SACRAMENTO OFFICE
925 L STREET, SUITE 1402
SACRAMENTO, CA 95814
TEL (916) 898-0202
FAX (916) 323-0546
boe.ca.gov/schaefer

DISTRICT OFFICE
1 COLUMBIA PLACE
401 WEST A STREET, SUITE 200
SAN DIEGO, CA 92101
TEL (619) 946-3791
Mike.Schaefer@boe.ca.gov

MIKE SCHAEFER
VICE CHAIR
CALIFORNIA STATE BOARD OF EQUALIZATION

MEMORANDUM

Date: December 10, 2020

To: Antonio Vazquez, Board Chairman
Ted Gaines, Board Member
Malia M. Cohen, Board Member
Betty T. Yee, State Controller

From: Mike Schaefer, Board Vice Chair

Re: RE: Item L2, Discussion on Bagley Keene with respect to BOE Governance Policy, proposed language to update Board's Governance Policy, and accompanying memo

During the past two years, our Board has brought up the subject of the practical application of the Bagley Keene Act (Gov. Code §11120 et seq.) multiple times. It is apparent that the Members have differing views of how broadly the Act should apply; however, we have not had the opportunity to openly discuss, nor memorialize, our position. I believe the time is ripe for a thorough discussion of the application – and limits – of Bagley Keene.

Currently, the Board has a Governance Policy, which addresses Bagley Keene; unfortunately, it does not provide adequate guidance on the Act. Our Governance Policy specifies what we ***cannot*** do, but it fails to clarify what we ***can*** do. I am hopeful that our discussion of Bagley Keene will generate conclusions and consensus, which can be used to amend our Governance Policy.

Accordingly, I submit for your consideration the following proposed edits and updates to the Governance Policy, Section VI.A. Bagley Keene Open Meeting Act. The goal is to identify and describe operational protocols that are positive, functional, and useful for the current and future Boards. Members and their staff must know what is permissible, in addition to what is prohibited, in order to ensure that the intent of the Act to provide transparency is properly applied.

Our overarching purpose is for the Policy to serve as an authoritative guide for Board Members to quickly find clear answers to questions regarding their powers, duties, and limitations for which they are collectively and individually accountable under the state constitution and statutes. Following is my proposed language for our Policy and a memo detailing the rationale for this update.

Proposed Amendments to BOE Governance Policy on Bagley Keene

Paragraph A. Bagley-Keene Open Meeting Act. (Gov. Code §11120 et seq.)

Board Members are subject to the requirements of the Bagley-Keene Open Meeting Act. A meeting includes any congregation of a majority of the members at the same time and place to hear, discuss, and deliberate upon any item within the subject matter jurisdiction of the state body. Gov. Code §11122.5(a).

A majority of the Board Members will not, outside an authorized meeting, use a series of communications of any kind, either directly or through intermediaries, to "discuss, deliberate, or take action on any item of business within the subject matter of the state body." Gov. Code §11122.5(b)(1). This includes "serial meetings," which are situations where instead of the Board Members meeting at one time, there is series of meetings or phone calls, or e-mails (directly or through intermediaries) that collectively involve a quorum of Board Members.

To determine whether an issue is prohibited from discussion, Members should consider:
(1) Is or will the issue be an item of business on a BOE agenda; and
(2) Is the issue within the Board's subject matter jurisdiction?

An "item of business" is an item on the Agenda of the BOE that requires action to be taken, i.e. a vote, or an issue that could arise on a BOE Agenda as an action item. The "subject matter" jurisdiction of the Board constitutes the administration of the Tax Programs listed within Section IV, the Roles and Powers of the Board listed within Section VII. A, and any other statutes or constitutional provisions.

Board Members will avoid meetings to discuss matters pending on the agenda or that *may arise* as future agenda items that are within the subject matter of the Board. However, issues that are not within the subject matter jurisdiction of the BOE are open for discussion among all Board Members, regardless of whether the issue is on the agenda.

For example, Members may discuss with each other public safety matters, education issues, transportation policies, fish and game regulations, climate change, fire safety, sports, the weather, or any other issue not related to the jurisdiction of the BOE.

Explanation of proposed edits to BOE Governance Policy on Bagley Keene

Purpose

The purpose of the Bagley Keene Act was to create more transparency in government by requiring all state body discussions and deliberations to be in public, so that the public can participate as fully as possible in the body's decision-making processes.

Both the California Constitution and the Government Code are clear on this point, as is a host of case law applying Bagley Keene. See Cal. Constitution Article I, Sec 3, subd. (b)(1); Gov Code 11120 et seq. ("Bagley Keene"); Gov. Code 54950 ("Brown Act") *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 Cal.App.2d 41; *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal. App. 3d 96; 85 Ops.Cal.Atty.Gen. 145, 147 (2002**);** 103 Ops.Cal.Atty.Gen. 42 (2020).

Unfortunately, the overly aggressive application of Bagley Keene by the BOE and other government agencies has created an unintended consequence of LESS government transparency and LESS public participation.

This issue was addressed by the **Little Hoover Commission in its Conversations for a Workable Government**, a report issued in June 2015

https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/227/Report227.pdf (LHC Report).

After a 10-month study of California's open meeting laws, Bagley Keene and its counterpart, the Brown Act, including discussions with elected officials subject to its provisions, the Commission found that, "Constraints on internal discussions by appointees and elected officials have driven more decision-making downward to the staff level and out of sight of the public." (LHC Report, p.ii)

Because the elected officials feel so stifled in their ability to discuss issues related to their jobs, the work falls to staffers and lobbyists who are not so constrained. Consequently, decisions are often made by those unaccountable to the public and out of the public view.

This is the opposite of what Bagley Keene was enacted to accomplish.

As noted in the LHC report, many public officials reported saying that "they so fear violating the state's open meeting acts and dragging their entity into lawsuits that they are afraid to talk privately about even the most general matters with their colleagues or be seen together at events outside of public meetings.

Their government attorneys, perpetually on the watch against open meeting act legal challenges that could endanger or overturn multimillion-dollar decisions or hard-fought compromises, interpret open meeting laws conservatively and advise officials to exercise maximum caution." (LHC report, p.iii)

This lack of transparency and intimidation of public officials needs to be addressed in open forum and reformed. That process can start right here at the BOE. I propose that we reexamine the purpose and application of Bagley Keene and establish a policy that both respects the public's right to transparency and the Members' ability to engage in private discussion without fear of reprisal.

Operative Language and Key Factors

The operative language of Bagley Keene which deserves scrutiny is in **Government Code Section 11122.5(b)(1):**

> "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."

Meeting and Notice

Bagley Keene has several factors to consider, including the existence of ***a meeting***, and ***notice*** (or authorization), both of which are clearly delineated in statute**. Gov. Code Sec. 11122.5(a) defines a *meeting* as "any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains."**

Case law and amendments to the statute have clarified that a ***meeting*** can include also an informal meeting (*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors* (1968) 263 Cal.App.2d 41, 45, 50-51) or a series of individual conversations, or seriatim. (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal. App. 3d 96.)

Notice is likewise clear. Section 11125 outlines the numerous elements of effective notice of a meeting, e.g. 10 days advance announcement, a specific agenda for the meeting, a brief description of the items of business, a person to contact who can provide further information, compliance with the Americans with Disabilities Act, etc.

Item of Business, Subject Matter Jurisdiction

However, two limiting factors outlined in Government Code Sec. 11122.5(b) are *not* clearly defined, those being an ***item of business*** and ***subject matter of the body***. A close look at both these terms is necessary to understanding how broadly Bagley Keene should be applied.

When recently asked to opine on a potential Bagley Keene issue, the Attorney General examined the meaning of the operative phrase, "upon any ***item*** that is within the subject matter jurisdiction" in ***subdivision (a)*** of Gov. Code 11122.5. 103 Ops.Cal.Atty.Gen. 42 (2020). The Attorney General used a basic two-part test to determine whether ***a meeting*** had occurred for purposes of subdivision (a). *Note, the opinion did not analyze* ***subdivision (b),*** *which prohibits discussion on* ***items of business****.*

The AG looked at the definition of an ***item*** and ***subject matter jurisdiction***. The AG did not define ***item***, but said that it must be something more than an item on the agenda; specifically, it would be inappropriate to limit the term to only items on the agenda. The AG also looked at the term ***subject matter jurisdiction***. The opinion again provides some guidance stating, "subject matter means 'matter presented for consideration,' and that 'jurisdiction' means 'power, right, or authority to hear . . . a cause.'" [quotations omitted] In other words, the subject matter jurisdiction of the BOE entails those issues presented for hearing over which the BOE has authority.

Subject matter of the Board is not any issue upon which the Board wishes to deliberate. It is only those matters the BOE has the inherent authority to decide. "The principle of 'subject matter jurisdiction' relates to the inherent authority of the court involved to deal with the case or matter before it." (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1087, 56 Cal.Rptr.2d 386.)

Thus, in the absence of subject matter jurisdiction, a trial court has no power "to hear or determine [the] case." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288, 109 P.2d 942.) *Varian Medical* v. Delfino 35 Cal.4th 180, 196 (2005). Quoted in *Barry v. State Bar of Cal*. (2017) 2 Cal.5th 318, 324. Consequently, issues over which the BOE has no authority are beyond the subject matter jurisdiction of the Board.

Prior to the Taxpayer Transparency and Fairness Act (AB 102; Chap 16; Stats. 2017; Government Code Sec. 15600 et seq.), the subject matter of the BOE was quite broad, covering a multitude of tax programs and administrative responsibilities.

However, AB 102 significantly limited the jurisdiction of the Board. In fact, the Legislature specifically and intentionally removed whole bodies of law from the authority of the BOE. The remaining subject matter of the BOE is outlined in Sections IV of the proposed Governance Policy and encompasses only those areas granted by the CA Constitution or referenced in statute. Section VII.A of the Governance Policy details additional roles and responsibilities of the Board, which fall within its subject matter jurisdiction.

This principle of limited jurisdiction is underscored by Government Code §15609, which specifies that, "At any meeting the board may transact any and all business and perform all duties imposed upon it and give and enter any and all orders and decrees within its jurisdiction." However, it is understood that the Board cannot perform duties and enter orders or decrees that are NOT within its jurisdiction. Matters over which the BOE has no jurisdiction are not subject to the limitations detailed in Bagley Keene.

Thus, for purposes of determining if a **subdivision (a) meeting** was about to occur, the question would be, are the members planning to discuss something that falls within the authority of the Board to decide? Keep in mind that under the Bagley Keene Act, **meetings** and **serial meetings** are not prohibited in and of themselves. Only such meetings to discuss **an item of business** that is **within the subject matter** of the BOE are prohibited (except within the confines of a noticed meeting). This proscription is in **subdivision (b).**

For **subdivision (b),** the words and the analysis are different than for subdivision (a). Subdivision (b) prohibits discussion on an **item of business**. Clearly the Legislature used a different term when it drafted subdivision (b) – **item** versus **item of business**. Basic rules of statutory construction dictate that when the Legislature uses different words in the same statute, it means something different. "When confronted with two statutes, one of which contains a term, and one of which does not, we do not import the term used in the first to limit the second.

Instead, **it is our obligation to interpret different terms used by the Legislature in the same statutory scheme to have different meanings**. (*Roy v. Superior Court* (2011) 198 Cal.App.4th 1337, 1352, 131 Cal.Rptr.3d 536 [" '[w]hen the Legislature uses different words as part of the same statutory scheme, those words are presumed to have different meanings'"]); *Romano v. Mercury Ins. Co.* (2005) 128 Cal.App.4th 1333, 1343, 27 Cal.Rptr.3d 784 [same], see *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 725, 257 Cal.Rptr. 708, 771 P.2d 406 [" ' "when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." ' "]

(*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 558, 163 Cal.Rptr.3d 205.) Walt Disney Parks & Resorts U.S., Inc. v. Super. Ct. (2018) 21 Cal.App.5th 872, 879. [Emphasis added]

Consequently, an ***item of business*** in subdivision (b) was intended to be something different than an ***item*** in subdivision (a). The Attorney General opined that an ***item*** was more than just an item on the agenda – it could be interpreted broadly. However, an ***item of business*** must be something more narrow. Practically speaking, a ***subdivision (a) meeting*** is broadly defined; a ***subdivision (b) prohibition*** is narrow.

Although the Legislature did not specify, *a reasonable and defensible interpretation would be that a* ***subdivision (b) item of business*** *is narrowly defined as an issue that either is, or may arise, on an agenda for a vote or action of the Board.*

This interpretation is further supported by the fact that, when creating exclusions from Bagley Keene in Section 11122.5(c), (which is part of the same "statutory scheme") the Legislature said that Members of a state body could convene for discussions at various events, as long as they did not discuss "business of a specified nature that is within the subject matter jurisdiction of the state body." (See subdivisions (c)(2)(A), (c)(3), (c)(4), and (c)(5).)

Business of a specified nature is not defined, but per the rules of statutory construction, we know it is something other than an ***item*** or an ***item of business***. Regardless of its definition, the Legislature clearly authorized Members to have conversations among each other. The Legislature recognized that Members will convene outside of their formal meetings and must have the ability to communicate with one another

Completing the analysis of the "Bagley Keene factors", the second limiting factor in subdivision (b) is that the item of business must be **within the subject matter** of the BOE. As discussed above, the subject matter of the BOE is that which is outlined in its Governance Policy, Section IV Tax Programs and Section VII.A. Roles and Responsibilities, and any additional responsibilities the Legislature may sanction. Subject matter of the BOE is not so broad as to include issues that are only peripheral to the BOE; it encompasses only that matter over which the BOE has inherent authority to decide.

Summary Conclusion

Government Code 11122.5(b)(1) is written in the conjunctive, that is, all elements of the sentence must be present for it to apply. Discussion, deliberation or action is prohibited on an **item of business** that is within the **subject matter** of the body. It follows that discussion on items that will never arise on the agenda or issues beyond the authority of the BOE to decide are not prohibited.

Consequently, issues that are **not within the subject matter** of the BOE are open for discussion among all Board Members, regardless of whether the issue is on the agenda. For example, Members may discuss with each other public safety matters, education issues, transportation policies, fish and game regulations, climate change, fire safety, sports, the weather, or any other issue not related to the jurisdiction of the BOE.

Arguably, strictly internal or administrative matters, such as calendaring issues, vacation schedules or holiday parties are not items of business within the subject matter jurisdiction of the Board and thus not subject to the limitations of Bagley Keene.

The objection has been raised that such an interpretation of Bagley Keene would allow the Board to discuss procedural rules or administrative matters such as the Property Tax Rules outside of a noticed meeting. This objection is meritless as the Rules are direct **subject matters** of the BOE, and clearly are potential **items of business** on an agenda. Thus, they fall squarely within the parameters of Bagley Keene.

In sum, given that Bagley Keene limits discussion only on items of business within the subject matter of the state body, it follows that meetings and discussions on issues extraneous to the BOE are not prohibited.

This interpretation is consistent with the findings and recommendations found in the **Little Hoover Commission's Conversations for a Workable Government** and I believe it should be memorialized in our Governance Policy.

I encourage you to read the Little Hoover Report and I invite your comments and robust discussion on this topic at our December 16, 2020 hearing.

Respectfully,

MIKE SCHAEFER, Vice Chair
Board of Equalization, 4th District

cc: Ms. Kari Hammond, Chief Deputy, Office of Chairman Antonio Vazquez
Mr. Gary Gartner, Chief Deputy, Office of Vice Chair Mike Schaefer
Ms. Regina Evans, Chief Deputy, Office of Member Malia M. Cohen
Mr. Matt Cox, Chief Deputy, Office of Member Ted Gaines
Ms. Yvette Stowers, Deputy State Controller
Ms. Brenda Fleming, Executive Director
Mr. Henry Nanjo, Chief Counsel
Ms. Catherine Taylor, Chief, Board Proceedings and Support Services