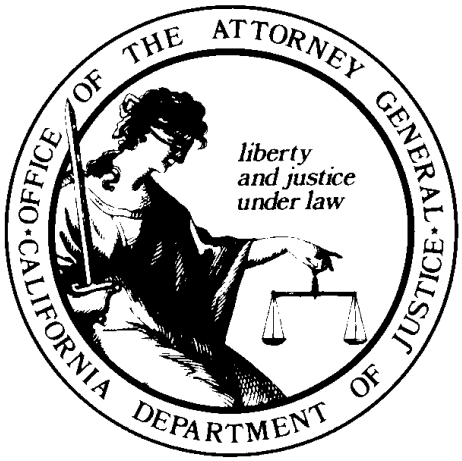

A Handy Guide to The Bagley-Keene Open Meeting Act 2004

California Attorney General's Office

INTRODUCTION

The Bagley-Keene Open Meeting Act ("the Act" or "the Bagley-Keene Act"), set forth in Government Code sections 11120-11132[1], covers all state boards and commissions. Generally, it requires these bodies to publicly notice their meetings, prepare agendas, accept public testimony and conduct their meetings in public unless specifically authorized by the Act to meet in closed session. Following is a brief summary of the Act's major provisions. Although we believe that this summary is a helpful road map, it is no substitute for consulting the actual language of the Act and the court cases and administrative opinions that interpret it.

If you wish to obtain additional copies of this pamphlet, they may be ordered or downloaded via the Attorney General's Home Page, located on the World Wide Web at http://caag.state.ca.us. You may also write to the Attorney General's Office, Public Inquiry Unit, P.O. Box 944255, Sacramento, CA 94244-2550 or call us at (800) 952-5225 (for callers within California), or (916) 322-3360 (for callers outside of California); the TTY/TDD telephone numbers are (800) 952-5548 (for callers within California), or (916) 324-5564 (for callers outside of California).

PURPOSE OF THE ACT

Operating under the requirements of the Act can sometimes be frustrating for both board members and staff. This results from the lack of efficiency built into the Act and the unnatural communication patterns brought about by compliance with its rules.

If efficiency were the top priority, the Legislature would create a department and then permit the department head to make decisions. However, when the Legislature creates a multimember board, it makes a different value judgment. Rather than striving strictly for efficiency, it concludes that there is a higher value to having a group of individuals with a variety of experiences, backgrounds and viewpoints come together to develop a consensus. Consensus is developed through debate, deliberation and give and take. This process can sometimes take a long time and is very different in character than the individual-decision-maker model.

Although some individual decision-makers follow a consensus-building model in the way that they make decisions, they're not required to do so. When the Legislature creates a multimember body, it is mandating that the government go through this consensus building process.

When the Legislature enacted the Bagley-Keene Act, it imposed still another value judgment on the governmental process. In effect, the Legislature said that when a body sits down to develop its consensus, there needs to be a seat at the table reserved for the public. (§ 11120.) By reserving this place for the public, the Legislature has provided the public with the ability to monitor and participate in the decision-making process. If the body were permitted to meet in secret, the public's role in the decision-making process would be negated. Therefore, absent a specific reason to keep

[1]All statutory references are to the Government Code.

the public out of the meeting, the public should be allowed to monitor and participate in the decision-making process.

If one accepts the philosophy behind the creation of a multimember body and the reservation of a seat at the table for the public, many of the particular rules that exist in the Bagley-Keene Act become much easier to accept and understand. Simply put, some efficiency is sacrificed for the benefits of greater public participation in government.

BODIES COVERED BY THE ACT: **General Rule**

The general rule for determining whether a body is covered by the Act involves a two part test (§ 11121(a)):

First, the Act covers multimember bodies. A multimember body is two or more people. Examples of multimember bodies are: state boards, commissions, committees, panels, and councils. Second, the body must be created by statute or required by law to conduct official meetings. If a body is created by statute, it is covered by the Act regardless of whether it is decision-making or advisory.

■ **Advisory Bodies**

The Act governs two types of advisory bodies: (1) those advisory bodies created by the Legislature and (2) those advisory bodies having three or more members that are created by formal action of another body. (§11121(c).) If an advisory body created by formal action of another body has only two members, it is not covered by the Bagley-Keene Act. Accordingly, that body can do its business without worrying about the notice and open meeting requirements of the Act. However, if it consists of three people, then it would qualify as an advisory committee subject to the requirements of the Act.

When a body authorizes or directs an individual to create a new body, that body is deemed to have been created by formal action of the parent body even if the individual makes all decisions regarding composition of the committee. The same result would apply where the individual states an intention to create an advisory body but seeks approval or ratification of that decision by the body.

Finally, the body will probably be deemed to have acted by formal action whenever the chair of the body, acting in his or her official capacity, creates an advisory committee. Ultimately, unless the advisory committee is created by staff or an individual board member, independent of the body's authorization or desires, it probably should be viewed as having been created by formal action of the body.

- **Delegated Body**

The critical issue for this type of body is whether the committee exercises some power that has been delegated to it by another body. If the body has been delegated the power to act, it is a delegated committee. (§ 11121(b).) A classic example is the executive committee that is given authority to act on behalf of the entire body between meetings. Such executive committees are delegated committees and are covered by the requirements of the Act.

There is no specific size requirement for the delegated body. However, to be a body, it still must be comprised of multiple members. Thus, a single individual is not a delegated body.

- **Commissions Created by the Governor**

The Act specifically covers commissions created by executive order. (§ 11121(a).) That leaves open two potential issues for resolution with respect to this type of body. First, what's an executive order as opposed to other exercises of power by the Governor? Second, when is a body a "commission" within the meaning of this provision? There is neither case law nor an Attorney General opinion addressing either of these issues in this context.

- **Body Determined by Membership**

The next kind of body is determined by who serves on it. Under this provision, a body becomes a state body when a member of a state body, in his or her official capacity, serves as a representative on another body, either public or private, which is funded in whole or in part by the representative's state body. (§ 11121(d).) It does not come up often, but the Act should be consulted whenever a member of one body sits as a representative on another body.

In summary, the foregoing are the general types of bodies that are defined as state bodies under the Bagley-Keene Act. As will be discussed below, these bodies are subject to the notice and open meeting requirements of the Act.

MEMBERS-TO-BE

The open meeting provisions of the Act basically apply to new members at the time of their election or appointment, even if they have not yet started to serve. (§ 11121.95.) The purpose of this provision is to prevent newly appointed members from meeting secretly among themselves or with holdover members of a body in sufficient numbers so as to constitute a quorum. The Act also requires bodies to provide their new members with a copy of the Act. (§ 11121.9.) We recommend that this Handy Guide be used to satisfy that requirement.

WHAT IS A MEETING?

The issue of what constitutes a meeting is one of the more troublesome and controversial issues under the Act. A meeting occurs when a quorum of a body convenes, either serially or all together, in one place, to address issues under the body's jurisdiction. (§ 11122.5.) Obviously, a meeting would include a gathering where members were debating issues or voting on them. But a meeting also includes situations in which the body is merely receiving information. To the extent that a body receives information under circumstances where the public is deprived of the opportunity to monitor the information provided, and either agree with it or challenge it, the open-meeting process is deficient.

Typically, issues concerning the definition of a meeting arise in the context of informal gatherings such as study sessions or pre-meeting get-togethers. The study session historically arises from the body's desire to study a subject prior to its placement on the body's agenda. However, if a quorum is involved, the study session should be treated as a meeting under the Act. With respect to pre-meeting briefings, this office opined that staff briefings of the city council a half hour before the noticed city council meeting to discuss the items that would appear on the council's meeting agenda were themselves meetings subject to open meeting laws.[2] To the extent that a briefing is desirable, this office recommends that the executive officer prepare a briefing paper which would then be available to the members of the body, as well as, to the public.

■ Serial Meetings

The Act expressly prohibits the use of direct communication, personal intermediaries, or technological devices that are employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body outside of an open meeting. (§ 11122.5(b).) Typically, a serial meeting is a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the body's members. For example, a chain of communications involving contact from member A to member B who then communicates with member C would constitute a serial meeting in the case of a five-person body. Similarly, when a person acts as the hub of a wheel (member A) and communicates individually with the various spokes (members B and C), a serial meeting has occurred. In addition, a serial meeting occurs when intermediaries for board members have a meeting to discuss issues. For example, when a representative of member A meets with representatives of members B and C to discuss an agenda item, the members have conducted a serial meeting through their representatives acting as intermediaries.

[2] 42 Ops.Cal.Atty.Gen. 61 (1963); see also 32 Ops.Cal.Atty.Gen. 240 (1958).

In the *Stockton Newspapers* case, the court concluded that a series of individual telephone calls between the agency attorney and the members of the body constituted a meeting.[3] In that case, the attorney individually polled the members of the body for their approval on a real estate transaction. The court concluded that even though the meeting was conducted in a serial fashion, it nevertheless was a meeting for the purposes of the Act.

An executive officer may receive spontaneous input from board members on the agenda or on any other topic. But problems arise if there are systematic communications through which a quorum of the body acquires information or engages in debate, discussion, lobbying, or any other aspect of the deliberative process, either among themselves or between board members and the staff.

Although there are no cases directly on point, if an executive officer receives the same question on substantive matters addressed in an upcoming agenda from a quorum of the body, this office recommends that a memorandum addressing these issues be provided to the body and the public so they will receive the same information.

This office has opined that under the Brown Act (the counterpart to the Bagley-Keene Act which is applicable to local government bodies) that a majority of the board members of a local public agency may not e-mail each other to discuss current topics related to the body's jurisdiction even if the e-mails are also sent to the secretary and chairperson of the agency, posted on the agency's Internet website, and made available in printed form at the next public meeting of the board.[4]

The prohibition applies only to communications employed by a quorum to develop a collective concurrence concerning action to be taken by the body. Conversations that advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue, are all examples of communications that contribute to the development of a concurrence as to action to be taken by the body. Accordingly, with respect to items that have been placed on an agenda or that are likely to be placed upon an agenda, members of state bodies should avoid serial communications of a substantive nature that involve a quorum of the body.

In conclusion, serial meeting issues will arise most commonly in connection with rotating staff briefings, telephone calls or e-mail communications among a quorum of board members. In these situations, part of the deliberative process by which information is received and processed, mulled over and discussed, is occurring without participation of the public.

Just remember, serial-meeting provisions basically mean that what the body can not do as a group it can not do through serial communications by a quorum of its members.

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[3] *Stockton Newspapers, Inc.* v. *Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105. See also, 65 Ops.Cal.Atty.Gen. 63, 66 (1982); 63 Ops.Cal.Atty.Gen. 820, 828-829 (1980).

[4] Cal.Atty.Gen., Indexed Letter, No. IL 00-906 (February 20, 2001).

■ Contacts by the Public

One of the more difficult areas has to do with the rights of the public to contact individual members. For example, a communication from a member of the public to discuss an issue does not violate the Act. (§ 11122.5(c)(1).) The difficulty arises when the individual contacts a quorum of the body.

So long as the body does not solicit or orchestrate such contacts, they would not constitute a violation of the Bagley-Keene Act. Whether its good policy for a body to allow these individual contacts to occur is a different issue.

■ Social Gatherings

The Act exempts purely social situations from its coverage. (§ 11122.5(c)(5).) However, this construction is based on the premise that matters under the body's jurisdiction will not be discussed or considered at the social occasion. It may be useful to remind board members to avoid "shop talk" at the social event. Typically, this is difficult because service on the body is their common bond.

■ Conferences and Retreats

Conferences are exempt from the Act's coverage so long as they are open to the public and involve subject matter of general interest to persons or bodies in a given field. (§ 11122.5(c)(2).) While in attendance at a conference, members of a body should avoid private discussions with other members of their body about subjects that may be on an upcoming agenda. However, if the retreat or conference is designed to focus on the laws or issues of a particular body it would no be exempt under the Act.

■ Teleconference Meetings

The Act provides for audio or audio and visual teleconference meetings for the benefit of the public and the body. (§ 11123.) When a teleconference meeting is held, each site from which a member of the body participates must be accessible to the public. [Hence, a member cannot participate from his or her car, using a car phone or from his or her home, unless the home is open to the public for the duration of the meeting.] All proceedings must be audible and votes must be taken by rollcall. All other provisions of the Act also apply to teleconference meetings. For these reasons, we recommend that a properly equipped and accessible public building be utilized for teleconference meetings. This section does not prevent the body from providing additional locations from which the public may observe the proceedings or address the state body by electronic means.

NOTICE AND AGENDA REQUIREMENTS

The notice and agenda provisions require bodies to send the notice of its meetings to persons who have requested it. (§ 11125(a).) In addition, at least ten days prior to the meeting, bodies must

prepare an agenda of all items to be discussed or acted upon at the meeting. (§ 11125(b).) In practice, this usually translates to boards and commissions sending out the notice and agenda to all persons on their mailing lists. The notice needs to state the time and the place of the meeting and give the name, phone number and address of a contact person who can answer questions about the meeting and the agenda. (§ 11125(a).) The agenda needs to contain a brief description of each item to be transacted or discussed at the meeting, which as a general rule need not exceed 20 words in length. (§ 11125(b).)

The agenda items should be drafted to 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. Bodies should not label topics as "discussion" or "action" items unless they intend to be bound by such descriptions. Bodies should not schedule items for consideration at particular times, unless they assure that the items will not be considered prior to the appointed time.

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.

REGULAR MEETINGS

The Act, itself, does not directly define the term " regular meeting." Nevertheless, there are several references in the Act concerning regular meetings. By inference and interpretation, the regular meeting is a meeting of the body conducted under normal or ordinary circumstances. A regular meeting requires a 10-day notice. This simply means that at least 10 days prior to the meeting, notice of the meeting must be given along with an agenda that sufficiently describes the items of business to be transacted or discussed. (§§ 11125(a), 11125(b).) The notice for a meeting must also be posted on the Internet, and the web site address must be included on the written agenda. In addition, upon request by any person with a disability, the notice must be made available in appropriate alternative formats, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the applicable federal rules and regulations. The notice must contain information regarding the manner in which and the deadline by which a request for any disability-related modification or accommodation, including auxiliary aids or services, may be made by a person requiring these aids or services in order to participate in the meeting.

In two special situations, items may be added to the agenda within the 10-day notice period, provided that they are added and notice is given no later than 48 hours prior to the meeting. (§ 11125.) The first such situation is where the body concludes that the topic it wishes to add would qualify for an emergency meeting as defined in the Act. (§ 11125.3(a)(1).) The second situation is where there is a need for immediate action and the need for action came to the attention of the body after the agenda was mailed in accordance with the 10-day notice requirement. (§ 11125.3(a)(2).) This second situation requires a two-thirds vote or a unanimous vote if two-thirds of the members are not present.

Changes made to the agenda under this section must be delivered to the members of the body and to national wires services at least 48 hours before the meeting and must be posted on the Internet as soon as practicable.

SPECIAL MEETINGS

A few years ago, special meetings were added to the Act to provide relief to agencies that, due to the occurrence of unforeseen events, had a need to meet on short notice and were hamstrung by the Act's 10-day notice requirement. (§ 11125.4.) The special meeting requires that notice be provided at least 48 hours before the meeting to the members of the body and all national wire services, along with posting on the Internet.

The purposes for which a body can call a special meeting are quite limited. Examples include pending litigation, legislation, licencing matters and certain personnel actions. At the commencement of the special meeting, the body is required to make a finding that the 10-day notice requirement would impose a substantial hardship on the body or that immediate action is required to protect the public interest and must provide a factual basis for the finding. The finding must be adopted by two-thirds vote and must contain articulable facts that support it. If all of these requirements are not followed, then the body can not convene the special meeting and the meeting must be adjourned.

EMERGENCY MEETINGS

The Act provides for emergency meetings in rare instances when there exists a crippling disaster or a work stoppage that would severely impair public health and safety. (§ 11125.5.) An emergency meeting requires a one-hour notice to the media and must be held in open session. The Act also sets forth a variety of other technical procedural requirements that must be satisfied.

PUBLIC PARTICIPATION

Since one of the purposes of the Act is to protect and serve the interests of the general public to monitor and participate in meetings of state bodies, bodies covered by the Act are prohibited from imposing any conditions on attendance at a meeting. (§ 11124.) For example, while the Act does not prohibit use of a sign-in sheet, notice must be clearly given that signing-in is voluntary and not a pre-requisite to either attending the meeting or speaking at the meeting. On the other hand, security measures that require identification in order to gain admittance to a government building are permitted so long as security personnel do not share the information with the body.

In addition, members of the public are entitled to record and to broadcast (audio and/or video) the meetings, unless to do so would constitute a persistent disruption. (§ 11124.1.)

To ensure public participation, the Legislature expressly afforded an opportunity to the public to speak or otherwise participate at meetings, either before or during the consideration of each agenda item. (§11125.7.) The Legislature also provided that at any meeting the body can elect to consider comments from the public on any matter under the body's jurisdiction. And while the body cannot act on any matter not included on the agenda, it can schedule issues raised by the public for consideration at future meetings. Public comment protected by the Act includes criticism of the programs, policies and officials of the state body.

ACCESS TO RECORDS

Under the Act, the public is entitled to have access to the records of the body. (§ 11125.1.) In general, a record includes any form of writing. When materials are provided to a majority of the body either before or during the meeting, they must also be made available to the public without delay, unless the confidentiality of such materials is otherwise protected. Any records provided to the public, must be available in appropriate alternative formats, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the applicable federal rules and regulations, upon request by a person with a disability.

Notwithstanding the foregoing, the Act makes Government Code section 6254, the most comprehensive exemption under the California Public Records Act, applicable to records provided to the body. That is, if the record that is being provided to the board members is a record that is otherwise exempt from disclosure under section 6254 of the Government Code, then the record need not be disclosed to members of the public. (§ 11125.1(a).) However, the public interest balancing test, set forth in Government Code section 6255, is expressly made inapplicable to records provided to members of the body.

If an agency has received a request for records, the Public Records Act allows the agency to charge for their duplication. (§ 11125.1(c).) Please be aware that the Public Records Act limits the amount that can be charged to the direct cost of duplication. This has been interpreted to mean a pro-rata share of the equipment cost and probably a pro-rata share of the employee cost in order to make the copies. It does not include anything other than the mere reproduction of the records. (See,§ 6253.9 for special rules concerning computer records.) Accordingly, an agency may not recover for the costs of retrieving or redacting a record.

ACCESSABILITY OF MEETING LOCATIONS

The Act requires that the place and manner of the meeting be nondiscriminatory. (§ 11131.) As such, the body cannot discriminate on the basis of race, religion, national origin, etc. The meeting site must also be accessible to the disabled. Furthermore, the agency may not charge a fee for attendance at a meeting governed by the Act.

CLOSED SESSIONS

Although, as a general rule, all items placed on an agenda must be addressed in open session, the Legislature has allowed closed sessions in very limited circumstances, which will be discussed in detail below. Closed sessions may be held legally only if the body complies with certain procedural requirements. (§ 11126.3)

As part of the required general procedures, the closed session must be listed on the meeting agenda and properly noticed. (§ 11125(b).) Prior to convening into closed session, the body must publically announce those issues that will be considered in closed session. (§ 11126.3.) This can be done by a reference to the item as properly listed on the agenda. In addition, the agenda should cite the statutory authority or provision of the Act which authorizes the particular closed session. (§11125(b).) After the closed session has been completed, the body is required to reconvene in public. (§ 11126.3(f).) However, the body is required to make a report only where the body makes a decision to hire or fire an individual. (§ 11125.2.) Bodies under the Bagley-Keene Act are required to keep minutes of their closed sessions. (§ 11126.1.) Under the Act, these minutes are confidential, and are disclosable only to the board itself or to a reviewing court.

Courts have narrowly construed the Act's closed-session exceptions. For example, voting by secret ballot at an open-meeting is considered to be an improper closed session. Furthermore, closed sessions may be improperly convened if they are attended by persons other than those directly involved in the closed session as part of their official duties.

■ Personnel Exception

The personnel exception generally applies only to employees. (§ 11126(a) and (b).) However, a body's appointment pursuant to subdivision (e) of Section 4 of Article VII of the California Constitution (usually the body's executive director) has been designated an employee for purposes of the personnel exception. On the other hand, under the Act, members of the body are not to be considered employees, and there exists no personnel exception or other closed session vehicle for board members to deal with issues that may arise between them. Board elections, team building exercises, and efforts to address personality problems that may arise between members of the board, cannot be handled in closed session.

Only certain categories of subject matter may be considered at a closed session authorized under the personnel exception. (§ 11126(a)(1).) The purpose of the personnel exception is to protect the privacy of the employee, and to allow the board members to speak candidly. It can be used to consider appointments, employment, evaluation of performance, discipline or dismissal, as well as to hear charges or complaints about an employee's actions. Although the personnel exception is appropriate for discussion of an employee's competence or qualifications for appointment or employment, we do not think that discussion of employee compensation may be conducted in closed

session in light of an appellate court decision interpreting a similar exception in the Brown Act, (the counterpart to the Bagley-Keene Act which is applicable to local government bodies).[5]

The Act requires compliance with specific procedures when the body addresses a complaint leveled against an employee by a third person or initiates a disciplinary action against an employee. Under either circumstance, the Act requires 24-hour written notice to the employee. (§ 11126(a)(2).) Failure to provide such notice voids any action taken in closed session.

Upon receiving notice, the employee has the right to insist that the matter be heard in public session. (§ 11126(a)(2).) However, the opposite is not true. Under the Act, an employee has no right to have the matter heard in closed session. If the body decides to hold an open session, the Bagley-Keene Act does not provide any other option for the employee. Considerations, such as the employee's right to privacy, are not addressed under the Bagley-Keene Act.

If an employee asserts his or her right to have the personnel matter addressed in open session, the body must present the issues and information/evidence concerning the employee's performance or conduct in the open session. However, the body is still entitled to conduct its deliberations in closed session. (§ 11126(a)(4).)

- **Pending Litigation Exception**

The purpose of the pending litigation exception is to permit the agency to confer with its attorney in circumstances where, if that conversation were to occur in open session, it would prejudice the position of the agency in the litigation. (§ 11126(e)(1).) The term "litigation" refers to an adjudicatory proceeding that is held in either a judicial or an administrative forum. (§11126(e)(2)(c)(iii).) For purposes of the Act, litigation is "pending" in three basic situations. (§11126(e)(2).) First, where the agency is a party to existing litigation. Secondly, where under existing facts and circumstances, the agency has substantial exposure to litigation. And thirdly, where the body is meeting for the purpose of determining whether to initiate litigation. All of these situations constitute pending litigation under the exception.

For purposes of the Bagley-Keene Act, the pending litigation exception constitutes the exclusive expression of the attorney-client privilege. (§ 11126(e)(2).) In general, this means that independent statutes and case law that deal with attorney-client privilege issues do not apply to interpretations of the pending litigation provision of the Bagley-Keene Act. Accordingly, the specific language of the Act must be consulted to determine what is authorized for discussion in closed session.

Because the purpose of the closed session exception is to confer with legal counsel, the attorney must be present during the entire closed session devoted to the pending litigation. The Act's pending litigation exception covers both the receipt of advice from counsel and the making of

[5] *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947.

litigation decisions (e.g., whether to file an action, and if so, what approach should be taken, whether settlement should be considered, and if so, what the settlement terms should be.

What happens in a situation where a body desires legal advice from counsel, but the Act's pending litigation exception does not apply? In such a case, legal counsel can either (1) provide the legal advice orally and discuss it in open session; or (2) deliver a one-way legal advice memorandum to the board members. The memorandum would constitute a record containing an attorney-client privileged communication and would be protected from disclosure under section 6254(k) of the Public Records Act. (11125.1(a).) However, when the board members receive that memorandum, they may discuss it only in open session, unless there is a specific exception that applies which allows them to consider it in closed session.[6]

- **Deliberations Exception**

The purpose of the deliberations exception is to permit a body to deliberate on decisions in a proceeding under the Administrative Procedures Act, or under similar provisions of law, in closed session. (§ 11126(c)(3).)

- **Real Property Exception**

Under the Act, the real-property exception provides that the body can, in closed session, advise its negotiator in situations involving real estate transactions and in negotiations regarding price and terms of payment. (§ 11126(c)(7).) However, before meeting in closed session, the body must identify the specific parcel in question and the party with whom it is negotiating. Again, the Act requires that the body properly notice its intent to hold a closed session and ~~to~~ cite the applicable authority enabling it to do so.

- **Security Exception**

A state body may, upon a two-thirds vote of those present, conduct a closed session to consider matters posing a potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body, where disclosure of these considerations could adversely affect their safety or security. (11126(c)(18).) After such a closed session, the state body must reconvene in open session prior to adjournment and report that a closed session was held along with a description of the general nature of the matters considered, and whether any action was taken in closed session.

Whenever a state body utilizes this closed session exception, it must also provide specific written notice to the Legislative Analyst who must retain this information for at least four years. (11126(c)(18)(D).) This closed session exception will sunset in 2006. (11126(h).)

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[6] *Roberts* v. *City of Palmdale* (1993) 5 Cal.4th 363, 381.

REMEDIES FOR VIOLATIONS

The Act provides for remedies and penalties in situations where violations have allegedly occurred. Depending on the particular circumstances, the decision of the body may be overturned (§ 11130.3), violations may be stopped or prevented (§ 11130), costs and fees may be awarded (§11130.5), and in certain situations, there may be criminal misdemeanor penalties imposed as well. (§ 11130.7.)

Within 90 days of a decision or action of the body, any interested person may file suit alleging a violation of the Act and seeking to overturn the decision or action. Among other things, such suit may allege an unauthorized closed session or an improperly noticed meeting. Although the body is permitted to cure and correct a violation so as to avoid having its decision overturned, this can be much like trying to put toothpaste back in the tube. If possible, the body should try to return to a point prior to when the violation occurred and then proceed properly. For example, if the violation involves improper notice, we recommend that the body invalidate its decision, provide proper notice, and start the process over. To the extent that information has been received, statements made, or discussions have taken place, we recommend that the body include all of this on the record to ensure that everyone is aware of these events and has had an opportunity to respond.

In certain situations where a body has violated the Act, the decision can not be set aside or overturned; namely, where the action taken concerns the issuance of bonds, the entering into contracts where there has been detrimental reliance, the collection of taxes, and, in situations where there has been substantial compliance with the requirements of the Act. (11130.3(b).)

Another remedy in dealing with a violation of the Act involves filing a lawsuit to stop or prevent future violations of the Act. (§ 11130.) In general, these legal actions are filed as injunctions, writs of mandates, or suits for declaratory relief. The Legislature has also authorized the Attorney General, the District Attorney or any other interested person to use these remedies to seek judicial redress for past violations of the Act.

A prevailing plaintiff may recover the costs of suit and attorney's fees from the body (not individual members). (§ 11130.5.) On the other hand, if the body prevails, it may recover attorney's fees and costs only if the plaintiff's suit was clearly frivolous and totally without merit.

The Act provides for misdemeanor penalties against individual members of the body if the member attends a meeting in violation of the Act with the intent to deprive the public of information to which he or she knows, or has reason to know, the public is entitled to receive. (§ 11130.7.)