State of California

Board of Equalization
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M e m o r a n d u m

To: Honorable Sally J. Lieber, Chair
Honorable Ted Gaines, Vice Chair
Honorable Antonio Vazquez, Third District
Honorable Mike Schaefer, Fourth District
Honorable Malia M. Cohen, State Controller

Date: November 5, 2024

From: Richard Moon
Chief Counsel
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Subject: **Bagley-Keene Open Meeting Act: Anonymous Public Comment at Board Meetings**

You have asked whether the Bagley-Keene Open Meeting Act[1] (Bagley-Keene) allows speakers to provide anonymous public comment at a publicly-noticed, Board of Equalization (BOE) meeting (Meeting). Bagley-Keene does not explicitly address anonymous public comments. However, several provisions explicitly grant the public the right to attend public meetings without identifying themselves and bar state bodies from prohibiting public criticism. As explained below, because the California Constitution requires these provisions to be interpreted broadly when furthering the public's rights of access and participation and construed narrowly when limiting those rights, in our opinion, anonymous public comment is allowed at a Meeting. This is consistent with the Board's practice and the internal guidance it has followed for at least the past 20 years.[2]

Bagley-Keene Open Meeting Act

The public's right to scrutinize meetings of public bodies is enshrined in the California Constitution. California Constitution article I, section 3, subdivision (b)(1) states:

> The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

This Constitutional provision is advanced by Bagley-Keene. Section 11120 sets forth the public policy of Bagley-Keene in its Legislative findings and declarations:

[1] Gov. Code, §§ 11120 – 11133.
[2] Board Meeting Reference Manual (2004).

> It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.
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> ¶ …¶
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> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The Attorney General has stated that Bagley-Keene's purpose is to allow the public to attend and participate as fully as possible in a state body's decision-making. (103 Ops.Cal.Atty.Gen. 42 (2020); see also Attorney General's *Bagley-Keene Open Meeting Act Guide* (2024), p. 4.) Government Code sections[3] 11123, 11124, and 11125.7 explicitly facilitate the public's exercise of these rights.[4]

Section 11123, subdivision (a) states that "All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body…."[5] Section 11124, subdivision (b) provides that the state body may not, as a condition of attendance at an open meeting, require any person to register their name, provide other information, complete a questionnaire or otherwise fulfill any prerequisite to attendance. While the state body may use an attendance list, register, questionnaire, or other similar document at the meeting, it must state clearly that completing such documents is voluntary, and that any person may attend the meeting regardless of whether or not they do so. (Gov. Code, § 11124, subd. (b).) When a state agency uses an internet website or other online platform to allow the public to attend a meeting remotely it must allow use of a pseudonym or other anonymous information to attend the meeting even if an attendee is required to submit personal information initially to log in to the meeting. (Gov. Code, § 11124, subd. (c).)

Section 11125.7, subdivision (a) requires a state body to provide an opportunity for the public to directly address it on each agenda item. Subdivision (d) of Section 11125.7[6] was enacted in 1997 by the passage of Senate Bill 95 (Stats. 1997, c. 949) and provides that, "[t]he state body shall not prohibit public criticism of the policies, programs, or services of the state body, or of the acts or omissions of the state body." However, "the state body may adopt reasonable

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[3] All further statutory references are to the Government Code, unless otherwise indicated.

[4] While this memorandum focuses on these explicit expressions of the public's right to attendance and participation, all Bagley-Keene provisions further these goals.

[5] Gov. Code, § 11123 lists a number of exceptions to open and public meetings. This memorandum assumes such enumerated exceptions are not at issue.

[6] Subdivision (d) was initially enacted as subdivision (c).

regulations to ensure that the intent of subdivision (a) [opportunity for public to directly address the state body] is carried out….” (Gov. Code, § 11125.7, subd. (b).)

Although Bagley-Keene clearly expresses the public’s right to attendance and participation at public meetings, because it does not explicitly address whether or not public comment may be made anonymously, the statutory language must be examined in the context of the entire statutory framework, harmonizing the various parts of the enactment. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.].) The fundamental interpretational task is to effectuate the Legislature’s intent. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) Where, as here, statutes affect the public’s right to scrutinize public meetings, the California Constitution requires broad construction where those rights are furthered and narrow construction where those rights are limited. (Cal. Const., art. I, § 3(b)(2).) Therefore, because sections 11123, 11124, and 11125.7, subds. (a) and (d) further the public’s right of access, they must be interpreted broadly. However, because section 11125.7, subd. (b) limits the public’s right of access, it must be interpreted narrowly.

In our view, prohibiting anonymous comments is inconsistent with a broad interpretation of the bar against an identification requirement to attend meetings anonymously and the prohibition of public criticism since an identification requirement may discourage public participation by those who wish not to be identified.[7] At the same time, prohibiting anonymous public comment is also inconsistent with a narrow interpretation of a reasonable regulation since a blanket requirement that speakers identify themselves does not further the purpose of ensuring that the public has an opportunity to address the state body. Thus, interpreted as required by the California Constitution, these statutes should be read to allow anonymous comment.

Furthermore, the Board receives comments from the public in order to acquire, exchange, and analyze information so that it can be more informed when making decisions. Opportunity is provided for the public to address the Board on any agenda item, including any item on the administrative agenda (Board Member Reference Manual (2020), p. 22), as well as on matters not on the agenda.[8] Whether commenters identify themselves, however, has no bearing on the Board’s ability to receive the information, and a blanket speaker identification requirement may also make it more likely the Board does not receive the information it may find helpful or necessary.

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[7] We recognize the possibility that some members of the public may want to remain anonymous for malicious reasons, however, we believe it just as likely some members of the public have legitimate reasons for wanting to remain anonymous. Furthermore, as explained, *infra*, state bodies may prevent public comment without a general prohibition on anonymous comment.

[8] See State Board of Equalization Meeting Agenda, Item 1 (for example, https://boe.ca.gov/meetings/pdf/2024/202410-Agenda.pdf). While the Board Members cannot address comments made on matters not on the agenda, they can add issues raised from these comments to a future agenda.

We believe it is highly instructive that the California Attorney General's office, in the past, has interpreted section 11124 in this manner – broadly, to allow anonymous *comment* – even though section 11124 explicitly allows only anonymous *attendance*.

> Since one of the purposes of the Act is to protect and serve the interests of the general public to monitor and participate in meetings of state bodies, bodies covered by the Act are prohibited from imposing any conditions on attendance at a meeting. (§ 11124.) For example, while the Act does not prohibit use of a sign-in sheet, notice must be clearly given that signing-in is voluntary and not a pre-requisite to either attending the meeting *or speaking at the meeting*.
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> (Attorney General's (AG) *Bagley-Keene Open Meeting Act Guide* (2004), p. 9, emphasis added.)[9]

Additionally, prior to the enactment of section 11125.7, subdivision (d), the Attorney General issued an opinion that made clear that when determining what speech can and cannot be prohibited at a public meeting under section 54954.3, part of the Ralph M. Brown Act (Brown Act),[10] the freedom of speech provisions of the federal and state Constitutions must also be examined. (78 Ops.Cal.Atty.Gen. 224, 230 (1995).) The Attorney General concluded that a city council meeting is a "limited public forum" where "reasonable regulations" on speech may be put in place, but care must be exercised not to violate the public's freedom of expression by being too broad, or when content is concerned, that the restriction serves a compelling state interest.[11] (*Id*.)

Section 11125.7, subdivision (d) mirrors section 54954.3, subdivision (c), and was enacted for the express purpose of conforming Bagley-Keene to the Brown Act. (Assem. Com. on Approp., Analysis of Sen. Bill No. 95 (1997-1998 Reg. Sess.) as amended Aug. 25, 1997.) Therefore, when determining what limitations on public comment are reasonable under Bagley-Keene, the principles delineated in the Attorney General opinion apply. Thus, a Meeting would likely be considered a "limited public forum" and any regulation of speech must not be overly broad and must serve a compelling state interest.

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[9] This language is not included in the most recent version of the Guide. However, all of the principles upon which that language was based remain. Thus, we believe the Attorney General's office maintains this position.

[10] Because both the Bagley-Keene and Brown Acts address the common topic of open and public meetings for state and local bodies, respectively, courts frequently rely on cases decided under the Brown Act to construe similar provisions of Bagley-Keene and vice versa. [See, e.g., *Southern Calif. Edison Co. v. Peevey* (2003) 31 C4th 781, 798-799, 3 CR3d 703, 714-716 (relying on Brown Act precedent to construe closed-session provisions of Bagley-Keene); *Travis v. Board of Trustees of Calif. State Univ.* (2008) 161 CA4th 335, 342, 73 CR3d 854, 858—Bagley-Keene and Brown Acts employ "a virtually identical open meeting scheme," making cases construing Brown Act's personnel exception applicable to Bagley-Keene's])

[11] We also note that the right to anonymous speech has long been held to be protected by the First Amendment of the United States Constitution. (See *McIntyre v. Ohio Elections Commission* (1995) 514 US 334.)

Applying these principles, we see no compelling state interest that would require someone who wishes to speak on an item listed on a Meeting's Public Agenda Notice (PAN) to be required to provide their name to make public comment. While requiring a speaker to identify themselves by name may make it less likely a speaker would engage in speech that may disrupt the meeting or tend to cause the meeting to become disordered, we do not believe that such benefit outweighs the risk of limiting public participation by prohibiting speaker anonymity, particularly since an identification requirement has the potential to squelch the public's right to make critical comments. (See *Leventhal v. 19 Vista Unified School Dist.* (1997) 973 F.Supp. 951 [policies that prohibited members of the public from criticizing school district employees were unconstitutional.].) Further, we believe that there is no compelling state interest in prohibiting speaker anonymity, particularly where other Bagley-Keene provisions allow "disorderly" comments to be cut off without requiring speaker identification.

Finally, we believe this conclusion is consistent with SB 95's bill analyses, which describes section 11125.7, subdivision (d) as prohibiting "a state agency from censoring *in any way* critical comments made by the public about the agency or its policies." (Assem. Com. on Judiciary, Hearing on Sen. Bill No. 95 (1997-1998 Reg. Sess.) as amended July 22, 1997, *emphases added*.) While prohibiting anonymous comment is not direct censorship of critical comments, such a prohibition may tend to discourage public criticism in a manner that effectively results in self-censorship.

Limits on Public Participation

While the public has a broad right to participate at an open meeting, that right is not unlimited. By its own terms, Bagley-Keene limits speakers to matters that are within the subject matter jurisdiction of the state body to which it pertains. (Gov. Code, § 11122.5, subd. (b)(1).) Further, Bagley-Keene provides state bodies with the ability to adopt reasonable regulations to limit the total amount of time allocated for public comment on particular issues and for each individual speaker. (Gov. Code, § 11125.7, subd. (b).) Federal and state law also permit reasonable limitations on the public's right to comment at limited public forums. (See *Madison Sch. Dist. v. Wisconsin Emp. Rel. Comm'n* (1976) 429 U.S. 167, 175.) Permissible restrictions also further the agency's "legitimate interest in conducting efficient, orderly meetings." (*Kindt v. Santa Monica Rent Control Bd.* (9th Cir. 1995) 67 F.3d 266, 271.) For example, "'While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, [the public agency] certainly may stop him if his speech becomes irrelevant or repetitious.'" (Ibid., *supra*, at p. 271.)

Thus, even though the Board Members allow anonymous public comment, they need not allow every public comment. An agency's presiding officer is afforded a "great deal of

discretion" in enforcing the orderly conduct of meetings. (*White v. City of Norfolk* (9th Cir. 1990) 900 F.2d 1421, 1426.)

Board of Equalization's Practice

BOE practice recognizes the principles and interpretation of law outlined above. The BMRM[12] cites section 11124 twice in concluding that anonymous comments may be made at Board meetings. First, on page 20, in the subsection dealing with hearings, it states:

> BOARD MEETING SIGN-IN
>
> Appellants, representatives, and witnesses scheduled for oral hearings are asked to complete and sign an appearance sheet. However, completing and signing an appearance sheet is voluntary. . . .

In the BMRM subsection addressing public comments at Board meetings, the manual states on page 22:

> PUBLIC COMMENT
> Opportunity is provided for the public to address the Board on any agenda item, including any item on the administrative agenda. . . . Board Proceedings Division staff will request that anyone planning to speak before the Board sign in and complete a public comment appearance sheet. *However, signing in and completing a public comment appearance sheet are voluntary and a speaker who declines to sign in or fill out an appearance sheet will not be precluded from speaking to the Board Members*.
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> (Emphasis added.)

The above analysis provides ample support, both externally and internally, for continuing to allow anonymous public comments at Board meetings.

Conclusion

Bagley-Keene was enacted to allow the public to attend and participate as fully as possible in a state body's decision-making. It explicitly allows speakers to comment on matters that are within the subject matter jurisdiction of the Board and specifically bars state bodies from prohibiting critical comments. Such public comments are subject to reasonable regulations that ensure the orderly conduct of meetings, however, requiring potential public commenters to identify themselves by name simply because of the potential possibility that a disruptive comment may be made is overbroad and does not serve a compelling state interest.

[12] Citations are to the 2020 version of the BMRM. However, the same or similar language has been in the BMRM since at least 2004.

Therefore, in our opinion and consistent with at least 20 years of past Board practice, Bagley-Keene allows speakers to make relevant public comments anonymously.

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cc: Ms. Catherine Taylor, Chief, Board Proceedings Division
Ms. Mary Tucker-Cichetti, Clerk

Approved:

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