TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 85-103
of	:	APRIL 2, 1985
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THE CALIFORNIA COMMISSION ON THE STATUS OF WOMEN has requested an opinion on the following questions:

1. May the California Commission on the Status of Women elect its officers by use of a secret ballot without violating the provisions of the Bagley-Keene Open Meeting Act, Government Code section 11120 et seq.?

2. May the California Commission on the Status of Women elect its officers through the use of a ballot by mail without violating the provisions of that act?

3. May legislative members of the California Commission on the Status of Women send proxies to vote in their place when they cannot attend a meeting?

CONCLUSIONS

1. The California Commission on the Status of Women may not elect its officers by use of a secret ballot since such a procedure would violate the provisions of the Bagley-Keene Open Meeting Act, Government Code section 11120 et seq.

2. The California Commission on the Status of Women may not elect its officers through the use of a ballot by mail without violating the provisions of that act.

3. The legislative members of the California Commission on the Status of Women may not send proxies to vote in their place when they cannot attend a meeting.

ANALYSIS

The California Commission on the Status of Women (hereinafter, Commission) is established pursuant to section 8240 et seq. of the Government Code.[1] It consists of seventeen members, including three members of the California State Senate, three members of the California Assembly, the Superintendent of Public Instruction, the Chief of the Division of Industrial Welfare in the Department of Industrial Relations, and nine public members. (§ 8241.)

The Commission essentially studies the social, economic and legal status of women in California with a view towards "developing recommendations which will enable women to make the maximum contribution to society" (section 8240) and reporting its "activities, findings, and recommendations to the Legislature" (section 8245).

As a "multimember body of the state" the Commission is a "state body" which must comply with the provisions of the Bagley-Keene Open Meeting Act, section 11120 et seq. (See § 11121.) That act was originally enacted in 1967 (Stats. 1967, ch. 1656, § 122, p. 4026) based upon a legislative interim committee study recommendation. Such recommendation was that an act similar to the Ralph M. Brown Act (section 54950 et seq.), which is applicable to local agencies, be enacted to apply to state agencies.[2]

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[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."

Accordingly, both the Ralph M. Brown Act and the Bagley-Keene Open Meeting Act require that governmental bodies falling within their requirements conduct their meetings open to the public unless specifically excepted by the act or by some other independent confidentiality provision which would permit a closed session. (See *Sacramento Newspaper Guild* v. *Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 57; 62 Ops.Cal.Atty.Gen. 150 (1979).) Thus, section 54953 of the Ralph M. Brown Act provides as to local agencies:

> "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

And similarly, section 11123 of the Bagley-Keene Open Meeting Act provides in virtually identical language:

> "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 except as otherwise provided in this article."[3]

Furthermore, the policy declarations of the Ralph M. Brown Act (see § 54950) and the Bagley-Keene Open Meeting Act (see § 11120) are couched in similar terms to the end, as stated in both statutes, that [t]he people insist on remaining informed so that they may retain control over the instruments they have created. Accordingly, the policy declarations of both statutes state that the "intent of the law" is that "actions [of state and local agencies] be taken openly and that their deliberations be conducted openly."

Thus, although the *exceptions* to the open meeting requirements of the acts are not identical, since the functions of state and local governments vary considerably, the basic thrust of each act is the same. Consequently, the acts are clearly "statutes in *pari materia*," that is, statutes which deal with the same subject matter. As stated by the California Supreme Court in a different context:

> ". . . It is an established rule of statutory construction that similar statutes should be construed in light of one another (*City of National City* v. *Fritz* (1949) 33 Cal.2d 635, 637 [204 P.2d 7]; *Frediani* v. *Ota* (1963) 215

[3] Additionally, section 8243 of the Commission's act specifically states:

""All meetings of the commission shall be open and public and all persons shall be permitted to attend any meetings of the commission."

> Cal.App.2d 127, 133 [29 Cal.Rptr. 912]), and that when statutes are *in pari materia* similar phrases appearing in each should be given like meanings. (*In re Phyle* (1947) 30 Cal.2d 838, 845 [186 P.2d 134]; *In re Marriage of Pinto* (1972) 28 Cal.App.3d 86, 89 [104 Cal.Rptr. 371]; 59 Ops.Cal.Atty.Gen. 23, 25 (1976).) The great-bodily injury provisions employ the identical language and have the 'same purpose or object' of deterring the infliction of serious injury upon the victims of crime; they are obviously *in pari materia*. (See 2A Sutherland, Statutory Construction (Sands rev.ed. 1973) Interpretation by Reference to Related Statutes, 5103, p. 298.). . . ." (*People* v. *Caudillo* (1978) 21 Cal.3d 562, 585.)

Or as stated by the leading authority on statutory construction:

> "Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense. . . ." (2A Sutherland, Statutory Construction (Sands 4th Ed. 1984) § 51.02, p. 454.)

(See also, e.g., *People* v. *Hill* (1980) 103 Cal.App.3d 525, 533, fn. 4.)

Thus, the attributes of an "open meeting" would generally be the same whether we are discussing the Ralph M. Brown Act or the Bagley-Keene Open Meeting Act.[4]

Finally, although neither act directly so states, we believe that implicit in both acts is the legislative intent and requirement that bodies falling within their scope shall act *only at meetings*.[5] We believe this is clear from the similar policy declarations and open meeting requirements of both acts, already discussed above, and from the similar definition

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[4] Indeed, this has been our consistent approach, that is, to construe the acts similarly unless there were clear differences between the acts dictating a different result. (See, e.g., 67 Ops.Cal.Atty.Gen. 85, 88-92 (1984), action taken in violation of either act does not invalidate the action; Cal.Atty.Gen.Unpub.Opns. I.L. 79-17, "meeting" requires more than one person; I.L. 75-255, Ralph M. Brown Act opinions applied to FPPC regarding "scope of meeting" within purview of state act; I.L. 77-104 and I.L. 74-162, "less-than-quorum" exception of Ralph M. Brown Act applied to meetings of state bodies; I.L. 72-185, CCCJ, a state agency, as well as a local agency, could meet in private to discuss confidential records. (Compare Opinion No. 84-1202 issued February 14, 1985, 68 Ops.Cal.Atty.Gen. ___ (1985), difference in acts for "screening committees" for selection of officers.)

[5] This is also the common law rule with respect to boards and commissions when acting upon matters involving the exercise of judgment and discretion. (See 4 McQuillan, Municipal Corporations (3d Ed. 1979) § 13.30; Ops.Cal.Atty.Gen. No. N.S. 4196 (1942).)

of "action taken" to be found in each act. Thus, section 54952.6 provides in the Ralph M. Brown Act:

> "As used in this chapter, 'action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body *when sitting as a body or entity*, *upon a motion*, *proposal*, *resolution*, *order or ordinance*. " (Emphasis added.)

And section 11122 similarly provides in the Bagley-Keene Open Meeting-Act:

> "As used in this article 'action taken' means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body *when sitting as a body or entity upon a motion*, *proposal*, *resolution*, *order or similar action*." (Emphasis added.)

With this background we proceed to the questions presented for resolution herein.

1. <u>The Election of Commission Officers By Secret Ballot</u>

The first question is whether the Commission may elect its officers by secret ballot without violating the Bagley-Keene Open Meeting Act. We conclude that the Commission may not do so without violating the act.

Initially, we note that the "personnel exception" to the open meeting requirements of the act would not permit a closed session of the Commission to elect its officers. (See §§ 54957 and 11126, pars. 1 and 2; 61 Ops.Cal.Atty.Gen. 10 (1978).) Accordingly, the issue presented is whether use of the secret ballots *while in open session* would violate the open meeting requirements of the act.

In 59 Ops.Cal.Atty.Gen. 619 (1976) this office considered the question whether, under the open meeting requirements of the Ralph M. Brown Act, a city council could make appointments to certain subsidiary bodies by means of a secret ballot *during its public meeting*. The initial assumption was that such personnel were "officers," and thus would not fall within the "personnel exception." We concluded the city council could not do so. We reasoned:

> ". . . The Brown Act is intolerant of secrecy at any stage of proceedings which are required to be public. Support for such a construction

> of the Act exists in the language of the Act's preamble, section 54950, which declares the Brown Act's intent that the 'actions [of legislative bodies] be taken openly and that their deliberations be conducted openly.' 'Openly' is defined by Webster's New International Dictionary (3rd ed. 1961) to mean 'in an open manner: freely and without concealment.' 'Action taken' is defined by section 54952.6 of the Act to include, *inter alia*, an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.' In light of the preceding definitions, action taken by secret ballot can hardly be regarded as action 'openly taken.'" (*Id.*, at pp. 621-622.)

Since sections 54953 and 11123 are statutes in *pari materia*, section 11123 should in our opinion receive a similar construction. We are aware of nothing in Bagley-Keene which would dictate a different construction.

Accordingly, we conclude that the California Commission on the Status of Women may not elect its officers through the use of a secret ballot without violating the open meeting requirements of the Bagley-Keene Open Meeting Act.[6]

2. The Use of Mail Ballots To Elect Commission Officers

The second question presented for resolution is whether the Commission may elect its officers by the use of mail ballots. We conclude that it may not.

Initially we note that neither the law under which the Commission is established, nor the Bagley-Keene Open Meeting Act, nor any other law of which we are aware authorizes the use of mail ballots to select Commission officers. Furthermore, in our view, the use of mail ballots would violate the open meeting requirements of the Bagley-Keene Open Meeting Act. As discussed at the outset, the intent of that act as well

[6] Interestingly, although in 59 Ops.Cal.Atty.Gen. 619 (1976), *supra*, we distinguished a New Mexico case, *Board of Education* v. *State Board of Education* (N.M. 1968) 443 P.2d 502, which permitted secret ballots, our research into more current case law on open meeting laws discloses a number of states where secret ballots are forbidden either specifically by statute or by court decision. (See *Esperance* v. *Chesterfield Tp of Macomb Cty.* (Mich.App. 1979) 280 N.W.2d 559, 562-563, secret ballot implicitly prohibited; *State* ex rel. *Murray* v. *Palmgren* (Kan. 1982) 646 P.2d 1091, 1097-1098, specific statute; *Brown* v. East *Baton Rouge Parish School Bd.* (La.App. 1981) 405 So.2d 1148, 1153, vote taken in closed session, which had effect of a written, secret ballot, was illegal; *Boffo* v. *Boone Cty. Bd. of Zoning Affects* (Ind.App. 1981) 421 N.E.2d 1119, 1130, specific statute; *News & Observer Pub.* v. *Interim Bd. of Ed.* (N.C.App. 1976) 223 S.E.2d 580, 588, voting by secret ballot not action performed "openly" as required by open meeting statute.)

as the Ralph M. Brown Act is to *require* governmental bodies to deliberate and act in open session with the public being afforded the opportunity to observe. Implicit in such requirements is that such bodies act *at meetings*. A mail ballot would run counter to all such requirements.

Although there are no cases in California on this issue, we were presented with the question of the propriety of mail ballots in an unpublished opinion of this office in 1971. In I.L. 71-181 we were asked whether a district forest practice committee could vote on matters before it, and particularly approve of alternate plans, by mail approve ballot. Relying heavily upon the then recently enacted state open meeting laws, now the Bagley-Keene Open Meeting Act, we stated:

> "In our opinion, the district forest practice committees may not so vote on matters before it by mail ballot.
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> "The usual rule is that multi member government agencies must exercise their powers collectively and in assembly at legally noticed meetings. Ops.Cal.Atty.Gen. N.S. 4196 (April 1, 1942). This principle has been further expanded in the open meeting law of 1967 (Government Code section 11120, et seq.) in which it is stated that the public policy of this State is that proceedings of public agencies 'be conducted openly so that the public may remain informed' and that actions taken by State agencies, that is, a collective decision by its members including actual vote on matters before it shall be taken at meetings open to the public. Government Code sections 11120, 11121, 11122, and 11123.
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> "While Government Code section 11526 permits vote by mail ballot with respect to certain matters falling within the Administrative Procedure Act (7 Ops.Cal.Atty.Gen. 274 (1946)), the approval of alternate plans and the matters normally coming before the forest practice committees do not fall within the exception of this section.
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> "In conclusion therefor it is concluded that a district forest practice committee may not vote on approval of alternate plans nor of other matters normally coming before it by mail ballot. Whether specific matters make Government Code section 11526 applicable would depend on the facts and circumstances of the matter."

We reaffirm our approach taken in the above unpublished opinion with respect to the state open meeting laws. We therefor conclude that the Commission may not elect its officers through the use of mail ballots.

3. Legislative Members of the Commission Voting By Proxy

The third question presented is whether legislative members of the Commission may send proxies to vote in their place when they cannot attend a meeting. We conclude that they may not.

We need not discuss this matter in great detail since we have already analyzed this precise question with respect to legislative members of the California Commission on Criminal Justice. (62 Ops.Cal.Atty.Gen. 479, 482-490.) We concluded that there was no statutory authority for legislators to act either through "deputies" or other representatives with respect to service on state boards and commissions. We analyzed all the general law with respect thereto.[7] Finding no statutory authority we applied the general principle that "a public body or public officer may not delegate discretionary duties or functions." (*Id.*, at p. 482.) The reasoning in that opinion is equally applicable to the legislative members of the California Commission on the Status of Women.[8]

Accordingly, we conclude that the legislative members of the Commission may not send proxies to vote in their stead when they are unable to attend a Commission meeting.

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[7] The statutes we examined in great detail are found in sections 7 through 7.9 which set forth when an officer may act through a deputy or other representative when he is also a member of a state board or commission. There have been no changes in these provisions since our 1979 opinion was issued to change our conclusion with respect to legislative members.

[8] We also note that since 1901 the opinions of this office have uniformly concluded that when an officer is given duties which involve judgment or discretion, *absent specific statutory authorization*, such duties may not be delegated. (See 54 Ops.Cal.Atty.Gen. 154, 156 (1971); 56 Ops.Cal.Atty.Gen. 399 (1973); Ops.Cal.Atty.Gen. N.S. 1521 (1939); Ops.Cal.Atty.Gen. N.S. 279 (1937); Ops.Cal.Atty.Gen No. 576 (1901); Compare 63 Ops.Cal.Atty.Gen. 240 (1980); 5 Ops.Cal.Atty.Gen. 40 (1945).)