



State of California

LITTLE HOOVER COMMISSION

December 1, 2014

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Executive Director

TO: California Open Meeting Act Advisory Committee

FROM: Carole D'Elia
Executive Director

SUBJECT: Summary of October 23, 2014 Advisory Committee Meeting

Thank you to everyone who participated in the October 23, 2014, advisory committee meeting convened by the Little Hoover Commission's California Open Meeting Act study subcommittee. The Commission's study aims to review transparency in state and local government, specifically the effects of amendments enacted in 2008 to the Brown Act and in 2009 to the Bagley-Keene Open Meeting Act on the ability of local governments and state boards and commissions and local governments to effectively conduct business.

The October 23 meeting explored potential legal language to clarify the Brown Act and Bagley-Keene Open Meeting Act regarding the ability of governing members of local government entities and state boards and commissions to have discussions with one another outside public meetings about policy issues related to their work without attempting to reach consensus on upcoming votes. The meeting aimed to find solutions that remove barriers to quality decision-making and information-gathering processes, while maintaining the highest levels of public transparency.

Proposed language and solutions were submitted by Professor Robert Fellmeth, executive director of the Center for Public Interest Law at the University of San Diego School of Law, to the Little Hoover Commission and disseminated to the meeting participants. This document also is posted on the Commission's website. Participants were asked to discuss the issues presented in the document and contribute their own ideas.

This document is intended to summarize the discussion on October 23 in order to reflect what the Commission heard at the meeting. It should not be considered to be Commission conclusions or recommendations.

Four Solutions Raised by Professor Robert Fellmeth

The meeting began with a roundtable discussion on the proposed language and solutions submitted by Professor Fellmeth to the Commission and meeting participants. The professor's report, which primarily addressed governing and transparency issues related to state boards and commissions – and in particular, the California Public Utilities Commission (CPUC) – highlighted for discussion the following four issues and potential clarifications and solutions:

1. The over breadth of AB1494 (Eng), the 2009 legislation that amended the Bagley-Keene Open Meeting Act, applied to agencies with full-time board members who are part of agency administration.
2. "Hybrid" adjudications (with broad public impact) and public review prior to finality.

3. A recommendation to move the CPUC's administrative law judges to the Office of Administrative Hearings (OAH) to assure basic integrity.
4. Opportunities to moderate the ex parte (concealed) communication that sometimes can facilitate executive branch corruption.

Meeting participants expressed numerous and sometimes opposing views on the proposed language and solutions presented in the document. Many participants were lawyers representing sectors within state and local government, the media and First Amendment coalitions and the private sector. Discussion ranged widely about transparency, governing at the city, county and state level and the ability to make decisions within the constraints of open meeting laws. Professor Fellmeth opened the meeting, stating his opinion that the Bagley-Keene Open Meeting Act is overly broad and unnecessarily limits conversations among state governing board members about general policy issues.

Yet he also contended that problems associated with the Bagley-Keene Act are only one part of the transparency issue in government. Professor Fellmeth said current state government transparency rules provide advantage to interests that are regulated by state boards and commissions. Professor Fellmeth contended that rules for nearly all government entities allow concealed communications between representatives of special interests and public officials – nearly always designed to influence those officials. He suggested new rules should require that those conversations be reported online and provide the public and other interested stakeholders with information about who talked with whom and about what topics. A review of proposals related to the Bagley-Keene Act, Brown Act and other issues follows.

Moving the CPUC's administrative law judges to the Office of Administrative Hearings

Professor Fellmeth contended that the CPUC's administrative law judges should be separate and function independently from the commission because of their influential role in the commission's decision-making processes. Professor Fellmeth recommended that "the CPUC's administrative law judges should be moved to the jurisdiction of the OAH, and constituted as a special expert judicial Utility Regulation Hearing Panel, similar to its Medical Quality Hearing Panel." The OAH would have the authority to select and govern administrative law judges. He said this internal structural change would dissolve institutional bias toward regulated interests and "corruptive" selection of judges within the commission for cases involving powerful special interests.

Some meeting participants disagreed with this suggestion stating it is logistically important to have administrative law judges remain part of the CPUC and "within the building."

Ex Parte Communication

During the discussion, there also were differing views on the effectiveness of current statutory and regulated ex parte communication rules. Some participants deemed the current rules and regulations as being sufficient, while others believed there is a need for change.

Professor Fellmeth warned, "Any system where one side may make claims without any check of the source, or consideration of alternative and contrary evidence, is dangerous." In his written testimony for the roundtable meeting, he recommended that state entities use modern communications tools and instantaneously disclose or post private communications to an accessible central online forum. This forum would allow the public to easily view communications between regulators and the regulated and comment, he said.

A participant said, however, that "the rules themselves are good today in terms of disclosing ex parte communication. We already have in place a pretty good process that is accountable."

Another participant agreed, stating that the core problems of ex parte communication stem primarily from people violating the rules.

Another participant commented that ex parte rules are absent in most state government boards and commissions and only exist for a few including the CPUC, California Energy Commission, Coastal Commission and State Water Resources Control Board.

Also, according to a meeting participant, California has better ex parte communication rules than the federal government. The participant said the federal government has very strict rules for governing ex parte communication and “has gone too far.” For instance, the Federal Energy Regulatory Commission prohibits any ex parte communication with a decisional employee regarding subjects that can influence a decision or affect outcomes of a proceeding. Decisional employees include commissioners and members of their personal staff, administrative law judges, and any other employee of the commission or contractor that is involved in the process of formulating a decision, rule or order in a proceeding. Stern restrictions on ex parte communication in the federal government limits the quality of information needed to make robust decisions, the participant said.

Professor Fellmeth countered several of these contentions, however, and called for full electronic disclosure of ex parte communications. He said, “It’s so easy to do with technology. There’s no reason not to do it.”

Consequences of Brown Act/Bagley-Keene Act Changes

Commissioners and meeting participants expressed significant concern over the perceived consequences of the 2008 and 2009 amendments to the state’s Brown Act and Bagley-Keene Open Meeting Act. Commissioners expressed concerned that the amendments, which limit conversations among governing board members, have transferred more decision-making processes from governing members to the staff level. “You don’t want staff stepping into the shoes of the appointments and commissioners...that is not the intent of the law,” a Commissioner said.

In response to the Commissioners concerns, some participants agreed, saying that more decision-making has been driven down to the staff level. A participant said this transfer in power has consequently created less transparency – not more. As a result, staff officers and agents control agendas and access to the government entity, another participant said.

Some Commissioners also said these changes are encouraging lobbyists and interested parties to use legal and permissible ex parte communications to control governing board deliberations and outcomes. That includes staff of governing agencies, they said. A participant said, “The irony of the Brown Act is the chief executive (of a city or county) is the chief lobbyist.” Participants said chief executives or executive directors possess significant power as they have a sense of various governing board member leanings on issues and can meet with all the governing board members. This creates privileged access to present his or her view of priorities and necessities to other commissioners and board members, a participant said. Another participant said that when “we want to lobby a commission we go to the executive director first. The executive director is one of the key people being lobbied.” For these reasons, some participants recommended that ex parte rules be extended to the executive director of state boards and commissions as well as local government bodies with appointed or elected governing board members. Others said adding ex parte rules to the executive officer would paralyze the government entity.

Isolating Decision-Makers

Commissioners and Commission staff also learned from the meeting participants that the 2008 and 2009 amendments to California's open meeting laws have adversely impacted decision-makers by isolating them from their colleagues. A meeting participant said decision-makers are being held accountable by the Governor and the public that elected them to make decisions in an isolated environment where they can't have open and robust policy discussions.

Participants said decision-makers are limited in their ability to express true candor in public settings for fear of making mistakes or saying things that political opponents will use against them. "If a commissioner were to play devil's advocate, the public might misinterpret" their position and use it against them and demand a recusal from the decision, a participant said. The participant also said rules that limit policy discussions to public meetings do not lead to better decisions. Participants said they would like decision-makers to have free flowing public discussions on policy and governing issues among themselves, much as the Legislature does with its caucus system. Some participants said the Legislature would hardly be able to operate if it had the same limits on discussions among members as do local governments and state boards and commissions. One participant suggested allowing a majority of a governing board such as a city council to meet among themselves with an attorney present and a confidential transcript kept of the proceedings.

Other participants disagreed with these contentions, saying they are essentially arguments to conduct public business secretly. These participants said they understand that it is difficult to comply with some of the state's open meeting laws. But they said the Brown Act, for example, was passed expressly to prevent these kinds of meetings. Another participant said that while the process of complying with the current standards of the Brown Act may at times be frustrating, local officials are functioning within its environment. The participant said the current standard is working "despite how frustrating it may be." The individual said city council members and mayors are "accepting this reality" and are progressively getting better at finding a balance to discuss issues among themselves and the need to make decisions.

Other Solutions

When discussing remedies to these issues, one participant suggested having public workshops to permit more open discussions among decision-makers. The participant said some state commissions have institutionalized this approach and structure after the 2009 amendments to Bagley-Keene Open Meeting Act. The workshops have created an arena for collective dialogue with governing members to identify and discuss broad priorities and organizational issues, the participant said. The participant also said members feel more comfortable discussing these issues in a public workshop setting.

A participant also recommended distributing scoping memos for discussion among commissioners prior to the public process. The scoping memos give commissioners flexibility to collectively discuss what information is needed to set the right policies. The participant also suggested allowing closed, but publicly-noticed proceedings among commissioners. The participant said this would allow a more united discussion on policy matters before them. Another participant suggested permitting shorter notices, such as a two-day public notice for a closed meeting as opposed to the current requirement of 10 days.

As the meeting came to a close, a participant recommended that the Commission expand its review to other boards and commissions governing significant areas of state government which do not have ex parte communication rules. This expanded review could examine how other state entities function and facilitate transparency and accountability.

Meeting Participants

A list of meeting participants follows:

Damien Brower, City Attorney, City of Brentwood, Member of the League of California Cities Brown Act Committee

Faith Conley, Legislative Representative, California State Association of Counties

Jim Ewert, General Counsel, California Newspaper Publishers Association

Robert Fellmeth, Executive Director, Center for Public Interest Law, University of San Diego School of Law

Robert Foster, Mayor of Long Beach, 2006-2014

Terry Francke, General Counsel, Californians Aware

Jennifer Henning, Counsel, California State Association of Counties

John Howard, Editor, Capitol Weekly

Michael Lauffer, General Counsel, State Water Resources Control Board

Alicia Lewis, Legislative Representative, League of California Cities

Frank Lindh, Partner, Crowell & Moring, San Francisco, California

Jeffery Ogata, Assistant General Counsel, California Energy Commission

J. Jason Reiger, Assistant General Counsel, California Public Utilities Commission

Peter Scheer, Executive Director, First Amendment Coalition

A list of other interested attendees follows:

Jaclyn Appleby, Chairman Horton's Office, California State Board of Equalization

Vicki Bermudez, California Nurse Association

Camille Dixon, Chairman Horton's Office, California State Board of Equalization

Toby Ewing, Consultant, Senate Governance and Finance Committee

Doris Fodge, California Water Projects Association

Dorothy Holzem, Legislative Representative, California Special Districts Association

Ditas Katague, Commissioner Catherine Sandoval's Chief of Staff, California Public Utilities Commission

Jacqueline Kinney, Principal Consultant, Senate Energy, Utilities and Communications Committee

Katie Kolitsos, Special Assistant, Assembly Speaker Toni G. Atkins

Galen Lemei, Office of Chief Counsel, California Energy Commission

Angela Mapp, Principal Consultant, California State Assembly Committee on Local Government

Tony Marino, Legislative Aide, Senator Jerry Hill

Scott Merrill, Staff Attorney, California Newspaper Publishers Association

Ed O'Neill, Senior Advisor, California Public Utilities Commission

Jason Pope, Attorney, California Gambling Control Commission

Pat Sabo, California Teachers Association