California Attorney General Clarifies Open Meeting Requirements for State and Local Agencies

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ATTORNEYS

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In California, the public's right to open meetings of public bodies is guaranteed in the state Constitution: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny" (Cal. Const., art. I, § 3, subd. (b)(1)). The Legislature has enacted two nearly identical statutes imposing specific open meeting requirements in the Bagley-Keane Open Meeting Act applicable to state agencies (other than the Legislature), and the Brown Act applicable to local agencies.

In responding to a series of questions from the State Fair Political Practices Commission the Attorney General recently issued an Opinion (18-901; September 22, 2020) interpreting provisions of the Bagley-Keane Open Meeting Act. The Opinion provides important guidance to all public officials of state and local agencies in fulfilling their obligations under the both the Bagley-Keane Act and the Brown Act:

- A member of a legislative body may respond to an email to the legislative body concerning the agency's business but only if that member does not circulate the response to other members of the legislative body, such as through a "reply to all."
  - Like the Brown Act, the Bagley-Keane Act provides that "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." (Government Code section 11122.5.) The Attorney General concluded that an e-mail response circulating among the members of the legislative body, such as "reply to all," would violate this section.
  - In reaching this conclusion, the Attorney General also relied on the case of *Roberts v. City of Palmdale* in which the California Supreme Court held that

under the Brown Act an agency's legal counsel could send a confidential attorney client privileged memorandum to members of the legislative body without violating the open meeting laws, so long as there is no collective deliberation on the memo outside of a noticed meeting of the agency.

- If an agenda for a meeting of a state or local agency states that the legislative body will only "discuss" an item, the legislative body may not take an "action" on that item.
  - The Attorney General relied on its prior opinions in which it observed that state legislative "[b]odies should not label topics as 'discussion' or 'action' items unless they intend to be bound by such descriptions," explaining that state bodies should 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."
  - The Attorney General determined, however, that the legislative body could act on the item if the agenda included a general statement at the beginning of the agenda stating that the legislative body would take action on "all items" on the agenda, finding that the legislative body would be in "substantial compliance" with the open meeting laws.
  - Public officials should therefore carefully draft agendas so as to accurately state whether the legislative body is being asked to act on an item or to just discuss an item with no action being considered.

A majority of the members of a legislative body may not "meet privately over lunch" to discuss the application of the open meeting acts to their agency.

If you have any questions, please contact **Peter Thorson** or **Serita Young** of the firm's **Public Law Department**.