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OPINION	:	No. 84-1202
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THE CALIFORNIA TRANSPORTATION COMMISSION has requested an opinion on the following question:

May the California Transportation Commission conduct interviews and reach its decision regarding the choice of an executive director in closed session?

CONCLUSION

The California Transportation Commission may not conduct interviews and reach its decision regarding the choice of an executive director in closed session. Potential candidates, however, may be "screened" through interview or otherwise in closed session by an advisory committee of or to the commission consisting of less than three individuals.

ANALYSIS

The Bagley-Keene Open Meeting Act is contained in sections 11120 *et seq.* of the Government Code.¹ This law was originally enacted in 1967. (Stats. 1967, ch. 1656, § 122, p. 4026.) It provides generally that all meetings of "state bodies" as defined therein, shall be duly noticed (§ 11125) and shall be open and public (§ 11123). It was patterned after the Ralph M. Brown Act (§ 54950 *et seq.*) which requires local agencies generally to conduct their business in open meetings.²

Whereas the Ralph M. Brown Act contains a limited number of statutory exceptions to its open meeting requirements (see §§ 54956.7, 54956.8, 54956.9, 54957, 54957.6), section 11126 of the Bagley-Keene Open Meeting Act currently contains 25 subdivisions providing exceptions and permitting "closed sessions" of state bodies. The number of exceptions reflects the myriad functions and problems of the state *vis a vis* local agencies such as cities, counties and school districts.

Our focus herein is on subdivision (a) of section 11126, which is the counterpart of section 54957 of the Ralph M. Brown Act--the "personnel exception." Section 11126, subdivision (a), provides as pertinent to our inquiry:

"11126. (a) Nothing contained in this article shall be construed to prevent a state body from holding closed sessions during a regular or special meeting to consider the appointment, employment, or dismissal of a public *employee* or to hear complaints or charges brought against that employee by another person or employee unless the employee requests a public hearing. .

..

"For the purposes of this section, 'employee' shall not include any person who is elected to, or appointed to a public office by, any state body. However, officers of the California State University who receive compensation for their services, other than per diem and ordinary and necessary expenses, shall, when engaged in that capacity, be considered employees." (Emphasis added.)

¹ All section references are to the Government Code unless otherwise indicated.

² See volume 12, number 10 of the Reports of the Assembly Interim Committee On Governmental Organization: "The Right To Know" (1965) pp. 78-82:

"The committee recommends the enactment of a comprehensive open meeting law applicable to all state agencies that is similar to the Ralph M. Brown Act for local legislative bodies."

Prior to their amendment in 1975 (Stats. 1975, ch. 959) both sections 54957 and 11126 permitted closed sessions "to consider the appointment, employment or dismissal of a public *officer or employee* or to hear complaints or charges against such *officer or employee*." (Emphasis added.)

Accordingly, in 1975 the authority to meet in private, executive or closed session was further limited. As was stated in the Legislative Counsel's Digest of the bill, Senate Bill 1, which became chapter 959 of the Statutes of 1975:

"(4) Existing law permits state and local agencies to hold executive sessions during a regular or special meeting to consider the appointment, employment or dismissal of a public officer or employee or to hear charges against such officer or employee by another officer or employee. *This bill would restrict this exemption to employees, as defined, of state and local agencies thus making the above matters subject to open and public meetings if public officers are involved.*" (Emphasis added.)

Thus, after 1975 both state and local agencies could and can hold executive or closed sessions on "personnel matters" only with respect to employees, *as defined*. If the matter involves the appointment, employment or dismissal of a public *officer* as opposed to a mere employee, an open session is required.

In short, if an individual is a mere employee, matters with reference to him may be discussed in closed session under both sections 54957 and 11126. However, if an individual is a public *officer*, the law mandates sessions which are open and public *unless* the law nonetheless specifically includes him or her within the definition of an employee.³

With this background, we proceed to the question presented, that is, whether the California Transportation Commission may conduct interviews and reach its decision regarding the choice of an executive director in closed session. Stated otherwise in the terms of section 11126, subdivision (a), may the commission "consider the appointment of" its executive director in closed session?

³ With respect to section 54957 of the Ralph M. Brown Act, this office analyzed chapter 959 in great detail in 59 Ops. Cal. Atty. Gen. 266 (1976). A reading of that opinion will point out that under section 54957 the term "employee" is defined to include a number of individuals who are in fact public *officers*, *e.g.*, a city manager, city attorney, county counsel, or department heads.

A reading of that opinion will also disclose that *unless* an officer is excepted by being included in the term employee, he or she is without question *an officer* for all purposes of the law requiring open and public sessions.

There is no doubt but that the California Transportation Commission is a "state body" which is subject to the Bagley-Keene Open Meeting Act. (See 11121.) Likewise, any advisory committee or advisory subcommittee of the commission created by formal action "consist[ing] of three or more persons" would also be a "state body" subject to the open meeting requirements of the Act. (See 11121.8.)⁴ Accordingly, the determinative issue is whether the commission's executive officer is a public *officer* instead of a mere employee.⁵

This question is not one of first impression with this office. In an unpublished opinion of this office issued on July 8, 1977 (I.L. 77-104) this office was presented with the question whether the California Postsecondary Education Commission could go into executive session to consider the appointment or dismissal of its director, clearly the counterpart of the executive director of the California Transportation Commission.

Thus in that unpublished opinion we noted that the director therein was appointed by the commission pursuant to statute (Education Code, section 66901); that the director appointed the commission's staff (*ibid.*) and that the director's qualifications and responsibilities had been specified in detail by the Commission.⁶

⁴ Such groups could act as screening committees as to potential candidates for the full commission.

⁵ At this juncture, we point out that nothing in section 11126 specifically exempts the commission from holding an open session to consider the appointment or dismissal of its executive officer. Compare subdivisions (j), (k) and (x) which specifically provide that nothing in the act shall be construed to prevent the appointment or dismissal in closed session of the Director of the California Postsecondary Education Commission or the executive officers of the Franchise Tax Board and the State Board of Equalization.

This matter is discussed more fully, *post*.

⁶ The responsibilities and qualifications were:

"The Director is the chief administrative officer of the Commission. Responsibilities of the position include the following: providing leadership and advice to the Commission, to the statutory advisory committee, composed of the chief executive officers of the postsecondary education segments or their designees, and to other committees, including the student advisory committee; developing and presenting policy recommendations and programs of action to the Commission; presenting Commission findings and recommendations to the Legislature, Governor, other public officials and educational institutions; appointing all members of the authorized staff, assigning their duties and supervising the Commission's work program, including budgetary proposals; directing the staff in the conduct of all studies, investigations, programs and reports for which the Commission is responsible; serving on advisory

We then reasoned in our 1977 opinion:

"Thus, the issue to be resolved is whether the director of the California Postsecondary Education Commission is an officer or an employee of the Commission. If he is an officer, the subject matter of his appointment or dismissal must be discussed at a public meeting.

"The difference between an office and an employment has been the subject of considerable controversy over the years. See, for example, cases and Attorney General's opinions listed in 57 Ops.Cal.Atty.Gen. 303 (1974). Resolution of the issue usually depends on the facts involved in a particular case. [7]

"The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him as agent, the performance of which is an exercise of a part of the governmental functions of the particular unit for which he, as agent, is acting. The duties must be important and usually require the exercise of judgment and discretion. *Coulter v. Poole* 187 Cal. 181, 187 (1921); *Spreckels v. Graham*, 194 Cal. 516, 529-530 (1924).

"In *People ex rel. Chapman v. Rapsey*, 16 Cal.2d 636 (1940), the court held that in order to make a determination that an individual is a public officer it is necessary to find that he exercises some part of the sovereignty of the state, holds an office created by the Constitution or some statute, and has a

committees to various postsecondary education services; and personally representing the Commission in seeking to implement its findings and recommendations.

"Qualifications desired of the Director: understanding of the process of planning and coordination of a multi-segment system of postsecondary education, including differentiation of functions among the various sectors; skill in the formulation of statewide plans, and in resolving issues by consultation and negotiation; leadership ability, including the ability to perceive issues and problems confronting postsecondary education, to make decisions and recommendations on a timely basis, and to work cooperatively with the segments of postsecondary education, the Legislature, other governmental agencies, educational organizations and members of the Commission; demonstrated ability to communicate effectively, both verbally and in writing; demonstrated ability to act as a chief administrative officer, including recruitment and development of competent staff; and ability to function effectively in a governmental environment, including the budgetary process. Experience in the field of education is desirable and advanced academic training is preferable."

⁷ For more recent examples of the difficulty in resolving the officer-employee question, see 65 Ops.Cal.Atty.Gen. 316 (1982); 63 Ops.Cal.Atty.Gen. 512 (1980).

position which is continuing rather than occasional or temporary. There, the court said, at pages 639-640:

"Definitions and application of this phrase depend, not upon how the particular office in question may be designated nor upon what a statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law--the tenure of which is not transient, occasional, or incidental--by which for a given period an individual is invested with power to perform a public function for public benefit.

"The individual who occupies such an office is a public officer. He is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give to acts performed by the officer the authority and power of a public act or law. An "incumbent" is one who is in the present possession of an office. The terms "officer" and "office" are paronymous, and in their original and proper sense are to be regarded as strictly correlative. They may be used in a sense other than the proper one, but the presumption is, unless the contrary appears, that the proper sense was intended.

"Of the various characteristics attached to public office by definition, some are regarded as indispensable, and others, while not in themselves conclusive, are yet said to indicate more or less strongly the legislative intent to create or not to create an office. One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.

"Application of these tests to the director of the California Postsecondary Education Commission necessitates the conclusion that he is an officer. He actually runs the Commission on a day to day basis. The Commission considers him its chief administrative officer. He suggests and carries out Commission policies. He has authority to hire the staff, coordinate all Commission activities, and acts for the Commission in its relationships with other state, local, and federal agencies. He is the one who is actually exercising a part of the sovereignty of the state on behalf of the Commission. His position is created by statute, and while his tenure is at the

pleasure of the Commission, the position itself is permanent and not transitory."

We believe the above reasoning is equally applicable to the executive director of the California Transportation Commission. The position is established by statute and he or she is appointed by the commission.⁸ The executive director administers the day to day affairs of the commission pursuant to its direction and appoints necessary staff.⁹ Although an "at pleasure" appointment, the position is permanent and not transitory. That the commission considers the executive director to be its chief administrative officer is demonstrated by the duties and responsibilities statement prepared for the commission's prior executive director, whose leaving precipitated the question presented herein.¹⁰

⁸ "The commission shall appoint an executive director for the commission who shall serve at the pleasure of the commission.

"The executive director shall receive the salary established by the Director of Finance for exempt officials." (§ 14510.)

⁹ "The executive director shall administer the affairs

of the commission as directed by the commission and shall direct the staff of the commission." (§ 14511.)

"The executive director may appoint, with the approval of the commission, such staff as necessary to carry out the provisions of this part. . . ." (§ 14512.)

¹⁰ That statement provided:

"To serve at the pleasure of the Commission and direct the affairs of the Commission and its staff as directed by the Commission. The Executive Director may appoint, with Commission approval, such staff as are necessary to carry out the functions of the Commission. The position of Executive Director shall be exempt.

"To assist and advise the Chairman of the California Transportation Commission and individual members thereof regarding the formulation of transportation policies and programs to include, but not limited to the annual and five-year estimate of State funds available for transportation purposes, adoption of the State Biennial Report and the annual State Transportation Improvement Program (STIP).

"To act as a liaison for the Commission to the Secretary of Business, Transportation and Housing Agency and to the Legislature. In this capacity the Executive Director and his/her staff will work closely with the Secretary of the Business, Transportation and Housing Agency and the Legislature and their respective staffs to interpret the actions taken by the Commission on all transportation modes and to report to the Commission on areas of concern to the Secretary and the Legislature.

"To attend public hearings and other meetings of the California Transportation Commission and assist the Chairman and the members of the Commission in the discharge of their duties.

"To supervise the personnel and operations of the Commission office.

Accordingly, based upon the same basic reasoning this office used to conclude that the director of the California Postsecondary Education Commission was a public officer and not a mere employee, we conclude that the executive director of the California Transportation Commission is also a public officer as opposed to a mere employee. Accordingly, it follows that the California Transportation Commission itself may not conduct interviews and reach its decision regarding the choice of an executive director in closed session.

However, since section 11121.8 defines "state body" for purposes of the Bagley-Keene Open Meeting Act to include those advisory boards, commissions and committees which consist of three or more persons, the commission, which consists of eleven members, could appoint an advisory committee of or to the commission consisting of less than three individuals to screen potential candidates. That committee would not have to meet in a duly noticed open meeting, but could conduct its business in private.¹¹

"To represent the Commission at meetings with Federal, State, regional and local governmental bodies or officials, civic or public organizations, and individuals.

"To organize Commission and committee meetings including scheduling, facilities, distribution of agenda and backup material, adequate public notice, and staff assistance.

"To work closely with the Department of Transportation on transportation matters especially on work performed by the Department at the request of the Commission and with the coordination of the legislative policies of the Commission and those of the Department.

"To establish and maintain a public information program to communicate Commission transportation policies and other information to interested groups and individuals.

"To review documents and reports and other matters scheduled to come before the Commission and when requested by a Commissioner make comments thereon.

"To supervise the handling of all correspondence for the Commission including follow-up with parties involved in Commission actions.

"To establish and maintain contacts with the public particularly those persons and firms in the transportation field, trade associates, and labor organizations regarding matters of mutual concern in the transportation industry.

"To perform such other duties and functions as may be requested by the Chairman or members of the California Transportation Commission."

¹¹ Here we have a significant difference between the Ralph M. Brown Act and the Bagley-Keene Open Meeting Act.

The Ralph M. Brown Act, in including advisory boards, commissions, and committees formed by formal action in *its* open meeting requirements, specifically exempts subcommittees of the parent body consisting of less than a quorum. Thus, less than a quorum of a local agency may act

This office reached the same result with respect to *state* bodies in our 1977 opinion discussed above on the general "less than a quorum" exception we implied for the open meeting laws. That conclusion, however, was reached before the addition of section 11121.8 in 1980.

In concluding that the California Transportation Commission must meet in open session with respect to appointing its executive director, we note several suggestions made for reaching a contrary result.

Initially, it has been suggested that insofar as section 11126, subdivisions (j), (k) and (x) exclude from the law's open meeting requirements the appointment or removal of the directors and executive secretaries of the California Postsecondary Education Commission, the Franchise Tax Board and the State Board of Equalization, these are meant as legislative *examples* of officials who are to be considered to be *employees* within the meaning of section 11126.¹² Therefore, according to the argument, all executive directors should be considered employees.

Such argument might have some vitality if subdivisions (j), (k) and (x) had been enacted in 1975 simultaneously with Senate Bill 1 which deleted "officer" from sections 54957 and 11126. However, subdivision (j) was enacted after our 1977 unpublished opinion as an urgency measure, and clearly in response thereto. It thus, in our opinion, merely created a limited *exception* to the main provisions of section 11126 for the California Postsecondary Education Commission. Had the Legislature considered our opinion to have been wrong, it (1) could have stated in the bill that it was declaratory of existing law, or (2) it could have provided a blanket exception for all executive directors,

as a "screening committee," and need not follow the open meeting requirements of that act. (See 54952.3, par. 4; see also, *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875 so holding.)

This office reached the same result with respect to *state* bodies in our 1977 opinion discussed above on the general "less than a quorum" exception we implied for the open meeting laws. That conclusion, however, was reached before the addition of section 11121.8 in 1980.

¹² "(j) Nothing in this article shall be construed to prevent the California Postsecondary Education Commission from holding closed sessions to consider matters pertaining to the appointment or termination of the Director of the California Postsecondary Education Commission."

"(k) Nothing in this article shall be construed to prevent the Franchise Tax Board from holding closed sessions for . . . considering matters pertaining to the appointment or removal of the executive officer of the Franchise Tax Board."

"(x) Nothing in this article shall be construed to prevent the State Board of Equalization from holding closed sessions when considering matters pertaining to the appointment or removal of the executive secretary of the State Board of Equalization."

executive secretaries or similar officials. It did neither.¹³ "Courts may not read into a statute an exception not incorporated therein by the Legislature. . . ." (*Pacific Motor Transportation Co. v. State Board of Equalization* (1972) 28 Cal.App.3d 230, 235.)

As to subdivision (k), that provision was added in 1980. (See Stats. 1980, chs. 1197 and 1284.) The Legislative Counsel's Digest is compelling that subdivision (k) was to create an *exception* to the open meeting requirements for the Franchise Tax Board. Thus, that digest to Senate Bill 1383, which became chapter 1197, Statutes of 1980 stated in part:

"(3) Existing law authorizes state agencies, including the Franchise Tax Board, to hold executive sessions for specified reasons as exceptions to the requirements that state agencies and legislative bodies of local agencies hold open and public meetings.

"This bill would *allow* the Franchise Tax Board to hold executive sessions for the purpose of considering matters pertaining to the appointment or removal of the board's executive officer. (Emphasis added.)

The use of the word "allow" signifies a *change* in the law, and the creation of a limited exception for the Franchise Tax Board. Similar use of the word "allow" is also found with reference to the addition of subdivision (x) in 1981. (See Senate Bill 334, which became chapter 180 as to the State Board of Equalization, Statutes of 1981, but which was subsumed by the more comprehensive later enacted chapter 968, Statutes of 1981.)

A second suggestion is that the Legislature could not have intended that sensitive matters, such as must be explored in the appointment of an executive director, should be discussed in sessions which are open and public. In response to this suggestion we point out that by deleting "officers" from the purview of the "personnel exception," both in sections 54957 and 11126 in 1975, the Legislature appears to have intended just that. Clearly, the appointment of a public *officer* is more sensitive a task than the appointment of a mere employee. Stated otherwise, the Legislature appears to have intended that the more important the position, *the more reason there is for public disclosure of the appointment or dismissal process*.

As stated in an analogous context, where the issue was whether the qualifications of independent contractors may be discussed in private due to the sensitive nature of the discussion (*Rowan v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 235):

¹³ See Assembly Bill 1860, 1977 Legislature, which became chapter 730, Statutes of 1977.

"Respondents contend that the term 'employee' as used in section 54957 should be given a broader than ordinary interpretation in order to accommodate the policies underlying the exception--which, it suggests, are to avoid 'undue publicity,' to protect the individual's reputation, and to establish an environment in which subtle and sensitive matters can be explored in an open and candid manner. These policies, it argues, are as applicable to contractors of the sort involved here as they are to employees.

"The Legislature may well have considered, however, that whatever privacy interests might be implicated in the engagement of an independent contractor by a public agency to perform special services are more than counterbalanced by the public's interest in full disclosure. . . ."

Likewise, in removing "officers" from the scope of sections 54957 and 11126, the "Legislature may well have considered . . . that whatever privacy interests might be implicated . . . are more than counterbalanced by the public's interest in full disclosure."

We believe that the following language from the *Rowan* case, *supra*, is the proper response to the suggestion that matters regarding the appointment of an executive director are too sensitive to be done in open session:

". . . We confront what is, in effect, a plea . . . that we amend the . . . [Bagley-Keene Open Meeting Act] by [quasi] judicial fiat, in order to effectuate our own judgment as to what we consider would be 'good' policy for the state's agencies. . . ." (121 Cal.App.3d at p. 237.)

This we cannot do.¹⁴

¹⁴ A second question was presented in the request for our opinion. That question was whether, after it has reached its decision regarding the choice of an executive director, the commission may publicly report that decision at the same meeting or must wait until a subsequent meeting to make such public report. (See § 11125.2.)

This question was rendered moot by our answer to the first question.