



Board Governance Committee Agenda Item 7

April 17, 2017

Item Name: Potential Limitations on Board Member E-Mail Usage

Program: Board Governance

Item Type: Information

Executive Summary

This agenda item presents for discussion two separate issues with respect to Board member usage of e-mail: (1) how should Board members distribute articles and similar items of general interest to other Board members; and (2) should Board members use private e-mail addresses and systems to communicate regarding CalPERS business.

Analysis

Issue 1

CalPERS' General Counsel has opined that a Board member should not use e-mail to circulate an article regarding a topic that is within CalPERS' jurisdiction to a majority of other Board members (or if the topic is within a Board committee's jurisdiction, to a majority of committee members). Yet there is a strong desire among some Board members to disseminate information to other Board members this way. The question becomes how to distribute articles and similar items of general interest without running afoul of the Bagley-Keene Open Meeting Act.

Bagley-Keene generally requires that all meetings of a state agency, such as the Board and its committees, be open and public (Gov. Code § 11123) and defines a meeting to include any congregation of a majority of the members of a state agency to hear, discuss, or deliberate upon something within the agency's subject matter jurisdiction (Gov. Code § 11122.5(a)). As a backstop, Bagley-Keene prohibits a majority of the agency's members from directly or indirectly engaging in communications outside of a meeting to discuss, deliberate, or take action on any business within that agency's subject matter jurisdiction (Gov. Code § 11122.5(b)(1), commonly known as the "prohibition on serial meetings"). Although it has not been examined by an appellate court, the prohibition on serial meetings has generally been interpreted by California state lawyers to prevent one Board member from distributing any article related to the state agency's business to a majority of the agency's members, as such dissemination likely constitutes a prohibited discussion. Bagley-Keene does however permit the dissemination of articles and other information relating to the agency's work when distributed by staff under narrowly circumscribed conditions. Government Code § 11122.5(b)(2) ("Paragraph (1) [the prohibition on serial meetings] shall not be construed to prevent an employee or official of a state agency from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the state

agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.”)

CalPERS' fiduciary counsel opined during the January 2017 fiduciary training that a best practice in this area would be to send an article to the CEO, who could then determine whether to include it in the agenda back-up materials (either in whole or through links) that are sent out to the entire Board and the public; alternatively, a Board member could mention the article during an open session and make it available to other Board members (and the public) at that time (<https://www.youtube.com/watch?v=m18QcfAlatU>, at app. 1:08:55 – 1:12:40 (Mr. Lind's and Mr. Slaton's questions and Ms. Dunning's answers)). A variant of this approach would require Board members to send articles of general interest to the CEO, who could then separately and without attribution distribute the ones she independently deems appropriate to the entire Board without waiting to include them in the agenda materials.

Staff recognizes that each of these options is inconvenient and cumbersome. As the California Attorney General's Office has noted, “[o]perating under the requirements of the Act can sometimes be frustrating for both board members and staff. This results from the lack of efficiency built into the Act and the unnatural communication patterns brought about by compliance with its rules.” California Attorney General's Office, *A Handy Guide to the Bagley-Keene Open Meeting Act 2004*, at 2. But that is a value judgment the Legislature has already made. “Simply put, some efficiency is sacrificed for the benefits of greater public participation in government.” *Id.* at 3.

This agenda item gives the Committee the opportunity to discuss this issue.

Issue 2

The second issue to be discussed in this agenda item is whether Board members should use private e-mail addresses and systems to communicate regarding CalPERS business. In a well-publicized recent decision, *City of San Jose v. Superior Court*, the California Supreme Court spoke to this issue in ruling that when a public employee conducts public business using a personal device or personal e-mail account, those electronic communications (including text messages) may be subject to disclosure under the California Public Records Act (CPRA). Among other things, this means that if a Board member uses a non-CalPERS communications device or system to conduct or discuss CalPERS business and those communications are potentially responsive to a CPRA request, the Board member would be required to search his or her devices or systems and produce those communications in order to comply. In some situations, a court could require a Board member who uses personal e-mail for CalPERS business to turn over his or her entire personal e-mail account and devices so that the court or a third party can review them for responsive documents.

CalPERS has long had a policy of requiring that team members only use CalPERS electronic communications systems, including e-mail addresses and accounts, messaging, and social media, to communicate regarding or to discuss CalPERS business, and that they specifically not use personal accounts or other electronic communication systems for this purpose. This agenda item allows the Committee to discuss whether to adopt that policy for itself.

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