



To: Chair Remke, Commissioners Audero, Cardenas, Hatch, and Hayward
From: Jack Woodside, General Counsel; John M. Feser Jr., Senior Commission Counsel
Subject: Procedures for Input from Commissioners on FPPC Meeting Agendas
Date: March 12, 2018

QUESTION

May the Commission adopt procedures that afford Commissioners ample opportunity to review meeting agendas before they are posted, with sufficient time for revisions, in accordance with requirements under the Bagley-Keene Act (the BK Act)?

SHORT ANSWER

Yes. The Commission’s existing policies and practices afford Commissioners ample opportunity to review and provide input on meeting agendas before the Chair sets them. However, existing policy provides no formal process for Commissioners to provide the Chair with their input on an agenda item. The Commission may adopt deadlines for submitting agenda items to the Chair, reviewing the Chair’s brief description of an item and, if necessary, providing the Chair with recommended revisions.

Agenda items may involve substantive information within the Commission’s jurisdiction. Consequently, in accordance with the BK Act, as well as the Commission’s own policy to meet high ethical standards that exceed legal minimums, all communications about agenda items may only occur between each individual Commissioner and the Chair.

ANALYSIS

A. Agenda Procedure Requirements Under the BK Act.

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).) The agenda needs to contain a brief description of each item to be transacted or discussed at the meeting, which as a general rule need not exceed 20 words in length. (*Ibid.*)

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. (*Ibid.*) “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.” (California Attorney General’s Office, A Handy Guide to the Bagley-Keene Open Meeting Act 2004, <http://oag.ca.gov> (the AG Guide) at p. 2.)

2. Sufficiency of agenda descriptions under the BK Act.

As mentioned, a brief general description of an item generally need not exceed 20 words. (Gov. Code, § 11125, subd. (b).) In construing a similar provision of the Brown Act (Gov. Code, § 54950 et seq.), courts have concluded that a “brief general description” may be adequate if it includes the general nature of the subject of the meeting, and need not specify the name of the person at issue. (*Duval v. Board of Trustees* (2001) 93 Cal.App.4th 902, 907 [“Section 54957—Public Employee Evaluation” gave adequate notice of actions taken in closed session]; *Moreno v. City of King* (2005) 127 Cal.App.4th 17, 26 [“brief general description” for purposes of Gov. Code, § 54954.2, subd. (a)(1) would be satisfied by agenda item that said “Public Employee Dismissal”].)

3. Limits on communications under the BK Act.

Under the BK Act, a “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” within the body’s subject matter jurisdiction. (Gov. Code, § 11122.5.) 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 the AG Guide at p. 5 (citing Brown Act authority).)

The BK Act prohibits a state body from circumventing the Act by holding serial meetings. A majority of a state body’s members may not use a series of communications of any kind outside of a meeting authorized under the Act, “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.” (Gov. Code, § 11122.5, subd. (b)(1).)

Individual communications between a member of a state body and any other person that do not violate the rule against serial communications are not treated as a meeting. (Gov. Code, § 11122.5 subd. (c).)

4. Liability for violating the BK Act.

The Attorney General may sue to prevent violations of the BK Act. (Gov. Code, § 11130.) Any interested person may sue for violation of the Act and, if successful, may be awarded court costs and reasonable attorney's fees. (Gov. Code §§ 11130.3, 11130.5.) A knowing violation of the Act by a member of the state body is a misdemeanor. (Gov. Code, § 11130.7.) Section 11130.7 states: "Each member of a state body who attends a meeting of that body in violation of any provision of this article, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this article, is guilty of a misdemeanor." (Emphasis added.)

B. Existing Practices for Commissioners and Meeting Agendas.

The Commissioner Manual (the Manual) contains an overview of the FPPC ethical duties and restrictions. The Commission has primary responsibility for the impartial, effective administration and implementation of the Political Reform Act. (Gov. Code, § 81000 et seq.). Commissioners attend the Commission's monthly meetings and review the agenda materials prior to the meeting. The Commission agenda contains all cases and items to be considered at the meeting, and is posted on its website 10 days before the meeting in accordance with the BK Act. The agenda generally consists of the following: (1) Minutes from prior meeting; (2) Enforcement cases; (3) Regulations; (4) Executive Staff Reports.

Commissioners review the agenda materials prior to the meeting. The materials can be extensive and take several hours to review. Individuals occasionally submit public comment letters on agenda items in the days leading up to the Commission meeting. The comment letters are forwarded to the Commissioners by the Commission Assistant to review before the meeting. In cases where a Commissioner reviews information on an agenda item and believes there is a need for additional information, he or she may make that request of staff in advance of the meeting. Requesting information in advance of the meeting provides staff with time to attempt to develop the requested information, and include it in their staff presentation, or be prepared to respond to questions from the Commission on that item. (Manual at p. 5.)

C. Existing Policy Properly Requires the Chair, with the Commissioners' input, to Set, Prioritize, and Schedule Agenda Items.

In 2001, the Commission adopted the Statement of Governance Principles (the Principles) which provides, among other things, that the Chair: "With input from commissioners and staff, sets the Commission agenda, prioritizing and scheduling agenda items as appropriate."

The duty to set the Commission agenda is properly delegated to the Chair, a paid full-time Commissioner (Gov. Code, § 83106) who oversees the Commission's daily operations. (See Manual at p. 8, setting forth the Chair's duties.) As a practical matter, decisions regarding the content of an agenda should be made by one person in order to avoid violating the BK Act. Involving two or more Commissioners would likely result in communications that violate the BK Act. (See generally FPPC Meeting Minutes, Nov. 19, 2017, at pp. 10-21.) In addition to understanding staff's existing workload, the Chair has the time and resources necessary to set,

prioritize and schedule agenda items. Involving any Commissioners other than the Chair in decisions regarding meeting agendas would be inefficient and a misallocation of agency resources. (See Principles, section C [“The Commission strives to achieve a governing style that encourages efficient operations...”].) The existing policy enables Commissioners to have input and review agenda items as needed while allowing for the Chair to set, prioritize and schedule agenda items.

Also, the Chair’s duty to set the agenda is consistent with the duties set forth in Robert’s Rules of Order, which include the duty:

- To open the session at the time at which the assembly is to meet, by taking the chair and calling the members to order;
- To announce the business before the assembly in the order in which it is to be acted upon;
- To recognize members entitled to the floor;
- To state and to put to vote all questions which are regularly moved, or necessarily arise in the course of the proceedings, and to announce the result of the vote;
- To protect the assembly from annoyance from evidently frivolous or dilatory motions by refusing to recognize them;
- To assist in the expediting of business in every way compatible with the rights of the members, as by allowing brief remarks when undebatable motions are pending, if he thinks it advisable;
- To restrain the members when engaged in debate, within the rules of order;
- To enforce on all occasions the observance of order and decorum among the members, deciding all questions of order (subject to an appeal to the assembly by any two members) unless when in doubt he prefers to submit the question for the decision of the assembly;
- To inform the assembly, when necessary, or when referred to for the purpose, on a point of order or practice pertinent to pending business; to authenticate, by his signature, when necessary, all the acts, orders, and proceedings of the assembly declaring its will and in all things obeying its commands.

(Robert’s Rules of Order, 4th ed., Art X., § 58.)

D. The Commission May Adopt Deadlines for Commissioner Input to the Chair for Agenda Items.

Although existing policy generally allows input from Commissioners for meeting agendas, there is currently no specific *formal* process for Commissioners to provide the Chair with their input on an agenda item. For instance, there are no deadlines for Commissioners and the Chair to review and revise an agenda. The only existing deadline for a Commission agenda is the requirement under the BK Act to distribute an agenda 10 days before a meeting.

Deadlines may help streamline the agenda process and remove any confusion about how and when Commissioners must provide the Chair with requests and input on agenda items. For example, deadlines could be set as follows:

- 7 Days before the agenda is due: Each Commissioner submits agenda items to the Chair.
- 5 Days before the agenda is due: The Chair submits a draft agenda to each Commissioner regarding their requested items.
- 3 Days before the agenda is due: Each Commissioner submits any proposed revisions to agenda item descriptions, if any, to the Chair.

E. In Accordance with the BK Act and FPPC’s Policy to Meet High Ethical Standards That Exceed Legal Minimums, Agenda Items Must Be Communicated Directly Between Each Commissioner and the Chair.

Agenda items may involve substantive information within the Commission’s jurisdiction, and group or serial communications about these items may violate the BK Act. Consequently, in accordance with the BK Act, all communications about agenda items may only occur between each individual Commissioner and the Chair. Thus, for instance, an e-mail communication regarding an agenda item should be sent and received only between an individual Commissioner and the Chair.

Limiting communications in this manner not only prevents violations of the BK Act, but also shows a commitment by the Commission to follow the high standards set forth in its own policy, which states in relevant part:

The Commission strives to achieve a governing style that encourages efficient operations, frank and collegial discussions among members of the Commission, the staff and the public, and fairness to persons whose compliance with the Act is called into question. (Principles at C.)

Among other things, each Commissioner must “[a]t all times meet high ethical standards that exceed legal minimums, including refraining from activities that suggest partisanship or other bias by the Commission or individual Commissioners. (Principles at C.6.)