



MEMORANDUM

DATE	December 17, 2010
TO	ALL EXECUTIVE OFFICERS
FROM	DOREATHEA JOHNSON Deputy Director Legal Affairs Division Department of Consumer Affairs
SUBJECT	Closed Session Protocols

Each board has essentially three duties under the Open Meeting Act.

1. To give adequate notice of meetings to be held.
2. To provide an opportunity for public comment.
3. To conduct such meetings in open session, except where a closed session is specifically authorized. The terms "agency" and "board" mean not only boards, but also commissions and any examining committees or boards within the jurisdiction of the Medical Board of California.

CLOSED SESSIONS

Government Code Section 11123 states that "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." Section 11126 sets forth the specific items of business which may be transacted in closed session. Therefore, absent statutory authorization, business transacted by an agency must be transacted in open session.

A. Purposes for Closed Session

Government Code Section 11126 enumerates those items of business that may be conducted in closed session. Accordingly, an agency within the Department of

Consumer Affairs may convene a closed session, pursuant to Section 11126 for the following purposes:

- > **Personnel Matters**
- > **Examination Matters**
- > **Matters Affecting Individual Privacy**
- > **Administrative Disciplinary Matters**
- > **Board of Accountancy Matters**
- > **Pending Litigation**
- > **Response to Confidential Final Draft Audit Report**
- > **Threat of Criminal or Terrorist Activity**
- > **Advisory Bodies/Committees May Meet in Closed Session**

1. Personnel Matters

A board may meet in closed session to ". . . consider the appointment, employment, evaluation of performance, or dismissal of a public employee; or to hear complaints or charges brought against such employee by another person unless the employee requests a public hearing."

Before considering personnel action in closed session, the employee must be given 24 hour written notice of his or her right to a public hearing. If notice is not given, any disciplinary or other action taken against any employee at the closed session shall be null and void.

As noted above, once the public hearing has been held, the state body may convene in closed session to deliberate on the decision to be reached.

If the employee (e.g., executive officer) did not request a public hearing, he or she must be given the opportunity for a hearing in closed session. After the hearing, the public employee should be excused from the closed session, and the board may then continue in closed session to deliberate on the decision to be reached.

Please note that Section 11126(a) is not to be interpreted to mean that a board is required to handle civil service personnel matters itself. Normally, this function of an agency is administered by its executive officer in conjunction with the Director of Consumer Affairs, who shares authority with respect to civil service personnel.

2. Examination Matters

A board may meet in closed session to "prepare, approve, grade or administer examinations." This includes any discussion regarding the actual content of examinations, and their reliability and validity.

This **does not** include discussion of the general logistics of administering an examination. This is not a proper subject matter for a closed session.

Also, an agency may hear appeals from examinees or re-review examinations in closed session as this would be included in the "grading" of the examination.

3. Matters Affecting Individual Privacy

A committee, *consisting of less than a quorum* of the full board, may meet in closed session to:

" . . . discuss matters which the [committee] has found would constitute an unwarranted invasion of the privacy of an individual licensee or applicant if discussed in an open meeting, . . . Those matters may include review of an applicant's qualifications for licensure and an inquiry specifically related to the state body's enforcement program concerning an individual licensee or applicant where the inquiry occurs prior to the filing of a civil, criminal, or administrative disciplinary action against the licensee or applicant by the state body."

CAVEAT: *This closed session provision does not authorize such a review by the full board. Nor does it generally authorize a committee of a board to review complaints, investigation reports, or other information to determine whether disciplinary or other action should be filed against a licensee.*

To ensure that board members render an impartial and fair decision in considering an Administrative Law Judge's proposed decision, board members are precluded from involving themselves in the investigation or prosecution phase of an action. (§11430.10 *et seq.*) The board's role is that of judge in the case. If a particular board member has any significant involvement in the investigative or prosecution phases, he or she must disqualify himself/herself from participation in the board's action relative to the proposed decision, and not attempt to influence any other board member regarding the decision. Legal counsel should be consulted before any enforcement actions are discussed with individual licensees, as such discussions may impact participation by the member in a final decision on a case (§11430.60), and may require disclosures under the provisions of the state's Administrative Procedure Act. (§11430.50)

4. Administrative Disciplinary Matters

A board may meet in closed session to deliberate on a decision in an administrative disciplinary proceeding under the Administrative Procedure Act.

- A. The board may decide whether to:
- (1) adopt a Proposed Decision,
 - (2) review a transcript of a hearing and render a decision of its own,
 - (3) deliberate upon evidence heard by the agency itself,
 - (4) consider a stipulation.
- B. The board may not convene into closed session to:
- (1) assign cases, *i.e.* deciding whether a case should be heard by a hearing officer alone or by the agency itself with a hearing officer.
 - (2) to review investigation files or complaints.

Members of boards that have the discretion to hear cases should not review pending complaints or investigation files for the reasons given above.

5. Board of Accountancy Matters

Pursuant to Business and Professions Code Section 5020, the administrative committee established by the State Board of Accountancy may convene in a closed session to "consider disciplinary action against an individual accountant prior to the filing of an accusation." (§11126(f)(3)) And the examining committee, established by that board pursuant to Business and Professions Code Section 5023, may convene in closed session to "interview an individual applicant or accountant regarding the applicant's qualifications."

As noted above, such administrative and examining committee meetings are required to be noticed as previously discussed in this memorandum.

6. Pending Litigation

A board may meet in 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.

Please note the very specific notice requirements discussed below when a closed session is to be held to discuss "pending litigation". Litigation means an adjudicatory proceeding before a court, administrative body, hearing officer or arbitrator. Litigation is considered to be pending if, (1) it has been initiated formally (e.g. a complaint, claim or petition has been filed) or (2) based on existing facts and circumstances and on the advice of its legal counsel, the state body believes there is significant exposure to litigation against it, or it is meeting to decide whether a closed session is authorized because of significant exposure to litigation or (3) based on existing facts and circumstances, the state body has decided or is deciding whether to initiate litigation. (§11126(e)(2))

The agency's legal counsel must submit a memorandum which complies with the requirements of Section 11126(e)(2)(C)(ii) prior to the closed session if possible, but no later than one week after the closed session. This document is confidential until the pending litigation has been finally adjudicated or otherwise settled. (§6254.25)

7. Response to Confidential Final Draft Audit Report

Section 11126.2 (added effective January 1, 2005) permits an agency to meet in closed session to discuss its response to a confidential final draft audit report from the Bureau of State Audits. However, once that audit report becomes final and is released to the public, the agency may only discuss it in open session.

8. Threat of Criminal or Terrorist Activity

Effective January 1, 2006, AB 277 (Chap. 288, Stats. 2005) authorizes an agency at a regular or special meeting to meet in closed session to consider "matters posing a threat or potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body," where disclosure of those considerations could compromise or impede the safety or security of the described subjects. The law (Section 11126(c)(18)) requires the agency to authorize the closed session by a two-thirds vote of the members present at the meeting.

9. Advisory Bodies/Committees May Meet in Closed Session

To the extent a licensing board, which is defined as a "state body" in the Open Meeting Act, is authorized to meet in closed session, then committees, subcommittees, or other bodies advisory to the licensing board, which are also defined as "state bodies," may meet in closed session for the same purposes as the licensing board. (§11126(f), (4)-(6))

B. Open Session Otherwise Required

Only for the above-mentioned reasons may a board within the Department of Consumer Affairs meet in closed session. (§11132) A board may not meet in closed session for the purpose of electing officers or to discuss the proposal or adoption of rules and regulations. Further, a board may not convene in closed session to discuss testimony received during a hearing on proposed rules and regulations. Finally, an agency may not meet in closed session because it wants to have a frank and open discussion among only members on a matter of controversy.

C. Notice and Reporting Requirements

1. Notice of Closed Session

When a closed session will constitute part or all of a meeting, it is important to note Government Code Section 11126.3, which requires that:

"(a) Prior to holding any closed session, the state body shall disclose, in an open meeting, the general nature of the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda. [A provision applicable to the Public Utilities Commission is not included herein.] If the session is closed pursuant to subparagraph (A) of paragraph (2) of subdivision (e) of Section 11126 [litigation has already commenced], the state body shall state the title of, or otherwise specifically identify, the litigation to be discussed unless the body states that to do so would jeopardize the body's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage."

Thus, if the meeting will consist in part or in its entirety of a closed session, you must include on the notice of the meeting the above-described information. If the closed session is for the purpose of discussing pending litigation, it is important that the above-requirements be adhered to. To obtain legal advice in closed session concerning pending litigation, the notice must cite subdivision (e) of Section 11126 and your attorney must prepare a memorandum stating the specific reasons and legal authority for the closed session.

If a closed session agenda to discuss pending litigation has been properly published, and an additional pending litigation issue subsequently arises, the state agency may discuss the new matter in closed session provided that postponement of the discussion would prevent the state agency from complying with any statutory, court-

ordered, or other legally-imposed deadline. The state agency must publicly announce the title of, or otherwise identify, the litigation unless to do so would jeopardize the ability to effectuate service of process, or to do so would jeopardize the agency's ability to conclude existing settlement negotiations to its advantage. (§11126.3(d))

If you intend to have a closed session during your meeting, **contact your Legal Division attorney to ensure that a closed session is authorized and properly noticed.**

2. Reporting After a Closed Session

Section 11126.3(f), requires a state body to convene in open session after a closed session and to report as required in Section 11125.2, which states that:

“ Any state body shall report publicly at a subsequent public meeting any action taken, and any rollcall vote thereon, to appoint, employ, or dismiss a public employee arising out of any closed session of the state body.”

D. Other Procedural Requirements for Closed Sessions

There are certain additional requirements that must be met when closed sessions are convened.

1. *Closed sessions must be held during a duly noticed regular or special meeting (§11128).*

Closed sessions may not be scheduled independently of a noticed meeting of the board or committee. For example, where a board or committee meeting is scheduled to discuss only matters appropriate for a closed session, the meeting should be opened as a public meeting with an announcement immediately following that the agency will convene into closed session.

2. *The general reasons for and the legal authority for the closed session must be announced prior to holding the closed session.*

As discussed under "Notice Required," above, prior to holding the closed session the agency must announce the general reason(s) for the closed session and the specific statutory or other legal authority under which the session is held. (§11126.3 (a)) With respect to litigation that has already been initiated, it must announce the title of or otherwise identify the litigation. (§11126.3(a)) Other specific notice requirements, discussed above, also apply to notices regarding pending litigation. In the closed session, only matters covered in the statement may be discussed. (§11126.3(b))

3. *Required agency staff person's attendance in closed session.*

The agency is required to designate a staff person to attend the closed session and to record in a minute book a record of topics discussed and decisions made. (§11126.1)

4. *Restriction on additional closed session attendees.*

As a general rule, closed sessions may involve only the membership of the membership of the body in question plus any additional support staff which may be required (e.g., attorney required to provide legal advice; supervisor may be required in connection with disciplinary proceeding; labor negotiator required for consultation.) Persons without an official role in the meeting should not be present. (*Cf.* 83 Ops.Cal.Atty.Gen 221, 222.) In this case, the "trusted staff members who are generally permitted to remain" in closed session, should not be in attendance during the closed session if they have no official role during the deliberations involved in the closed session. Their presence compromises the closed session deliberations of the board.

5. *Confidentiality of the minute book.*

The minute book referenced in (3) is available only to members of the agency, or if a violation of the Open Meeting Act is alleged, to a court of general jurisdiction. (§11126.1)

6. *The discussion and information received in closed session is confidential.*

Information received and discussions held in closed session are **confidential** and must not be disclosed to outside parties by members or staff who attended the closed session. A recent opinion of the Office of the California Attorney General concluded that:

“ A local school board member may not publicly disclose information that has been received and discussed in closed session concerning pending litigation unless the information is authorized by law to be disclosed.” (80 Ops.Cal.Atty.Gen. 231)

That opinion also cited a previous opinion, in which the Attorney General stated that “We have ... routinely observed that it would be *improper* for information received during a closed session to be publicly disclosed.” (76 Ops.Cal.Atty.Gen. 289, 290-291; Emphasis in the original.)

E. **MEETING BY TELECONFERENCING**

Effective 1/1/95, subdivision (b) was added to Government Code section 11123 to authorize meetings by teleconference. (Stats. 1994, Chapt. 1153; AB 3467) This section provides the following in pertinent part:

"(a) 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.

"(b) (1) A state body may hold an open or closed meeting by teleconference for the benefit of the public and state body. The meeting or proceeding held by teleconference shall otherwise comply with all applicable requirements or laws relating to a specific type of meeting or proceeding, including the following:

(A) The teleconferencing meeting shall comply with all requirements of this article applicable to other meetings.

(B) The portion of the teleconferenced meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting.

(C) If the state body elects to conduct a meeting or proceeding by teleconference, it shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the rights of any party or member of the public appearing before the state body. Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public. The agenda shall provide an opportunity for members of the public to address the state body directly pursuant to Section 11125.7 at each teleconference location.

(D) All votes taken during a teleconferenced meeting shall be by rollcall.

(E) The portion of the teleconferenced meeting that is closed to the public may not include the consideration of any agenda item being heard pursuant to Section 11125.5.

(F) At least one member of the state body shall be physically present at the location specified in the notice of the meeting.

(2) For the purposes of this subdivision, 'teleconference' means a meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio or both audio and video. This section does not prohibit a state body from providing members of the public with additional locations in which the public may

observe or address the state body by electronic means, through either audio or both audio and video."

A method is thus available whereby meetings may be conducted by audio or video teleconferencing provided the criteria set forth in the statute have been met. Note the restriction in subdivision (b)(1)(E) that prohibits a closed session emergency meeting. Emergency meetings in open session may be conducted by teleconference.

We emphasize that the law now requires every teleconference meeting location to be identified in the notice and agenda and be open to the public. Most importantly, the members of the agency must attend the meeting at a public location. Members are no longer able to attend the meeting via teleconference from their offices, homes, or other convenient location unless those locations are identified in the notice and agenda, and the public is permitted to attend at those locations. Nothing prohibits additional locations, where only the public is connected to the teleconference meeting.
(§11123(b)(2))