

Agenda II: Bagley-Keene Open Meeting Act and Conflict of Interest Overview

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Purpose of the Act

To allow members of the public to attend and participate as fully as possible in a state body's decision-making processes.

(Gov. Code section 11120; 103 Ops.Cal.Atty.Gen. 42)

Applicability to the Data Release Committee

Bagley-Keene applies to “state bodies,” such as any state board or “similar multimember body” that is created by statute...” (Gov. Code section 11121(a)).

The HPD Data Release Committee is created by Health & Safety Code section 127673.84(a).

What is a Meeting?

Bagley-Keene sets requirements for the Committee's "**meetings.**"

"Meeting" Definition: A **quorum** of the committee convening, at the same time and place, to hear, discuss, or deliberate on any item within the subject matter of the committee.

- A "**quorum**" is the minimum number of members who must be present for the Committee to transact business and California law generally states that a quorum is a majority of members. (94 Ops.Cal.Atty.Gen. 100.) However, the Committee has a special law regarding quorum, which requires less members to establish quorum than normal (Health & Safety Code section 127673.84(a)).
- Thus, for the Committee, if 11 members are appointed, quorum is established with 5 members (normally, this would be 6).

Physical Presence/Location Requirements and COVID-19 Exception

Normally, the Act requires the physical presence of Committee members at meetings and a physical location where the public may attend. The Act allows some teleconferencing, but still requires physical presence and location.

Because of COVID-19, the Legislature suspended the physical presence/location requirements until July 1, 2023. (Gov. Code section 11133.)

- The Committee must still comply with the notice and public participation requirements of the Act.
- Statute urges state bodies to adhere as closely to the Act as possible to “maximize transparency and provide the public access to meetings.”

Serial Communications Are Prohibited

- A quorum of members cannot, outside of a properly noticed “meeting”,
 - communicate in a series of communications of any kind,
 - directly or through intermediaries,
 - regarding items within the subject matter of the committee.

Purpose: to prevent Committee deliberations/actions/decisions being made in secret, without public knowledge or participation.

(Gov. Code section 11122.5(b))

“Meeting” Exceptions

- The Act does not consider the following to be “meetings”:
 - **Public Contacts:** a member of the public contacting a quorum of Committee members if Committee members do not solicit such contacts.
 - **Social Gatherings:** a quorum of the Committee may attend a purely social event, if they do not discuss Committee issues among themselves.
 - **Conferences:** Conferences are exempt as long as they are open to the public and involve subject matter of general interest, and a quorum of Committee members do not discuss Committee issues among themselves, other than as part of the scheduled program.

(Gov. Code section 11122.5(c))

Meeting Notices and Agendas

The Committee must post meeting notices on the internet at least **10 days** before a meeting.

Notices must have:

- Time and place(s) of the meeting.
 - For virtual meetings, the notice must have “the means by which members of the public may observe the meeting and offer public comment”
- A **specific agenda** for the meeting that contains a brief description of all items to be discussed/transacted at the meeting.
 - The description should provide enough information to allow the public to understand what issues will be discussed or considered.
 - Generally, if an issue is not on the agenda, the Committee cannot consider it. However, a new issue can be mentioned for the purpose of including it at a future meeting.

The 10-day notice requirement does not apply for “emergency” or “special” meetings as defined under statute.

(Gov. Code sections 11125 and 11133)

Public Attendance and Participation

Generally, meetings must be **open and public**.

- Conditions on public attendance at the meeting cannot be imposed. An individual is not required to identify themselves or to sign-in to attend.

Public Participation: The Committee must give the public an opportunity to directly address the Committee on each agenda item before or during the Committee's discussion or consideration of the item.

- Public criticism of the Committee cannot be prohibited.

Broadcasting/Recording of Meetings: Members of the public are allowed to record and broadcast meetings.

(Gov. Code sections 11123, 11124, 11124.1, and 11125.7)

Closed Sessions

“Closed sessions” are parts of meetings without the public and are allowed only for specific statutorily-stated reasons, e.g., to discuss pending litigation or to discuss employment issues.

These sessions have to be included on the agenda and the specific statutory authority allowing the closed sessions must be stated.

Meeting Documents

Generally, materials distributed to the Committee prior to or during a meeting are disclosable public records.

- Some materials can be held confidential pursuant to certain sections of the California Public Records Act.
- Materials prepared by Committee members or committee staff are required to be available to the public at the meeting.
- Materials prepared by others are required to be available to the public after the meeting.

(Gov. Code section 11125.1)

Voting

The vote or abstention of each Committee member must be publicly reported. (Gov. Code section 11123(c).)

- If a virtual meeting, votes must be taken by rollcall. (Gov. Code sections 11123(b); and 11123.5(e).)

Vote by secret ballot at a meeting is not allowed. (68 Ops.Cal.Atty.Gen. 65.)

Vote by proxy is not authorized. (68 Ops.Cal.Atty.Gen. 65.)

Abstentions

Abstentions may complicate voting.

In general, a state body cannot act without support of at least a majority of its quorum. For the full DRC, this is at least 3 members.

Members who voluntarily abstain are counted toward a quorum, but decisions will only require the majority of those members who actually vote as long as there is support from a majority of the quorum.

Members who are disqualified from voting by law are not counted toward a quorum.

(94 Ops.Cal.Atty.Gen. 100.)

Penalties for Non-Compliance

- **Civil:**

- Any interested person, the Attorney General, or a district attorney can commence court action to stop or prevent violations of the Act. (Gov. Code section 11130.)
- Any interested person can also commence court action to declare a Committee action taken in violation of the Act's notice, agenda, and public attendance requirements as "null and void." (Gov. Code section 11130.3.)
- If successful, a plaintiff can obtain a court order, court costs, and attorneys' fees. (Gov. Code section 11130.5.)

- **Criminal:**

- It is also a misdemeanor for any Committee member to attend a meeting in violation of the act and where the member "intends to deprive the public of information to which the member knows... the public is entitled." (Gov. Code section 11130.7.)

Conflict of Interest and Form 700

Overview of Conflict-of-Interest Laws

Conflict of Interest Laws (non-exhaustive List):

- (1) Financial Conflicts:** A DRC member “shall not make, participate in making, or in any way attempt to use the [their] official position to influence a governmental decision in which the [member] knows or has reason to know the [member] has a financial interest.”
- (2) Common Law Doctrine:** A DRC member is “prohibit[ed] from placing themselves in a position where their private, personal interests may conflict with their official duties.”
- (3) Incompatible Activities:** A DRC member “shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.”

Purpose of Conflict-of-Interest Laws

The State of California's "conflict-of-interest statutes are concerned with what might have happened rather than merely what actually happened....

They are aimed at eliminating temptation, avoiding the appearance of impropriety, and assuring the government of the officer's undivided and uncompromised allegiance....

Their objective 'is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision....'"

(People v. Honig (1996) 48 Cal.App.4th 289, 314.)

Appearance of Impropriety

The State of California is concerned with not just actual conflicts of interest, but also the appearance of impropriety. This is to instill confidence and build public trust in government and that its decisions are legitimate.

Exception: Financial Effect on Representative Interest

There is no conflict of interest if a decision would generally impact the industry, trade, or profession or other identified interest the committee member legally represents in the committee.

(Cal. Code Regs., title 2, section 18703(e).)

Disqualification and Recusal

A DRC member disqualified from making or participating in decision must not take part in the decision, and the member's recusal from the decision must meet the following requirements:

- (1) The member's determination of a conflict of interest may be accompanied by an oral or written disclosure of the conflicting interest.
- (2) The member's presence will not be counted toward achieving a quorum.
- (3) During a closed session, a disqualified member must not be present when the decision is considered or knowingly obtain or review a recording or any other nonpublic information regarding the governmental decision.
- (4) The DRC may adopt a rule requiring the member to step down from the dais or leave the chambers.

(Cal. Code Regs., title 2, section 18707(b).)

Example Conflict of Interest Policy

Committee for the Protection of Human Subjects (CPHS) Conflict of Interest Policy:

“A member shall not participate in the review process for any project, except to provide information requested by the CPHS, in which he or she has a present or potential conflict of interest, including any personal, professional, or financial conflicts. The member should notify the Chair of the conflict of interest and should be absent from the meeting room during the discussion and voting phases of the deliberations, except to provide information requested by the CPHS.”

(CPHS Policies may be found at <https://www.chhs.ca.gov/cphs/>)

Form 700

HCAI is required to have a Conflict-of-Interest Code which identifies its positions that involve the making or participation in the making of decisions that may have financial effects. These positions are required to file a “Statement of Economic Interests,” also known as the “Form 700.”

DRC members will be included in HCAI’s Conflict of Interest Code and will be required to file Form 700s about relevant financial interests. Generally, Form 700s require a member to disclose foreseeable conflict of interests, which HCAI will specifically identify in its Conflict-of-Interest Code.

This serves to provide transparency to the public and also acts as a reminder to members of potential conflicts of interest.