberation on, or even so much as a discussion about, the substance of a matter among a majority of the members of a decisional body or their intermediaries.

By its terms, the 2010 amendment applies not just to decision-makers themselves, but also to “intermediaries.” It thus places restrictions on the communications among the Commissioners’ Advisors, as well as the Commissioners.

These restrictions apply to dialogue, direct or indirect, among three or more Commissioners’ Offices about the substance of a matter that will, or may, come before the Commission for a vote.

The Legal Division understands that the 2010 amendment was in respond to an appellate court’s statement that under the old version of the Brown Open Meeting Act (a parallel statute to Bagley-Keene) serial meetings did not violate the law unless they resulted in a “collective

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concurrence” among the members. (See *Wolfe v. City of Fremont* (2006) 144 Cal. App. 4th 533, 545, n.6, (as modified on denial of rehearing).) The amendment was an express repudiation of this more lenient interpretation of the law, and now all discussions outside of a noticed meeting about the substance of any item of business among the majority of decision-makers, or their intermediaries, is prohibited.

In practice Commissioners can, outside of the regularly scheduled open business meetings, discuss items of business in a Ratesetting Deliberation Meeting under Public Utilities Code §1701.3(c) and Rule 8.3(4) of the Commission’s Rules of Practice and Procedure. However, this is only applicable to a subset of the Commission’s proceedings, specifically ratesetting cases in which a hearing has been held. Bagley-Keene Alliances are also used at the Commission.

A Bagley-Keene Alliance is a Commission term referring to an arrangement between two Commissioners (i.e., not a majority of the board) to have substantive discussion among themselves, but not other Commissioners (or their intermediaries) about an item of business.

Commission staff, including Administrative Law Judges, are not covered by Bagley-Keene unless they are Commissioner intermediaries, and can freely discuss matters of substance with Commissioners; however, they cannot communicate the comments or positions of one Commissioner to other Commissioners, or their intermediaries, absent a Bagley-Keene Alliance.

The Commission’s Legal Division provides the attached “A Simple Guide to the Bagley-Keene Open Meeting Act” to the Commission’s staff for guidance.

Sincerely,

/s/ JASON REIGER
JASON REIGER
Assistant General Counsel
The California Public Utilities Commission

SR:tlg

cc: Jim Wasserman, Deputy Executive Director
Tamar Lazarus, Project Manager
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Attachment