

Memorandum

To: Chairman Perez and Voting Modernization Board Members
Fr: Stephen N. Trout, Elections Counsel
Dt: July 7, 2002
Re: The Bagley-Keene Open Meeting Act and the Voting Modernization Board

The Bagley-Keene Open Meeting Act ("Bagley-Keene Act") appears in Gov. Code §§ 11120-11132, a copy of which is contained in your binder. A Guide published by the Attorney General's Office is also contained in your binder. The Ralph M. Brown Act ("Brown Act"), beginning at Gov. Code § 54950, which applies in similar fashion to local legislative bodies, provides additional guidance.

Purpose of the Bagley-Keene Act

The Bagley-Keene Act requires that meetings of state bodies be open to the public, except as required by specific statute or confidentiality provision. The Voting Modernization Board ("VMB") is covered by the Bagley-Keene Act.

The purpose of the Bagley-Keene Act and the Brown Act is that actions and deliberations of state and local agencies will be open and that members of the public will be allowed to attend, observe, and participate in the decision making process.

Meetings

A "meeting" occurs when a quorum of a body convenes, either serially or together, in one place to address issues under the body's jurisdiction. (Gov. Code § 11122.5). A meeting includes situations in which the body is merely receiving information, like informal study sessions or pre-meeting get-togethers. If a quorum is involved, the study session should be treated as a meeting.

The Bagley-Keene Act exempts purely social situations. (Gov. Code § 11122.5(c)(5)). Matters under the board's jurisdiction should not be discussed or deliberated at social situations, including lunch breaks during meeting days, or it may be deemed a "meeting" even though no formal action was taken. *Sacramento Newspaper Guild v. Sacramento Co. Bd. of Suprs.* (1968) 263 Cal.App.2d 41.

Serial Meetings

For purposes of the VMB's activities, the Bagley-Keene Act specifically prohibits the use of direct communication, personal intermediaries, or technological devices employed by a majority of the members to develop a collective concurrence as to action to be taken on an item by the members. (Gov. Code § 11122.5(b)). A serial meeting is a series of communications, each of which involves less than a quorum, but which taken as a whole involves a majority of the body's members.

For example, a chain of communications involving contact from member A to member B who then communicates with member C would constitute a "serial meeting" in the case of a five-person body like the VMB. Similarly, when a person acts as the hub of a wheel (member A) and communicates individually with the various spokes (members B and C), a serial meeting has occurred.

In addition, a serial meeting occurs when intermediaries for board members have a meeting to discuss issues. For example, when a representative of member A meets with representatives of members B and C to discuss an agenda item, the members have conducted a serial meeting. In *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, the Court concluded that a series of telephone conversations conducted by the agency's attorney as an intermediary constituted a meeting within the scope of the Brown Act. (See also, 65 Ops.Cal.Atty.Gen. 63 (1982); 63 Ops.Cal.Atty.Gen. 820 (1980)).

An executive officer may receive spontaneous input from board members on the agenda or on any other topic. But problems arise if there are systematic communications involving a quorum of the body acquiring information, engaging in debate, discussion, lobbying, or any other aspect of the deliberative process, either among themselves or between board members and the staff.

The Attorney General's Office recently concluded under the provisions of the Brown Act that a majority of the board members of a local public agency may not e-mail each other to discuss agenda topics even if the e-mail are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board. (84 Op. Atty Gen. Cal. 30 (February 20, 2001)).

The prohibition applies to communications employed by a quorum to develop a collective concurrence concerning action to be taken by the body. Conversations that advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications that contribute to the development of a concurrence as to action to be taken by the body. With respect to items that have been placed on an agenda or that are likely to be placed upon an agenda, members should avoid serial communications of a substantive nature concerning such items.

In conclusion, serial meeting issues will arise most commonly in connection with rotating staff briefings, telephone calls or e-mail communications among a quorum of board members. In these settings, part of the deliberative process by which information is received, processed and discussed, is occurring without the benefit of the public. If these communications are permitted, the public will be deprived of its right to observe and fully participate in the decision making process.

Permissible Activities

The VMB must proceed in its deliberations and actions in open meetings that are timely noticed. It is advisable that the members of the VMB be fully aware of the complex issues on which they must quickly act. It is likewise necessary that the VMB comply with the serial meeting provisions of the Bagley-Keene Act.

In light of the foregoing, the following at least would appear to be permissible activities by the VMB:

- The Executive Director may meet with the Chairman to receive direction.
- The Executive Director may meet with one other member of the Board.
- The Chairman may meet with any other member of the Board on a different subject.
- Each Board member may submit written questions to the Executive Director.