

Exhibit 25

Information/Action Item

Consideration of the Commission's request to notice a closed session at every Commission Meeting under the Bagley-Keene Open Meeting Act

As legal counsel to the Commission, I have been asked to address a Bagley-Keene Open Meeting Act ("Open Meeting Act") question that arose during the June 2014 Commission meeting. At that meeting members of the Commission requested that, for each Commission meeting, the agenda include an "executive session" to enable the Commission to, as a routine matter of practice, recess into closed session to address issues that had arisen. During the discussion, both the personnel exception and the pending litigation exception to the Open Meeting Act were referenced as potential topics which the Commission would like to see regularly noticed on the meeting agenda so as to permit a closed session to be held.

While both the personnel and pending litigation exceptions are specifically established in law as valid grounds to hold a closed session, it was not clear from the Commission's discussion whether the intention in noticing the closed session was because the Commission intends to discuss, for example, personnel matters at each meeting or whether the notice of a closed session personnel item would be more in the nature of a standing agenda item that would serve as a placeholder on the agenda, in case the Commission decided it needed to hold a closed session under one of the exceptions noticed. Having a standing closed session whether for personnel, litigation, or any other specifically enumerated exception to the Open Meeting Act does potentially raise an issue in the event that the Commission repeatedly notices a closed session merely as a placeholder "just in case".

Standing Agenda Items for Closed Session under the Open Meeting Act

The purpose of the Open Meeting Act is to provide transparency on the discussions, deliberations and actions of state bodies such as the Commission. The law declares "public agencies exist to aid in the conduct of the people's business" and further that the public does "not give their public servants the right to decide what is good for them 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." (Govt. Code § 11120). In furtherance of that purpose the public must be given notice and an opportunity to witness the deliberations and actions of a state body. The fact that an item is denoted for a closed session does not change the Commission's obligations to meet the notice requirements of the Open Meeting Act. As noted by the Office of the Attorney General in its publication "A Handy Guide to The Bagley Keene Open Meeting Act 2004", (hereinafter "Guide"):

The notice and agenda requirements apply to both open and closed meetings. There is a tendency to think that agendas need not be prepared for closed session items because the public cannot attend. But the public's ability to monitor closed sessions directly depends upon the agenda requirement which tells the public what is going to be discussed. (p. 8.)

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The question then becomes whether the practice of noticing items which the Commission has no intention of hearing, whether for an open or closed session item, constitutes notice for purposes of the Open Meeting Act. There do not appear to be published court cases or opinions by the Office of the Attorney General that indicate whether having a “standing” closed session agenda item as a placeholder is appropriate under the Open Meeting Act for any of the enumerated exceptions. It would seem, however, that such a practice does not align with the policy underpinning the Open Meeting Act. If a state body were to repeatedly notice items that it had no intention of hearing at every meeting, the public is not being given any meaningful notice of what the Commission intends to deliberate and act upon. This is precisely the purpose of the “specific notice” requirement found in Government Code section 11125.¹ As noted by the Office of the Attorney General in 67 Ops.Cal.Atty.Gen 84,77: “it is evident that the purpose of subdivision (b) 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.”²

Another provision of the Open Meeting Act related to “special meetings” also seems to support the position that standing closed sessions are not permissible. In 1997, Section 11125.4 was added to the Open Meeting Act. This provision allows for the calling of Special Meetings when the 10-day notice provisions create “a substantial undue hardship on the state body or where immediate action is required to protect the public interest.” Section 11125.4 lists specific instances under which the Special Meeting section may be invoked including “to consider pending litigation” and “to consider disciplinary action involving a state officer or employee.” As a result of Section 11125.4, the Commission could notice a special meeting with 48 hours advance notice to address pending litigation and/or a personnel issue for which it wished to consider taking disciplinary action if the 10-day notice period for a Regular Meeting notice would be a substantial hardship. Thus, it would seem that there is no specific need to notice a placeholder closed session on every agenda “just in case.”

Guidance on the Personnel Exception

Assuming that the Commission intends, at every meeting, to convene into closed session to discuss an item lawfully noticed and appropriately falling within Section 11126, there does not seem to be any reason why the Commission would not be able to hold such a closed session. However, the personnel exception should not be used as a pretext for discussing matters that must be discussed in open session. Assuming that it is the intention of the Commission to actually discuss a personnel item at every meeting, it is recommended that, prior to meeting in closed session, the Commission seek legal advice on the parameters of the proposed discussion to help ensure that compliance with the Open Meeting Act is maintained. Generally speaking, however, based upon published case law and guidance from the opinions published by the Office of the Attorney General, the following topics would be permissible in closed session:

¹ 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. (Govt. Code § 11125(b).)

² This opinion was based upon a previous version of Section 11125(b) which was narrower than the current version and provided “The notice of a meeting of a body which is a state body as defined in Section 11121, 11121.1, 11121.5, or 11121.7, shall include a specific agenda for the meeting, which shall include the items of business to be transacted or discussed, and no items shall be added to the agenda subsequent to the provision of this notice.”

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- Discussions related to the appointment, employment, evaluation of performance and dismissal of the executive director, including establishing criteria for evaluation of performance;
- Discussions related to the appointment, employment, evaluation of performance and dismissal of all other Commission civil service employees, including establishing criteria for the evaluation of performance;
- Discussions related to the appointment, employment, evaluation of performance and dismissal of other Commission employees as such activity impacts the evaluation of the Executive Director; and
- Discussions concerning possible disciplinary action against an employee – assuming the employee has been given proper notice.

As part of a closed session “personnel” discussion, the Open Meeting Act does not allow and the Commission should not discuss:

- Compensation/salary issues, unless the discussion is associated with an employee disciplinary matter;
- Commission governance issues, self-evaluations, or team building.
- Any concerns related to a Commissioner or amongst Commissioners. Commissioners are not “personnel” for purposes of the Open Meeting Act. As a result, any issues that relate to Commissioners such as attendance and participation at meetings, board elections, or other disputes between Commissioners cannot be discussed in closed session. This would also include disagreement amongst Commissioners over whether or not the Chair or other Commissioner should or should not have acted in a certain manner or capacity or should or should not have directed the Executive Director or other staff member to act or not act in a certain manner of capacity.

For example, if Commissioners are in closed session discussing concerns over an action the Executive Director has taken, and it is identified that the Executive Director took the action under direction of, or with approval of, the Chair, a committee chair, or an individual Commissioner, and some Commissioners continue to be concerned over whether the Executive Director should have acted in the first place, the discussion must be continued in open session. This is because the Executive Director acted under direction or approval of a Commissioner. Thus, the disagreement no longer involves a personnel matter, i.e., the Executive Director’s performance, which may be discussed in closed session, but involves the action of the Chair, committee chair, or individual Commissioner. The Open Meeting Act requires this to be discussed in open session.

- Benefits issues, such as, for example, the severance agreements for EdFund Executive Management Team which was a previous issue between the Commission and the EdFund Board of Directors;
- General employment matters, such as workload, working conditions, a need for new positions;
- Any issues involving a consultant/independent contractor;
- Discussion of whether a closed session should or should not be held to address a personnel issue;

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Guidance on the Pending Litigation Exception

In addition to the personnel exception, Commissioners mentioned the potential need to notice an item for pending litigation on the agenda. The pending litigation exception to the Open Meeting Act allows a state agency to “confer with, or receive advice from, its legal counsel regarding pending litigation when a discussion in open session concerning these matters would prejudice the position of the state body in litigation.” Government Code § 11126(e)(1). “Litigation” under this exception applies to any adjudicatory proceeding, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. This exception applies to: matters against the Commission that have been formally initiated; matters the Commission has decided or is deciding to initiate; or where, based on existing facts and circumstance, there is a significant exposure to litigation against the state body.

The Open Meeting Act requires legal counsel to prepare and submit a memorandum stating the specific reasons and legal authority for the closed meeting, including where applicable: the title of the litigation or the "existing facts and circumstances" supporting the state body's lawsuit or liability. The memorandum should be submitted to the state body before the closed session, but must be submitted no later than one week after the closed session.

For state boards or commissions with significant involvement in litigation, listing all current litigation matters so as to permit the state body to address those matters that need to be discussed might make some practical sense. However, the Commission is only rarely involved as a party to litigation and does not generally have a significant number of pending litigation matters which regularly need to be addressed. When litigation matters arise, the Commission has in the past, and will continue in the future, to notice a closed session as appropriate to allow the Commission to receive legal advice.

Commission Agenda Process

Under the Commission's recently adopted Governance Policy, Commission Governance Policy 3: Officers of the Commission, paragraph E(1)(a) provides that the role of Commission's Chair is to “[c]oordinate the planning of the Commission's activities for the year ahead providing guidance and leadership on general policy direction, and develop the agenda for each Commission meeting, with input from Commissioners and the Executive Director.” The “New Business” item is included on the agenda at each committee meeting to give Commissioners a forum to request that an item appear on the agenda of a future meeting.

Once the Commission Chair has decided that a potential closed session item will appear on the Commission's agenda, legal counsel should be consulted to provide advice on whether an item is appropriately held in closed session under the Open Meeting Act, or is an issue which must be heard by the Commission in open session, so that the meeting notice can be issued accordingly.

Recommendation: It is recommended that the Commission not notice closed session items as a placeholder on the meeting agenda. In addition, the Commission is strongly encouraged to seek advice of legal counsel on matters being considered for closed session and for counsel to be present during closed session to assist in ensuring compliance with the requirements of the Open Meeting Act.

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