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.

The bill repealed the prohibition against the use of certain types of communication to develop a "collective concurrence" and instead enacted a broader prohibition against a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 statue to Bagley-Keene) serial meetings did not violate the law unless they resulted in a "collective

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
Krystal Beckham, Research Analyst
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Sherry McAlister, Analyst
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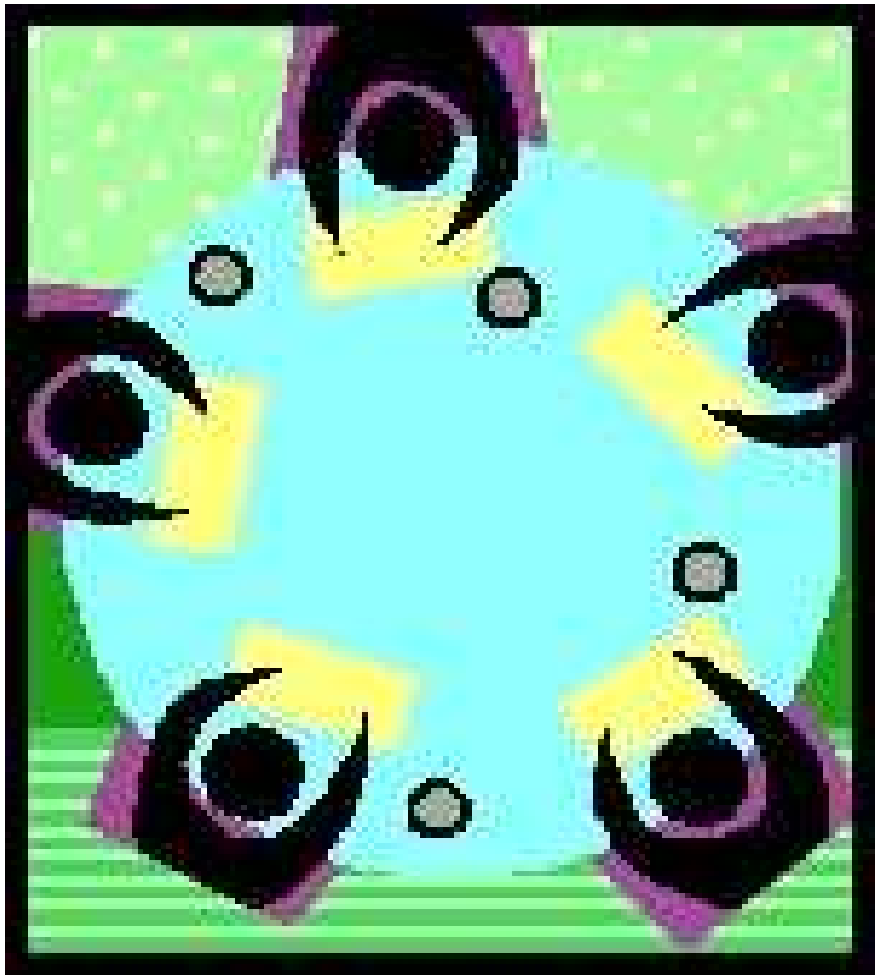
Attachment

A SIMPLE GUIDE

TO THE BAGLEY-KEENE OPEN MEETING ACT



Prepared by the Legal Division of the
California Public Utilities Commission (CPUC)

As a Resource for Members of the Public

Contributors: Helen Mickiewicz, Joel Perlstein, & Suman Mathews

October 2011

I. The Bagley-Keene Open Meeting Act ("Act") is codified in the California Government Code, beginning at Section ("§") 11120.

All references to sections in this Guide, not otherwise specified, are to sections in the Government Code.

II. Purpose of the Bagley-Keene Open Meeting Act

The purpose of the Bagley-Keene Open Meeting Act is to ensure that public agencies conduct the people's business openly so that the public may observe and be informed. (§ 11120)

III. Applicability of the Act

A. The Act applies to any "state body". (§ 11121)

B. A state body is defined to include all of the following:

1. **Every state board, or commission, or similar multimember body of the state that is created by statute or required by law to conduct official meetings.**
   (a) A "multimember body" is two or more people.
2. **A board, commission, committee, or similar multimember body that exercises any authority of a state body delegated to it by that state body.**
3. **An advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if:**
   (a) It was created by formal action of the state body or of any member of the state body, AND
   (b) If the advisory board that was created consists of three or more people.
4. If an advisory body created by formal action of another body has only two members, it is not covered by the Act.

IV. Meetings

A. What is a meeting?

1. A meeting occurs when a majority of the members of a state body gathers at the same time and place, or is joined electronically or telephonically, to

    - hear,
    - discuss, or
    - deliberate

    about any item within the subject matter jurisdiction of the body. (§ 11122.5 (a))

2. *A meeting includes a gathering where a majority of the members of a state body are discussing, debating, or voting on issues or a gathering where they are merely receiving information.*

3. Certain gatherings are <u>not</u> considered meetings, even though a majority of the members of the state body are gathered at the same time and place. (§ 11122.5 (c))

    (a) So long as the members of the body do not discuss privately among themselves business of a specific nature that is within the jurisdiction of the agency, then the following are *not* "meetings":

        (1) The attendance of a majority of the members of a state body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public

        (2) The attendance of a majority of the members of a state body at an open and publicized meeting organized to address a topic of state concern by a person or organization other than the state body

        (3) The attendance of a majority of the members of a state body at an open and noticed meeting of another state body or of a legislative body of a local agency

        (4) The attendance of a majority of the members of a state body at a purely social or ceremonial occasion

    (b) The attendance of a majority of the members of a state body at an open and noticed meeting of a standing committee of that body, if the members of the state body who are not

members of the standing committee attend only as observers, also does not constitute a meeting.

B. Serial meetings are prohibited.

1. As amended in 2009, the Act expressly prohibits the use of serial meetings. A serial meeting occurs when a majority of the members of a state body use a series of communications of any kind, directly or through intermediaries, to -

    - discuss,
    - deliberate, or
    - take action

    outside of a noticed meeting on any item of business within the jurisdiction of the body. (§ 11122.5(b)(1))

2. However, the prohibition on serial meetings does not " "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 [state] 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 [state] body the comments or position of any other member or members of the [state] body." (§ 11122.5(b)(2))

3. Consistent with Paragraph 2 above, the Commission requests that parties meeting with a Commissioner's Office not reveal to any Commissioner's Office the thinking of any other Commissioner's Office about a matter that the Commission may vote on. Similarly, parties meeting with a Commissioner's Office should not provide that Office with any information of anticipated votes of other Commissioners. The term "Commissioner's Office" here refers to a Commissioner together with that Commissioner's personal staff (e.g., personal advisors and chief of staff).

4. The Act does, however, allow *serial* discussions outside of a publicly noticed meeting. of purely a procedural nature among a majority of the members of a state body, or their intermediaries.

V. All meetings require notice to the public.

A. Basic Requirements

1. The notice and agenda provisions require state bodies to provide notice of their meetings to any person who requests that notice in writing. (§11125(a))
2. The notice of a meeting must include a specific agenda for the meeting.
3. Notice of a meeting must be given to the public at least 10 days before the meeting. In addition, notice must be made available on the Internet at least 10 days before the meeting. The "notice" must include the name, address, and telephone number of a person who can provide further information prior to the meeting.
4. The written notice also must include the address of the Internet site where notices required by the Act are made available.
5. The notice of a meeting does not need to include a list of speakers expected to appear at the meeting.

B. All meetings require an agenda.

1. *Agenda requirements*
   (a) The agenda must contain a brief description of the items of business to be transacted or discussed in open or closed session. (§ 11125(b))
2. *How specific or broad do agenda items have to be?*
   (a) A brief general description of an item generally does not need to exceed 20 words.
      (1) However, the agenda items should be drafted to provide interested members of the public with enough information to allow them to decide whether to attend the meeting or to participate in that particular agenda item.
3. *Can items be added to the agenda within the 10-day notice period?*
   (a) Items can be added to the agenda within the 10-day notice period in either of the following situations:
      (1) A majority of the state body first votes that an emergency situation exists (§ 11125.3(a)(1)),

An "emergency situation" is defined as either of the following:

a) work stoppage or other activity that severely impairs public health or safety, or both. (§ 11125.5(b)(1))

b) crippling disaster that severely impairs public health or safety, or both. (§ 11125.5(b)(2))

(2) The state body determines that there is a need for immediate action and that the need for action came to the attention of the state body after the agenda was posted (§ 11125.3(a)(2)).

a) Two-thirds of the members of the state body must vote in favor of this determination, or if two-thirds of the state body members are not present, then the vote must be unanimous. . (§ 11125.3(a)(2))

(b) Notice must be given to members of the state body and to national wire services no later than 48 hours prior to the meeting. (§ 11125.3(b))

(c) Changes made to the agenda under this section must also be posted on the Internet as soon as practicable. (§ 11125.3(a)(b))

4. *Can a state body address items raised by the public at a meeting?*

(a) The state body cannot act on a matter raised by a member of the public unless it is on the agenda for that meeting. The state body can schedule issues raised by the public for consideration at future meetings.

C. Special requirements for meetings held by videoconference or teleconference.

1. *Definition of a teleconference*

(a) A teleconference includes any meeting in which members of the state body are at different locations and connected by electronic means, through either audio or both audio or video. (§ 11123(b)(2))

(b) Any meeting can be held by teleconference. (§ 11123(b)(1)

2. *Requirements for a teleconference*(§ 11123(b))

   (a) The portion of the teleconferenced meeting that is required to be open to the public must be audible to the public at the location specified in the notice of the meeting

   (b) The state body must post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the rights of any party or member of the public appearing before the state body

   (c) Each teleconference location must be identified in the notice and agenda of the meeting

   (d) Each teleconference location must be accessible to the public

   (e) The agenda must provide an opportunity for members of the public to address the state body directly on each agenda item (as further discussed below) at each teleconference location.

   (f) All votes taken during a teleconferenced meeting must be by roll call

   (g) At least one member of the state body must be physically present at the location specified in the notice of the meeting.

VI. Rights of the public

A. Rights of the public to access records

1. When a state body, or a member of the body. provides written material relating to a matter on the agenda of a public meeting to a majority of the body, either before or during a meeting, those materials must be made available to the public at the meeting,, unless they are confidential.
2. Written materials provided to a majority of the state body by other persons relating to a matter on the agenda must be made available to the public after the meeting, unless they are confidential.
3. Any such disclosable records must be made available to the public upon request without delay
4. Any such disclosable records must be made available in appropriate alternative formats, as required by Section 202 of the Americans with Disabilities Act of 1990 and the implementing federal regulations, upon request by a person with a disability.

B. Rights of the public to speak at a meeting.

1. *The state body must provide an opportunity for members of the public to directly address the state body on any agenda item before or during the state body's discussion or consideration of the item. (§ 11125.7(a))*

2. Members of the public do not have a right to speak on agenda items that involve decisions of the Public Utilities Commission regarding adjudicatory hearings. (§ 11125.7(g))

   Adjudicatory hearings are hearings that are held in enforcement cases, and in complaint cases that do not challenge the reasonableness of any rates or charges of a public utility. (Pub. Util. Code § 1701.1(c)(2))

VII. Closed Sessions

A. Certain statutes authorize the Commission to hold closed sessions in a number of specific circumstances.

B. The Commission most frequently holds closed sessions in three of these circumstances.

1. *The Act provides that state bodies may meet in closed session to discuss "pending litigation" with legal counsel. (§ 11126(e)(1))*

   (a) The Act defines three different situations in which litigation is considered "pending":

      (1) When an adjudicatory proceeding to which the state body is a party has been initiated formally before a court, another administrative agency, or an arbitrator (§ 11126(e)(2)(A))

         a) These items appear on the Commission's agenda as "existing litigation".

         b) This category does *not* include adjudicatory proceedings to which the Commission has not yet become a party.

      (2) When "in the opinion of the state body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the state body." (§ 11126(e)(2)(B)(i))

These items appear on the Commission's agenda as "threatened litigation".

(3) When "[b]ased on existing facts and circumstances, the state body has decided to initiate or is deciding whether to initiate litigation." (§ 11126(e)(2)(C)(i))

a) These items appear on the Commission's agenda as "initiation of litigation".

b) Initiation of litigation includes situations in which the Commission is considering whether or not to intervene in litigation that has been formally filed, but in which the Commission is not yet a party.

2. *The Act provides that state bodies may meet in closed session to consider personnel issues. (§ 11126(a)(1))*

(a) Personnel issues are defined as situations in which the state body meets to:

(1) Consider the appointment, employment, evaluation of performance, or dismissal of a public employee, OR

(2) Hear complaints or charges brought against that employee by another person or employee, unless the employee requests a public hearing.

3. *The Public Utilities Code allows the Commission to meet in closed session for the purposes of a ratesetting deliberative meeting. (Pub. Util. Code § 1701.3(c))*

(a) A ratesetting deliberative meeting may be held concerning an item that is categorized as "ratesetting" as defined in Pub. Util. Code § 1701.1(c)(3) that has gone to hearing**.** In order to hold a closed session on such an item, there must be a ban on ex parte communications for a period specified in Pub. Util. Code § 1701.3(c) and the Commission's Rules of Practice and Procedure. .

C. Notice requirements for closed sessions.

1. Items to be considered in closed session ordinarily must be included on the agenda published 10 days in advance of the meeting. *(§ 11125(b).)*

2. The state body may discuss in closed session an item not appearing on the published agenda under the following circumstances: (§ 11126.3(d))

   (a) If the item is a "pending litigation" matter that arose after the agenda was published the postponement of which will prevent the state body from complying with a statutory, court-ordered, or other legally imposed deadline; and.

   (b) If the state body publicly announces at the meeting the title of the litigation to be discussed, or specifically identifies it in some other way, unless one of the specifically described exceptions to this requirement applies.