



# community report

APRIL 9, 2015

*NOTE: This Community Report reprints a story from the San Francisco Examiner written by columnist and CC-HSR Board Member, Kathy Hamilton*

## **Open Meetings Act Violated? The saga of a High-Speed Rail subcommittee meeting.**

A committee to California's High Speed Rail Authority may have violated state open meeting laws when it shut the public out of a recent meeting. A lawyer very familiar with the open government laws says this: "State law requires government bodies to notify the public of closed sessions in advance and to specify what exception under the law – such as pending litigation or personnel matters – allows for the closed meeting."

It says in the Bagley Keene Act: *"The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."*

On March 10, the Authority sub-committee did intentionally shut out the public when finance committee chairman Michael Rossi asked other board members and staff to stay behind for an executive meeting, according to citizens who attended. The Authority later said it was a private meeting.

**Gary Patton**, an environmental attorney who served on the Santa Cruz County Board of Supervisors for twenty years, and who also served on the State Air Resources Board, is very familiar with the Bagley Keene Act. When told of what happened, Mr. Patton said, "It seems quite possible that the Board violated the requirements of the Bagley-Keene Act. The public is permitted to be present for everything, except for very specific issues, legal issues and a few other exceptions such as personnel issues." Michael Rossi, board member and chairman of the Finance and Audit group did not respond to an email requesting his side of the story; however, Rail Authority spokesperson Lisa-Marie Alley did; here is her response in italics and in bold print:

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***“As you and your attorney should know two-person committees, like our Finance and Audit Committee, are not subject to the public meeting requirements of Bagley-Keene. The Authority, in our quest for transparency with the public, has chosen to open our twoperson committee meetings, including the Finance and Audit Committee, even though we are not required to do so.”***

While it is true Bagley-Keene does require three members, the Authority long ago agreed to have their subcommittee meetings open. Years ago they did have three members but nevertheless, though they now have 2 on this committee, the Authority verifies their board meetings and sub committee meetings are under the Bagley-Keene Act.

***<http://hsr.ca.gov/Board/index.html>***

Therefore these meetings and the requirements within the Act should apply.

***“To be clear, there was no Executive meeting, part B of the Finance and Audit Committee.”***

But according to 12 witnesses, Michael Rossi, declared they were going into an Executive session or an Executive staff meeting. The term “Executive Meeting” is considered to be synonymous with the term “closed meeting.” *“At the conclusion of Finance and Audit Committee meeting, Board Member Rossi and Vice-Chair Richards wanted to have a private discussion with a member of the Authority staff. Two additional Board Members stayed in the room which did not equate to a quorum defined as five board members under the High-Speed Rail Authority statutes. The Authority’s Chief Legal Counsel was present to assure that no Bagley-Keene violations occurred.”*

Bagley-Keene does provide if the subcommittee consists of three or more persons, the same provisions apply to its meetings as apply to meetings or committees.” As stated by the rail authority they chose to follow the law with a twoperson committee and therefore they should follow the rules that apply to any meeting covered by Bagley Keene.

In addition, the Finance and Audit Committee is subject to Bagley-Keene for other reasons other than the generosity of the High-Speed Rail Authority and those reasons are unambiguous. See Resolution #HSRA 14-20, approved at the August 12, 2014 Board Meeting, which declares: *Board delegates to the Finance and Audit Subcommittee the responsibilities of review and approval of annual audit plans, receiving reports as to whether appropriate action has been taken on audit findings, and receiving reports of material and/or egregious findings and receiving notification if uncorrected operational deficiencies reported.*

In the second definition of a “state body” subject to Bagley-Keene (GC 11121(b)): *A board, commission, committee, or similar multimember body that exercises any authority of a state body delegated to it by that state body. Finance and Audit Committee exercises delegated authority. This seems to indicate that the Committee is not “voluntarily” subject to Bagley-Keene. Regardless of the number of members, all audit committees are subject to Bagley-Keene.*

***“ Board members are at liberty to meet privately with staff to discuss high-speed rail matters. Therefore, there were no Bagley-Keene violations.”***

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The Authority seems to be declaring this wasn't a meeting at all, it was just a private conversation but they are concerned as to whether a board majority attended the second meeting. This all boils down to what the definition of a meeting is. in the AG handbook it says this: The issue of what constitutes a meeting is one of the more troublesome and controversial issues under the Act. A meeting occurs when a quorum of a body convenes, either serially or all together, in one place, to address issues under the body's jurisdiction. (§ 11122.5.) The law also says, *"To the extent that a body receives information under circumstances where the public is deprived of the opportunity to monitor the information provided, and either agree with it or challenge it, the open-meeting process is deficient."* To be clear, a private discussion with highspeed rail staff about the high-speed rail project with four or more board members and other staff members is not listed as bone fide reasons for a closed meeting in the Bagley Keene Act. Reasons such as legal issues and private personnel issues are most typical.

The exceptions are explained by the Attorney General's office on pages 11-13 which reviews permissible closed sessions. Most common closed meetings are legal matters and personnel issues, [http://www.ag.ca.gov/publications/bagleykeene2004\\_ada.pdf](http://www.ag.ca.gov/publications/bagleykeene2004_ada.pdf) Or see this newest interpretation of the Bagley Keene Act as of January 2015 by California's Department of Consumer Affairs- Legal Division.

**[http://www.dca.ca.gov/publications/bagleykeene\\_meetingact.pdf](http://www.dca.ca.gov/publications/bagleykeene_meetingact.pdf)**

See the table of contents under closed meetings for a quick list of exceptions.

### **Here is the public's account of the March 10th subcommittee meeting:**

On March 10th a dozen Central Valley residents traveled for hours to attend to the board meeting. In addition, since they had made the journey, they attended the Finance and Audit sub-committee meeting held usually an hour before the board meeting. That subcommittee meeting is chaired by Michael Rossi and co-chaired by Fresno's Tom Richards. These Finance and Audit subcommittee meetings have been established as separate public meetings, with a separate agenda, which was properly posted. No "closed session" was listed. According to some of the attendees, Authority personnel and board members seemed very surprised to see this many loom for the Finance and Audit subcommittee meeting. According to Frank Oliveira, co-chair for the Central Valley group called, Citizens for California High-Speed Rail Accountability (CCHSRA) "The room was very small, so small that you would have to jump over someone's brief case to leave the room."

In fact there was no room for people who arrived last to actually to enter the room; instead, they stood around the door leading into the meeting to listen. According to Frank Oliveira and Alan Scott, also from Citizens for California High-Speed Rail Accountability (CCHSRA), their presence seemed to inhibit conversation. The staff seemed to struggle for words. According to them, there were four High-Speed Rail Board Members were in attendance, Michael Rossi, the chair of the Finance Committee, Tom Richards, co-chair, Lynn Schenk and the newest board member, Lou Correa.

And so at the end of the meeting, Michael Rossi, the chair of the subcommittee, specifically asked Board Member Lynn Schenk to stay and pointed to various others in the room to stay

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as well. It is believed that former Senator Lou Correa and the newest HSR board member stayed as well. Rossi told the small crowd they were now going into an executive or some remembered he said it was an Executive Staff meeting. No government code section was cited for the reason which supposed to announce for closed session. Here's an example of what the Authority usually notes. "The Authority will meet in closed session pursuant to Government Code section 11126(e)(2)(A) to confer with counsel with

Attorney Gary Patton offers, "Legally, there is no exception to the state's open meeting law, based on the Authority's desire to have a private meeting." Board member Michael Rossi is very experienced in a corporate environment. He retired as Vice Chairman of BankAmerica corporation in 1997 but he also worked in a public environment as his resume on the High-Speed Rail website indicates. Alan Scott, (CCHSRA) said, "I really believe Rossi was still thinking of private sector business meetings, where you conduct a broad scope meeting and once regular business is finished, then the senior staff will be held back for information that is more restrictive."

"This extension of the Finance and Audit subcommittee meeting, though the Authority denied it was that, with the public excluded, may have well been closed to the public because sensitive financial information was being discussed. If so, said Gary Patton, it] appears that a violation of the law is likely to have occurred." Patton also serves as the Executive Director for Community Coalition] on High-Speed Rail (CC-HSR.org) is well acquainted with both the Brown Act and in this case the Bagley Keene Act (the law applicable to state agencies) and reviewed the account just presented.

Meetings to discuss those issues may be closed to the public, but Patton said, "Meetings may only be closed for exceptions listed in the law and prior to discussing such topics at a closed session, the body must publicly announce those issues that will be considered in closed session and must cite the applicable authority enabling it to exclude the public. You can't legally meet in a closed session because the agency "wants to have a frank and open discussion among only members on a matter of controversy (or when sensitive financial information is at issue). From all appearances, the public should have been allowed in this meeting."

### **Summary points:**

The Authority is voluntarily following the Bagley-Keene Act for the sub-committee meetings, though it has 2 instead of 3 board members according to its own website Note any decisions must be brought before the full board for a vote.

The second meeting which occurred after the Finance and Audit committee meeting, was a closed (private) meeting in which some board members discussed high-speed rail issues with an employee or employee says the Authority representative. The Authority has attendance for the second meeting.

It is unclear if Board chairman, Dan Richard was present. The Authority's response to that question was: "Board Chair Dan Richard did not participate in the private discussion," which

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does not technically clarify if he was present or not. Board members not member of the committee are permitted to attend as observers and may not be actively involved in the meeting. So the response the Rail Authority spokeswoman sent fits into that name the people present in the room.

Even though this day would be the first board meeting for former Senator Lou Correa's first meeting as a HSR board member, he counts. and it says this: *"The open meeting provisions of the Act basically apply to new members at the time of their election or appointment, even if they have not yet started to serve. (§ 11121.95.)* The biggest question mark is what did the sub-committee discuss in private with one or more of the Finance and Audit staff that they did not want to public to know?

In the end, violations of the code are considered a misdemeanor. though no indication of how much the fee would be. If the public brought the agency to court and the public entity was found guilty of violating the code, fines would be assessed but no member would be personally liable; the state would pay.

### ***Help us continue our coverage.***

Since 2008, CC-HSR has been working through litigation, lobbying, and public outreach to make sure that the state's proposed High-Speed Rail project does not bring devastating impacts to the San Francisco Peninsula, or to other parts of California. Return go to our web site [www.cc-hsr.org](http://www.cc-hsr.org) to make a donation to support our work. CC-HSR is totally supported by the community, and this latest decision by the STB, and the anticipated approval in January of the proposed Caltrain "Pre-HSR" project, means that we will probably have to be back in court very soon. We truly need your help!

**AND, please Know This: WE APPRECIATE Your Support!**

***CC-HSR is totally supported by the community, and we truly appreciate your help! Thank you again for your support and assistance for our work!***

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