

Legal Topics Presented to BRN Advisory Committees

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Topics covered in this presentation:

- Bagley-Keene Open Meeting Act
- California Public Records Act



Bagley-Keene Open Meeting Act

Full statutory text can be found at:

Government Code §§ [11120 - 11132](#)



Why the complicated formalities?

The *Bagley-Keene Open Meeting Act (OMA)*:

- Government Code §§ 11120 – 11132
- Requires that discussions, deliberations, and action taken by “state bodies” be conducted in public “meetings” that abide by established requirements
- Allows for limited authority for certain proceedings to occur in closed session (only if expressly authorized in statute)



Why the complicated formalities?

Government Code § 11120 – statement of legislative intent behind the OMA:

“It is the public policy of this state that public agencies exist to aid in the conduct of the people’s business and the proceedings of public agencies be conducted openly so that the public may remain informed.... [T]he Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

This article shall be known and may be cited as the Bagley-Keene Open Meeting Act.”



Why the complicated formalities?

Inherent tradeoff:

Efficiency and flexibility in conducting business

vs.

Transparency, opportunities for stakeholder input, public participation, etc.

*The OMA prioritizes the latter.



Fundamental premises of the OMA:

Government Code § 11123(a):

“All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except as otherwise provided in this article.”

Government Code § 11122.5(b)(1):

“A majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, 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.”



OMA Definitions

“State body” – Government Code § 11121:

“As used in this article, ‘state body’ means each of the following:

- (a) Every state board, or commission, or similar multimember body of the state that is created by statute or required by law to conduct official meetings and every commission created by executive order.
- (b) A board, commission, committee, or similar multimember body that exercises any authority of a state body delegated to it by that state body.
- (c) An advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons.
- (d) ...
- (e) ...”



OMA Definitions

“Meeting”:

Government Code § 11122.5(a):

“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.”

*The phrase “hear, discuss, or deliberate” is generally construed broadly.



OMA Definitions

“Action taken”:

Government Code § 11122:

“As used in this article ‘action taken’ means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative 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.”

*But remember, “action” is not the only thing that is prohibited outside of a “meeting”; state bodies also may not “hear, discuss, or deliberate” upon matters within their jurisdiction outside of a meeting that complies with the OMA.

Committee members should avoid violations of the requirements and spirit of the OMA by not discussing committee business outside of a formal committee meeting.



What is required for a compliant “meeting”?

The basics:

- 10 days’ notice to the public/written agenda
- Opportunities for public comment
- ADA and non-discrimination compliance
- Physical meeting location (...)

*(*This list is not exhaustive.)*



What is required for a compliant “meeting”?

10 days’ notice to the public/written agenda

Government Code § 11125:

(a) ... Notice shall be given and also made available on the Internet at least 10 days in advance of the meeting....

(b) 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. A brief general description of an item generally need not exceed 20 words. A description of an item to be transacted or discussed in closed session shall include a citation of the specific statutory authority under which a closed session is being held. No item shall be added to the agenda subsequent to the provision of this notice, unless otherwise permitted by this article.

...



What is required for a compliant “meeting”?

ADA and non-discrimination compliance

Government Code § 11123.1:

“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.”

Government Code § 11131:

“No state agency shall conduct any meeting, conference, or other function in any facility that prohibits the admittance of any person, or persons, on the basis of ancestry or any characteristic listed or defined in Section 11135, or that is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase.”



What is required for a compliant “meeting”?

Physical meeting location

- The OMA has very specific rules regarding in-person and teleconference meeting requirements.
- During the Covid-19 pandemic, temporary legal authority was passed allowing meetings to be conducted entirely by remote means, without a physical meeting location. That authority has expired, and was replaced by legislation that updated the in-person and teleconference requirements.
- Board staff will coordinate committee meetings to accommodate the needs and convenience of committee members to the extent possible, but within the mandatory confines of the OMA’s requirements.



What is required for a compliant “meeting”?

Physical meeting location

Government Code § 11123 allows agencies to conduct meetings entirely in person, without a teleconference/remote option (as long as the meeting complies with other OMA requirements regarding public access, etc.).

It also authorizes one of three methods by which state bodies may conduct teleconference meetings.



What is required for a compliant “meeting”?

Physical meeting location

Government Code § 11123 (teleconference method 1):

“...(b)(1)(C) If the state body elects to conduct a meeting or proceeding by teleconference, it shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the rights of any party or member of the public appearing before the state body. 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. The agenda shall provide an opportunity for members of the public to address the state body directly pursuant to Section 11125.7 at each teleconference location.

...

(b)(1)(F) At least one member of the state body shall be physically present at the location specified in the notice of the meeting.”

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Under this method, each location at which a committee member is present must: be identified in the agenda; be open to the public; meet ADA requirements; have an agenda posted outside; allow for the open session to be audible to the public; etc.



What is required for a compliant “meeting”?

Physical meeting location

Additionally, under teleconference methods 2 and 3, there is a requirement to be visible on camera during the open session if possible.

Government Code § 11123.2(k) and § 11123.5(h) :

- (1) Except as provided in paragraph (2), the members of the state body shall visibly appear on camera during the open portion of a meeting that is publicly accessible via the internet or other online platform.
- (2) The visual appearance of a member of the state body on camera may cease only when the appearance would be technologically impracticable, including, but not limited to, when the member experiences a lack of reliable broadband or internet connectivity that would be remedied by joining without video, or when the visual display of meeting materials, information, or speakers on the internet or other online platform requires the visual appearance of a member of a state body on camera to cease.
- (3) If a member of the state body does not appear on camera due to challenges with internet connectivity, the member shall announce the reason for their nonappearance when they turn off their camera.



What is required for a compliant “meeting”?

Physical meeting location – misc. provisions

- * Votes taken during teleconference meetings must be by rollcall.
- * During teleconference meetings, if there is a failure of the remote means of access that allows members of the public to participate during open session, the meeting should recess until such means can be reestablished, or adjourned.
- * Government Code § 11124:
“No person shall be required, as a condition to attendance at a meeting of a state body, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.”



Closed sessions during a meeting

Government Code § 11128:

“Each closed session of a state body shall be held only during a regular or special meeting of the body.”

Government Code § 11132:

“Except as expressly authorized by this article, no closed session may be held by any state body.”

*The OMA provides authorization to conduct closed sessions for specific reasons such as, under appropriate circumstances, to discuss pending litigation, administrative discipline matters, or to avoid the unwarranted invasion of the privacy of an individual licensee or applicant. (See Gov. Code, § 11126.)



Taking action during meetings

Government Code § 11122:

“As used in this article ‘action taken’ means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative 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.”

*In order to take action on an item, a “quorum” of members of the state body must be present at the meeting. The number of members that constitutes a quorum is typically defined in statute or, in the case of advisory bodies not codified in statute, in the committee charter.

*The committee chairperson should facilitate an orderly discussion, including: allowing for discussion by committee members; accepting a motion and second from a member; direct the taking of public comment; and then take a vote by roll call.



California Public Records Act

Full statutory text can be found at:

Government Code §§ [7920.000 – 7931.000](#)



Fundamental premise of the California Public Records Act (PRA)

Government Code § 7921.000:

“In enacting this division, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”



What does the PRA require of state agencies ?

*Agencies must make public records available to any person that requests them.

Government Code § 7922.530:

“Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. Upon request, an exact copy shall be provided unless impracticable to do so.”



What does the PRA require of state agencies?

*Agencies must issue a written response to the request, generally within 10 days from receipt.

Government Code § 7922.535(a):

“Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. If the agency determines that the request seeks disclosable public records, the agency shall also state the estimated date and time when the records will be made available.”

(In statutorily-defined “unusual” circumstances,” the agency can invoke a limited extension of the time allowed to respond.)



What does the PRA require of state agencies?

*Agencies have a duty to assist members of the public to make a focused and effective request (e.g., if a request is vague or ambiguous).

Government Code § 7922.600(a):

“When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, shall do all of the following, to the extent reasonable under the circumstances:

- (1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.
- (2) Describe the information technology and physical location in which the records exist.
- (3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.”

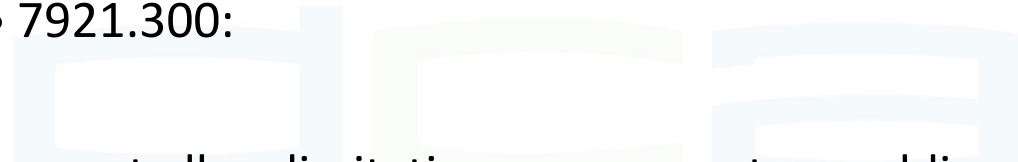
*Note, a request does not need to cite statutory authority or mention the applicable law in order to be considered a request under the PRA or to trigger the agency’s statutory duties.



What does the PRA require of state agencies?

*Agencies may not determine whether/what records to disclose based upon the identity of the requester or the reason for their request.

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Government Code § 7921.300:

“This division does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure.”



What does the PRA require of state agencies?

*“Public record” is a broadly defined term that includes, e.g., committee members’ emails and other physical and electronic records related to committee business.

Government Code § 7920.530(a):

As used in this division, “public records” includes any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

Government Code § 7920.545:

As used in this division, “writing” means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.



Exemptions to disclosure under the PRA

*In general, agencies' records are considered public unless they are subject to an explicit statutory exception.

“The objectives of the Public Records Act thus include preservation of islands of privacy upon the broad seas of enforced disclosure.”

Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 653.

*The PRA identifies various specific categories of records that are considered exempt from disclosure to the public, including, e.g.: complaint and investigative records; personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy; licensing examinations, scoring keys, etc.



What to do if you receive a request for records?

- *Contact BRN staff immediately, and forward a copy of the request.
- *Do not disclose any records unless specifically directed to do so.
- *Board staff will make a determination of whether the request calls for the disclosure of public records, or whether the records are exempt from disclosure (consulting with Board legal counsel if necessary).
- *Board staff will handle the preparation of a written response, and if appropriate, the disclosure of responsive records to the requester, and/or staff will provide further direction to the committee member.



Questions & Comments?

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