Carole D'Elia, Executive Director, Little Hoover Commission
Workshop on Government Decision-Making and Open Meetings
Monday, June 22, 2015

The Little Hoover Commission has been studying the state's open meeting act laws, including the Bagley-Keene Open Meeting Act, and in particular, an amendment that was made to the Act in 2009, as well as ex parte rules of various state entities for the past year. Our review has been much broader than my fellow panelists in that we reached out to numerous state boards and commissions that must comply with Bagley-Keene and we looked at ex parte rules across various state entities and also had a hearing participant provide an update on trends at the federal level.

We held two public hearings and two public meetings on the topic. Our Commissioners have discussed potential recommendations after these events and at two recent public business meetings and will potentially adopt and formally release recommendations this Thursday.

Today I will be providing an overview of what we learned during our year-long process and potential recommendations. I'd like to begin my presentation by describing what sparked this study. A year ago in April the Commission held a public hearing on energy governance where it heard from the Public Utilities Commission, the Energy Commission and the California Independent System Operator. The Commission had a final panel that day that included representatives from the Natural Resources Defense Council, E3, the Greenlining Institute and UC Berkeley Professor Severin Borenstein. Commissioners had asked the panel about impediments to working with the state's energy organizations to which Ralph Cavanagh, representing the Natural Resources Defense Council, unexpectedly answered, "I yield to no one in my reverence to Bagley-Keene, but one amendment a few years ago, has done some real unintended damage and I encourage you to draw attention to it, and that is the constraint on the ability of individual commissioners to talk to each other as part of a normal course of business." Two of the other panelists quickly added their agreement.

The consensus that day was that the difficult process of complying with changes made by the amendment that was enacted in 2009 has essentially trumped quality policymaking. Adhering to the requirements for transparency has become more important than having all the information and discussions necessary to make complex, often multibillion-dollar decisions.

Before I expand on what we learned, I want to briefly describe the amendment to Bagley-Keene Act that Mr. Cavanagh referenced. A 2006 court ruling on a Brown Act case, the local open meeting act equivalent to the state Bagley-Keene Act, created confusion regarding serial meetings, where Commissioner A communicates with Commissioner B who then communicates with Commissioner C. There was and remains general consensus that serial meetings violate the open meeting acts.

To clear up the confusion, the Legislature amended the Brown Act in 2008 and similarly amended the Bagley-Keene Act in 2009. The panelists at the Commission's hearing singled out two words in the amendments: "to discuss."

Specifically, the new language stated that "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."

Again, the new key words in that sentence are "to discuss." Enacted with the best of civic intentions, these words are stifling the state's ability to govern effectively. According to one hearing witness, the confusion over the 2009 amendment has some public agencies "tied up in knots."

A surprising consequence of the additional language is less government transparency. Constraints on discussions have driven more decision-making down to the staff level and out public sight.

Many participants in the Commission's study process said staffers who are not accountable to the public through elections or the appointment process are gathering consensus and making decisions for leaders to ratify in public meetings.

More troubling, lobbyists who understand the constraints of the system, can talk to every member of a board or commission and learn like bees spreading pollen about various positions.

One hearing witness told us that in some cases everyone in the audience at a meeting knows what the outcome of a vote on a particular matter will be before it occurs – everyone that is except the officials voting on the matter.

Everyone we heard from in our public process supports transparency in government, but as a result of the 2009 amendment, there is less, not more transparency.

Prior to the 2009 amendment, decision-makers believed they could talk with one another informally about general policy issues related to their work, even as a majority provided they did not attempt to reach consensus on a future action or vote. After the changes, many believed, due to legal interpretations from their government attorneys, that discussing or trying to learn about general policies among themselves risked violating the act. Today members of state boards and commissions are left grappling with the complexities of governing a modern state while barely talking with one another outside public meetings. A representative from the Center for Public Interest Law told the Commission that the problem with the 2009 change is the possible overreach involved in its bright line formulation of "discuss" that applies not to just commissioners, but any "intermediaries" such as staff."

The amendments affected all state boards and commissions, from volunteer advisory bodies like the Little Hoover Commission to the full-time boards making multibillion dollar decisions.

At the Little Hoover Commission, members are volunteers and generally don't see or talk to each other in between meetings, and as a result, compliance is easier than for those boards, like the Public Utilities Commission, the State Water Board, and the Energy Commission who have full-time board members. We were told some of these board members often avoid going to the office – why go to an office where you can't talk to anybody – one board member told us.

During our study process, we heard from members and government lawyers representing the CPUC, the Energy Commission, the State Water Board, and the Coastal Commission – state government entities charged with making complex decisions that often affect millions of Californians. We also heard from representatives from Californians Aware, the First Amendment Coalition and the California Newspaper Publishers Association, the sponsor of the original Bagley-Keene Open Meeting Act and the 2009 amendment.

These folks ardently insist that the 2009 amendments have not created a problem. In testimony, a representative from the California Newspaper Publishers Association suggested that there isn't anything that needs to be fixed with the Bagley-Keene Act. He said he would "characterize interpretation of the existing law as being ultra conservative" by the attorneys and members who testified before the Commission.

As he addressed the Commission at the table in front of the dais during one of our public hearings, I could see these attorneys and the board members sitting in our audience shaking their heads. The government attorneys interpret the law the way that the do because they do not want to risk having the state get sued or have important decisions delayed or overturned by any real or perceived Bagley-Keene violation.

The Little Hoover Commission's body of work is guided by the principles of accountability, transparency and advancing the public interest. We believe wholeheartedly in open government and providing a seat at the table for the public.

In that spirit, the members of the Little Hoover Commission have discussed recommending that the Legislature adopt minor modifications – new language to clarify that officials appointed to state boards and commissions can hold informal internal discussions among two or more members about general policy issues related to their work so long as the discussions are not used to develop concurrence or consensus on an upcoming vote or decision.

As part of this study, the Commission also examined everyday use of private conversations in the executive branch between government officials and the interests they regulate. These so called "ex parte communications" became a significant concern during the course of our study as allegations that some officials at the California Public Utilities Commission held unreported and illegal conversations with the utilities they regulate. As a result, legislation has been proposed that would provide stricter control on ex parte communications at the CPUC.

The Commission considered whether private conversations between regulators and the regulated are appropriate. We looked at the array of rules employed by various agencies throughout state government and also reviewed trends at the federal level. The Commission concluded that these private conversations are, in most cases, a necessary and effective tool of information gathering and governing.

Though the down side is a public perception that influential interests run the table as a result of these conversations, the truth is that they also are a two-way street in which regulators are able to gather relevant information that can lead to smarter decisions. The Commission is not convinced that tightening the rules will change the culture that led to the alleged illegal conversations and potentially could make it more difficult for regulators to make informed decisions.

This is consistent with previous recommendations the Commission made during a study of the state water boards. In its 2009 report on the topic, the Commission recommended allowing communication between state and regional board members with regulated entities, as long as there was adequate disclosure. The Commission found that strict rules made the board members unapproachable and also undermined stakeholder confidence in the board's regulatory system. In short, the prohibitions in place at the time on contacts between the regulators and the regulated sowed lack of trust in the boards and lack of understanding of why they made their decisions.

Similarly, regarding ex part communications, the members of the Little Hoover Commission have discussed recommending that the state retain its current array of ex part policies that provide useful information to executive branch decision-makers and govern a variety of quasi-legislative and quasi-judicial proceedings and a variety of hybrid proceedings with consideration as to additional transparency and accountability.

As I stated earlier, the Little Hoover Commission will be discussing and potentially adopting recommendations at its business meeting this Thursday. If adopted, these recommendations will be posted on the Commission's website shortly after the meeting.

Thank you for including me today. The Commission stands ready to assist the Governor's Office on this issue and I'm happy to answer any questions.