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FAIR POLITICAL PRACTICES COMMISSION
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To: 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: June 21, 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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From: Brian Lau, Acting General Counsel, FPPC Legal Division
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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: June 21, 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. Just as members of the public should be notified and fully informed about an agenda item at a Commission meeting, members of the Commission should know whether a given action violates the BK Act.

QUESTIONS AND LEGAL ANALYSIS

A. SUMMARY OF RELEVANT LEGAL AUTHORITY

1. 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.)

2. 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.)

3. 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.)

4. 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.)

B. PUBLIC COMMUNICATIONS TO COMMISSIONERS

QUESTION #1: Is the BK Act violated if one member of the public sends an e-mail to five FPPC Commissioners?

Short Answer: The BK Act is not violated if one member of the public sends an e-mail to five FPPC Commissioners because the communication is not a “meeting” and not part of a collective decision-making process.

Analysis: A meeting under the BK Act 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” within the body’s subject matter jurisdiction. (Section 11122.5.)² A meeting also includes a gathering of at least a quorum of a body to receive information. Thus, study sessions or pre-meeting briefing sessions are treated as meetings if a quorum is present. (See Attorney General Guide to Bagley-Keene (the AG Guide) at p. 5 (citing Brown Act authority).)

In *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, under the Brown Act, the city council’s passive receipt of a letter from the city attorney that did not concern pending litigation was not a “meeting” of the council, because receiving a letter was not part of a collective decision-making process. (*Id.* at pp. 375-377.) Similarly, receiving an email is not part of a collective decision-making process.

QUESTION #2: Is the BK Act violated if one member of the public sends an e-mail to five FPPC Commissioners and one Commissioner responds in a “reply all” email?

Short Answer: Whether the BK Act is violated if one member of the public sends an e-mail to five FPPC Commissioners and one Commissioner responds in a “reply all” email depends on content of the email. An email with information regarding a matter within the Commission’s subject matter jurisdiction is prohibited, but information not within the Commission’s subject matter jurisdiction is permitted.

Analysis: A “meeting” includes any congregation of a majority of the Commission members to hear, discuss or deliberate upon an item within the Commission’s subject matter jurisdiction. (Section 11122.5(a).) A majority of Commissioners may not, outside of a Commission meeting, 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 11125.5(b)(1).)

This does not prevent a Commission employee or official from engaging in separate communications, outside of a Commission meeting, to answer questions or provide information regarding a matter that is within the subject matter of the Commission, if that person does not communicate to Commissioners the comments or position of any other Commissioner or Commissioners. (Section 11125.5(b)(2).)

An email from a Commissioner to members of the public that contains subject matter jurisdiction content also raises serial meeting concerns. Serial meetings are prohibited, which includes serial deliberations by email. (Section 11122.5(b).) A majority of Commission members, outside of an open and noticed meeting, cannot use a series of communications of any

² Note that for purposes of the BK Act, “subject matter jurisdiction,” appears to be broadly construed and to include laws outside of the Political Reform Act if the Commission is subject to the law’s requirements. (See *infra* at Question #7.)

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).)

Commissioners have no control over information shared with the public. The likelihood of a serial meeting increases significantly when content within the Commission's subject matter jurisdiction is emailed to members of the public. Consequently, such email communications to the public should be avoided. However, emails that contain information outside the Commission's subject matter jurisdiction, such as scheduling a matter on an agenda, would not be prohibited.

QUESTION #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?

Short Answer: No, this is not a BK Act violation.

Analysis: Like QUESTION #1, this does not constitute a meeting under the BK Act. Receiving an email is not part of a collective decision-making process.

QUESTION #4: 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?

Short Answer: Maybe yes. The BK Act may be violated because the Commissioner is sending an email to the public with the knowledge that at least one member of the public is communicating the matter with other Commissioners. The likelihood of a serial meeting increases significantly when substantive content is emailed to members of the public.

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).)

C. AGENDA DESCRIPTIONS

QUESTION #5: 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?

Short Answer: Based on the prevailing legal authority discussed above, the BK Act is likely violated if action is taken on an agenda item that was only noticed to the public for discussion but not noticed for action. Notice identifying an agenda item for discussion and not action would not provide interested lay persons with enough information to allow them to decide whether to attend the meeting or to participate and address potential action taken in that agenda item.

Analysis: “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.” (The AG Guide at p. 2.) An agenda item that states only that the matter will be discussed does not sufficiently notify the public that the Commission will act on the matter, or do anything other than discuss it.

QUESTION #6: 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?

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.

Analysis: There is no legal authority that directly addresses this question. Based on the legal authority discussed 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. A court would determine whether this constitutes substantial compliance.

D. COMMISSIONER DISCUSSIONS OF THE BK ACT

QUESTION #7: 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?

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.

Analysis: 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.

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].)

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.

QUESTION #8: Is the BK Act violated if there is a discussion of an issue among three or more Commissioners which takes place outside of a public meeting and which subject is not anticipated to be scheduled for a hearing in the foreseeable future?

Short Answer: Yes, the BK Act is violated if three Commissioners discuss an item within the Commission's jurisdiction outside of a public meeting, regardless of whether the subject is anticipated for a future hearing.

Analysis: A "meeting" includes any congregation of a majority of the Commission members to hear, discuss or deliberate upon an item within the Commission's jurisdiction. (Section 11122.5(a).) The Commission has five members. Three members is a majority. If three members discuss any item within the Commission's jurisdiction, then the BK Act is violated. (Section 11122.5(a).)

E. COMMISSION SUBCOMMITTEES – THIRD PARTY COMMUNICATIONS

QUESTION #9: Is the BK Act violated if two Commissioners who serve as the only members of a FPPC subcommittee, without posting an agenda or public notice interview one member of the public?

Short Answer: No, the BK Act is not violated because a two-member subcommittee is not a majority of Commission members. To avoid a serial meeting under Section 11122.5(b), the member of the public should be admonished not to communicate with any other Commissioner about matters discussed at the interview.

Analysis: A "meeting" includes any congregation of a majority of the Commission members to hear, discuss or deliberate upon an item within the Commission's jurisdiction. (Section 11122.5(a).) The Commission has five members. Two members is not a majority.

QUESTION #10: Is the BK Act violated if two Commissioners who serve as the only members of a FPPC subcommittee, without posting an agenda or public notice interview two or more members of the public, each of whom were present during all interviews?

Short Answer: No, the BK Act is not violated because a two-member subcommittee is not a majority of Commission members. To avoid a serial meeting under Section 11122.5(b), members of the public should be admonished not to communicate with any other Commissioner about matters discussed at the interview.

Analysis: A “meeting” includes any congregation of a majority of the Commission members to hear, discuss or deliberate upon an item within the Commission’s jurisdiction. (Section 11122.5(a).) The Commission has five members. Two members is not a majority.

QUESTION #11: Is the BK Act violated if two Commissioners who serve as the only members of a FPPC subcommittee, without posting an agenda or public notice interview one member of the public and a third Commissioner attends the interview, but only to observe, not participate?

Short Answer: Yes, the BK Act is violated because a third Commissioner would be present to “hear” the interview, and thus the interview would constitute a meeting of a majority of the Commission under Section 11122.5(a).

Analysis: A “meeting” includes any congregation of a majority of the Commission members to hear, discuss or deliberate upon an item within the Commission’s jurisdiction. (Section 11122.5(a).) The Commission has five members. Three members is a majority. If three members discuss any item within the Commission’s jurisdiction, then the BK Act is violated. (Section 11122.5(a).)

QUESTION #12: Is the BK Act violated if two Commissioners who serve as the only members of a FPPC subcommittee, without posting an agenda or public notice interview one member of the public, a third Commissioner attends the interview and participates in the interview?

Short Answer: Yes, the BK Act is violated because a third Commissioner would be present to “hear, discuss or deliberate” during the interview, and thus the interview would constitute a meeting of a majority of the Commission under Section 11122.5(a).

Analysis: A “meeting” includes any congregation of a majority of the Commission members to hear, discuss or deliberate upon an item within the Commission’s jurisdiction. (Section 11122.5(a).) The Commission has five members. Three members is a majority. If three members discuss any item within the Commission’s jurisdiction, then the BK Act is violated. (Section 11122.5(a).)

F. COMMISSION SUBCOMMITTEES – THIRD PARTY COMMUNICATIONS

QUESTION #13: Is the adoption of policies that deal exclusively with internal management matters subject to the notice or public hearing requirements of the BK Act?

Short Answer: Yes. Adoption of internal management policies is within the Commission’s subject matter jurisdiction. Thus, the BK Act’s notice and hearing requirements apply.

Analysis: A “meeting” includes any congregation of a majority of the Commission members to hear, discuss or deliberate upon an item within the Commission’s subject matter jurisdiction. (Section 11122.5(a).) “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].) Adoption of internal policies involves a matter before the Commission that requires it to act in a particular way, and is thus within the Commission's subject matter jurisdiction. (See *infra* at Question #7 (discussion of case law defining subject matter jurisdiction).)

G. COMMISSIONER CALL-IN FROM REMOTE LOCATION

QUESTION #14: Is the BK Act violated if a Commissioner is out of town, cannot personally attend a Commission meeting, and appears by telephone from a location in Alaska from a 19th Century historic building that was not ADA compliant?

Short Answer: Yes, a telephone appearance must be made from an ADA compliant building. However, we have found no case law interpreting the BK Act's strict compliance with a meeting location's ADA compliance, or how any exceptions under the ADA may apply.

Analysis: A Commissioner may appear at a meeting by telephone under Section 11123. Section 11123.1 provides: "All meetings of a state body that are open and public shall meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof." Under Section 11123.1, a telephone appearance from a building that was not ADA compliant is a BK Act violation. However, substantial compliance discussed above may apply.

QUESTION #15: Is the BK Act violated if a Commissioner is out of town, cannot personally attend a Commission meeting, and appears by telephone from a location in China from a modern office building, but the Commissioner does not know whether it is ADA compliant?

Short Answer: This likely violates the BK Act. However, the BK Act does not clearly define what constitutes a location "accessible to the public," and we have found no case law interpreting the BK Act's strict compliance with a meeting location's ADA compliance, or how any exceptions under the ADA may apply.

Analysis: Section 11123(b)(1)(C) states in relevant part: "Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and *each teleconference location shall be accessible to the public.*" We have found no legal authority interpreting what constitutes a location accessible to the public under Section 11123(b)(1)(C). This may violate the BK Act because China is not readily accessible to members of the public likely to attend a Commission meeting. This also violates BK Act requirements if the building is not ADA complaint.

Substantial compliance discussed above may apply to both the remote location and ADA issues. If the BK Act seeks to ensure public notice, open access to meetings, and open access to participate in a meeting with a Commissioner in a remote location, then a telephone appearance

in a modern building that is open to the public may constitute substantial compliance. Whether China is too remote to satisfy the BK Act's objectives is unclear.

QUESTION #16: Is the BK Act violated if a Commissioner is out of town, cannot personally attend a Commission meeting, and appears by telephone from a location in the Commissioner's Los Angeles office where the building was ADA compliant, but security was strict and the office was not publicly accessible?

Short Answer: Yes, this violates the BK Act.

Analysis: Section 11123(b)(1)(C) states in relevant part: "Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and *each teleconference location shall be accessible to the public.*" If a teleconference occurs in an office that is not accessible to the public, then the BK Act is violated.

H. NOTICE/AGENDA REQUIREMENTS – SUBSTANTIAL COMPLIANCE

QUESTION #17: 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?

SAME AS QUESTION #5

Short Answer: Based on the prevailing legal authority discussed above, the BK Act is likely violated if action is taken on an agenda item that was only noticed to the public for discussion but not noticed for action. Notice identifying an agenda item for discussion and not action would not provide interested lay persons with enough information to allow them to decide whether to attend the meeting or to participate and address potential action taken in that agenda item.

Analysis: "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." (The AG Guide at p. 2.) An agenda item that states only that the matter will be discussed does not sufficiently notify the public that the Commission will act on the matter, or do anything other than discuss it.

QUESTION #18: Is the BK Act violated if the Commission votes on an agenda item where the item is part of an executive staff report that covers other issues and staff has proposed recommended action for the Commission, such as a position on legislation, to take on the item?

Short Answer: Yes, if the item up for vote is set forth in an executive staff report, but is not properly described in accordance with the specific agenda requirement, then this would not violate the BK Act.

Analysis: "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.” (The AG Guide at p. 2.) An agenda item set forth in an executive staff report and not conspicuously set forth and described as an agenda item does not comply with the specific agenda requirement.

I. 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.