

A BRIEF GUIDE TO THE BAGLEY-KEENE OPEN MEETING ACT

The Pharmacy Benefit Management Reporting Task Force (“Task Force”) is subject to the Bagley-Keene Open Meeting Act (“the Act” or “the Bagley-Keene Act”). The Act requires the Task Force’s meetings to be open to the public.¹ While operating under the requirements of the Act can sometimes be frustrating, such openness is essential for public transparency.

B. Meetings Subject To The Bagley-Keene Act

1. What is a “meeting”?

The term “meeting” under the Bagley-Keene Act has a broader definition compared to how that term is used in day-to-day language. Under the Bagley-Keene Act, a “meeting” will occur when a quorum of the Task Force convenes, either serially or all together in one place, to address issues under the Task Force’s jurisdiction.² Obviously, a meeting includes a formal gathering where members debate and vote on issues. But a meeting also includes situations where the Task Force merely receives information.

Issues about what constitutes a meeting often arise in the context of informal gatherings such as study sessions or pre-meeting get-togethers. The study session historically arises from a group’s desire to study a subject prior to its placement on the group’s agenda. However, if a quorum is involved, the study session should be treated as a meeting under the Bagley-Keene Act. With respect to pre-meeting briefings, such meetings may be considered “meetings” and thus open to the public.

2. Beware of emails, texts and “serial” meetings.

The Bagley-Keene Act prohibits a majority of the members of the Task Force from using “a series of communications of any kind...to discuss, deliberate, or take action on any item of business that is within the subject matter of “the Task Force.”³ A meeting held via a series of communications between members is often referred to as a “serial meeting.”

Examples of serial meetings include emails and texts exchanged between a majority of the members regarding issues before them. A serial meeting can also occur when Board Member A discusses with Board Member B an issue within the board’s jurisdiction. Board Member B then calls Board Members C and D to get their thoughts on the issue. If a majority of the board members discuss the issue in this way, the Bagley-Keene Act considers them to have held a meeting, although they did not meet in person or at the same time.

¹ The Bagley-Keene Act is codified in Government Code sections 11120-111321.

² Government Code section 11122.5.

³ Government Code section 11122.5.

In short, members of the Task Force must refrain from calling or otherwise contacting other members on a one-to-one basis, or conducting serial meetings, in order to discuss, deliberate, or take action outside the meeting on a matter within the Task Force's purview.

Additionally, members must not text or email each other during an open meeting on any matter within the Task Force's jurisdiction. Using electronic devices to communicate on such matters outside the public's view violates the law.

C. Notice And Agenda Requirements For Regularly Scheduled Meetings

The Task Force must give the public at least 10 calendar days' written notice of each meeting to be held.⁴ The notice must include the name, address, and telephone number of a person who can provide further information prior to the meeting and must contain the website address where the notice can be accessed. The notice must also be posted on the Internet at least 10 calendar days before the meeting and made available in appropriate alternate formats upon request.

The notice of each meeting must include the meeting's agenda, including all items of business to be transacted or discussed at the meeting, and must provide a brief general description of each item. The description should have enough information to allow an interested lay person to decide whether to attend the meeting or to participate in that particular agenda item. Likewise, the state body cannot add additional items to the agenda unless it provides the proper 10 days' notice.⁵

Items not included on the agenda may not be discussed, even if no action is to be taken by the Task Force regarding those items.

E. Voting

All voting must be made publicly. Accordingly, members may not vote by secret ballot or by proxy. Likewise, the Task Force must publicly report (i.e., include in the minutes) any action taken and the vote or abstention on that action of each member present for the action.⁶

⁴ Government Code section 11125, subdivision (a).

⁵ Government Code section 11125, subdivision (b). There are two rare situations in which agenda items may be added after the 10-day notice period has started to run. The first situation is when the topic the state body wishes to add would qualify as a grounds for an emergency meeting under the Bagley-Keene Act. An emergency exists in the event of a work stoppage or other activity that severely impacts public health and/or safety, or in the event of a "crippling disaster that severely impairs public health or safety or both." (Gov. Code § 11125.5(b).) The second situation occurs when there is a need for immediate action and that need came to the body's attention after the agenda was released in accordance with the 10-day notice requirement.

⁶ Government Code section 11123, subdivision (c).

F. Recording The Meetings

All recordings of meetings of the Task Force must be made available for public inspection under the California Public Records Act, but may be erased or destroyed 30 days after the taping or recording.

Persons attending a public meeting have a right to record the proceedings in the absence of a reasonable finding by the Task Force that the recording could not continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.⁷

G. No Conditions On The Public's Attendance Of Meetings

No person can be required to register or sign-in or fulfill any other condition in order to attend a public meeting of the Task Force. If an attendance list, register, questionnaire, or other similar document is posted at or near the entrance to the room where the meeting is to be held, or is circulated to persons present during the meeting, "it shall state clearly that the signing, registering, or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers, or completes the document."⁸

All meetings must be accessible to persons with disabilities.⁹

H. Opportunity For Public Comment At Meetings

The Bagley-Keene Act, with limited exceptions, requires the Task Force to allow members of the public an opportunity to directly address the Task Force on each agenda item before or during the Task Force's discussion or consideration of the item.

Generally, if a body wishes to establish a standing rule limiting discussion of agenda items or public comment to a certain amount of time, the body may do that by adopting an administrative regulation. To this end, the Department of Managed Health Care has a regulation regarding public comment during meetings subject to the Bagley-Keene Act. Specifically, unless otherwise allowed by the Task Force:

members of the public will be permitted to address the committee, panel or board prior to the committee, panel or board making any decision. Public comments will be heard in the order in which speakers sign up; limited to only agenda items; and may be no longer than five minutes in length unless otherwise permitted.¹⁰

⁷ Government Code section 11124.1, subdivision (a).

⁸ Government Code section 11124.

⁹ Government Code section 11131.

¹⁰ California Code of Regulations, title 28, section 1003.

Members of the public who use a translator must be allowed at least twice the allotted time to address the Task Force.

I. Disclosure Of Documents

When documents are distributed to all, or a majority of all, the members of the Task Force for discussion or consideration at or before a public meeting, those documents must be made available for public inspection. Generally, the records must be made available for inspection at the time of distribution to members.¹¹

If records are prepared by some other person and distributed to members of the Task Force during a meeting, the documents must be made available for public inspection after the meeting.¹²

The Task Force may not charge a fee for a notice, including the agenda, of a meeting, and may only charge fees to cover the direct reproduction costs of documents considered at the meeting.¹³

Documents distributed prior to or during a meeting must be made available upon request by persons with disability, in appropriate alternative formats. No extra charge can be imposed for putting those documents into an alternative format.

J. Penalties For Violation Of The Bagley-Keene Act

Any interested person, the Attorney General, or a district attorney could bring a court action if the Task Force failed to comply with the Act. In that action, the plaintiff could seek to nullify any actions the Task Force took without providing proper notice. If the action succeeded, the plaintiff would be entitled to attorney's fees and costs.¹⁴

Moreover, a violation of the Bagley-Keene Act done with the intention of depriving the public of information to which the member knows or has reason to know the public is entitled, constitutes a misdemeanor.¹⁵

If you have questions regarding the Bagley-Keene Act, please do not hesitate to contact Sarah Ream, Acting General Counsel of the Department of Managed Health Care. Ms. Ream can be contacted at (916) 324-6870 or by email at Sarah.Ream@dmhc.ca.gov

¹¹ Government Code section 11125.1, subdivision (a).

¹² Government Code section 11125.1, subdivision (b).

¹³ Government Code section 11126.7.

¹⁴ Government Code section 11130.5.

¹⁵ Government Code section 11130.7