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Action

Attorney General's Opinion Regarding the Participation of Ex-Officios in Closed Session

Executive Summary: Staff will present the Attorney General's opinion regarding the participation of Ex-Officios in the Commission's Closed Session proceedings.

Recommended Action: To accept the opinion as written and the policy manual be updated to reflect the opinion.

Presenter: Mary Armstrong, General Counsel

Strategic Plan Goal: 2

Continue to refine the coordination between Commissioners and staff in carrying out the Commission's duties, roles and responsibilities.

- ◆ Continuously improve the development, distribution and dissemination of agenda and information to the Commission.

Attorney General's Opinion Regarding the Participation of Ex-Officios in Closed Session

Introduction

On January 23, 2007, the Office of the Attorney General issued the attached opinion regarding the participation of Ex-Officio Commissioners in the Commission's Closed Session proceedings.

Background

At its meeting of July 31 through August 1, 2006, the Commission took action to request an opinion from the Attorney General regarding the following question:

Does the Commission on Teacher Credentialing have the discretion to exclude Ex-Officio representatives appointed pursuant to section 44212 of the Education Code from Closed Sessions held under the following circumstances:

1. pursuant to sections 11126 of the Government Code and section 44245 of the Education Code pertaining to adverse actions and reinstatements of credentials;
2. pursuant to section 11126(e) of the Government Code pertaining to pending and potential litigation and subject to the attorney client privilege; and
3. pursuant to section 11126(g)(2) of the Government Code and section 44220(c) of the Education Code pertaining to the appointment and termination of the Executive Director?

Recommended Action

Staff recommends that the Attorney General's opinion be accepted as written and the Policy Manual be updated to reflect the opinion.



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January 16, 2007



Mary C. Armstrong
General Counsel
Commission on Teacher Credentialing
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RE: Informal Advice Regarding Exclusion of Ex Officio Representatives
from Commission Closed Sessions

Dear Ms. Armstrong:

You have asked for this office's informal advice regarding the following question:

Does the Commission on Teacher Credentialing (commission) have the discretion to exclude ex officio representatives appointed pursuant to Education Code¹ section 44212 from closed sessions held under any of the following circumstances:

- (1) Pursuant to sections 111256 of the Government Code and section 44245 of the Education Code pertaining to adverse actions and reinstatements of credentials;
- (2) Pursuant to section 11126(e) of the Government Code pertaining to pending and potential litigation and subject to the attorney client privilege; and
- (3) Pursuant to section 11126(g) (2) of the Government Code and section 44220(c) of the Education code pertaining to the appointment and termination of the Executive Director?

¹All further section references are to the Education Code unless otherwise noted.

Summary of Conclusions

Ex officio representatives are commission members who, with certain exceptions, have no voting privileges. Absent a conflict of interest as discussed below, they can participate in closed sessions held pursuant to the sections described above.

Analysis

Closed sessions may involve only the membership of the body and required staff. Persons without an official role should not be present. (See 83 Ops. Cal. Atty. Gen. 221, 222 (2000).) Accordingly, a threshold question is whether representatives appointed pursuant to section 44212 are commission members. It has been suggested they are not commission members because the Legislature did not include them in section 44210, which establishes the commission and identifies its voting members.² That suggestion is rendered untenable however,

²Section 44210 provides in part:

(a) There is hereby established in the state government the Commission on Teacher Credentialing, to consist of 15 voting members, 14 of whom shall be appointed by the Governor with the advice and consent of the Senate, as specified in paragraphs (2) to (7), inclusive. The commission shall consist of the following members:

(1) The Superintendent or his or her designee.

(2) Six practicing teachers from public elementary and secondary schools in California.

(3) One person who is employed on the basis of a services credential other than an administrative services credential.

(4) One member of a school district governing board.

(5) Four representatives of the public. None of these persons shall have been employed by an elementary or secondary school district in a position requiring certification, or shall have served as a school district governing board member in the five-year period immediately prior to his or her appointment to the commission.

(6) One school administrator in a public elementary or secondary school in California.

(7) One faculty member from a college or university that grants baccalaureate degrees.

by section 44212, which explicitly denominates these representatives "ex officio members."³ While these representatives are ordinarily non-voting, the language unambiguously designates them as commission members.

While 44212 provides for appointment of a representative to serve ex officio, it has been noted that such representatives may technically not be ex officio because they are appointed and do not hold their positions by virtue of their office. (Ex officio means "by virtue or because of an office; by virtue of the authority implied by office." (Black's Law Dictionary (8th ed. 2004).)⁴ Even if these representatives are not ex officio, it is clear from the language of section 44212 that the Legislature intended them to serve as non-voting members.⁵

While representatives appointed pursuant to section 44212 are commission members, the question remains whether voting members have discretion to exclude them from closed sessions

...

³ Section 44212 provides:

The Regents of the University of California, the Trustees of the California State University, the California Postsecondary Education Commission, and the Association of Independent California Colleges and Universities shall each appoint a representative to serve as member ex officio without vote in proceedings of the commission.

The ex officio members shall not vote in any proceedings of the commission nor in any of its committees or subcommittees, except, by a majority vote of the commission, ex officio members may be permitted to vote in committees or subcommittees in order to establish a quorum or as otherwise determined by majority vote of the commission.

⁴ In discussing section 44210, the Attorney General noted that the Superintendent of Public Instruction is the only "ex officio" member of the Commission. (72 Ops. Cal. Atty. Gen. 159, 164 (1989).) The same opinion also recognized, however, that "[t]he Commission also has four ex officio members who, with certain exceptions, have no voting privileges. (44212.)" (*Id.* at fn. 2.)

⁵Furthermore, the Commission has adopted Robert's Rule of Order, which makes no distinction between ex officio members and other members in terms of the privileges of membership. "If a person holds an office in a society of which he is not a member and the bylaws make that officer an ex-officio member of the board, the nonmember is thereby a full-fledged board member with all the accompanying rights; but this does not make him a member of the society." (Robert's Rules of Order Newly Revised, 10th Edition, p. 432, l. 12-17.)

pursuant to the sections identified, the issue to which I now turn.

A. Section 44245/Government Code Section 11126

Section 44245(a) provides that:

all hearings and deliberations of the commission and Committee of Credentials to consider an adverse action or a reinstatement or reduction in penalty shall be closed sessions with only commission members . . . in attendance.

While this section provides for closed sessions and limits participation to “commission members,” members appointed pursuant to section 44212 are commission members. Accordingly, it provides no basis for their exclusion from closed sessions.⁶ Moreover, Government Code section 11126, part of the Bagley-Keene Open Meeting Act, authorizes closed sessions in specified cases but does not address closed sessions pertaining to adverse actions or otherwise provide grounds for excluding members appointed pursuant to section 44212.

B. Government Code Section 11126(e)

The Bagley-Keene Act also authorizes closed sessions to confer with, or receive advice from, legal counsel. (Gov. Code § 11126(e).⁷) While the attorney-client privilege could be deemed waived if the commission permitted nonmembers to attend such sessions, representatives appointed pursuant to section 44212 are members. Accordingly, no waiver issue is presented.

A related question is whether members appointed pursuant to section 44212 can be excluded from sessions closed to confer with counsel if they, or the entities they represent, have interests that could be adverse to the commission. While the answer to this question turns upon the facts, it appears the commission may exclude members, including non-voting members, where participation would involve a financial conflict of interest, or the appearance of such a conflict, under the Political Reform Act of 1974, Government Code section 87100 et seq.

The Political Reform Act of 1974, prohibits a public official from making, participating in making, or in any way attempting to use his official position to influence a governmental

⁶This offices’s prior informal oral expression of concern regarding attendance of section 44212 commission members is superceded by this advice letter.

⁷Government Code section 11126 (e)(1) provides:

Nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation.

decision in which he has a financial interest. A public official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or on any source of income aggregating \$250 or more received by the official within the 12 month period preceding the governmental decision. (Gov. Code § 87103, subd. (c).)

In *Hamilton v. Los Gatos* (1989) 213 Cal.App.3d 1050, a city council member was voluntarily absent from a closed session because he had a financial conflict of interest in the subject discussed. The court determined that his silent observation of the closed session or subsequent acquisition of a tape of that session would constitute "participation" within the meaning of the Political Reform Act of 1974 so that he was properly denied access to the tape. In rejecting the council member's argument that Government Code section 87100 prevents him only from actively participating in governmental decisions in which he has a conflict of interest, the court stated:

The whole purpose of the Political Reform Act of 1974 was "to preclude a government official from participating in decisions where it appears he may not be totally objective because the outcome will likely benefit a corporation or individual by whom he is employed." (*Witt v. Morrow* (1977) 70 Cal.App.3d 817, 822-823, 139 Cal.Rptr. 161.) "It is not just actual improprieties which the law seeks to forestall but also the appearance of possible improprieties." (*Id.* at p. 823, 139 Cal.Rptr. 161.)

Despite Hamilton's insistence that nothing improper could come of his silent observation of the closed session, or his later acquisition of the tape, we are concerned with how this might look to the public. To permit a financially interested council member to be privy, unnecessarily, to confidential information which might affect his business interests gives the appearance of impropriety. In our society, information is power. The council member might use the confidential information to his advantage personally, or he might disclose the information improperly to others interested in the decision. [Footnote omitted.] Furthermore, the disqualified member's mere presence, or knowledge thereafter, might also subtly influence the decisions of other council members who must maintain an ongoing relationship with him.

(*Hamilton v. Los Gatos, supra*, at 1058.)

The court's conclusion was based largely on the fact that the reason for the closed session was to confer with legal counsel:

In this particular case, our conclusion is based in large part on the fact that the reason for the closed session was to have the town council confer with legal counsel about the parking issues. As noted in *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 824, 176 Cal.Rptr. 342, "there is a public entitlement to the effective aid of legal counsel in civil litigation." Moreover, "an attorney who cannot confer with his client outside his opponent's

presence may be under insurmountable handicaps." (*Ibid.*) In the case where a council member is disqualified from participation in a decision because of a financial conflict of interest, it does not appear to be in the best interest of the town to have that council member present at discussions between the council and its attorney concerning that decision. The attorney, as well as the other council members, might not feel as free to disclose everything necessary when a "biased" public official were present. The council members and attorney might feel similarly inhibited where they are aware that a "biased" council member can later obtain a tape recording of the attorney-council discussion. The town might thus be denied effective assistance of counsel.

(*Hamilton v. Los Gatos, supra*, at 1059.⁸)

The commission may also have the power to exclude members where participation would involve common law conflicts of interest. Courts and this office have found conflicts of interest by public officials to be violative of both the common law and statutory prohibitions. A good expression of the common law doctrine is found in *Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51: "A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public. [Citations.]"

Where no conflict is found according to statutory prohibitions, special situations could still constitute a conflict under the longstanding common law doctrine. (53 Ops.Cal.Atty.Gen. 163 (1970).) This office has advised that if a situation arises where a common law conflict of interest exists as to a particular transaction, the official "is disqualified from taking any part in the discussion and vote regarding" the particular matter. (26 Ops.Cal.Atty.Gen. 5, 7 (1955).)

C. Section 44220(c)/Government Code Section 11126(g)

Section 44220 authorizes the commission to hold closed sessions to consider matters relating to the recruitment, appointment, employment, or removal of the executive director.⁹

⁸In considering the attorney-client privilege the court noted: " If we had concluded that section 87100 did not bar council member Hamilton from obtaining the tape despite his disqualification from active participation in the closed session, the attorney-client privilege would offer . . . no further protection from disclosure. Hamilton would have had the right to be a silent spectator at the closed session, or to obtain the tape, simply by virtue of his membership on the council. The attorney-client privilege would not have come into play, as Hamilton would have stood, not in the shoes of the general public, but in the shoes of a full council member/ 'client.'" (*Hamilton v. Los Gatos, supra*, at 1059, fn. 7.)

⁹Section 44220 provides in relevant part:

(a) The commission shall appoint an executive director, who shall be exempt from the provisions of the State Civil Service Act, and may in its discretion remove him

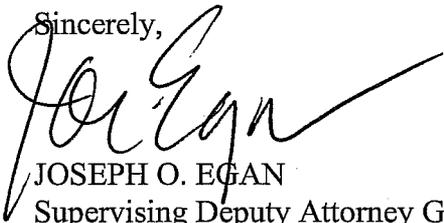
Mary C. Armstrong

January 16, 2007

Page 7

While section 44220(c) authorizes the commission to hold closed sessions, members appointed pursuant to section 44212 are commission members. Accordingly, section 44220(c) provides no basis for their exclusion from closed sessions to consider matters related to the executive director. Government Code section 11126(g), part of the Bagley-Keene Open Meeting Act, also authorizes the commission to hold closed sessions but does not provide grounds for excluding members appointed pursuant to section 44212.

Sincerely,



JOSEPH O. EGAN

Supervising Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

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or her by a majority vote of all its members. . . .

(c) Pursuant to subdivision (aa) of Section 11126 of the Government Code, the commission may hold closed sessions when considering matters relating to the recruitment, appointment, employment, or removal of the executive director.

Government Code section 11126(g) provides in relevant part:

(g) This article [the Bagley-Keene Open Meeting Act, Government Code section 11120 et seq.] does not prevent either of the following:

...

(2) The Commission on Teacher Credentialing from holding closed sessions when considering matters relating to the recruitment, appointment, or removal of its executive director.

...

(There is no Government Code section 11126(aa). See Government Code section 11126(g).)