KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CALIFORNIA 94244-2550

Public: (916) 445-9555
Telephone: (916) 324-5481
Facsimile: (916) 324-8835
E-Mail: Ted.Prim@doj.ca.gov

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

RE: Response to Invitation from Little Hoover Commission

Dear Ms. D'Elia,

Thank you for your invitation to Senior Assistant Attorney General Douglas J. Woods for him or a colleague to testify at the Commission's upcoming hearing on August 26, 2014. Mr. Woods referred your invitation to me. As I understand Mr. Woods has discussed with you, our office is not in a position to send a representative to the hearing, but we hope the following comments will be of assistance.

BACKGROUND:

We understand that some Public Utilities Commission ("PUC") members are concerned about some provisions of the Bagley-Keene Open Meeting Act ("Act" or "Bagley-Keene"), which they believe may unduly constrain their ability to discuss PUC issues. We are told that the commissioners interpret Assembly Bill 1494 in 2009 to impose restrictions on serial meetings which would prevent commissioners from having the kinds of discussions they have previously had with each other.

The Act's goal is governmental transparency. We endorse that goal and we agree that the Act constrains certain types of discussions among PUC commissioners. Below we briefly describe the Act's open meeting rules and how AB 1494 affected those rules. We also discuss ways the PUC might address its concerns within the Act's current framework.

PURPOSES OF THE ACT:

The call for open, transparent, and participatory government is set forth in the opening section of the Act:

> "In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation 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. Code, § 11120.)

The California Constitution contains a similar provision:

> "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. I, § 3, subd. (b)(1).)

The Act represents a compromise between two policy interests: (1) open and participatory government and (2) efficient governmental decision making. The Legislature decided to protect the public's right of access to, and participation in, the work of multi-member governmental boards even if protecting those rights would mean comparatively less efficient governmental decision-making processes.

Service on a public board differs from service on a corporate board. Members of corporate boards routinely discuss business in private to exchange information, test proposals, and achieve consensus before board meetings. In this way, corporate boards may reach decisions efficiently in brief meetings of the entire board. But the Act prohibits such pre-meeting conduct for a public board. The balance struck by the Legislature sacrifices some efficiency to reap the benefit of public participation in government.

Where efficiency is a higher priority, the Legislature can authorize an individual, such as a department head, to make unilateral decisions. Individual decision makers, in contrast to multimember boards, are not subject to the Act's requirements. But when the Legislature (or the people) creates multimember state bodies, it makes a different value judgment. Rather than strive for efficiency, it places a higher value on having a group of people with diverse experiences, backgrounds and viewpoints make decisions through group deliberation, including learning, listening, debating, and negotiating. Group deliberation is a different process from the single decision maker model.

When the Legislature enacted the Act, it made another value judgment. It decided that when a diverse multimember state body gathers to address its business, it must reserve a seat for the public. The Act gives California citizens the right to be present not only when a state body takes action but also to monitor and participate in deliberation. If a state body tries to deliberate

behind closed doors, the public could be left out of government decision making. Thus, absent a statutory exception to address a competing public policy, all phases of a state body's decision making must be open to the public.

CURRENT LAW:

Multimember state bodies must hold open meetings to deliberate. A meeting occurs when a majority of a state body gathers at the same time in one place to deliberate on a topic under the state body's jurisdiction. (Gov. Code, § 11122.5, subd. (a).) The Act applies to all phases of deliberations—information gathering, analysis, debate, negotiation, and decision making. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1409.)

Courts interpret "deliberations" to include not only "collective decision making" but also "collective acquisition and exchange of facts preliminary to the ultimate decision." (*216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860, 877.) Thus, any meeting where a majority of a state body simply listens to information on a topic under the state body's jurisdiction is a meeting subject to the Act, even if the state body does not take action. Informational meetings subject to the Act may include staff briefings, pre-meeting conferences, informal studies, training, facility tours, investigations, and fact-finding sessions. (See, e.g., *Frazer v. Dixon Unified School Dist.*, *supra*, 18 Cal.App.4th at pp. 795-797; *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 101-102; 94 Ops.Cal.Atty.Gen. 33, 36 (2011); 42 Ops.Cal.Atty.Gen. 61, 68 (1963).)

Because a meeting is a gathering of a majority of a state body, a state body could circumvent the Act if a majority of its members communicated among themselves through a series of private communications, as long as no single communication involved a majority. To prevent this, the Act prohibits state body members from engaging in private serial meetings. A majority of a state body may not use a series of private communications of any kind to deliberate on any topic under the state body's jurisdiction. (§ 11122.5, subd. (b)(1).)

Serial meetings consist of several communications, each among less than a majority of a state body, but taken together, involving a majority. For example, a communication chain starting with contact from member A to member B, who then communicates with member C is a prohibited serial meeting of a majority of a five-member state body. (See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376 [collective deliberation through a series of letters or telephone calls from one local body member to the next violates the parallel Brown Act open meeting rules].) Similarly, when member A acts as the hub of a wheel and communicates individually with the different spokes (members B and C), a prohibited serial meeting has occurred. (See *Page v. MiraCosta Community College District* (2009) 180 Cal.App.4th 471)

Serial meetings can also occur indirectly through intermediaries. For example, when member A's delegate communicates with member B's delegate who then communicates with member C's delegate, a prohibited serial meeting has occurred. Similarly, when a third party acts as a hub of a wheel and communicates individually with the different spokes (members A, B and C), a prohibited serial meeting has occurred. For example, when the trustees of a

community college met individually with a mediator during settlement negotiations, the court determined that the trustees had engaged in serial meetings with an intermediary (the mediator), in violation of open meeting rules. (*Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 503, see *Stockton Newspapers, Inc. v. Redevelopment Agency*, *supra*, 171 Cal.App.3d at p. 105 [attorney individually polled members of a local body before meeting].)

Since enactment of the Act, technological innovations in communications (e.g., email, cell phones, instant messaging, text messaging, social networking services, blogs, and the like) have created additional channels for potential prohibited serial meetings. A majority of a state body may not communicate electronically, through e-mail, text, or otherwise, to deliberate on a topic under the state body's jurisdiction. (84 Ops.Cal.Atty.Gen. 30, 32-33 (2001).) (See, e.g., *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 523-524 [prohibited serial meeting when a majority of body circulated, reviewed, and signed a proposal outside of a public meeting].) However, the prohibition against serial meetings would not prevent an executive officer from planning upcoming meetings by discussing times, dates, locations and placement of matters on the agenda.

As applied to the PUC, the Act would prohibit serial meetings among a majority of commissioners on subjects under the PUC's jurisdiction. The practice of commissioners conducting informal meetings in the PUC's hallways and offices may not lawfully occur if a majority of the PUC is involved in the communications chain.

We understand that this prohibition against informal communications is especially frustrating to the PUC because its board members are full-time commissioners, often with offices in close proximity. However, comparatively less efficiency is the price the commissioners must pay to afford the public a full opportunity to participate in its decision-making process. Each of the Act's rules enhances the public's right to have a seat at the table when the PUC conducts its business, so the public can see the PUC receive information, see its deliberations, and see how it reaches its final decisions. Each nonpublic or serial communication is a missed opportunity for the public to participate. The Legislature has mandated transparency with limited exceptions, and even those exemptions should be narrowly construed to protect the public's interest in openness.

ASSEMBLY BILL 1494:

The serial meeting prohibition was first articulated by the courts and in the published opinions of the Attorney General. (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95; 65 Ops.Cal.Atty.Gen 63 (1982); 63 Ops.Cal.Atty.Gen 820 (1980).) The original interpretation of the prohibition by both this office and most practitioners turned out to be the same as what was ultimately adopted in statute and reflected in current law. In particular, in 2001 the Legislature codified the serial meeting prohibition in the Act to prohibit any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the body to develop a collective concurrence as to action to be taken. (Stats. 2001, Chap. 243 (A.B. 192), § 6.) This provision was modeled on the parallel provision in the local agency open meeting law, the Brown Act. (Gov. Code, § 54952.2, subd. (b).)

Again, this office and most practitioners had already interpreted this provision in the same manner as was prescribed in the new law. However, in 2006, the court in *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, reached a more limited interpretation regarding the serial meeting prohibition in the Brown Act, which again pertains to local government bodies. It concluded that serial communications did not violate the Brown Act if they did not commit to an action to be taken. Perhaps the PUC applied that proposition to Bagley-Keene and relied upon the *Wolfe* opinion to conduct informal discussions and deliberations via serial communications during the period that *Wolfe* was good law.

Because a wide range of public and media attorneys believed that the court in *Wolfe* had erred in its interpretation, many groups including the media and the League of Cities collaborated to sponsor legislation to ensure that a majority of a body's members could not use a series of communications outside of a noticed meeting to discuss, deliberate, or act on a matter under the body's jurisdiction under either the Brown Act or Bagley-Keene. (Stats. 2008, ch. 63 (S.B. 1732), § 1; Stats. 2009, ch. 150 (A.B. 1494), § 1.). The legislation specifically eliminated the language on which the *Wolfe* interpretation had been based, and in an uncodified section of SB 1732, expressly rejected the *Wolfe* decision:

> "(a) The Legislature hereby declares that it disapproves the court's holding in *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 545, fn. 6, to the extent that it construes the prohibition against serial meetings by a legislative body of a local agency, as contained in the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code, to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition rather than also including the process of developing a collective concurrence as a violation of the prohibition.
>
> "(b) It is the intent of the Legislature that the changes made by Section 3 of this act supersede the court's holding described in subdivision (a)."

Besides restoring the long-accepted interpretation of serial meetings, the legislation created a specific exemption for limited staff briefings for members of boards and commissions. Under current law, an agency employee may engage in "separate" communications outside a meeting with members of a body to answer questions or give information on a matter within the body's jurisdiction if that person does not communicate to members of the body the comments or position of any other member of the body. (Gov. Code, § 11122.5, subd. (b)(2).)

ALTERNATIVES FOR THE PUC:

While the Act imposes significant constraints on how flexibly public boards can deliberate, those constraints are an important means of accomplishing government transparency. These constraints do not prevent the boards from conducting their business. Moreover, in many instances boards can increase their flexibility within the bounds of Bagley-Keene, while still achieving the Act's purpose of government transparency. We are offering to have our attorneys

work with the PUC to develop an approach by which the PUC would conduct frequent noticed meetings, possibly even multiple times each week, in an effort to balance the pressure of work with the public's interest in open deliberations. The idea would be to craft a systematic approach to a layered use of permissible unnoticed 2-person advisory committees, noticed committee meetings, and full Commission meetings to process the workload, permit commissioners the opportunity to exchange views and develop solutions, and simultaneously provide the public with the opportunity to monitor and participate in PUC decisions.

The details of such an arrangement would need to be carefully considered, but we would be glad to help develop a solution for the PUC's meeting needs.

Sincerely,

TED PRIM
Deputy Attorney General
Government Law Section

For KAMALA D. HARRIS
Attorney General

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