

BAGLEY-KEENE ACT TRAINING

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The information contained in this presentation is a general overview of existing law. It is not intended as legal advice. Application of the Bagley-Keene Act is fact-specific. Please consult with the Office of the Director, Legal Unit if you need legal advice about the Bagley-Keene Act

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What is Bagley-Keene?

The Bagley-Keene Open Meeting Act (“the Act”) is set forth in Government Code (“GC”) sections 11120-11133.

- The Act aims to ensure transparency and give the public access to observe and participate in the decision-making process of state bodies.
- The Act covers multimember bodies of two or more people. Examples: state boards (OHSB), commissions (CSHWC), advisory committees (3 or more members) (AB 547-Janitorial Advisory Committee), councils (Fast Food Council), panels.
- The Act requires that these bodies publicly notice their meetings, prepare agendas, accept public testimony, and conduct their meetings in public unless specifically authorized by the Act to meet in closed session.

General Requirements

- All **meetings are open and public**. (GC sections 11123 and 11123.2)
- Meetings must be **noticed at least ten calendar days in advance**—including posting on the internet. (GC section 11125(a))
- **Agenda required**—must include a description of specific items to be discussed. (GC sections 11125 and 11125.1)
- A **quorum** must be present to take action (majority). (GC section 11122)
 - Meetings of the CHWSC would require the presence of 5 members in order to take action.
- **Public comment** must be allowed on open session agenda items before or during discussion of each item and before a vote. (GC section 11125.7)
- **Teleconferences and remote participation** – There are special rules to ensure such meetings are transparent and accessible (GC sections 11123, 11123.2, 11125).
- **Closed sessions** - Only limited subjects may be discussed in closed session, with special rules and recording requirements (GC sections 11126, 11126.1)

Teleconference Meetings and 2024 Updates (GC sections 11123, 11123.2, and 11123.5)

- A “**teleconference meeting**” occurs when state body members **participate at different locations** and communicate with each other electronically through audio, or audio and video. (GC sections 11123(b)(2), 11123.2(a)(1).
- A “**teleconference location**” is a location that is known and accessible to the public, at which a state body **member is physically present** while participating in the teleconference.
- A “**remote location**” is a location **other than a “teleconference location” – i.e., not disclosed or accessible to the public** - from which a state body member participates in a teleconference meeting.
- The Act has three sets of teleconference rules: GC sections 11123, 11123.2, and 11123.5. An **advisory body** may operate by any of these sets of rules, while a **decision-making body** must abide by sections 11123 or 11123.2 only.
- These three sets of rules differ on **who must be at which locations** and **how much information about and access to these locations** must be provided to the public.

Key provisions of GC section 11123 applicable to all state bodies

- There can be multiple teleconference locations. Each location must be disclosed to and accessible to the public. (GC section 11123 (b)(1)(C)).
- Every teleconference location must have at least one member physically present there. (GC section 11123 (b)(1)(F)).
- All members must be present at a teleconference location. There are no remote locations which are not disclosed to or accessible to the public.
- All votes during a teleconference meeting must be by rollcall. (GC section 11123 (b)(1) (D)).

Key provisions of GC section 11123.2 applicable to all state bodies

- **Majority of members** must be **physically present** at the **same location**, referred to as a “**teleconference location**”. (GC section 11123.2(j)(1)).
- More than one teleconference location may be used, but **at least one member** of the state body must be **physically present at each teleconference location**. (GC section 11123.2(i)).
- The **public** must be **able to attend and participate** at **every teleconference location**. (GC section 11123.2(a)(2), (d)(1)).

Key provisions of GC section 11123.2 applicable to all state bodies

- Members may participate from **remote locations** that are **not disclosed on the notice and agenda** and are **not accessible to the public**, in two circumstances:
 - The remotely-participating members are in **excess of a majority** (GC section 11123.2(j)(1)), or
 - The member's remote participation is a **reasonable accommodation** for a physical or mental **disability** and they have **timely notified** the body of the circumstances necessitating their remote participation. (GC section 11123.2 (j)(2)).

Key provisions of GC section 11123.2 applicable to all state bodies

- Members participating from remote locations must **disclose if other people** 18 years of age or older are **present** in the room and the general nature of the relationship. (GC section 11123.2(j)(4)).
- All members **must appear on camera during open portions of meetings** unless technologically impractical. Must announce the reason for nonappearance when turning off their camera. (GC section 11123.2(k)(2-3)).

Special Rules Applicable to Advisory Bodies (GC section 11123.5)

All members of advisory bodies can appear from remote locations, subject to specific requirements below.

- A **primary physical meeting location** must be designated in the notice of the meeting where members of the public may physically attend the meeting, observe and hear the meeting, and participate. At least **one staff member of the body must be present** at the primary physical meeting location during the meeting. The advisory body shall post the agenda at the primary physical meeting location, but need not post the agenda at a remote location. (GC section 11123.5(f)).
- Any **member appearing remotely** must be **listed in the minutes** of the meeting. (GC section 11123.5(b)).
- **Notice at least 24 hours** before the meeting that identifies any **member who will participate remotely** by posting the notice on its internet website and by emailing notice to any person who has requested notice of meetings. (GC section 11123.5(c))

Special Rules Applicable to Advisory Bodies (GC section 11123.5)

- **State body must provide** a means by which the **public** may remotely hear audio of the meeting or remotely observe the meeting, including, if available, **equal access equivalent to members of the state body participating remotely**. (GC section 11123.5(g)).
- Advisory members must visibly appear on camera during the open portion of a meeting that is publicly accessible via the internet or other online platform. Member must announce reason for turning off their camera. (GC section 11123.5(h)).

What is a Meeting? (GC sections 11122.5 and 11123)

- A meeting occurs when: (1) a majority (**quorum**) of a state body; (2) gathers to **hear, discuss, or deliberate** on; (3) an item under its **subject matter jurisdiction**. (Gov. Code, section 11122.5(a)).
- **Deliberation includes** not only **decision-making**, but also **information gathering**, e.g., listening to staff, public testimony, or reports, pre-meeting conferences, training. *216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860, 877, internal quotation marks omitted; accord, 103 Ops.Cal.Atty.Gen. 42, 52, fn. 54 (2020).
- Meetings also include **serial meetings** or scenarios resulting from **multiple, separate private contacts** among members that together **amount to majority consideration** of the body's business.

Pitfalls and Things to Avoid

Serial Meetings – The Act expressly **prohibits** the use of **direct communication, personal intermediaries, or technological devices** that are 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 **outside of an open meeting**.

- Typically, a serial meeting is a series of communications, each of which involves less than a majority of the Council, but which taken as a whole involves a majority of the body's members.

Pitfalls and Things to Avoid

Example 1: A chain of email communications involving contact from member A to member B who then communicates with member C would constitute a serial meeting of the three-member majority of a five-person body.

Example 2: 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.

Example 3: Intermediaries for board members have a meeting to discuss issues. 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 through their representatives acting as intermediaries.

What Kind of Communication (outside of meetings) is Permitted?

- **Public contact of individual members.** Private communications between a member of the public and an individual state body member is not a meeting if a majority of the state body has not deliberated. Public cannot act as a go between or delegate=serial meeting.
- **Obtaining information from staff.** It is permissible for staff to communicate separately with each member to provide information or answer questions.
- There are also **limited exceptions** for attending **public conferences, meetings of other governmental bodies, and social gatherings**: (1) **public**; (2) relates to topic of **general public interest**; and (3) members **do not discuss Council business**.
- **One-way communication of written legal advice to Board members.**

Can a majority of DIR's ABC Commission members meet privately over lunch and discuss how the Bagley-Keene Act applies to the Commission?

No. (103 Ops.Cal.Atty.Gen. 42, *2-4 (2020) [Members of the public have a strong interest in participating in any discussion by the Commission that could imperil their own access to the Commission's future actions or deliberations. The Commission possesses the "subject matter jurisdiction" to consider the matter of how the Bagley-Keene Act applies to it].

A member of DIR's ABC Commission reaches out to other members privately to ask about their views for serving on the Commission. Violation?

Yes. This communication may illicit the views or opinions from members about Commission business. A state body majority's discussion of a topic relating to the state body is a "meeting" that triggers the Act's requirements. (103 Ops.Cal.Atty.Gen. 42, *2-4) [discussion of how to comply with the Act is a matter within the state body's subject matter jurisdiction].

A member of DIR's ABC Commission is contacted by a news reporter to get the member's opinion regarding a recent Commission decision. Can the member engage with the reporter?

Yes. The reporter is a member of the public and is inquiring about a decision that the Commission has already made. Even if the reporter's reporting reaches other Commission members, a "collective concurrence" is unlikely to form about action to take, because the action has already been taken. However, members should be cautious about engaging with a reporter about current business or future decisions.

Key Takeaways

- State body members should avoid discussing business with other members outside of a public meeting.
- Goal is transparency
- Public meetings may include teleconference technology and remote participation; but the rules are complex.
- Use common sense
- The Act provides for remedies and penalties in situations where violations occur. The decision of the body may be overturned, violations may be stopped or prevented, costs and fees may be awarded, and in certain situations, there may be criminal misdemeanor penalties imposed if there was intent to deprive the public of information.

Resources:

- *Office of the Attorney General, Bagley-Keene Open Meeting Act Guide 2024*
- *Department of Consumer Affairs, Bagley-Keene Open Meeting Act Guide*