

BAGLEY-KEENE ACT OPEN MEETING TRAINING SUMMARY

April 2020

INTRODUCTION

Life under the Bagley-Keene Act can sometimes be a bit inefficient and frustrating.

- The notice and open meeting requirements take people out of their natural communication patterns.
- Compliance with the Bagley-Keene Act is not intuitive.
- Familiarity with the Bagley-Keene Act and its underpinning can assist with understanding and acceptance.

Multi-member bodies:

- State boards are multi-member bodies comprised of individuals with different experiences and viewpoints.
- These boards make decisions through collaboration, debate and exchange of ideas between members.
- This is a consensus-building process, and differs substantially from a single decision-maker model.

PURPOSE OF THE BAGLEY-KEENE ACT

The Bagley-Keene Act promotes transparency and gives a seat at the table to members of the public.

- Open meetings, notice, public testimony and access to public records promote the public's ability to be part of the process.
- Closed sessions and serial meetings defeat the public's interest in participation.

WHAT BODIES ARE COVERED?

The Bagley-Keene Act applies to "state bodies" (also referred to as "body" or "board")—there are five types:

- Bodies created by statute or the constitution, which may be decision-making or advisory.
- Advisory bodies of a state body.
 - An advisory body is a committee or subcommittee of an existing state body comprised of at least three persons. Membership may come from the parent body, staff, or the public.
 - An advisory body makes recommendations to the parent body but does not exercise any decision-making authority.

- An advisory body must be created by formal action of a state body or by a member of the state body. Formal action need not be a formal resolution, any board action is sufficient.
- Three or more board members may inadvertently create an advisory body. Rule of two may help avoid inadvertent violations.
- Delegated bodies of a state body of at least two persons. A delegated body has decision-making authority.
- Bodies created by executive order.
- Bodies on which a member of a state body serves in official capacity and the body receives funding from the state body.

WHAT IS A MEETING?

The Bagley-Keene Act requires meetings of a state body to be open to the public.

- A meeting is generally a gathering of a majority of a state body to deliberate on any matter under the body's jurisdiction.
- Deliberation includes not only decision-making, but also information gathering, e.g., listening to staff or public testimony or reports.

Meetings also include serial meetings in which a majority is not present at a single time and place.

- A serial meeting is a series of communications, each involving less than a majority of members of a state body, but collectively involving a majority to deliberate on any matter under the body's jurisdiction.
- A serial meeting can occur through a chain of communications from one member to another, or when one person acts as a hub of a wheel and communicates individually with the various spokes.
- A serial meeting can occur directly or indirectly through intermediaries, such as staff or a lobbyist.
- A serial meeting can involve face-to-face communications, telephone calls, emails, texting, and instant messaging.
- Examples of impermissible serial meetings for a five-person board might include: A sends text to B who then emails C re an agenda item; A phones/texts/emails B and C re an agenda item.

Exception: Staff may communicate separately with each member to provide information or answer questions. These communications must occur privately with only one member at a time, and the comments or position of one member may not be communicated to another (preventing staff from acting as an intermediary in a serial meeting).

Remember, the Bagley-Keene Act seeks to promote transparency and public participation, and the serial meeting rules are intended to further that purpose by preventing secret deliberations or decision-making.

GATHERINGS NOT SUBJECT TO OPEN MEETING RULES

- A conversation between a member of the board and any other person, such as a member of the public or staff. Serial meetings are excluded from this exception.
- There are also limited exceptions for conferences, noticed non-governmental meetings, meetings of other governmental bodies, and social gatherings, so long as a majority of the members do not discuss agency business.
- An open and noticed meeting of a standing committee of the board attended by a majority of the board is not a meeting of the board, if the board members who are not members of the standing committee attend only as observers.
- One-way confidential legal advice from legal counsel to board members is not a meeting subject to open meeting laws if board members do not discuss the legal advice among themselves outside of a public meeting.

NOTICE REQUIREMENTS

The Bagley-Keene Act requires meetings to be noticed 10 calendar days in advance.

- The notice must be posted on the Internet 10 calendar days before the meeting.
- The notice must also be provided in writing to anyone who requests a copy of the notice. Anyone may request to receive notices for all meetings of the board.
- A notice must include an agenda of the matters to be discussed at the meeting. The agenda must include a brief description of each specific matter, typically no longer than 20 words. The brief description should contain enough material information about the matter to be discussed so that an average lay person can make an informed decision whether to attend and participate in the meeting. The description should convey the whole scope of the decision. The public should not have to be clairvoyant or resort to collateral information to understand a state body's intended action.
- If an agenda item concerns a contract, loan, or grant, we recommend that the agenda description reflect the purpose, parties, and dollar amount of the contract, loan, or grant.
- Generally, items may not be added to the agenda after the ten-day notice period. There are limited exceptions.
- A board member may not discuss any item not on the agenda at a public meeting, even if no action is to be taken by the board.

- A notice must be provided in alternative formats upon request by any person with a disability.
- Special requirements apply to teleconference meetings. If the board wishes to conduct a meeting where members will attend from different locations it must do so in a way that protects the rights of the public and any party appearing before the board. These requirements have been modified by the Governor's Executive Order during the COVID-19 pandemic. The board members may attend a meeting from undisclosed remote locations so long as regular notice procedures are followed and members of the public can attend and comment remotely and such information is set forth in the notice.

PUBLIC RIGHTS

The Bagley-Keene Act promotes public participation in meetings of state bodies.

Attending a meeting:

- Meeting location must be ADA compliant.
- No identification required. Security exception: information must be kept away from board personnel. Sign-up sheets must clearly state they are voluntary. Member of public may testify without providing identification.
- Public may record, film, or stream meeting unless to do so would be a persistent disruption of the meeting. Persons willfully interrupting the meeting may be removed, but the board should exercise this power with care and should document the circumstances justifying removal.

Testimony: before or during consideration of agenda item:

- Public testimony can be easily integrated into the board's consideration of an agenda item by asking for public comment after staff presentation and before the board's final deliberation.
- The board may permit public testimony on any non-agendized issue under its jurisdiction, but it is not mandatory. The board may not deliberate on the matter, but it may place it on a future agenda or direct the person to staff. Many boards place a standing item on their agenda for this type of public testimony.
- Time limits on testimony are permitted, but must be reasonable under the circumstances. Time limits restrict public participation. Board should tailor any limitations to particular circumstances.

Access to meeting records:

- Meeting records provided to a majority of the board must be made available to the public promptly upon request. Records prepared by board staff in connection with meeting must be available at the meeting. Records provided by a third person should be made available as soon as practicable.
- Routinely posting meeting records on the board's website can save time and resources for the board and its personnel.

- The public has a right to know the vote of each board member, which is easily accomplished by roll call vote.

The Public Records Act applies to state bodies including most exemptions. But the balancing test exception does not apply to meeting records.

CLOSED SESSIONS

There are discrete and narrow exceptions to the requirement that all meetings of a state body must be open to the public. Some exceptions are limited to particular agencies.

This handout will not provide a comprehensive discussion of every exception as the list is somewhat lengthy. But it does touch on two exceptions that apply to all state bodies.

Personnel Exception

- The board may meet in closed session to consider the employment, evaluation, dismissal of an employee, or to hear complaints or charges against an employee. A matter unrelated to a specific employee may not be considered in closed session.
- The purpose of the personnel exception is to protect the privacy of the employee and permit board members to engage in a full and candid exchange of ideas about a personnel decision.
- In order to consider disciplinary action or dismissal of an employee based on complaints and charges from another employee or other person, the board must give the employee 24-hour written notice of his or her right to have the closed session item held in open session. The employee cannot demand to be admitted into closed session, but the employee could be invited into closed session if the board wishes. After the board listens to information about the employee in open session, the board may still deliberate in closed session.

Pending Litigation

- The board may meet in closed session to confer with or receive advice from its legal counsel regarding pending litigation when discussion in open session would prejudice the position of the agency in the litigation.
- To obtain legal advice from its counsel on a litigation matter, the board must follow specific procedural requirements. Not all legal advice may be heard in closed session, only legal advice related to pending litigation.
- Litigation is pending under three circumstances—the board is party to litigation, the board is considering initiating litigation, the board has substantial exposure to litigation based on facts or circumstances.
- The closed session must be properly noticed. For litigation that has already been initiated, the agenda must announce the title of the case.

- Legal counsel must submit a memorandum stating the specific reasons and legal authority for the closed session no later than one week after the closed session.

Closed Sessions: Special Procedural Requirements.

- The noticed agenda must indicate that there will be a closed session, identify the items to be discussed, and state the statutory authority for the closed session. The description should not divulge confidential information or invade the privacy rights of an individual.
- Before convening the closed session, the board must also announce in open session the issues that it will discuss in the closed session and allow public comment on the closed session matter.
- The board may address in closed session only those matters listed on the agenda and announced at the meeting. Board members may not stray into other topics, even if those topics are reasonably related to the closed session agenda item.
- A staff member must attend each closed session to record topics discussed and decisions made at the closed session. After the closed session the board must reconvene in public before adjourning the meeting. Only those staff members with an essential role may attend a closed session.
- Information received and discussions held in closed session are confidential and must not be disclosed to outside parties by members or staff who attended the closed session.

REMEDIES FOR VIOLATIONS

- Criminal - The Bagley-Keene Act imposes criminal misdemeanor penalties against individual board members who violate the Bagley-Keene Act intending to deprive the public of information to which the member knows, or has reason to know, the public is entitled.
- Civil - Any interested person may file a civil action to void a government decision with some exceptions. Attorney Fees - A prevailing plaintiff is likely to recover reasonable attorney fees.
- A defense in a civil action against a state body is that the state body substantially complied with open meeting requirements.
- Opportunity to Correct - The Bagley-Keene Act permits state bodies to cure or correct an open meeting violation. If possible, the state body should try to return to a point in time before the violation. If the violation is improper meeting notice, the board can avoid costly litigation by simply holding a new meeting with proper notice to reconsider the matter.

SUMMARY AND KEY TAKEAWAYS

- When a board meets to gather information, deliberate, or make a decision, the Bagley-Keene Act requires that the public have a seat at the table in most instances.

- Serial meetings conducted outside of a noticed public meeting that ultimately involve a majority of the board frustrate the Bagley-Keene Act's goals of transparency and violate the law.
- The Bagley-Keene Act's requirement for a ten-day notice and agenda, public testimony, and the conduct of open meetings ensure the public's right of participation in the board's consensus-building process.
- A board member may individually contact staff to ask questions or gather information about an upcoming item, so long as the member and staff do not share these conversations with other members outside of a properly noticed board meeting.
- When a member receives information from staff, they should not communicate with other members about this information.
- If information is sent by email to all members, they should not reply to all.
- A member may communicate individually with members of the public to share the work of the board, indicate whether the views expressed are those of the board or their own, and listen to comments from the public.
- A board member should avoid discussing board business with more than one other member outside of a public meeting to avoid creating an inadvertent advisory body.
- A majority of the board may be present at social events, meeting of other public bodies, and public conferences, but may not discuss board business outside of a properly notice board meeting.