



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Germond, Commissioners Cardenas, Hatch, and Hayward

From: Brian Lau, Acting General Counsel, Legal Division
John M. Feser Jr., Senior Counsel, Legal Division

Subject: Draft Legal Analysis re Bagley-Keene Act Questions in Support of Commission's Request for an Opinion by the Office of the Attorney General

Date: July 9, 2018

Attached for the Commission's consideration is the Legal Division's legal analysis in accordance with the Attorney General's (AG) requirements for submitting a request for an AG opinion pursuant to Government Code section 12519.

LEGAL ANALYSIS REQUIRED

The Attorney General's (AG) authority to issue legal opinions is set out in Government Code section 12519: "The Attorney General shall give his or her opinion in writing to any . . . state agency . . . upon any question of law relating to [it's office]." This includes the FPPC. (See *id.*)

An AG opinion request should be submitted in writing, and signed by the public official or head of the agency authorized to make the request. The request should set out the question to be answered as clearly as possible, along with enough description of the background and context of the question to allow a precise legal analysis to be prepared.

Any request that is made by a department or officer that employs legal counsel must be accompanied by a **legal analysis** prepared by the department or officer's legal counsel.

A Deputy Attorney General in the Opinion Unit may contact the requester for additional background information, or to discuss whether revisions to the question are desirable.



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To: Susan Duncan Lee
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From: Brian Lau, Acting General Counsel, FPPC Legal Division
John M. Feser Jr., Senior Counsel, FPPC Legal Division

Subject: Legal Analysis of Questions re Bagley-Keene Open Meeting Act in Support of
FPPC Request for Opinion by the Office of the Attorney General

Date: July 9, 2018

INTRODUCTION

The Fair Political Practices Commission (the Commission or FPPC) seeks an Opinion from the Office of the Attorney General (the AG) regarding questions of law under the Bagley-Keene Open Meeting Act (the BK Act). Specifically, the Commission requests an AG Opinion that addresses questions that are based on real circumstances, many of which the Commission has been and will be facing regularly in conducting its business. Generally, the Commission seeks an AG Opinion that provides clarity to BK Act requirements that are vague, unclear, and lack guidance from interpreting courts or other legal authorities.¹

FPPC Commissioners are members of an ethics agency who collectively interpret, govern and enforce laws and regulations that affect California's political process. Each Commission member seeks to act in accordance with all applicable laws, such as the BK Act. However, this objective not only meets legal requirements, but also enables each Commissioner to act as an example by satisfying the high standard of compliance that the FPPC expects of its regulated community. Unfortunately, many provisions of the BK Act lack the clarity needed for Commission members to comply with its requirements, despite best efforts and intentions to satisfy their self-imposed high standard of compliance.

Because of the ongoing nature of the BK Act issues involved, the Commission's questions are set forth generally, without reference to a specific event. Thus, although based on real circumstances, the questions are hypothetical, prepared in a way that highlight the questions of law to be addressed in factual contexts relevant to the Commission members.

¹ *Conversations for Workable Government*, Little Hoover Commission, Report #227, June 2015;
<http://www.lhc.ca.gov/sites/lhc.ca.gov/files/Reports/227/Report227.pdf>.

An AG Opinion is needed to provide guidance and clarity on questions of law where prevailing legal authority is insufficient or nonexistent. There is insufficient guidance and direction addressing the issues the Commission has identified. The BK Act requires the Commission to publish agendas that are timely noticed and contain information that would allow the public to decide whether to attend the meeting or participate in a particular agenda item. Parts of the BK Act fail to provide the detail and clarity that it requires of the state bodies it governs. Commission members do not know whether certain actions violate the BK Act. The Commission requests an AG Opinion that eliminates this uncertainty in the law.

The Commission requests that the Attorney General issue an Opinion on the following questions of law.

1. Is the BK Act violated if the Commission votes on an agenda item where the agenda states only that the matter will be discussed, not specifically that the Commission would take any action on the item, but the top of the agenda contains a general statement that the Commission may act on any item listed on the agenda?
2. Is the BK Act violated if five FPPC Commissioners meet outside a public meeting (e.g., over lunch) and talk about how the BK Act applies to the FPPC?
3. Is the BK Act violated if one member of the public sends an e-mail to five FPPC Commissioners and other members of the public and one Commissioner responds by email, but only to the members of the public?

QUESTIONS AND LEGAL ANALYSIS

I. QUESTION ONE

Is the BK Act violated if the Commission votes on an agenda item where the agenda states only that the matter will be discussed, not specifically that the Commission would take any action on the item, but the top of the agenda contains a general statement that the Commission may act on any item listed on the agenda?

A. Short Answer.

Legal authority related to this issue is unclear. The general “may take action” statement may provide sufficient notice to an interested lay person that action may be taken, even on an agenda item that states only that the matter will be discussed. However, if the two statements are considered contradictory and confusing, then action taken on the discussion item may violate the BK Act. The general statement may constitute substantial compliance with notice requirements under the BK Act, but a court would make that determination.

B. Analysis.

1. Legal Authority.

a. Notice and Specific Agenda Under the BK Act.

“The notice of a meeting of a body that is a state body shall include a specific agenda for the meeting, containing a brief description of the items of business to be transacted or discussed in either open or closed session.” (Gov. Code, § 11125, subd. (b).) According to the Attorney General, “the purpose of [the specific agenda requirement] is to provide advance information to interested members of the public concerning the state body’s anticipated business in order that they may attend the meeting or take whatever other action they deem appropriate under the circumstances.” (See 67 Ops.Cal.Atty.Gen. 84 (1984).) Section 11125 is intended to nullify the need for guesswork or further inquiry by the interested public. (*Id.*)

“The agenda items should be drafted to provide interested lay persons with enough information to allow them to decide whether to attend the meeting or to participate in that particular agenda item. Bodies should not label topics as ‘discussion’ or ‘action’ items unless they intend to be bound by such descriptions.” (The AG Guide at p. 2.)

b. Action Taken Under the BK Act.

Under the BK Act, “action taken” means a collective decision, collective commitment or promise to make a 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.” (Gov. Code, § 11122.)

c. Cases Regarding Sufficiency of an Agenda Description.

In an Opinion request, the Attorney General was asked to consider an agenda of the State Board of Food and Agriculture, which was subject to the BK Act. An agenda for the board stated that the board would consider “Tuolumne River San Joaquin River Flood Control Problem.” However, in acting on that agenda item, the board adopted a resolution opposing congressional designation of the Tuolumne River as a “Wild and Scenic River.” The Attorney General concluded that the agenda did not meet the requirements of the statute because members of the public would have to guess as to whether they should attend the meeting of the board or seek additional information from the board. (67 Ops.Cal.Atty.Gen. 84 (1984).)

The Brown Act does not have a “specific agenda” requirement, but it does require a “brief general statement” of each item of business to be transacted or discussed at the meeting. (See Gov. Code, § 54954.2.) Consequently, Brown Act precedents are proper authority in cases under the BK Act that regarding whether the agenda statement was sufficient.

In *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637, 645, The City Council considered approval of a development project that involved a substantial subsidy to the builder. The agenda stated:

Adoption of a resolution to approve: 1. An Agreement Regarding Real Property (Use Restrictions) between the City of Oceanside and SD Malkin Properties Inc. to guarantee development and use of the property as a full service resort consistent with the entitlements for the project; 2. An Agreement Regarding Real Property to provide a mechanism to share Transit Occupancy Tax (TOT) generated by the Project; 3. A Grant of Easement to permit construction of a subterranean parking garage under Mission Avenue; and 4. A report required by AB 562 prepared by Paul Marra of Keyser Marston and Associates documenting the amount of subsidy provided to the developer, the proposed start and end date of the subsidy, the public purpose of the subsidy, the amount of tax revenue and jobs generated by the project; and 5. A License Agreement to permit construction staging for the project on a portion of Lot 26.

(*Id.* at pp. 641-642.) The court held that the agenda provided sufficient information about this item even though it did not include the amount of the subsidy, its duration or its source. The agenda “was not in any sense confusing, misleading, or unfairly opaque” and it “gave the public fair notice of the essential nature of what the council would be considering.” (*Id.* at p. 645.)

In *Moreno v. City of King* (2005) 127 Cal.App. 4th 17, an agenda for a special meeting stating “Public Employee (employment contract)” was inadequate to describe a discussion at the meeting concerning a particular employee’s dismissal. It would have been sufficient, however, if the agenda had stated “Public Employee Dismissal” without naming the employee in question. (*Id.* at pp. 26-27.)

In *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2013) 216 Cal.App. 4th 1167, the agenda for a county planning commission meeting included possible approval of a subdivision. The agenda stated:

V. ... MINOR SUBDIVISION APPLICATION No. MS07-030—William Morris—To divide three parcels totaling 380.45 acres into nine parcels, ranging from 40.00 acres to 54.72 acres in size. The project site is located at the southwest corner of American Avenue and Mitchell Road in the Hilmar area. The property is designated Agricultural land use in the General Plan and zoned A-1 (General Agricultural). THE ACTION REQUESTED IS TO APPROVE, DISAPPROVE OR MODIFY THE APPLICATION. JH.”

(*Id.* at p. 1172.) “No further description of this item of business was provided. No mention was made in the agenda that the Commission would be considering the adoption of a [mitigated negative declaration] in connection with the project.” (*Id.*) At the meeting, however, the commission also adopted a document required under the California Environmental Quality Act (CEQA) for the project. The commission violated the Brown Act because approval of the CEQA document was a distinct item of business, and the public interest in the item was substantial. (*Id.* at pp. 1176-1179.)

In *Carlson v. Paradise Unified School Dist.* (1971) 18 Cal.App. 3d 196 (decided under analogous provision of Education Code), an agenda stating the board of education would

consider a “Continuation school site change” did not give sufficient notice that the board would consider closing an elementary school and moving the continuation school to the elementary school site. The agenda item, though not deceitful, was misleading and inadequate to show the whole scope of the board’s plans. (*Id.* at p. 200.)

In *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App. 5th 194, an agenda item stated “Walmart Initiative Measure” and the recommendation for action was “Provide direction to staff.” At the meeting, the council approved several initiative measures relating to amendments to the general plan to permit construction of a Walmart supercenter. It also approved a memorandum of understanding (MOU) where Walmart would pay for the special election to consider the initiatives. The meeting violated the Brown Act because the agenda failed to mention the MOU. (*Id.* at pp. 207-209.)

d. Substantial Compliance with the BK Act.

In *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416 (*Pacifica*), the court explained that, in determining whether a state body has substantially complied with statutory requirements of the BK Act, the primary consideration is the statute’s objective. Unless the intent of a statute can only be served by demanding strict compliance with its terms, substantial compliance is the governing test. “Substantial compliance ... means actual compliance in respect to the substance essential to every reasonable objective of the statute.” (*Pacifica*, *supra*, 166 Cal.App.4th at p. 1432.)

The stated objectives of the BK Act are to assure that “actions of state agencies be taken openly and that their deliberation be conducted openly.” (Gov. Code, § 11120.) Because Government Code section 11130.3, subdivision (b)(3) allows substantial compliance with the BK Act’s notice requirements, strict compliance is not required. Thus, state actions in violation of those requirements should not be nullified, so long as the state agency’s reasonably effective efforts to notify interested persons of a public meeting serve the statutory objectives of ensuring that state actions taken and deliberations made at such meetings are open to the public. (*Pacifica*, *supra*, 166 Cal.App.4th at pp. 1431–1432.)

2. Whether Contradicting Action Statements on an Agenda Violate the BK Act is Unclear Under Prevailing Legal Authority.

There is no legal authority that directly addresses this question. Based on the legal authority above, a representation at the top of an agenda stating “the Commission may take action on any item listed on the agenda” may provide sufficient notice to an interested lay person that action may be taken, even on an agenda item that states only that the matter will be discussed. For instance, Section 11125 is intended to nullify the need for guesswork or further inquiry by the interested public. (See *supra*, 67 Ops.Cal.Atty.Gen. at p. 84.) The general “may take action” statement may be sufficient to eliminate any guesswork.

On the other hand, a court could find that the two statements are contradictory and confusing, and thus violate the BK Act. If so, then the Commission's actions in violation of the BK Act may not be nullified if a court found that it substantially complies with notice requirements under the BK Act.

An agenda item that calls for discussion only, along with preliminary agenda language allowing action on any item, would likely confuse the public. Moreover, the preface language may not be noticed since the term "discussion" is set forth in the agenda description. However, stating that "the Commission may take action on *any* item listed on the agenda" notifies the public of potential action on any agenda item. The general "may take action" language may comply with the substance of the statute's objective that the Commission notify the public of before taking any action and allow the public to participate in its open deliberations.

If an agenda like this was challenged, a court would likely determine whether this constitutes substantial compliance. Thus, statutory provisions under the BK Act provide no direct answer to this question. Violation of the BK Act is a misdemeanor. (Section 11130.7.) An AG Opinion is needed to clarify the vague statutes and provide guidance to Commission members seeking to comply with the law.

II. QUESTION TWO

Is the BK Act violated if five FPPC Commissioners meet outside a public meeting (e.g., over lunch) and talk about how the BK Act applies to the FPPC?

A. Short Answer.

Prevailing legal authority suggests that the BK Act is within the Commission's subject matter jurisdiction, but we have found no authority under the BK Act or interpreting case law. Thus, discussions among five Commissioners outside an FPPC meeting regarding the BK Act is likely a BK Act violation.

B. Analysis.

1. Subject matter jurisdiction.

Section 11122.5(a) states: "As used in this article, "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."

We have found no direct authority stating that the BK Act is within the subject matter jurisdiction of the FPPC. Although the Commission is *subject to* the requirements under the BK Act as a "state body" under Section 11121(a), the BK Act is not necessarily *within the subject matter jurisdiction* of the Commission.

"Subject matter jurisdiction" is not defined in the BK Act. The following are examples of case law definitions of the term "subject matter jurisdiction" in California:

The principle of “subject matter jurisdiction” relates to the inherent authority of the court involved to *deal with the case or matter before it*, and thus, in the absence of subject matter jurisdiction, a trial court has no power to hear or determine the case. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 324 [emphasis added].)

Subject matter jurisdiction relates to the inherent authority of the court involved to *deal with the case or matter before it*. (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1192 [emphasis added].)

“Subject matter jurisdiction” is power of court over cause of action or *to act in a particular way*. (*Greener v. Workers’ Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1035 [emphasis added].)

2. The BK Act is likely within the Commission’s subject matter jurisdiction, but the answer is unclear in light of the undefined term and overly broad effect on permissible communications about the BK Act.

The above case law definitions demonstrate that the BK Act is likely within the Commission’s subject matter jurisdiction. As a state body subject to the BK Act, its requirements constitute *a matter before it* at all times. Moreover, the BK Act dictates how the Commission must *act in a particular way*, such as providing notice to the public, having open meetings, and limiting deliberative communications.

Statutory provisions under the BK Act provide no direct answer to this question. Violation of the BK Act is a misdemeanor. (Section 11130.7.) An AG Opinion is needed to clarify the vague statutes and provide guidance to Commission members seeking to comply with the law.

3. The BK Act may give rise to First Amendment and due process concerns when applied to Commissioners discussing matters of public concern outside of a Commission meeting.

Generally, public officials are advised to err on the side of caution in determining if Bagley-Keene applies, and Section 11122.5 prohibits a majority of the members of a state body “to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body” or to “use series of communications ... to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body.”

While prevailing legal authority suggests that “subject matter jurisdiction” may be broadly defined, adopting a broad definition leads to considerable uncertainty as to the scope of the BK Act. Broadly defined, Section 11122.5 appears to prohibit members of a state body from discussing, outside of a public meeting, both laws under their direct jurisdiction as well as any laws that may theoretically apply to their agency. Section 11122.5 may also restrict members of state body from discussing or sharing matters of public concern, such as a newspaper article. To the extent that subject matter jurisdiction is broadly interpreted, the BK Act may give rise to First Amendment and due process concerns.

Regarding First Amendment concerns, speech of a governmental employee may be protected to the extent that the speech is citizen speech as opposed to employee speech. “Whereas speech as a citizen may trigger protection, the Court held that ‘when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.’” (*Lane v. Franks* (2014) 134 S. Ct. 2369, at 2378 citing *Garcetti v. Ceballos* (2006) 547 U. S. 410, at 421.)

Additionally, the “void for vagueness” doctrine requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact to prevent arbitrary and discriminatory enforcement of a criminal statute. (*Smith v. Goguen* (1974) 415 U.S. 566, 572, 573.) The doctrine is based on the due process clause that “requires ... some level of definiteness in criminal statutes.” (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 269 [citation omitted].) “The basic premise of the void-for-vagueness doctrine is that ‘[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.’” (*People v. McKay* (2002) 27 Cal.4th 601, 634 [citation omitted].) Thus, a criminal statute must be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt. (*People v. Morgan* (2007) 42 Cal.4th 593, 605 [citations and quotations omitted].)

As the BK Act appears to apply broadly to nearly all discussion outside of a public meeting, the restriction may extend into protected private speech absent further definition. Moreover, because a violation of the BK Act is a misdemeanor (Section 11130.7), the BK Act’s criminal statute may be impermissibly vague absent further definition.

III. QUESTION THREE

Is the BK Act violated if one member of the public sends an e-mail to five FPPC Commissioners and other members of the public and one Commissioner responds by email, but only to the members of the public?

A. Short Answer.

Maybe yes. The response email is not a violation on its face. However, such an email may lead to a BK Act violation because the Commissioner is sending an email to the public with the knowledge that at least one member of the public has communicated the matter with other Commissioners. The likelihood of a serial meeting increases significantly when substantive content is emailed to members of the public, who may then lawfully communicate separately with other Commissioners.

B. Analysis.

A majority of Commission members, outside of an open and noticed meeting, cannot use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or act on any item of business that is within the subject matter of the Commission. (Section

11122.5(b).) Communicating with members of the public with knowledge that a member of the public is communicating, or capable of communicating with the other Commissioners increases the risk of a serial meeting. (Section 11122.5(b).)

Factual circumstances such as directing the member of the public not to share the response with other Commissioners may change this analysis. Also, as discussed above, communications involving content within the Commission's subject matter jurisdiction are prohibited under the BK Act, and content not within the Commission's subject matter jurisdiction is not prohibited. (Section 11122.5(a).)

Analyses of factual scenarios under the BK Act are fraught with circumstances like the present question, where a given action is not a violation, but the action is nevertheless discouraged because of the potential that it could lead to a subsequent action, by the original actor or by others, that would violate the BK Act. An AG Opinion is needed to clarify and define the actions that are prohibited and allowed under the BK Act.

V. CONCLUSION

The above questions and accompanying legal analysis demonstrate the need to clarify the BK Act to enable and ensure compliance with the law. An AG Opinion on these questions would provide legal authority and guidance not only to the FPPC, but also to numerous other state bodies in California subject to the BK Act.