CALIFORNIA

DEPARTMENT OF JUSTICE

BAGLEY-KEENE OPEN MEETING ACT GUIDE

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INTRODUCTION

California's Constitution gives people the right to access information about public business. (Cal. Const., art. I, § 3, subd. (b)(1).) For that reason, the meetings of public bodies must be open to public scrutiny. (*Id.*) To advance this policy, the Legislature enacted the Bagley-Keene Open Meeting Act (Bagley-Keene Act, or Act), intending that actions of state agencies be taken openly and that agency deliberation be conducted openly. (Gov. Code, § 11120; see Gov. Code, §§ 11120-11133].)[1] The Bagley-Keene Act protects the public's opportunity not only to observe, but also to participate in, the decision-making process of state bodies. (See *California State Employees' Assn. v. State Pers. Bd.* (1973) 31 Cal.App.3d 1009, 1013.) Thus, in California, state bodies generally deliberate at meetings that are open to the public. (See *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.* (2001) 87 Cal.App.4th 862, 867.) The Act creates exceptions for closed-door deliberations in limited circumstances.

When a state body makes decisions, the Act's provisions on public access and participation generally apply to that body's decision-making process. In contrast, when an individual state official makes decisions, the Act's public access and participation provisions do not apply, allowing for streamlined decision-making. In deciding whether to entrust a particular decision to a state body or to an individual, the Legislature implicitly decides which public interests—public access and participation, or streamlined decision-making—are more important in that context.

In general, meetings of state bodies must be open to the public. This means that state bodies must give the public an opportunity to attend and to speak at meetings. Under certain circumstances, state bodies may meet in closed sessions that exclude the public. (See Closed-session exceptions, *infra*.) Regardless, state bodies must give advance notice of the time and place of meetings, and the specific topics or decisions that the state bodies will consider at the meetings.

This Guide offers a road map of the Bagley-Keene Act's open-meeting rules. Along the way, it cites certain code sections of the Act. It also cites judicial and Attorney General opinions on open meetings, including ones involving the Ralph M. Brown Act (Brown Act), which applies to local agencies. (See Gov. Code, § 54950 et seq.) Because the Bagley-Keene Act closely

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

parallels the Brown Act, "these statutes are construed in the same way absent a clear linguistic difference calling for a different result." (103 Ops.Cal.Atty.Gen. 42, 44 (2020); *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416, 1434 [Brown Act provides a "virtually identical open meeting scheme" to Bagley-Keene Act].

This Guide is neither an exhaustive source of applicable legal authorities nor an exhaustive analysis of them. The Act and applicable decisional authority may change after publication of this Guide. This Guide is not a substitute for advice from an attorney. This Guide also appears on the Attorney General's website at https://oag.ca.gov.

This Guide has four parts. First, the Guide discusses the entities and gatherings covered by the Act. Next, the Guide describes the requirements for compliance, detailing the rules for notices and agendas; public access and participation; access to records; and rules for teleconference and videoconference meetings. The Guide then discusses closed-session exceptions and procedures. Last, the Guide describes the potential consequences of violating the Act, including the possible penalties and available remedies.

I. MEETINGS SUBJECT TO ACT

To be subject to the Bagley-Keene Act, a "state body" must conduct a "meeting." (Gov. Code, § 11123, subd. (a).)

A. State bodies

The Act governs members of every "state body." (Gov. Code, § 11127.)[2] A state body exists under the Act if it is (1) a multimember body such as a state board or state commission, (2) created by one of five specified methods, and (3) not statutorily excluded.

[2] The open-meeting rules apply not only to incumbent members, but also to newly appointed or elected members who have not yet assumed office. (Gov. Code, § 11121.95.) Members-to-be should avoid private deliberations with incumbent members so as not to violate these open-meeting rules. Each state body must provide a copy of the Act to each member upon appointment or assumption of office. (Gov. Code, § 11121.9.)

1. Multi-member body

A state body must have two or more members. (Gov. Code, § 11121.) Therefore, state departments controlled by a single director are not state bodies for purposes of the Act.

2. Formed in one of five ways

Besides having two or more members, a "state body" under the Act must be formed or operated in one of five ways.

a. Created by statute

The Act governs state multimember bodies created by statute or required by statute to conduct official meetings. (Gov. Code, § 11121, subd. (a).) The Act extends not only to statutory bodies with operative powers but also to those with advisory functions. (See 85 Ops.Cal.Atty.Gen. 145, 148 (2002) [clinical advisory panel created by statute is state body subject to Act even though it has only a limited advisory role].)

b. Created by executive order

The Act governs commissions created by executive order. (Gov. Code, § 11121, subd. (a).) An executive order is a directive from the Governor to subordinate executive officers concerning the enforcement of law. (See 63 Ops.Cal.Atty.Gen. 583, 584 (1980).) A state body created by an executive officer other than the Governor is not subject to the Act unless it falls within the definition of another type of state body subject to the Act. (See 75 Ops.Cal.Atty.Gen. 263, 268-270 (1992) [private citizen task force created by State Insurance Commissioner is not state body created by executive order for purposes of Act].)

c. Created as a delegated body

The Act governs a multimember body, such as a board, commission, or committee, that exercises any authority delegated to it by a state body governed by the Act.[3] (Gov. Code,

[3] The lawfulness of particular delegations of power is beyond the scope of this Guide. Not all state bodies have statutory authority to delegate discretionary power, for example. (See, e.g., 90 Ops.Cal.Atty.Gen. 89, 98 (2007).)

§ 11121, subd. (b).) A classic example is an executive committee with delegated authority to act on a state body's behalf between meetings. A delegated body may also consist of a governing board of a non-profit entity exercising authority delegated by a state body. (See *Epstein v. Hollywood Entertainment Dist. II Business Improvement Dist.* (2001) 87 Cal.App.4th 862, 869-873.) Consistent with the statutory definition of a state body, a delegated body must include two or more members. Thus, if a state body delegates authority to only a single person, such as a chair or an executive director, the individual is not a state body for purposes of the Act. (75 Ops.Cal.Atty.Gen. 263, 268-269 (1992).)

d. Created as an advisory body

The Act governs any advisory body composed of three or more members that a state body or one of its members creates by formal action. (Gov. Code, § 11121, subd. (c).) An advisory body of just two members is therefore not a state body subject to the Act. A member of an advisory body could be a state body member, a staff member, or a member of the public. (See Gov. Code, § 11121, subd. (c) [not limiting who may serve on advisory body].) Unlike a delegated body, an advisory body does not exercise discretionary authority on its own, but instead advises the parent body. An advisory body created by a single department head is not a state body subject to the Act, unless a state body, statute, or executive order by the Governor directed the department head to create the advisory body. (75 Ops.Cal.Atty.Gen. 263, 268-269 (1992).)

For purposes of creating such advisory bodies, "formal action" may include a vote adopting a resolution, as well as other types of official action creating an advisory body. For example, one court broadly construed a similar Brown Act provision to encompass the myriad of ways to create an advisory body, such as a city council's designation of its members to serve on a new advisory group. (*Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 805 & fn. 5.) If a state body directs staff to create an advisory body, it has taken formal action to create the advisory body even if it does not select the body's members. (*Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 792-793.) Advisory bodies do not include a group of state

body employees meeting with industry representatives to exchange ideas where no state body member is present and where, at the state body's direction, the employees compile information, consider possible alternatives, and formulate proposals for the state body's consideration. (89 Ops.Cal.Atty.Gen. 241, 246-247 (2006).)

e. Supported and represented by a state body

The Act governs public or private bodies where a state body member serves as the state body's official representative on the body and the body receives funding from the state body. (Gov. Code, § 11121, subd. (d).) For example, when a member of a university student organization represented that organization on the board of a private non-profit association, and the student organization provided funding to the non-profit, the non-profit was a state body subject to the Act. (65 Ops.Cal.Atty.Gen. 638, 643-644 (1982).)

3. Not excluded by statute

If specifically excluded by statute, a multimember body formed in one of these five ways is *not* considered to be a "state body" subject to the Act. (Gov. Code, § 11127.) The Act does not apply to the Legislature or to the state courts. (Gov. Code, § 11121.1, subds. (a), (c).)[4] Local bodies covered by the Brown Act are not subject to the Bagley-Keene Act. (Gov. Code, § 11121.1, subd. (b); see *Torres v. Board of Commissioners* (1979) 89 Cal.App.3d 545, 549-550 [local housing authority]; 73 Ops.Cal.Atty.Gen. 1, 3-4 (1990) [regional open space district]; 71 Ops.Cal.Atty.Gen. 96, 96-99 (1988) [air pollution control district].) Other particular bodies and categories of meetings may also be exempted from the Act. (See, e.g., Gov. Code, § 11121.1, subds. (d) [exempting certain meetings regarding employee bargaining in higher education], (e) [exempting Cancer Advisory Council], (f) [exempting Credit Union Advisory Committee]; Health & Saf. Code, § 51615, subd. (b) [exempting certain actions of California Housing Finance Agency Board].)

[4] The Legislature and the judicial branch, however, may be subject to other public access laws. (See, e.g., Gov. Code, § 9027 et seq. [requiring open meetings for legislative committees]; *People v. Scott* (2017) 10 Cal.App.5th 524, 529-530 [recognizing a criminal defendant's constitutional right to a public trial].)

B. Meetings

A meeting occurs when (1) a majority of a state body (2) gathers to hear, discuss, or deliberate on (3) an item under its subject matter jurisdiction. (Gov. Code, § 11122.5, subd. (a).)

1. Majority of a state body

The Act applies when a majority of a state body congregate, either at or outside an open and noticed meeting. A majority of a state body may also be present in two less-apparent scenarios. One scenario involves a "serial" meeting—a meeting resulting from multiple separate private contacts among members that together amount to majority consideration of the body's business. Another scenario occurs through a meeting by a majority of a subsidiary state body, such as a committee or subcommittee, even though a majority of the parent state body is not present. These two scenarios, which result in a state-body majority, are described below.

a. Serial meetings

A serial meeting comprises several communications, each among less than a majority of a state body, which taken together involve a majority. Specifically, the Act provides, "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." (Gov. Code, §§ 11122, 11122.5, subd. (b)(1); 103 Ops.Cal.Atty.Gen. 42, 51-52 (2020); see *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 523-524 [prohibited serial meeting occurred when a majority of a body circulated, reviewed, and signed a proposal outside of a public meeting].) With this provision, the Act prohibits attempts to circumvent its open meeting requirements through serial meetings. The restriction on serial meetings extends to all communications technologies (e.g., email, mobile phones, instant messaging, text messaging, social media, blogs). (See Gov. Code, § 11122.5, subd. (b)(1).) Consequently, a majority of a state body may not separately communicate by electronic means to deliberate on a topic under the state body's jurisdiction. (103 Ops.Cal.Atty.Gen. 42, 52 (2020); see 84 Ops.Cal.Atty.Gen. 30, 32-33 (2001).)

Serial meetings may occur within a state body either through (1) sequential contacts among the body's members, or (2) one member's selective communications with multiple members. In the sequential scenario, a communication chain starting with contact from member A to member B who then communicates with member C is a serial meeting of the three-member majority of a five-member state body. (See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376-377 [collective deliberation through letters or telephone calls from one local body member to the next would violate open-meeting rules].) In the selective scenario, a serial meeting occurs when member A acts as the hub of a wheel and communicates directly with selected spokes (members B and C). (See, e.g., *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 101-102.)

Serial meetings may also occur indirectly through go-betweens or delegates who are not state body members, in the same two ways that they may occur directly—sequentially or selectively. When member A's delegate communicates with member B's delegate, who then communicates with member C's delegate, a serial meeting has occurred if the delegates then transmit the communications to these members or act on the members' behalf. Alternatively, when a non-member acts as the hub of a wheel and communicates individually with selected spokes (members A, B, and C), the members have engaged in a serial meeting. (See *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105 [attorney representing local body polled individual members before meeting].) For example, when the trustees of a community college met individually with a mediator during settlement negotiations, a court determined that the trustees had engaged in serial meetings with an intermediary (the mediator), in violation of open-meeting rules. (*Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 503.)

Conversely, an individual state body member may communicate with another member or any other person as long as the communication does not amount to deliberation by a majority of the state body. (Gov. Code, § 11122.5, subd. (c)(1), see, e.g., Communicating privately with the public, *infra*.) Thus, where a member of the public sends an email message to the entire state body and other members of the public, and one state body member replies by email solely to the sender and the other members of the public, this email exchange is not deliberation by a majority of the state body. (103 Ops.Cal.Atty.Gen. 42, 53-54 (2020).) The serial meeting prohibition also does

not prevent state body members from planning upcoming meetings by discussing times, dates, locations, and order of agenda items but only if such planning communications do not include substantive discussion of agenda items. (See generally 84 Ops.Cal.Atty.Gen., 30, 32-33 [open meeting requirements apply only to "substantive discussions" among a majority of a body].)

b. Less than majority gatherings

Large state bodies often create several smaller state bodies, such as subcommittees, that are subject to the Act. (Gov. Code, § 11121, subd. (b), 11127.) A gathering of less than a majority of a parent body may result in a subcommittee meeting subject to the Act. For example, a private gathering of three state body members, although less than a majority of a nine-member parent state body, may be a majority of one of its smaller five-member subcommittees. Such a gathering may violate the Act as an inadvertent meeting of the subcommittee.

To avoid inadvertent violations, state body members may choose to follow a "rule of two." (See Gov. Code, § 11122.5, subd. (c)(1).) Under this practice, a state body member should not discuss any matter under the state body's jurisdiction with more than one other state body member, thus avoiding a majority in most cases. This practice, however, would not work for three-member state bodies, because two members would make a majority. The point to remember is this: A non-majority of a larger state body still may make up a majority of its smaller state body—such as a committee or subcommittee.

2. Hear, discuss or deliberate

The Act applies when a majority of a state body gathers to hear, discuss, or deliberate a matter. To hear, discuss or deliberate, a state body need not vote. Deliberation includes "not only collective decision making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision." (*216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860, 877, internal quotation marks omitted; accord, 103 Ops.Cal.Atty.Gen. 42, 52, fn. 54 (2020).) Deliberation encompasses information gathering, analysis, debate, and negotiation, as well as decision-making. (See *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 Cal.App.2d 41, 47-48 ["[t]o 'deliberate' is to examine, weigh, and reflect upon the

reasons for or against the choice," including "the ascertainment of facts"].) Information gathering includes staff briefings, pre-meeting conferences, informal studies, training, facility tours, investigations, and fact-finding sessions. (See, e.g., *Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 795-797 [information session with prospective contractors]; *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 101-103 [series of one-on-one telephone conversations with agency attorney]; *Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 233–234 [gathering to discuss qualifications of prospective consultants]; 94 Ops.Cal.Atty.Gen. 33, 36-37 (2011) [facility tour]; 42 Ops.Cal.Atty.Gen. 61, 68 (1963) [pre-meeting briefing sessions].)

3. Item within the state body's subject matter jurisdiction

The Act applies when a majority deliberates "upon any item that is within the subject matter jurisdiction of the state body." (Gov. Code, § 11122.5, subd. (a).) An "item" is not limited to an item on a public meeting agenda, but includes any "separate, distinct topic" that the majority may consider within its subject matter jurisdiction. (103 Ops.Cal.Atty.Gen. 42, 45 (2020).) Were this not the case, a state body could "circumvent the Act by deliberating on or deciding a matter affecting the public that is not yet, or may never be, placed on an agenda—while excluding the public from participation." (*Ibid.*) As for the term "subject matter jurisdiction," it simply means that the body has the authority to hear the matter. (*Id.* at p. 45.) Thus, a state-body majority's discussion of a topic relating to the state body is a "meeting" that triggers the Act's requirements. (*Id.* at p. 43 [discussion of how to comply with the Act is a matter within the state body's subject matter jurisdiction]; 78 Ops.Cal.Atty.Gen. 224, fn. 2 (1995) [discussion of a member's personal life is a matter outside the state body's subject matter jurisdiction].)

C. Communications or gatherings that are not meetings

As described above, a communication or gathering of state body members is not a meeting subject to the Act if it does not involve a majority of a state body, deliberation among its members, or consideration of an item under its jurisdiction. Some gatherings are expressly exempt from the Act. In addition, under case law, some communications are not subject to the Act's notice and open-meeting requirements.

1. Communicating privately with the public

Generally, private communications between a member of the public and an individual state body member is not a meeting subject to the Act if a majority of the state body has not deliberated. (Gov. Code, § 11122.5, subd. (c)(1); 103 Ops.Cal.Atty.Gen. 42, 51-54 (2020).) Even if the member of the public meets individually but separately with enough members to constitute a majority of the state body, such separate communications are still not a meeting. But if the member of the public acts as a go-between or delegate (see Serial meetings, *supra*) or a majority of the state body otherwise use these private communications to deliberate indirectly among themselves, the communications become a serial meeting prohibited by the Act. (Gov. Code, § 11122.5, subds. (b)(1), (c)(1); 103 Ops.Cal.Atty.Gen., 42, 53-54 (2020); *Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 503.)

2. Obtaining information from staff

A private communication between a state body member and a staff member to obtain information on a matter under the state body's jurisdiction is not a meeting subject to the Act if the staff member does not communicate to state body members the comments or position of any other member. (Gov. Code, § 11122.5, subd. (b)(2).) This staff briefing exception allows state body members to get the information they need to prepare for a meeting by allowing staff to answer their questions. Under this safe-harbor exception, staff may communicate privately with only one member at a time, without communicating the comments or position of any other member.

The staff briefing exception does not apply when a two-member subcommittee that does not qualify as a state body under the Act meets with a staff member to obtain information. Such communications, however, are not prohibited serial communications (see Serial meetings, *supra*) unless the staff member communicates the comments or position of the two-member subcommittee to other members of the larger parent body.

3. Receiving written advice from legal counsel

A one-way communication of written legal advice to state body members is not a meeting subject to the Act. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 381.) A member's solitary

review of legal advice received by a majority of a state body may occur outside of an open meeting. The exception does not apply if the members privately discuss the content of the legal advice with each other. Such a discussion would amount to deliberation, which would qualify the discussion as a meeting under the Act. (But see Closed-session exceptions, *infra* [legal advice relating to litigation strategy may be provided to a majority of a state body in closed session].)

4. Attending a public conference

A state-body majority's attendance at a conference or similar gathering is not a meeting subject to the Act if three conditions are met. First, the conference must be open to the public.[5] Second, the conference must cover a topic of general interest to the public or to public entities like the state body. Third, the state body members must not deliberate with each other on specific business under the state body's jurisdiction except as part of the scheduled public program. (Gov. Code, § 11122.5, subd. (c)(2)(A).) For example, under this exception, a state body member may participate on a panel by generally discussing a topic under the state body's jurisdiction even if a majority of other state body members are present at the conference. But state body members should avoid private discussions with other members about upcoming agenda items. Also, if the conference only focuses on the laws or issues of a particular body it would not be exempt under the Act.

5. Attending a public meeting of another entity

When the majority of a state body attends a noticed or publicized public meeting that another public or private entity holds on a topic of statewide concern, no separate meeting of the state body has occurred. But a majority of a state body may not deliberate with each other at the entity's meeting on a matter under the state body's jurisdiction except as part of the scheduled meeting program. (Gov. Code, § 11122.5, subds. (c)(3), (c)(4).)

[5] The Act does not require free admission for a conference to be considered open to the public; conference organizers may charge for admission. (See Gov. Code, § 11122.5, subd. (c)(2)(B).)

6. Attending a standing committee meeting

A majority of a state body may attend open and noticed meetings of a state body's standing committees but only if the members who are not on the standing committee attend as mere observers. (Gov. Code, § 11122.5, subd. (c)(6).) A standing committee is "[a] committee that is established for ongoing business, that continues to exist from session to session, and that is usu[ally] charged with considering business of a certain recurring kind." (Black's Law Dict. (11th ed. 2019) p. 342, col. 1; see 79 Ops.Cal.Atty.Gen. 69, 72 (1996).) A "standing committee" does not include a limited-term subcommittee, or an ad hoc committee charged with accomplishing a specific task in a short timeframe. (79 Ops.Cal.Atty.Gen. 69, 73 (1996).) Attending as an observer means that a member may watch and listen, but may not ask questions, make statements, or sit at the dais with the standing committee members. (See 81 Ops.Cal.Atty.Gen. 156, 159-160 (1998).) Participation by state body members who are not on the standing committee may only occur at a public meeting of the larger parent body.

7. Attending a social or ceremonial gathering

A social or ceremonial gathering, attended by a majority of a state body, is not a meeting subject to the Act, as long as the state body members do not deliberate with each other at the event on specific business under the state body's jurisdiction. (Gov. Code, § 11122.5, subd. (c)(5).) In contrast, a luncheon attended by a majority of a state body is a meeting subject to the Act when the members discuss agency business. (103 Ops.Cal.Atty.Gen. 42, 43-48 (2020); see *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 Cal.App.2d 41, 45, 50-51.)

II. OPEN MEETING PROCEDURES

A. Notice and agenda

The Act has rules for both the timing and the content of the notice and agenda for a state body's meeting. The rules give advance information to the public regarding the state body's planned business, so that those who are interested may attend the meeting or take other action. (103 Ops.Cal.Atty.Gen. 42, 49 (2020).) At the same time, the Act has exceptions to these rules.

1. Timing of notice and agenda

A state body subject to the Act must give advance public notice of its meetings, including a specific agenda of the items it will consider at each meeting. At least 10 calendar days before a regular meeting, the state body must send the notice and agenda to any person who requests it, and post it on its website.[6] (Gov. Code, § 11125, subd. (a); see 78 Ops.Cal.Atty.Gen. 327, 330-331 (1995).) The notice deadline is calculated in calendar days, not business days. (Gov. Code, § 11125, subd. (a).) Holidays falling within the 10-day period do not result in more time to post a meeting notice. (Gov. Code, § 6800.) Thus, if a notice deadline falls on a holiday or other nonbusiness day and if a state body cannot post a notice on that day, the state body should post the notice earlier.

2. Contents of notice and agenda

A notice must include administrative information about the meeting, consisting of: (1) the meeting's time and place; (2) contact information for the person who can answer questions about the meeting; (3) the state body's website address; and (4) information on how persons with a disability may ask for accommodations. (Gov. Code, § 11125, subds. (a), (f); § 11125.4, subd. (b).) If asked, a state body must provide the notice in alternative formats that comply with the federal Americans with Disabilities Act. (Gov. Code, § 11125, subd. (f); see 42 U.S.C. § 12132; 28 C.F.R. § 35.160.)

A notice must also include substantive information about the meeting, including an agenda describing each item of business that the state body will consider at the meeting. (Gov. Code, § 11125, subd. (b).) The description of each agenda item generally need not exceed 20 words, but it must give the average person enough information to decide whether to attend or participate in the meeting. (Gov. Code, § 11125, subd. (b); 67 Ops.Cal.Atty.Gen. 84, 88 (1984).) The public should not have to be "clairvoyant or have had collateral information" to understand a state body's

[6] The Act does not define the term "regular meeting," although the term appears several times in the Act. (See, e.g., Gov. Code, §§ 11126, subds. (a), (c)(18)(B), 11128, 11128.5.) By inference, a regular meeting is any meeting other than a special meeting or emergency meeting. It is a meeting of the body conducted under normal or ordinary circumstances at a time set by law or regulation. (See Gov. Code, § 11128.5).

intended action. (67 Ops.Cal.Atty.Gen., *supra*, at p. 88.) The description must not be misleading and should convey the whole scope of a matter. (*Ibid.*)

"Action taken" means a collective decision, a collective commitment or promise to make a positive or negative decision, or an actual vote, by state body members upon a motion, proposal, resolution, order, or similar action. (Gov. Code, § 11122.). An action item does not include "mere discussion." (103 Ops.Cal.Atty.Gen. 42, 49 (2020).) Normally, a state body should avoid labeling an item on the agenda as "discussion" or "action" unless it limits itself to that description at the meeting. (*Id.* at p. 50.)

Notice and agenda rules also apply to closed sessions. For closed session items, the agenda must show that the state body will meet in closed session on that item, describe generally the topic of the closed session, and cite the statutory authority for the closed session. (Gov. Code, § 11125, subd. (b); see Closed session procedures, *infra*.)

A state body ordinarily may not deliberate or act upon on any item not described, or inadequately described, on the agenda. (Gov. Code, §§ 11125, subd. (a), 11125.3.) Several cases illustrate this precept. In *Moreno v. City of King*, for example, the court held that the description "Public Employee (employment contract)" did not give adequate notice of a closed session to consider an employee's dismissal. ((2005) 127 Cal.App.4th 17, 26-27.) In *Carlson v. Paradise Unified School District*, the agenda description "Continuation school site change" did not give adequate notice that a school district intended to close not only its high school continuation program but also its elementary school program. ((1971) 18 Cal.App.3d 196, 200.) In *San Joaquin Raptor Rescue v. County of Merced*, an agenda item to consider approving a project to subdivide a parcel did not give proper notice that a planning commission would also consider the adoption of a mitigated negative declaration for the project. ((2013) 216 Cal.App.4th 1167, 1176-1179.) And *Hernandez v. Town of Apple Valley* held that a town council agenda item to put an initiative approving a commercial development on a special election ballot did not give adequate notice that the town council also intended to approve the acceptance of a gift from the developer to pay for the special election. ((2017) 7 Cal.App.5th 194, 207-209; see also 67 Ops.Cal.Atty.Gen. 84, 85-88 [the State Board of Food and Agriculture failed to give proper notice by voting for a resolution opposing congressional designation of the Tuolumne River as a "Wild and Scenic River" and the

"Tuolumne River Canyon" as a "wilderness area" where the agenda had stated only that the board would consider "Tuolumne River San Joaquin River Flood Control Problem"].)

By contrast, technical errors or immaterial omissions in a meeting agenda will not prevent the state body from acting if the agenda discloses the essential nature of the matters the body will consider. (*Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 520; *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637, 644-645.) The description requirement applies to both discussion items and action items. (Gov. Code, § 11125, subd. (b).)

During a meeting, state body members may engage in limited conversations not appearing in the agenda, such as reporting on personal activities or interacting with public speakers and staff for informational or procedural purposes, including asking to add a business matter to a future agenda. They may not, however, deliberate on any substantive policy matter not on the agenda. (See 84 Ops.Cal.Atty.Gen. 30, 32-33 (2001) [the Brown Act applies to "substantive discussion" among a majority of a body].)

Anyone may request a free copy of the notice and agenda for any meeting of a state body. (Gov. Code, §§ 11125, subd. (d), 11126.7.) A state body must keep a mailing list of the requestors and update the list at least once per year. (Gov. Code, § 14911.) To update the list, the state body may send a postcard or letter to each person on the list. If the person fails to respond, the state body may remove them from the list. While the Act does not expressly address the option of electronic delivery, it does not restrict a state body from providing electronic notice to those who request it.

3. Notice and agenda exceptions

The Act has limited exceptions to the notice and agenda rules for meetings. These exceptions fall into the following categories: adding an agenda item past the deadline for notice, holding a special meeting, calling an emergency meeting, adjourning a meeting, and continuing a public hearing.

a. Adding agenda item past deadline

Normally, a state body must provide a written notice of its agenda at least 10 calendar days before the meeting. (Gov. Code, § 11125, subd. (a).) In two circumstances, a state body may add an item to a regular meeting agenda in fewer than 10 calendar days before the meeting. (Gov. Code, § 11125.3.) First, it may add a matter to the agenda when a majority of a state body concludes that the matter qualifies for an emergency meeting, as described below. (Gov. Code, § 11125.3, subd. (a)(1); see Gov. Code, § 11125.5.) Second, it may add a matter to the agenda by a two-thirds vote at the meeting (or if less than two-thirds are present, by a unanimous vote of those present) if the state body determines a need exists to take immediate action. The need for immediate action must come to the state body's attention after it has distributed and posted the agenda under the 10-day notice rule. (Gov. Code, § 11125.3, subd. (a)(2).) When adding an item to the agenda, the state body must give notice of the new agenda item to its members, persons on its mailing list, and all national press wire services. It must post the revised agenda on its website, as soon as practicable, but no later than 48 hours before the meeting. (Gov. Code, § 11125.3, subd. (b).)[7]

b. Holding a special meeting

A state body may hold a "special meeting" on no less than 48-hours' notice for specified purposes upon a finding that following the 10-day notice rule would impose a substantial hardship on the state body, or that protecting the public interest calls for immediate action. (Gov. Code, § 11125.4, subd. (a).) A special meeting may be held only for the following purposes: consideration of pending litigation or proposed legislation; issuance of a legal opinion; disciplinary action involving a state officer or employee; the purchase, sale, exchange, or lease of real estate; licensing examinations and applications; and certain other decisions specified in the Act. (Gov. Code, § 11125.4, subd. (a).)

To hold a special meeting, the state body must prepare and distribute a notice and an agenda of the meeting to its members, persons on its mailing list, and all national press wire services, and

[7] The 48-hour period may include weekend hours. (78 Ops.Cal.Atty.Gen. 327, 330-331 (1995).)

post the agenda on its website as soon as practicable but no later than 48 hours before the meeting. (Gov. Code, § 11125.4, subd. (b).)

At the start of the special meeting, the state body must make a finding on the record that following the 10-day notice rule would impose a substantial hardship on the state body or that protecting the public interest calls for immediate action. (Gov. Code, § 11125.4, subd. (c).) The finding must articulate the facts creating the hardship or the impending harm to the public interest. The state body must adopt the finding by two-thirds vote (or if less than two-thirds are present, a unanimous vote), and must post the finding on its website. If the state body fails to adopt the finding, the special meeting is over and the state body may not consider or act upon the agenda item. If the state body adopts the finding, it may only consider the item on the agenda and may conduct no other business at the special meeting. (Gov. Code, § 11125.4, subd. (b).)

c. Calling an emergency meeting

A state body may call an emergency meeting without following the 10-day notice rule for regular meetings or the 48-hour notice rule for special meetings, when prompt action is necessary due to an "emergency situation" caused by "the disruption or threatened disruption of public facilities." (Gov. Code, § 11125.5, subd. (a).) An emergency includes a crippling disaster or work stoppage that severely impairs public health or safety. (Gov. Code, § 11125.5, subds. (a), (b).) The state body must post the emergency meeting's notice and agenda on its website as soon as practicable. The state body's presiding officer must notify the news organizations on its mailing list of the emergency meeting by telephone at least one hour before the meeting. If telephone services are down, the presiding officer may give notice as soon as possible after the meeting, with a report on any action taken at the meeting. (Gov. Code, §§ 11122, 11125.5, subd. (c).)

At the start of the emergency meeting, the state body must determine that an emergency exists. (Gov. Code, § 11125.5, subd. (b).) As soon as possible after the meeting, the state body must post in a public place, and on its website, the meeting minutes, a list of persons who received the meeting notice or whom the presiding officer tried to notify, the roll call vote, and any action taken. This information must be posted for at least 10 days. (Gov. Code, § 11125.5, subd. (d).)

d. Adjourning a meeting

A state body may postpone ("adjourn") a noticed regular or special meeting to a different time or place without requiring another 10-day notice for the future regular meeting or another 48-hour notice for the future special meeting. The adjournment order must state the time and place of the future meeting. Less than a quorum of the state body may adjourn a meeting. If no state body member attends a meeting, a clerk or secretary may adjourn the meeting and state the time and place of the future meeting. (Gov. Code, § 11128.5.)

If a state body or state body member adjourns a meeting, the state body must conspicuously post the adjournment order near the door of the place of the adjourned meeting within 24 hours after the time of adjournment. (§ 11128.5.) A state body may post the adjournment order on its website, but is not required to do so.

If a clerk or secretary declares a meeting adjourned, they likewise must conspicuously post the adjournment notice near the door of the place of the adjourned meeting within 24 hours after the time of adjournment. Additionally, the clerk or secretary must deliver the adjournment notice to the persons on the state body's mailing list and to all national press wire services, and must post the notice on the state body's website, all as soon as practicable, but in no event less than 48 hours before the future meeting. (Gov. Code, §§ 11125.4, subd. (b), 11128.5.)

Because the later meeting is simply a postponement of the original, adjourned meeting, the original agenda applies to the postponed meeting. Nothing in the Act prevents a state body from canceling a scheduled or noticed meeting at any time without adjournment. Although not required, a state body may wish to distribute and post a notice of cancellation. Once a state body cancels a meeting, it must comply with the regular 10-day notice and agenda requirements for a subsequent meeting. (See Timing of notice and agenda, *supra*.)

e. Continuing a public hearing

When a state body conducts a public hearing at a noticed meeting, it may continue the hearing to a future time and place without giving another meeting notice. (Gov. Code, §§ 11128.5, 11129.) To continue the hearing, the state body must conspicuously post the continuance order

near the door of the place of the continued hearing within 24 hours after the hearing. If the state body continues the hearing to a time fewer than 24 hours after the meeting, then it must post the continuance order immediately after the hearing. (Gov. Code, § 11129.) The state body may post the continuance order on its website, but is not required to do so.

B. Rights of the public at an open meeting

Besides complying with notice and agenda requirements, a state body must make sure that its meetings are open and transparent to the public. This section sets forth the Act's open-meeting rules that protect these rights. It then discusses exceptions that allow state bodies to hold meetings that are closed to the public in specified circumstances.

1. Public attendance at meetings

Generally, the public is entitled to attend meetings (other than authorized closed sessions) with minimal restrictions. (See Gov. Code, § 11123, subd. (a); see, e.g., 68 Ops.Cal.Atty.Gen. 65, 68-71 (1985) [right of the public to attend meeting of a state body would be violated by the election of officers by secret ballot, mail ballot, or proxy].) Meeting locations must be accessible to all members of the public, including persons with disabilities. (Gov. Code, §§ 11123.1, 11131.) No state body may prohibit public attendance at a meeting because of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental or physical disability, medical condition, genetic information, marital status, or sexual orientation. (Gov. Code, §§ 11131, 11135, subd. (a).) A state body may not charge a fee to attend a meeting subject to the Act. (Gov. Code, § 11131.) Individuals may attend meetings without identifying themselves. If a state body posts or circulates an attendance list, register, questionnaire, or other similar document at a meeting, the document must state that filling it out is voluntary. (Gov. Code, § 11124.)

The public may record and broadcast a meeting with an audio or video recorder unless the state body reasonably determines that the noise, light, or view obstruction from the recording or broadcast would be a persistent disruption to the meeting. (Gov. Code, § 11124.1, subds. (a), (c); see Gov. Code, §§ 6090, 6091; *Nevens v. City of Chino* (1965) 233 Cal.App.2d 775, 779.)

The public may not bring a firearm or other weapon to a meeting. (Pen. Code, § 171b.) If a person willfully disturbs a meeting, the state body may remove that person from the meeting. If the removal fails to restore order, the state body may clear the whole meeting room. After clearing the room, the state body may set up a process for readmitting persons who did not participate in the willful disturbance. The body must readmit press or news media who did not participate in the disturbance. (Gov. Code, § 11126.5.)

2. Public participation at meetings

Generally, the public is entitled to speak at meetings with few restrictions. (Gov. Code, § 11125.7, subd. (a); see, e.g., Gov. Code, § 11125.7, subds. (e), (f), (g), (h) [exempting from this rule include closed sessions, certain administrative adjudications, California Victim Compensation Board hearings, and Public Utilities Commission adjudicatory hearings].) At a meeting, a state body must give the public an opportunity to comment on each agenda item before voting on the item. (Gov. Code, § 11125.7, subd. (a).) Allowing public comment on each item immediately before the body considers the item ensures the body "has a clear and complete understanding of the public concern" regarding the item. (*Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 528.) Limiting public comment on agenda items to just one specific designated time rather than multiple times throughout the meeting before each agenda item "may defeat this purpose." (*Ibid.*)

A state body may also include on its meeting agenda (except an emergency-meeting agenda) an opportunity for the public to comment generally on any other topic under its jurisdiction even if that topic does not appear on the agenda. (Gov. Code, § 11125.7, subd. (a).) But the state body may not otherwise deliberate on any matter not specified on the agenda. (Gov. Code, §§ 11122.5, 11125, 11125.3.)

To preserve robust public debate on governmental issues, during public comment the public is entitled to criticize a state body's programs, policies, services, acts, or omissions. (Gov. Code, § 11125.7, subd. (d).) A state body, however, may prohibit the public from commenting on topics not under its jurisdiction. (78 Ops.Cal.Atty.Gen. 224, 230 (1995).) A state body also may adopt reasonable procedures to limit the time allocated to each topic and each speaker. (Gov.

Code, § 11125.7, subd. (b); *Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 170-177.) Whether a time limit is reasonable depends on the circumstances of each meeting, including the time allocated to the meeting, the number and complexity of each agenda item, and the number of persons wishing to comment. (75 Ops.Cal.Atty.Gen. 89, 92 (1992).) When a state body limits time for public comment, it must allow twice the allotted time to non-English speakers who address the state body through a translator. (Gov. Code, § 11125.7, subd. (c)(1).)

Public participation is not mandatory in certain administrative proceedings held under the Administrative Procedure Act. (Gov. Code, § 11125.7, subd. (f); but see 80 Ops.Cal.Atty.Gen. 247, 252 (1997) [because the State Board of Equalization is not statutorily exempted from public comment, members of the public, including employees of public agencies, have the right to address the board at a taxpayer's appeal hearing].) Further, the public is not entitled to a second opportunity to comment on an agenda item when a committee composed exclusively of members of the state body considered the item at a meeting during which the public had an opportunity to comment on the item, unless the item substantially changed since the committee meeting. (Gov. Code, § 11125.7, subd. (a).)

When a state body deliberates on whether to notice an item for a future meeting, it may exclude the public from that discussion. (See *Coalition of Labor, Agriculture & Business v. County of Santa Barbara Bd. of Supervisors* (2005) 129 Cal.App.4th 205, 209-210.)

3. Public access to meeting records

When persons distribute writings to a majority of a state body in connection with matters subject to consideration at a public meeting of the state body, the writings are public records that are generally disclosable under the California Public Records Act. (Gov. Code, § 11125.1; see generally Gov. Code, § 7920.000 et seq.) Such writings include notices and agendas, agenda packets, memos or reports prepared by or at the direction of staff, memos or written comments prepared by state body members, and support or opposition letters from the public. (Gov. Code, §§ 11125.1, subd. (f), 7920.545.) A state body's recording of an open meeting is a public record subject to inspection but may be destroyed after 30 days. (Gov. Code, § 11124.1, subd. (b).) If a state body prepares a transcript of the recording, the transcript is a public record subject to

disclosure. (64 Ops.Cal.Atty.Gen. 317, 321 (1981).) The state body must also make the records available at the meeting itself if the body or one of its members prepares them. Upon request, the records must also be provided in alternative formats complying with the Americans with Disabilities Act. (Gov. Code, § 11125.1, subd. (b); see generally 42 U.S.C. § 12101 et seq.) The state body may charge fees for copies of public meeting records, limited to the direct costs of duplication. (Gov. Code, §§ 11125.1, subd. (e), 11126.7.)

Some meeting records may be confidential even if distributed to a majority of a state body. (See, e.g., Gov. Code, § 11125.1, subd. (a) [incorporating certain disclosure exemptions provided in California Public Records Act]; *General American Transportation Corp. v. State Bd. of Equalization* (1987) 193 Cal.App.3d 1175, 1179-1180 [recognizing incorporation of disclosure exemption into both Act and California Public Records Act].)

4. Public monitoring of votes taken at meetings

A state body must publicly report any action taken, and the vote or abstention of each state body member present for the action. (Gov. Code, §§ 11122, 11123, subd. (c).) Taking action through "roll call vote or a specific tally" helps to satisfy this vote reporting requirement by identifying each member's vote or abstention. (See *New Livable Cal. v. Assn. of Bay Area Governments* (2020) 59 Cal.App.5th 709, 712, fn. 2.) This procedure allows each member's vote or abstention to be publicly reported in the state body's official meeting minutes or other written summary of the body's decisions.

C. Teleconference meetings

The Act includes special rules for teleconference meetings.[8] (Gov. Code, § 11123, subd. (b)(1).) A "teleconference meeting" occurs when a state body members participate at different locations accessible to the public and communicate with each other electronically through audio, or audio and video. (Gov. Code, § 11123, subd. (b)(2).) A teleconference location is a location at

[8] During the COVID-19 State of Emergency, the Governor temporarily suspended some teleconference requirements under the California Emergency Services Act. (Gov. Code, § 8550 et seq.) On September 13, 2023, the Legislature temporarily reinstated the emergency teleconference rules. (Gov. Code, § 11133.) The emergency teleconference rules expire on December 31, 2023.

which a state body member is physically present while participating in the teleconference meeting. (Gov. Code, § 11123, subd. (b)(1)(F).) A teleconference meeting may be a regular, special, or emergency meeting, including closed sessions during a regular or special meeting. (Gov. Code, § 11123, subd. (b)(1)(E).) The general teleconference meeting rules apply to all state bodies, and alternative rules apply to state bodies with only advisory powers.

1. Teleconference rules for decision-making bodies

A teleconference meeting for state bodies with the power to render decisions must comply with the Act's general open-meeting and notice rules, and with the following additional teleconferencing rules: (1) the meeting's notice and agenda must identify all teleconference locations; (2) the state body must post agendas at all teleconference locations; (3) each teleconference location must be accessible to all members of the public, including those with disabilities; (4) the meeting, other than a closed session, must be audible to the public at all teleconference locations; (5) the public must have an opportunity to speak to the state body at all teleconference locations; and (6) all votes must be by roll call. (Gov. Code, § 11123, subd. (b)(1).)

If a state body holds a teleconference meeting, it must do so in a way that protects the rights of the public and any party appearing before the state body. (Gov. Code, § 11123, subd. (b)(1)(C).) Occasionally, the notice for a teleconference meeting may announce a teleconference location, but a state body member might fail to attend from the remote site on the day of the meeting because of an illness or scheduling conflict. In that situation, the remote site must nonetheless remain open and be available to the public so that the public may participate in the meeting electronically from the remote site. Similarly, the state body must still comply with the other requirements for teleconference locations, including posting the agenda at the remote site, giving the public at the remote site an opportunity to speak directly to the state body, and taking action by roll call vote. (Gov. Code, § 11123, subd. (b)(1).)

If individuals other than state body members—staff or the public—participate in a meeting electronically, this does not, by itself, result in a teleconference meeting. Thus, for example, a guest speaker may appear at a meeting by telephone or by videoconference without triggering the teleconference rules. A state body also may offer more locations at which the public may observe

or participate in a meeting electronically without triggering a teleconference meeting. (Gov. Code, § 11123, subd. (b)(2).)

2. Teleconference rules for advisory bodies

State advisory bodies may hold teleconference meetings in the same way as decision-making bodies. Alternatively, the Act has special teleconference rules for advisory bodies. An advisory body may choose to follow either the regular teleconference rules or the special teleconference rules, but not both.

The special teleconference rules for advisory bodies allow a member of a state advisory body appear and participate in a public meeting remotely without appearing at an open teleconference location. (Gov. Code, § 11123.5.) The state advisory body need not disclose the location of the member appearing remotely. (Gov. Code, § 11123.5, subd. (c).) For the special teleconference rules to apply, a quorum of the advisory body must be present at the primary physical location designated in the agenda. Members attending remotely do not count towards a quorum. (Gov. Code, § 11123.5, subd. (e).) The state advisory body must provide a 24-hour notice on its website and to persons on its email mailing list if a member will appear remotely under the special teleconference rules. (Gov. Code, § 11123.5, subd. (c).) The 24-hour notice must also describe how the public may participate in the meeting remotely. (Gov. Code, § 11123.5, subd. (f).) The minutes of the meeting must identify those members who attended the meeting remotely. (Gov. Code, § 11123.5, subd. (b).)

III. CLOSED SESSIONS

A. Closed-session exceptions

A state body may hold a closed session not open to the public, but only for reasons expressly authorized by statute. (Gov. Code, § 11132; 85 Ops.Cal.Atty.Gen. 145, 149 (2002).) During an authorized closed session, a state body may deliberate and vote. (See *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 186; *Lucas v. Board of Trustees* (1971) 18 Cal.App.3d 988, 991-992.) The Act sets forth circumstances authorizing closed sessions. (Gov. Code, §§ 11126, 11126.2, 11126.4.) Agency-specific statutes may also authorize

closed sessions. (See, e.g., Bus. & Prof. Code, §§ 827, 1696, 1966.3, 2664, 2770.10, 3534.2, 4869.) Under the California Constitution, all closed-session exceptions must be narrowly construed. (Cal. Const., art. I., § 3, subd. (b)(2).) When authorized, a closed session must comply with specific procedures. (Gov. Code, § 11126.3; *Southern Cal. Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 800.)

All the closed-session exceptions in the Act and in other laws are too numerous to mention in this Guide, but seven common exceptions are discussed below.

1. Personnel matters

The personnel exception lets a state body meet in closed session to consider certain personnel matters. (Gov. Code, § 11126, subd. (a).) The exception allows the state body to discuss sensitive matters freely while shielding the employee from public embarrassment. (*Travis v. Board of Trustees of Cal. State University* (2008) 161 Cal.App.4th 335, 342, 346.)

The personnel exception applies to two types of personnel matters. The first type is the appointment, employment, or performance evaluation of an employee. (Gov. Code, § 11126, subd. (a)(1); see *Travis v. Bd. of Trustees of Cal. State University, supra,* 161 Cal.App.4th at p. 347 [personnel exception includes discussion regarding an employee's return after leave of absence].) If a state body meets in closed session to consider the performance evaluation of an employee, the evaluation may, but need not, be a formal comprehensive periodic review. (See *Duval v. Bd. of Trustees* (2001) 93 Cal.App.4th 902, 909.) The evaluation or review may consider even a single instance of job performance. (*Ibid.*) A state body may also meet in closed session to consider the process for evaluating a particular employee's job performance. (*Ibid.*)

The second type of matter falling under the personnel exception is a hearing on a complaint or charge against an employee from any source. (Gov. Code, § 11126, subds. (a)(1), (a) (2).) A state body may meet in closed session to consider dismissing or disciplining an employee, unless the employee asks that the matter be heard publicly. To hold a closed session to consider disciplinary action or dismissal, the state body must give written notice at least 24 hours in advance to the employee. (Gov. Code, § 11126, subd. (a)(2); see *Moreno v. City of King* (2005)

127 Cal.App.4th 17, 28-29; *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 682.) The notice must advise the employee of their right to a public hearing. Failure to give the required notice to the employee voids any closed session action to discipline or dismiss the employee. (Gov. Code, §§ 11122, 11126, subd. (a)(2).)

Not all personnel matters may be considered in closed session. The exception does not apply to general personnel decisions, such as the creation of a new position, or specification of the duties of an employee position in the abstract. (See 63 Ops.Cal.Atty.Gen. 153, 156-157 (1980).)

The exception for personnel matters is limited to decisions affecting employees only. The term "employee" includes civil service employees, as well as employees, staff, executive directors, or other statutory officers exempt from civil service under the state Constitution. (Gov. Code, § 11126, subd. (b); see Cal. Const., art. VII, § 4, subd. (e); and see, e.g., 89 Ops.Cal.Atty.Gen. 187, 189-192 (2006) [Prison Industry Board had no authority to create executive officer position as exempt from civil service because it already had created a general-manager position exempt from civil service].) Conversely, "employee" does not include any person elected or appointed to a public office, such as a state body member. (Gov. Code, § 11126, subd. (b).) The term "employee" does not include independent contractors. (*Rowen v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 236-237.) Thus, a state body may not meet in closed session to discuss an outside vendor or consultant under contract. The personnel exception also does not apply to employees who report to a different entity. (85 Ops.Cal.Atty.Gen. 77, 80 (2002).)

The exception does not give an employee the right to demand a closed session on a personnel matter. (*Leventhal v. Vista Unified School Dist.* (S.D.Cal. 1997) 973 F.Supp. 951, 958.) Rather, a state body may discuss a personnel matter at a closed session or an open session at the body's discretion. But an employee does have the right to a public hearing on a disciplinary or dismissal matter. (Gov. Code, § 11126, subd. (a)(2).) If an employee asserts this right, the state body must listen to the information, evidence, and issues during the open meeting, but may meet in closed session to discuss and vote on the matter. (Gov. Code, § 11126, subd. (a)(4).) During a witness examination in an open meeting or closed session on a personnel matter, a state body may exclude other witnesses. (Gov. Code, § 11126, subd. (a)(3).)

After the closed session, the state body must publicly report in open session any final action and the roll call vote to appoint, employ, or dismiss an employee. (Gov. Code, §§ 11122, 11125.2.) If the state body takes no action on the personnel matter, it need not so report in open session. (See 89 Ops.Cal.Atty.Gen. 110, 116 (2006).)

2. Pending litigation

The Act allows a state body to consult with its attorney about pending litigation in closed session when discussing the matter in open session would prejudice the state body's position. (Gov. Code, § 11126, subd. (e)(1).) The pending-litigation exception protects frank communications between a state body and its legal counsel. The attorney must be present and participating, in person or by telephone, during the entirety of the closed session. (See Gov. Code, § 11126, subd. (e)(1).)

During the closed session, the state body may only consider the pending litigation. Litigation means any adjudicatory proceeding before a court, administrative body, hearing officer, or arbitrator. (Gov. Code, § 11126, subd. (e)(2)(A), (e)(2)(C)(iii).) Litigation is pending when a state body is a party to existing litigation, has substantial exposure to litigation based on existing facts or circumstances, or wishes to explore initiating litigation. (Gov. Code, § 11126, subd. (e)(2)(A)-(C).) An example of substantial exposure to litigation is the receipt of a demand letter or some other type of threat of litigation against the state body. (See Gov. Code, § 54956.9, subds. (d), (e), (h) [listing other qualifying circumstances under the parallel pending-litigation exception of the Brown Act]; 69 Ops.Cal.Atty.Gen. 232, 235-238 (1986).)

Certain parameters govern the state body's discussions during a closed session on pending litigation. The state body may receive legal advice about litigation and deliberate on litigation strategy. The state body may also discuss settlement options, including the strengths and weaknesses of its case and the upper and lower limits of its settlement authority. (*Southern Cal. Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 799-801.) But it may not meet in closed session to negotiate a settlement directly with an opposing party or the opposing party's counsel. (See *Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 502.) A state body may not use a settlement agreement adopted in closed session to vote on a related matter that would

otherwise require an open meeting. (*Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, 186.)

A state body must comply with three procedural steps when holding a closed session under the pending-litigation exception. First, the state body's legal counsel must send to the state body a legal memorandum stating the reason and authority for the closed session. If feasible, legal counsel must send the memorandum before the closed session, but no later than one week after the closed session. The memorandum must state the title of the relevant case if available. If the litigation has not yet started, the memorandum must describe the existing facts and circumstances forming the basis for the anticipated litigation. (Gov. Code, § 11126, subd. (e)(2)(C)(ii).) The memorandum is exempt from disclosure under the California Public Records Act, but only until the litigation has finally resolved. (Gov. Code, §§ 7927.205, 11126, subd. (e)(2)(C)(ii); see 71 Ops.Cal.Atty.Gen. 235, 237 (1988).) Disclosing the memorandum stating the reason and authority for the closed session will not waive any attorney-client privilege. (Gov. Code, § 11126, subd. (e)(2)(C)(iv).)

Second, a state body must comply with the usual notice requirements for closed sessions. (See Closed-session procedures, *infra*.) In this regard, the meeting agenda must show the state body will hold a closed session, identify generally the topic of the closed session, and cite the statutory authority for the closed session. (Gov. Code, § 11125, subd. (b).) Further, if the litigation has already started, the agenda must either state the case name, or state that disclosing the name would jeopardize the body's ability to effect service of process or settle the case to its advantage. (Gov. Code, § 11126.3, subds. (a), (c); see also Gov. Code, § 54954.5, subd. (c).) If a meeting agenda has a closed session item for pending litigation, and other pending litigation arises during the 10-day notice period, the state body may confer with legal counsel in closed session on the new litigation, but only if postponement would prevent the state body from complying with a legal deadline. (Gov. Code, § 11126.3, subd. (d).)

Third, a state body must hold an open meeting before convening in closed session to discuss pending litigation. During the open meeting, it must announce its intent to meet in closed session to confer with legal counsel on pending litigation. If the litigation has already started, it must publicly state the case name, or state that disclosing the name would jeopardize the body's ability

to effect service of process or settle the case to its advantage. (Gov. Code, § 11126.3, subd. (d); see *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1082-1083.)

Nothing in the Act requires a state body to report on any closed session action on pending litigation. (See Gov. Code, § 11126.3.) The information discussed during the closed session is confidential; state body members may not publicly comment on this information or disclose it to others. (86 Ops.Cal.Atty.Gen. 210, 212 (2003); see *Kleitman v. Super. Ct.* (1999) 74 Cal.App.4th 324, 332; 80 Ops.Cal.Atty.Gen. 231, 240-241 (1997).)

The pending-litigation exception authorizing a closed session applies to a narrower set of topics than what is covered by the attorney-client privilege. A private communication between a state body and its attorney may be protected by the attorney-client privilege, but not relate to pending litigation, and thus not be the proper subject of a state body's deliberation in closed session. (Gov. Code, § 11126, subd. (e)(2).) If a state body needs confidential legal advice on a matter, even if unrelated to pending litigation, legal counsel may deliver one-way written legal advice to the state body. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 381.) The advice letter will be exempt from disclosure under the California Public Records Act as a privileged attorney-client communication. (Gov. Code, §§ 7927.705; 11125.1, subd. (a).) But discussion among members about the advice letter will be subject to the Act's open-meeting requirements.

3. Licensing examinations

The licensing-examination exception is for state bodies that license businesses and professionals. Under the exception, state licensing bodies may prepare, approve, grade, or administer licensing examinations in closed session. (Gov. Code, § 11126, subd. (c)(1); see, e.g., Bus. & Prof. Code, § 6026.7, subd. (c) [allowing the State Bar to hold closed sessions for law licensing purposes].) A state body may consider the actual content of an examination in closed session, but it must plan the general logistics of administering the examination at an open meeting. (See Gov. Code, § 11126, subd. (c)(1).)

4. Administrative adjudications

The deliberations exception lets a state body meet in closed session to review and discuss an administrative law judge's proposed decision in quasi-judicial proceedings of the Office of Administrative Hearings. (Gov. Code, § 11126, subd. (c)(3); *Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 948-949.) Alternatively, under the Administrative Procedure Act, state body members may vote on a proposed decision by mail or phone or other electronic means without engaging in collective deliberations before making their decision. (Gov. Code, § 11526; Asimow et al., Cal. Practice Guide: Administrative Law—Review by Agency of Proposed Decision (The Rutter Group 2022) ¶ 9:302.)

5. Real estate negotiations

The real estate negotiations exception allows a state body to meet in closed session before buying, selling, exchanging, or leasing real property to instruct its negotiator about price and payment terms. (Gov. Code, § 11126, subd. (c)(7)(A).) This exception recognizes the realities of the commercial marketplace and the need to prevent the parties with whom the state body is negotiating from listening to discussions of negotiation terms. (See *Kleitman v. Super. Ct.* (1999) 74 Cal.App.4th 324, 331.)

The exception does not extend to all decisions affecting real property. (See 93 Ops.Cal.Atty.Gen. 51, 55 (2010).) The closed session may not go beyond a property's price and payment terms in a realistically anticipated transaction (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 924), but it may include matters essential to arriving at authorized price and payment terms. (94 Ops.Cal.Atty.Gen. 82, 89 (2011).)

The meeting agenda must identify the property that is the subject of the closed session, the negotiator, and the negotiating parties. (Gov. Code, § 11125, subd. (b), § 11126, subd. (c)(7)(B); 73 Ops.Cal.Atty.Gen. 1, 5 (1990); see also Gov. Code, § 54954.5, subd. (b).) Before convening in closed session, the state body must publicly announce the same information. (Gov. Code, § 11126, subd. (c)(7)(B).)

6. Agency security

Under the agency-security exception, a state body may meet in closed session to discuss the threat of criminal or terrorist activity against its personnel, property, buildings, facilities, or equipment, including electronic data that is owned, leased, or under its control, where disclosure of these considerations could adversely affect its safety or security. (Gov. Code, § 11126, subd. (c)(18)(A).) At any regular or special meeting, a state body may convene under this exception upon a two-thirds vote of the members present at the meeting. (Gov. Code, § 11126, subd. (c)(18)(B).) After the closed session, the state body must reconvene an open meeting, describe the general nature of the matters considered, and report on its action. (Gov. Code, § 11126, subd. (c)(18)(C).) Under the agency-security exception, a state body must give written notice of a closed session to the Legislative Analyst, who must keep the notice for at least four years. (Gov. Code, § 11126, subd. (c)(18)(D).)

7. Audit reports

A state body may meet in closed session under the audit exception to consider its response to a confidential final draft audit report prepared by the Bureau of State Audits. (Gov. Code, § 11126.2, subd. (a).) After the bureau publicly releases the audit report, the state body may further discuss the audit only in open session unless another closed-session exception applies. (Gov. Code, § 11126.2, subd. (b).)

B. Closed-session procedures

In addition to the specific procedures for the closed sessions described above, all closed sessions must comply with certain general procedures. Closed sessions may be held only during a regular or special meeting, not during an emergency meeting. (Gov. Code, § 11128.) The meeting agenda must show that the state body will hold a closed session, must identify generally the topic of the closed session, and must cite the statutory authority for the closed session. (Gov. Code, § 11125, subd. (b).) Unlike the Bagley-Keene Act, the Brown Act has notice templates for various types of closed sessions. (Gov. Code, § 54954.5.) Substantial compliance with these templates provides a "safe harbor" from Brown Act violations. (*Castaic Lake Water Agency v.*

Newhall County Water District (2015) 238 Cal.App.4th 1196, 1206-1207.) These templates therefore may be a useful guide to state bodies for complying with the Bagley-Keene Act's agenda-description requirements for closed sessions.

At an open meeting, before reconvening in closed session, the state body must publicly announce the issues it will discuss during the closed session. The announcement may simply refer to the matter numbers of the closed-session items on the meeting agenda. (Gov. Code, § 11126.3, subd. (a).) The public's right to comment at open meetings includes the right to comment on closed session items. (Gov. Code, § 11125.7, subd. (a); *Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1080.) But the public does not have a right to attend closed sessions. (Gov. Code, § 11125.7, subd. (e).) Therefore, before convening in closed session, a state body must provide an opportunity for the public to comment at the open meeting on a closed-session item.

A state body may not selectively admit some members of the public to a closed session while excluding others. (46 Ops.Cal.Atty.Gen. 34, 35 (1965).) Only essential persons with an official role may attend a closed session. (105 Ops.Cal.Atty.Gen. 89, 93 (2022).) Attendance may not include support staff, unless they have an essential and official role in the closed session. (*Ibid.*; 82 Ops.Cal.Atty.Gen. 29, 33 (1999).) A state body may not allow individuals outside the state body attend a closed session unless their participation is essential to the purpose of the closed session. (See, e.g., Gov. Code, § 11126, subd. (e) [legal counsel]; 88 Ops.Cal.Atty.Gen. 16, 23 (2005) [applicant for disability retirement]; 80 Ops.Cal.Atty.Gen. 308, 311 (1997) [candidates for employment].) A state body member's designee may attend a closed session if serving in the place of the member (82 Ops.Cal.Atty.Gen., 29, 33-34 (1999)), but the member's personal staff may not attend even if beneficial to the member (105 Ops.Cal.Atty.Gen. 89, 93 (2022).)

In a closed session, the state body may only discuss those matters noticed on the agenda and announced at the open meeting. (Gov. Code, § 11126.3, subd. (b).) Members may not stray into other topics, even if topics reasonably related to the closed-session agenda item. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 924.)

A state body must designate a clerk, officer, or employee to attend a closed session, and keep and enter in a minute book a record of the topics discussed and decisions made at the closed session. The minute book may include a recording of the closed session. The minute book is confidential, and only state body members may access it. (Gov. Code, § 11126.1.) If a state body member abstains from a closed session because of a conflict of interest, the member may not access the minutes. (*Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050.) A court may view the minute book in an action challenging the legality of a closed session. (*Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 898, fn. 3.) If the court determines that the closed session violated the Act, it may order the state body to record its closed sessions in the future. (Gov. Code, § 11130, subd. (b).) If a closed session is not authorized, then its minutes are not confidential. (*Register Div. of Freedom Newspapers, Inc. v. County of Orange, supra,* 158 Cal.App.3d at pp. 907-908.) On motion, and following in camera review, the court may deem the recordings subject to civil discovery. (Gov. Code, § 11130, subd. (c).)

After the closed session, the state body must reconvene in open session before ending the meeting and, if required by the Act, report on its action. (Gov. Code, § 11126.3, subd. (f).) Information received in closed session may not be shared outside the closed session. (86 Ops.Cal.Atty.Gen. 210, 212 (2003); see *Kleitman v. Super. Ct.* (1999) 74 Cal.App.4th 324, 332; 80 Ops.Cal.Atty.Gen. 231, 240-241 (1997).) A member's designee, however, may communicate confidential information with the member, and a member may disclose confidential information to legal counsel. (See 72 Ops.Cal.Atty.Gen. 159, 165-166 (1989).)

VI. CONSEQUENCES FOR VIOLATIONS

The Act provides for criminal penalties, civil remedies, and attorney fee awards in connection with violations of the Act.

A. Criminal penalties

The Act authorizes misdemeanor criminal penalties against any state body member who violates the Act intending to deprive the public of information to which the member knows, or has reason to know, the public is entitled. (Gov. Code, § 11130.7; see Pen. Code, §§ 19, 19.2)

B. Civil remedies

The Act authorizes various civil remedies. The Attorney General, a district attorney, or any interested person may seek mandamus, injunctive, or declaratory relief in a superior court to prevent or stop violations or threatened violations of the Act. (Gov. Code, § 11130, subd. (a).) To qualify as an interested person, a state body member must have a personal interest in the matter. (*Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 668-669.)

Any interested person may file a civil action to invalidate a decision violating the Act within 90 days of the decision. (Gov. Code, § 11130.3. subd. (a).) Not all decisions may be invalidated. A court may not overturn decisions relating to a bond issuance, tax collection, or contract on which a party has detrimentally relied in good faith. (Gov. Code, § 11130.3, subds. (b)(1), (b)(2), (b)(4).) Merely conferring with and giving direction to staff also is not a decision that may be invalidated. (*Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1118.)

A court may not overturn any decision made in substantial compliance with the Act's notice or open-meeting provisions. (Gov. Code, § 11130.3, subd. (b)(3).) Substantial compliance is actual compliance with the essential substance of the statute's reasonable objectives. (*North Pacifica LLC v. Cal. Coastal Com.* (2008) 166 Cal.App.4th 1416, 1432-1433 [determining that violating the 10-day notice rule for public meetings substantially complied with the Act where the commission acted in good faith to give notice of the hearing's date, location, and purpose].)

The Act allows a state body to cure or correct an open-meeting violation. (Gov. Code, § 11130.3, subd. (a).) To do so, the body should identify a point before the violation occurred, and then repeat the process from that point forward. For example, if the violation involved improper notice, the body could invalidate its decision, provide proper notice, and start the process over. To the extent the state body already engaged in discussions or received information, the body should include such events on the record to make sure that everyone is aware and has an opportunity to respond. (See *Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Protection Dist*. (2021) 62.Cal.App.5th 583, 601 [a "cure" generally requires that the action be thoroughly reconsidered at a properly noticed meeting, not merely ratified].)

C. Attorneys' fees

A prevailing plaintiff in an open-meeting action may recover reasonable attorneys' fees, but only from the state body, not from the members who violated the Act. (Gov. Code, § 11130.5.) A prevailing state body may only recover fees if the plaintiff's lawsuit was frivolous and totally lacking in merit. (Gov. Code, § 11130.5; *Sutter Sensible Planning, Inc. v. Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 825-826.) The purpose of the fee-award statute is to encourage private enforcement of the open-meeting laws. (*Common Cause v. Stirling* (1981) 119 Cal.App.3d 658, 663.)

The award of attorneys' fees is at the court's discretion, but the discretion to deny fees to a plaintiff is narrow; the state body must show the award is unjust. (*Galbiso v. Orosi Public Utility Dist*. (2008) 167 Cal.App.4th 1063, 1077.) The factors for determining whether a fee award is unjust include the necessity for the lawsuit, the lack of injury to the public, the likelihood of resolution by some other means, and the probability of recurring violations of the Act. (*Ibid*.) A court may not consider whether a state body acted in good faith, nor the wealth of a plaintiff. (*Los Angeles Times Communications LLC v. Los Angeles County Bd. of Supervisors* (2003) 112 Cal.App.4th 1313, 1333-1334.)

TABLE OF AUTHORITIES

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